

**H.R. 6344, “LOCAL ACT OF 2018”; H.R. 6360,
“PREDICTS ACT OF 2018”; H.R. 6346,
“WHOLE ACT OF 2018”; H.R. 6354,
“STORAGE ACT OF 2018”; H.R. 6345,
“EMPOWERS ACT OF 2018”; H.R. 3608,
“ENDANGERED SPECIES TRANSPARENCY
AND REASONABLENESS ACT”; H.R. 6364,
“LAMP ACT OF 2018”; H.R. 6356, “LIST ACT
OF 2018”; AND H.R. 6355, “PETITION ACT
OF 2018”**

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

Wednesday, September 26, 2018

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LEGISLATIVE HEARING ON H.R. 6344, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO ENCOURAGE VOLUNTARY CONSERVATION EFFORTS, “LOCAL ACT OF 2018”; H.R. 6360, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO PROVIDE FOR GREATER CERTAINTY AND IMPROVED PLANNING FOR INCIDENTAL TAKE PERMIT HOLDERS, “PREDICTS ACT OF 2018”; H.R. 6346, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO PROVIDE FOR CONSIDERATION OF THE TOTALITY OF CONSERVATION MEASURES IN DETERMINING THE IMPACT OF PROPOSED FEDERAL AGENCY ACTION, “WHOLE ACT OF 2018”; H.R. 6354, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO PROHIBIT DESIGNATION AS CRITICAL HABITAT OF CERTAIN AREAS IN ARTIFICIAL WATER DIVERSION OR DELIVERY FACILITIES, “STORAGE ACT OF 2018”; H.R. 6345, TO PROVIDE FOR GREATER COUNTY AND STATE CONSULTATION WITH REGARD TO PETITIONS UNDER THE ENDANGERED SPECIES ACT OF 1973, AND FOR OTHER PURPOSES, “EMPOWERS ACT OF 2018”; H.R. 3608, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO REQUIRE PUBLICATION ON THE INTERNET OF THE BASIS FOR DETERMINATIONS THAT SPECIES ARE ENDANGERED SPECIES OR THREATENED SPECIES, AND FOR OTHER PURPOSES, “ENDANGERED SPECIES TRANSPARENCY AND REASONABLENESS ACT”; H.R. 6364, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO INCREASE STATE AND LOCAL INVOLVEMENT IN MANAGEMENT PLANS, “LAMP ACT OF 2018”; H.R. 6356, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO PROVIDE FOR IMPROVED PRECISION IN THE LISTING, DELISTING, AND DOWNLISTING OF ENDANGERED SPECIES AND POTENTIALLY ENDANGERED SPECIES, “LIST ACT OF 2018”; AND H.R. 6355, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO DEFINE PETITION BACKLOGS AND PROVIDE EXPEDITED MEANS FOR DISCHARGING PETITIONS DURING SUCH A BACKLOG, “PETITION ACT OF 2018”

**Wednesday, September 26, 2018
U.S. House of Representatives
Committee on Natural Resources
Washington, DC**

The Committee met, pursuant to notice, at 2:11 p.m., in room 1324, Longworth House Office Building, Hon. Rob Bishop [Chairman of the Committee] presiding.

Present: Representatives Bishop, Young, McClintock, Gosar, Tipton, LaMalfa, Denham, Westerman, Radewagen, Bergman; Grijalva, Costa, Sablan, Huffman, Beyer, and Gallego.

Also present: Representative Norman.

The CHAIRMAN. All right. I want to welcome you all here today. This Committee hearing is going to come to order.

The Committee is meeting to hear testimony on nine bills that modernize the Endangered Species Act.

Under Committee Rule 4(f), any opening oral statements at this hearing are limited to the Chairman and the Ranking Minority Member. This will allow us to hear from our witnesses sooner and keep Members to their schedules. Therefore, I ask unanimous consent that other Members' opening statements be made part of the hearing record if they are submitted to the Subcommittee Clerk by 5:00 p.m.

Without objection, that is so ordered.

I also ask unanimous consent that the following list of Members who are not on the Committee be allowed to sit on the dais and participate in this hearing from the dais. Specifically, Mr. Norman from Louisiana if and when he is there. Others will obviously be recognized from the dais, as well.

Let me switch the order here, and allow Mr. Huffman, representing the Minority—if you would like 5 minutes for an opening statement.

STATEMENT OF THE HON. JARED HUFFMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HUFFMAN. Thank you, Mr. Chairman. The slate of bills before us today, I am sorry to say, Mr. Chairman, is a painful reminder of how far we have moved away from the bipartisan agreement that Democrats and Republicans used to share over a core set of values, and the values of conservation and respect for science, in particular.

Both sides of the aisle used to agree that protecting America's natural heritage for the enjoyment of this generation and future ones was a worthy goal, and that relying on sound science to guide conservation policy was the gold standard for natural resource management.

I would like to remind everyone that when the ESA was enacted, it had strong bipartisan support, passed out of the Senate unanimously, was voted 390 to 12 out of the House of Representatives, and signed by a Republican President.

The Endangered Species Act has long been one of our most successful and broadly supported conservation laws, and it has prevented the extinction of 99 percent of the species that have received its protection.

The ESA, it is important to remember, only kicks in when a species is in danger of extinction, or when it is foreseeable that it will be in such danger. And if you think about it, if an emergency room doctor saved 99 percent of the patients that came through the door and put 90 percent of them on a clear and timely road to recovery, as the ESA has done with imperiled species, that doctor would receive universal praise.

So, following on this analogy, it is alarming to note that one of the bills before us today wouldn't even let the patient into the waiting room. If the waiting room is full, it would kick the patient out of the hospital, leaving it to suffer alone. This is not a way to manage species.

So, why does the ESA receive so much criticism by the Trump administration and some of my colleagues across the aisle? I suspect the answer is simple. The law requires Federal agencies to use the best available science to determine decisions, to prevent extinction, regardless of who produced the science. And that can be bad news for mining companies, oil and gas companies, big developers, and others.

For example, one of the bills before us, H.R. 3608, deems anything submitted by states, tribes, or localities to be the best-available science, regardless of the quality of that information.

Another bill, the STORAGE Act, would prohibit Federal agencies from designating critical habitat in man-made water infrastructure areas, further endangering California salmon and steelhead populations.

And yet another bill, the LIST Act, would require the Secretary to de-list a species if he receives substantial scientific or commercial information showing that a species has recovered. Another handout to those wishing to develop and destroy important habitat for imperiled species.

These bills ignore the fact that protecting fish and wildlife is not just good, in principle. It is good for the economy, and good for people, as well. The salmon fishermen in my district and elsewhere on the West Coast, for example, depend on a strong and functioning ESA to protect salmon runs, allowing them to continue catching healthy stocks.

The bottom line is that the ESA has worked because decisions under the law must be made based on data and evidence. That is a pretty reasonable standard to uphold.

So, yes, we no longer just cut down as many trees or catch as many fish as possible without thinking about the future. But that is a good thing, not just for fish and wildlife, but for future generations of people, as well.

It would be a welcome change if we were really talking about modernizing the ESA, so that it works better for both people and wildlife. But these bills, unfortunately, won't get us there.

With that, I yield back, Mr. Chairman.

The CHAIRMAN. I haven't done my statement, but I will recognize Mr. Grijalva for yours before I do that.

**STATEMENT OF RAÚL M. GRIJALVA, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA**

Mr. GRIJALVA. Thank you, Mr. Chairman. It is a shame that the last hearing that this Committee is going to have before we return in November is such a fraud. It really is.

The bills before us today are not in the best interest of the American public. They aren't meant to fix the Endangered Species Act, as will be claimed by my Republican colleagues. They are not thoughtful pieces of legislation to fix real problems like the extinction crisis we currently face. They are bad-faith proposals designed to destroy the law and give handouts to oil and gas companies.

It is no coincidence that the American Petroleum Institute, the American Exploration and Mining Association, and the Western Energy Alliance have endorsed all these bills.

While this political stunt of a hearing is ridiculous on its own, the titles of some of these bills are really insults to the public's intelligence. My personal favorite is the STORAGE Act, or the Stop Takings on Reserve Antithetical to the Germane Encapsulation Act. It makes me wonder—to all my friends, both Republicans and Democrats—what the phrase “germane encapsulation” really even means.

I am a little disappointed that Mr. McClintock's bill is the only one without an acronym. I guess he missed the acronym meeting.

The important thing to remember today is that the Endangered Species works. Despite years of Republican efforts to weaken the Act, to cut funding for agencies that protect and recover American wildlife, 99 percent of the listed species have continued to survive, and 90 percent are on schedule to meet recovery goals. These are facts that are not up for debate.

Last year, the Committee passed a package of five extinction bills. They got no traction in the Full House because the public didn't want them. Few people outside oil, gas, and mining industries actually opposed the Endangered Species Act.

So, we hold these hearings and hold these votes and we have to wonder exactly why.

Here, today, is a new package of damaging and misguided bills. They harm protected species and their habitats, they create barriers to listing species that need protection, they allow states to potentially over-ride listing decisions, they allow the use of faulty science, and undermine citizen involvement in the enforcement of the Act. They make too many other destructive and unwarranted changes to list them all. And we will do everything in our power to ensure that these bills suffer the same fate as the previous bills.

These attacks on one of the most successful and popular conservation statutes in the history of the world are old, they are tired, and they are not fooling anyone.

We are going to be hearing today that ESA kills jobs, or impedes economic growth. We hear this every time, and we still don't have evidence. Words are not evidence. These claims are simply not grounded in reality. The U.S. economy has more than tripled in size since the law was passed, from \$5 trillion in 1973 to \$16 trillion today.

We have a duty to preserve species for the next generation. Indeed, a moral duty to do that. Instead of debating these bills, which are, in my mind, an embarrassment and a waste of time, we should be talking about how we can truly support the ESA, fund it fully, provide the personnel, and with that, let the job be done that legislation was intended to do.

With that, Mr. Chairman, I yield back.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF THE HON. RAÚL M. GRIJALVA, RANKING MEMBER,
COMMITTEE ON NATURAL RESOURCES

Thank you, Mr. Chairman. It's a shame that the last hearing we'll have in this Committee before we return in November is such a fraud.

The bills before us today are not in the best interest of the American public. They aren't meant to "fix the Endangered Species Act," as my Republican colleagues will claim. They are not thoughtful pieces of legislation to fix real problems—like the extinction crisis we currently face. They are bad faith proposals designed to destroy the law and give handouts to oil and gas companies.

It's no coincidence that the American Petroleum Institute, the American Exploration & Mining Association, and the Western Energy Alliance have all endorsed these bills.

While this political stunt of a hearing is ridiculous on its own, the titles of some of these bills are insults to the public's intelligence. My personal favorite is the STORAGE Act, or the Stop Takings on Reserves Antithetical to Germane Encapsulation Act. It makes me wonder what my Republican friends think the phrase "germane encapsulation" even means.

I'm a little disappointed that Mr. McClintock's bill is the only one without an acronym—I guess he missed the memo—but I digress.

The important thing to remember today is that the Endangered Species Act works. Despite years of Republican efforts to weaken the Act and cut funding for agencies that protect and recover American wildlife, 99 percent of listed species have continued to survive, and 90 percent are on schedule to meet their recovery goals. These facts are not up for debate. Deep down, even many Republicans know this. But the Republicans on this Committee pretend otherwise.

Last year, this Committee passed a package of five extinction bills. They got no traction in the Full House because the public doesn't want this. Few people outside the oil, gas and mining industries actually oppose the Endangered Species Act.

So, we hold these meaningless hearings and hold these meaningless votes, and we have to wonder why.

Here we are today with a new package of damaging and misguided bills. They harm protected species and their habitats. They create barriers to listing species that need protection. They allow states to potentially over-ride listing decisions. They allow the use of faulty science and undermine citizen involvement in enforcement of the Act. They make too many other destructive and unwarranted changes to list them all. And I will do everything in my power to ensure that these bills suffer the same fate as the previous bills.

These attacks on one of the most successful and popular conservation statutes in the history of the world are old, they're tired, and they're not fooling anyone.

The Fish and Wildlife Service and the National Marine Fisheries Service have provided us with more than 40 years of evidence that the law gives states, localities, landowners, and private interests an incredible amount of flexibility to proceed with development projects. The law makes sure we build things and create jobs in ways that conserve fish, wildlife, plants and the landscapes they need to survive. These agencies are good at what they do. Congress needs to provide adequate funding for them to do their jobs, and then get out of the way.

We're going to hear today that complying with the ESA kills jobs or impedes economic growth. We hear this every time, and we still don't have the evidence. Words are not evidence. These claims are simply not grounded in reality. The U.S. economy has more than tripled in size since the law was passed, from \$5 trillion in 1973 to \$16 trillion today.

We have a moral duty to preserve species for the next generation, instead of debating these bills. They are an embarrassment and a waste of time.

I yield back.

The CHAIRMAN. Thank you, I think. I now want to yield to myself 5 minutes for my opening remarks.

**STATEMENT OF THE HON. ROB BISHOP, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF UTAH**

The CHAIRMAN. I am appreciative of the wonderful comments that have been made by the Ranking Member, as well as the Ranking Vice Member here today. I am very happy that you are so supportive of the piece of legislation that was signed by Richard

Nixon. It is, indeed, his legacy. In fact, maybe we should have a monument on the Mall to Richard Nixon for ESA, EPA, Clean Air, and Clean Water Act. They all kind of roll together.

Mr. GRIJALVA. Wilderness?

The CHAIRMAN. Yes, all sorts of bad ideas.

So, what Mr. Grijalva said is actually correct. We are here today to talk about modernizing this Act. I want to thank the witnesses, the bills' sponsors for being here today. I want to thank the Western Caucus and others who live in the West who understand. They have done a tremendous amount of work in drafting measures and building coalitions of support.

The Endangered Species Act is an important law that is in need of improvements. Despite what some might have you believe, Americans actually do agree. The Morning Consult poll, which I want to ask unanimous consent to put into the record, conducted nationwide in September of 2018, showed 73 percent of Americans favor updating the Endangered Species Act. The poll also showed that a majority of Americans believe the main purpose of the Endangered Species Act should be to aid in the recovery of endangered plants and animal species, something it does not do now.

More registered voters believe that states should be more responsible for managing the recovery of species than the Federal Government. And since 2015, there has been an 8 percent increase in voter opinions that state and local governments should be most responsible for managing endangered species efforts, primarily because the states actually work, and the Federal Government efforts don't.

Two in three support removing species from the endangered species list, returning it to state management if they meet all of the recovery goals, something that does not happen in practice today. Sixty-eight percent support revising the Endangered Species Act to focus efforts on conserving species before they become threatened or endangered. And they are right in all those approaches.

Too often, species are indefinitely kept on the endangered species list. Litigation focuses the law on listing more species and not enough on actual recovery and eventually de-listing of species.

State and local communities, and their expertise on the ground, are often cut out of the process. They have very little to say in the decisions to list and the most effective recovery strategies that can be used.

At the end of the day, more focus needs to be on actual recovery and eventually de-listing a species. States should have a role in the recovery, rather than being ignored by the Federal Government. Science and best practices, rather than litigation and judges, should guide our decisions.

The bills we are addressing today address these issues and they improve the law for the betterment of species and communities.

Everything needs to be updated occasionally. It has been far too long since this was updated because we can do a better job, and we must do a better job. The Endangered Species Act is not necessarily being maligned, it is simply saying it is not working, and it needs to be made to work.

I yield back the remainder of my time.

[The prepared statement of Mr. Bishop follows:]

PREPARED STATEMENT OF THE HON. ROB BISHOP, CHAIRMAN, COMMITTEE ON
NATURAL RESOURCES

It's been almost 45 years since the Endangered Species Act was first passed by Congress to protect and recover species at risk of extinction. Despite these worthy intentions, less than 2 percent of species have recovered enough to warrant removal from the list of endangered and threatened species.

In the past several years, the Committee has held numerous hearings and heard testimony from dozens of witnesses on how the ESA has failed in its fundamental goal of recovering species. Further, the law has been misused to restrict land use, block economic activity, and stifle resource and infrastructure development. Excessive litigation has only exacerbated these issues and worked to drain resources away from actual conservation efforts. Clearly something is not working.

I am optimistic that working with our colleagues in the Senate and this Administration, we can continue to lay the groundwork for ESA modernization. That is why we are here today to consider a package of bills from the Western Caucus that modernize the ESA. The nine bills before us today—two of which are bipartisan—seek to improve the Act in a manner that enhances species recovery without unduly burdening communities, economies and livelihoods.

Action needs to be taken on numerous fronts to achieve these goals. Increasing efficiency and providing certainty regarding regulations are paramount to resolving conflict arising from the ESA. Bills presented today promote regulatory certainty and reward good behavior of public and private entities to help recover species.

H.R. 6344, the LOCAL Act, is a bipartisan effort that will codify programs and increase certainty on regulations, incentivizing private property owners to manage land in a way that will benefit species we are so desperately trying to protect.

H.R. 6360, the PREDICTS Act, will codify the Clinton Administration's "No Surprises" regulation, supporting public and private entities that faithfully uphold their agreements to help endangered species.

H.R. 6346, the bipartisan WHOLE Act, will allow the totality of conservation efforts to be considered before Federal actions are taken, ensuring projects won't harm species while incentivizing private contributions to help recover species.

H.R. 6354, the STORAGE Act, ensures misunderstandings, like designating limited water reservoirs and water infrastructure areas as critical habitat, will not take place, benefiting not only endangered species, but also water and power infrastructure operators and their customers.

In addition to improving regulatory certainty, the ESA should be adapted to provide more meaningful opportunities for states, tribes, and local communities to be involved in the ESA decision-making process. These local entities often have some of the most specialized knowledge about the threats facing species and have successful local conservation measures in place to counter such threats and to ensure the survival of the species.

H.R. 6345, the EMPOWERS Act, requires Federal agencies to consult states for data when listing decisions are considered that will impact a state.

H.R. 3608, sponsored by Congressman McClintock, improves transparency by requiring that relevant state data be utilized in listing decisions and that data used as the basis for a listing decision be publicly disclosed, as well as information concerning ESA litigation.

H.R. 6364, the LAMP Act, will assist state and local governments by allowing the establishment of cooperative agreements to manage species and habitats.

Last, one thing we can all agree on is species recovery. H.R. 6356, the LIST Act, will help bring the ESA up to date, authorizing the Secretary of the Interior to delist species discovered to be ecologically abundant.

H.R. 6355, the PETITION Act, will reform the highly abused petition process, allowing for a petition backlog when frivolous petitions stack up and the Federal Government becomes vulnerable to lawsuits.

I look forward to discussing these bills today and working together, along with my colleagues on the other side of the aisle, to find common ground on how to best improve this important law to ensure its success for future generations.

I want to thank our witnesses and bill sponsors for being here today, and I look forward to hearing their testimony about these important measures.

The CHAIRMAN. Now I am going to introduce the witnesses. We have, first of all, Mr. Greg Renkes, who is the Director of Office Policy Analysis with the U.S. Department of the Interior.

I appreciate you being here.

I wish to yield 30 seconds for Mr. LaMalfa, so he can introduce our second witness.

If you would, please.

Mr. LAMALFA. All right. Thank you, Mr. Chairman, for the honor of doing that.

The President of California Farm Bureau, Jamie Johansson, has joined us today, and we are very pleased to have him and part of his team and his leadership out here with us.

So, thank you for your attendance today.

He is also a neighbor of mine in my home county, and purveys a very, very fine olive oil product up there that is part of a very, very nice Ag. tour that goes on in October in Butte County, so it is fun to take part of that and see his family and operation there. I know that it really comes from the heart, where the Ag. background is.

So, thank you for joining us today.

And thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Our third witness is David Sauter, who is a County Commissioner in Washington State.

I am saying that because there is no way I am ever going to pronounce your county properly, so you will have to do that for me. Thanks.

Then Mr. Robert Dreher, who is the Senior Vice President with the Conservation Program and General Counsel at Defenders of Wildlife.

And our last witness is Mr. Jonathan Wood, attorney with the Pacific Legal Foundation in Washington, DC.

I remind our witnesses that, under our Committee Rules, they are limited on their oral statement to 5 minutes, but the entire written statement will appear in the hearing record.

I am assuming you have all been here before, and recognize the mechanism in front of you. When your time starts, the green light goes on. As soon as it hits yellow, you have 1 minute left. When it is red, I am going to be snotty to you and actually cut you off in mid-sentence. So, please watch that red light. Don't let it hit you.

With that, we are going to go through each bill individually and allow Members to ask witnesses questions pertaining to the bills being considered.

We are going to start with H.R. 6344 by Mr. Tipton, which amends the Endangered Species Act of 1973 to encourage voluntary conservation efforts.

The Chair is now going to recognize Mr. Tipton if he would like to introduce his piece of legislation.

STATEMENT OF THE HON. SCOTT R. TIPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. TIPTON. Thank you, Mr. Chairman. I want to also thank our panel for taking the time to be here today. I do appreciate the opportunity to be able to speak in support of the bipartisan Land

Ownership Collaboration Accelerates Life Act, otherwise known as the LOCAL Act.

I firmly believe that the most effective approach to species recovery and conservation is through proactive, localized efforts that take into account the unique landscape, habitat, and ecological conditions of an area. It is critical to empower the landowners who have their boots on the ground every day to lead critical conservation and recovery efforts.

The LOCAL Act would amend and, I believe, strengthen the Endangered Species Act to give the Federal Government the opportunity to engage non-Federal landowners in voluntary conservation efforts through the species recovery agreements, habitat reserve agreements, private party conservation grants, and a conservation planning loan program.

I don't think you can find a better steward of public lands or a protector of animals than landowners who are out working their land every day for farming, ranching, or other purposes. They know the challenges that threatened and endangered species face, and they are in a unique position to be able to provide input on the best conservation strategies.

Through a species recovery agreement or a habitat reserve agreement, the Secretary of the Interior could enter into an agreement with a non-Federal landowner who agrees to carry out activities that protect or restore habitat and contribute to the recovery of an endangered or threatened species. The landowner would receive payments to cover the costs of these agreements.

Through private-party conservation grants, a private property owner could receive financial conservation aid to alleviate the burdensome ESA compliance, and states, counties, and municipalities could receive assistance for conservation planning to the conservation planning loan programs.

We have seen how collaboration and localized initiatives have benefited species like the sage-grouse in Colorado. The best way to be able to protect species is by preventing them from getting listed in the first place, so we need to start being proactive instead of reactive. This is the goal of the LOCAL Act.

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

The CHAIRMAN. All right. We are now going to turn to our panel.

Once again, you can have 5 minutes to begin with. You have nine bills that we are going to handle here. If you wish to speak to all nine bills, that is fine. If you want to try to sum up your entire statement the first time around and then, if you want to add to that when we hit the other bills, however you would like to handle that.

Mr. Renkes, let me recognize you first to talk about, hopefully, all nine. And then we will see if there is stuff that can be added to you afterwards.

**STATEMENT OF GREGG RENKES, DIRECTOR, OFFICE OF
POLICY ANALYSIS, U.S. DEPARTMENT OF THE INTERIOR,
WASHINGTON, DC**

Mr. RENKES. Thank you, Chairman Bishop, Ranking Member Grijalva, and members of the Committee. My name is Gregg Renkes. I am the Director of the Office of Policy Analysis in the

Department of the Interior, and I appreciate the opportunity to present the Department's views to you today on the nine bills to amend the Endangered Species Act.

The Administration supports the goals of the ESA to prevent extinction and foster recovery of species in danger of extinction. We pursue these goals, knowing the Federal Government must be a good neighbor, and also knowing that critical expertise and resources for species recovery most often lie with the states.

We must partner with the states and private landowners, who often bear a disproportionate share of the burden in conserving Endangered Species-listed species, particularly in the West. And we are working to make common-sense improvements to ESA implementation in recently proposed regulations.

Earlier this month, Secretary Zinke issued a memorandum reaffirming the authority of states to exercise broad powers as stewards of the Nation's fish and wildlife on Federal public lands and waters. He instructed all bureaus to complete a review of Fish and Wildlife regulations, policies, and guidance, and provide recommendations as to how the Department can better align with states.

The Secretary recognizes that states are good stewards of our natural resources, and have a long history of sound fish and wildlife management. This is why the Department participates in the joint Federal-State task force on ESA policy, and was a participant with the Western Governors Association endangered species efforts. The Administration is committed to making the ESA work for the American people, and we will continue to work with the states and Congress to improve implementation of the law.

Mr. Chairman, a modern vision of conservation is one that uses cooperative federalism, public-private partnerships, market-based solutions, the best-available science, transparency, and sensible, efficient regulation to achieve the greatest good for the greatest number of people over the longest term.

The bills before the Committee today are excellent examples of these principles, and complement the Administration's efforts. Collectively, these bills seek to improve the ESA by providing greater regulatory certainty, embracing federalism and transparency, and improving frameworks for listing, de-listing, and recovery of species. The Department supports these goals.

Staying within my allotted time, I refer the Committee to my written statement for the Department's more detailed comments on each of the nine bills.

Four of the bills being discussed today seek to improve regulatory certainty for states, local governments, and private landowners impacted by the ESA. Consistent with the goals of the LOCAL Act, the Department believes strongly in the value of voluntary conservation, the power of financial incentives, and in providing regulatory assurances to landowners doing good work on their land.

And we agree with the sponsors of the WHOLE Act, the STORAGE Act, and the PREDICTS Act, that improving predictability and regulatory certainty under the ESA is of paramount importance to the American people.

We support the themes of the EMPOWERS Act, LAMP Act, and Endangered Special Transparency and Reasonableness Act to strengthen the cooperative federalism structure of the ESA, and improve transparency.

The Department recognizes that state fish and game agencies are experts in the conservation field, and critical partners in our work to achieve ESA goals.

The PETITION Act and LIST Act seek to improve procedures for listing and de-listing. The Department agrees more needs to be done. We have proposed regulations to clarify the factors used to determine species recovery. The petition process needs to be improved. We all understand the time and cost of litigation have become significant challenges in implementing ESA.

As the ESA approaches its 50th anniversary, the Department recognizes the need to modernize the law and make it work for the American people. Our commitment to improving implementation of the ESA is reflected in the Administration's reform and reorganization recommendations, which return the National Marine Fisheries Service to Interior, merging it with the Fish and Wildlife Service. This would consolidate the Endangered Species Act and Marine Mammal Protection Act into one agency within Interior, resulting in more consistent policy and improve service to stakeholders.

The Administration is committed to common-sense solutions that make the ESA as efficient, reliable, and defensible as possible, and conserving threatened and endangered species and protecting the ecosystems upon which they depend. We appreciate the Committee's work toward this end, and support the goals of the nine bills before the Committee today.

The Department stands ready to work with you to address these and other legislative efforts to improve the Endangered Species Act. Thank you.

[The prepared statement of Mr. Renkes follows:]

PREPARED STATEMENT OF GREGG RENKES, DIRECTOR, OFFICE OF POLICY ANALYSIS, DEPARTMENT OF THE INTERIOR ON H.R. 6356, LIST ACT OF 2018; H.R. 6345, EMPOWERS ACT OF 2018; H.R. 6344, LOCAL ACT OF 2018; H.R. 6355, PETITION ACT OF 2018; H.R. 6364, LAMP ACT OF 2018; H.R. 6360, PREDICTS ACT OF 2018; H.R. 6346, WHOLE ACT OF 2018; H.R. 6354, STORAGE ACT OF 2018; AND H.R. 3608, "ENDANGERED SPECIES TRANSPARENCY AND REASONABLENESS ACT"

INTRODUCTION

Good afternoon Chairman Bishop, Ranking Member Grijalva, and members of the Committee. I am Gregg Renkes, Director of the Office of Policy Analysis in the Department of the Interior (Department). I appreciate the opportunity to testify before you today on nine bills to amend the Endangered Species Act of 1973 (ESA). The Administration supports the goals of the ESA to prevent the extinction of species and to foster recovery of species in danger of extinction. We pursue these goals knowing that the Federal Government must be a good neighbor and work collaboratively with states and landowners who often bear a disproportionate burden in conserving species protected under the ESA, given that approximately two-thirds of lands in the United States are privately owned. That is why the Administration is working diligently to partner with states and landowners and make common-sense improvements to how we administer the ESA, while maintaining our environmental standards and stewardship responsibilities.

Each of the bills being discussed today—H.R. 6356, H.R. 6345, H.R. 6344, H.R. 6355, H.R. 6364, H.R. 6360, H.R. 6346, H.R. 6354, and H.R. 3608—seeks to improve implementation of the ESA. In general, the Administration supports the

goals of these bills to improve coordination with, and expand the role of, the states in implementing the ESA, to improve transparency in decision making, to expand tools to encourage voluntary conservation on private lands, and to improve the processes for listing, down-listing, de-listing and recovery of species. The Department welcomes the opportunity to work with the Committee to improve the ESA's effectiveness at its primary goals—preventing extinction and recovery—while reducing and avoiding unnecessary burdens.

BACKGROUND

The ESA is one of our Nation's most important wildlife conservation laws. It is implemented jointly by the U.S. Fish and Wildlife Service (Service) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) (together known as "the Services"). The law's stated purpose is to provide a program and means for the conservation of threatened and endangered species and the ecosystems upon which they depend. When a species is designated as threatened or endangered—or "listed" under the ESA—it is in urgent need of help. The law directs the Services to use the best available scientific and commercial information to determine whether a species needs to be listed, to identify and address the threats to the species, and to facilitate the recovery of the species.

ADMINISTRATION PRIORITIES

The Administration is committed to making the ESA work for the American people. The ESA has had some notable success since its passage over 40 years ago—bald eagles and peregrine falcons, once rare in the lower 48 states, are fully recovered, and we have brought species like the California condor and black-footed ferret back from the very brink of extinction. But as we look at our record of de-listing and recovery there is clearly room for improvement. Implementation of the law regularly generates frustration and controversy among private landowners, states, regulated industries, and environmental advocates alike. Some argue that getting species on the list is easier than getting them off. Particularly in western states, the law and certain species have become lightning rods for intense disagreement.

Our commitment to improving implementation of the ESA is reflected in the Administration's Reform Plan and Reorganization Recommendations which includes a proposal to merge the Department of Commerce's NMFS with the Service. This merger would consolidate the administration of the ESA and Marine Mammal Protection Act in one agency and combine the Service's science and management capacity, resulting in more consistent Federal fisheries and wildlife policy and improved service to stakeholders and the public, particularly on infrastructure permitting.

The Department is focused on improving implementation of the ESA and has placed a high priority on regulatory reform. A modern vision of conservation is one that uses cooperative federalism, public-private partnerships, market-based solutions, the best available science, and sensible regulations in order to achieve the greatest good in the longest term. To that end, in July of this year, the Service and NMFS jointly proposed regulations to modify the parameters for Federal agency consultation; clarify and improve some of the standards under which listings, de-listing, reclassifications, and critical habitat designations are made; and adopt a change in approach to how the Service applies protections to threatened species. These proposed revisions are based on public input, the best available science, and best practices and are intended to improve conservation results and reduce the regulatory burden on the American people.

In addition to pursuing these regulatory revisions, the Department and the Service continue to work to address concerns raised by state and local governments, as well as other stakeholders, through administrative initiatives to improve implementation of the ESA. As part of these efforts, the Service has sought to bring greater transparency and predictability to the listing process, which benefits stakeholders and the public. To achieve this, the Service developed and released a National Listing Workplan, which prioritizes listing and critical habitat decisions over a 7-year period. In addition to providing transparency and predictability, the workplan helps the Service and its partners be strategic in delivering conservation on the ground to prevent the need to list species under the ESA. The workplan identifies candidate species and species petitioned for listing and undergoing a 12-month finding.

In a similar vein, late last year, the Service also developed a National Downlisting and Delisting Workplan that outlines upcoming actions addressing 5-year status reviews, petitions undergoing a 12-month finding, and proposed rules to down-list and

de-list species over a 3-year period. The workplan was developed to provide greater predictability regarding the timing of recovery actions.

The Service also developed the Species Status Assessment (SSA) framework as part of the ongoing effort to improve implementation of the ESA and enhance conservation success. An SSA is a focused, science-based, repeatable, and rigorous assessment of a species' ability to maintain self-sustaining populations over time. The result is a single document that delivers foundational science for informing all ESA decisions, including listing determinations, consultations, grant allocations, permitting, and recovery planning.

When it comes to developing guidance on how to best help listed species achieve recovery, the Service has revised its approach. Informed by the Species Status Assessment, the Service is improving and streamlining the way it develops recovery plans to produce them faster and with more flexibility to adapt to new information or circumstances affecting species.

Additionally, the Service is tackling the backlog of recovery plans, 5-year status reviews, and de-listing and down-listing actions. The Service must manage its multiple responsibilities for recovery planning, recovery actions, de-listing and down-listing rulemaking, and 5-year status reviews concurrently and is working to develop a national multi-year strategy to ensure balance among these responsibilities. In the FY2019 Budget, the Administration proposed modest funding increases to expand the Service's capacity to ensure that recovery plans have objective and measurable recovery criteria and to address 5-year status review recommendations.

Finally, the Department and Service are committed to being good partners to the states and working to incorporate that in all they do. In support of that, earlier this month, Secretary Zinke issued a Memorandum to all Bureaus reaffirming the authority of the states to exercise their legal authority to regulate fish and wildlife species on Federal public lands and waters, except as otherwise required by Federal law. The Secretary recognizes that states are good stewards of our natural resources and practice sound management of fish and wildlife while allowing appropriate opportunities for citizens to enjoy public resources.

I offer the following comments on the individual bills under consideration today.

H.R. 6356—Less Imprecision in Species Treatment (LIST) Act of 2018

The LIST Act would require the Secretary to initiate a de-listing rule when a species meets the recovery goals described in an associated recovery plan, or when the Secretary determines that the species is recovered based on available information. It requires a species to be de-listed if the Secretary finds that it was listed based on inaccurate, fraudulent, or misrepresentative information. Additionally, it would prevent parties from submitting petitions for a period of 10 years if the Secretary determines that they knowingly submitted fraudulent species data. The LIST Act would transform recovery plans from advisory documents, the content of which are not subject to legal challenge, into action-forcing documents. If enacted, recovery plans would become decision documents and may be subject to legal challenge. The bill would also shield negative petition findings and de-listing determinations from public review and comment, and shield a subset of negative findings from judicial review, while retaining those public participation and oversight mechanisms for positive petition findings and listing determinations.

The Department and the Service values science-based decision making and want to ensure that it continues. The Department would welcome the opportunity to work with the Committee on these areas of the bill.

H.R. 6345—Ensuring Meaningful Petition Outreach While Enhancing Rights of States (EMPOWERS) Act of 2018

The EMPOWERS Act would require petitioners to notify affected states and counties prior to submitting petitions to the Secretary. It would also enable states to advise the Secretary on petitions and require the Secretary to demonstrate that the information provided by a state or county government is incorrect if the Secretary disagrees with a recommendation that the petition is not warranted. The bill would also require the Secretary to provide advance notice to affected states and counties of a proposed regulation, invite recommendations from the state and county governments, and require the Secretary to respond within a certain time frame if the Secretary disagrees with a not warranted recommendation.

The Department supports advance notification from petitioners to state governments regarding forthcoming petitions as an important means of increasing transparency and raising awareness among affected entities, and recently revised the regulations governing processing of petitions to require such advance notification. The Department welcomes the information, data, and advice provided by state and local governments. The Secretary will continue to make species determinations

based on the best available scientific and commercial information. State fish and wildlife agencies are expert agencies in the conservation of fish, wildlife and plants, and the Service makes special effort to obtain information from those agencies and give special consideration to their views. Federal agencies will continue to work with the states and local communities to ensure the best possible science is used for decision making. For wide ranging species, the requirement to provide advance notification and treat information from county governments as the best available science will be procedurally burdensome and problematic. Additionally, requirements and associated deadlines related to proposed regulations in the bill may increase workload for agency staff and may expose the Department to additional litigation risk. We welcome the opportunity to discuss these issues with the Committee.

H.R. 6344—Land Ownership Collaboration Accelerates Life Act (LOCAL) of 2018

The LOCAL Act would establish new programs administered by the Secretary to incentivize voluntary conservation on private lands. These include incentive payments for short-term conservation agreements for listed species; cost-share payments and incidental take permits for long-term conservation contracts for listed species, candidate species, or species of concern; incentive payments for the preservation of habitat for listed species; and grants for private landowners implementing conservation practices for listed species on their land. It also establishes a habitat conservation planning loan program for state and local governments. The bill also creates an aid program to compensate landowners for the fair market value of a project on their land that would not comply with section 9(a). Additionally, the bill requires the Secretary to review applications for incidental take permits for private landowners within a certain time frame.

The Department strongly supports voluntary conservation agreements for species and habitats and recognizes the need for incentives to encourage broad participation. To that end, the Service offers Candidate Conservation Agreements with Assurances (CCAAs), Safe Harbor Agreements (SHAs), and Habitat Conservation Plans (HCPs) to landowners, with the incentive for participation primarily based on regulatory assurances. This bill would direct the Service to offer a variety of new species and habitat conservation programs to landowners, with the primary incentive for participation being financial support. Considering the creation of a significant new financial assistance program requires careful consideration of budgetary impacts to ensure consistency with the Administration's broader fiscal goals. While Federal funding, to the extent that it is available, could provide strong incentives to encourage conservation efforts by additional landowners, we would like to work with the Committee to promote broader participation in CCAAs, SHAs, and HCPs, which all provide regulatory assurances.

In light of the overlap between the provisions of H.R. 6344, H.R. 6360, and H.R. 6364 concerning voluntary conservation agreement vehicles and provisions, we recommend that the Committee work with the Department to reconcile the separate but related provisions in these three bills. We would like to work with the Committee to ensure these programs are structured in a manner consistent with the Administration's proposals to achieve operational efficiencies in similar conservation programs managed by the U.S. Department of Agriculture.

H.R. 6355—Providing ESA Timing Improvements That Increase Opportunities for Nonlisting (PETITION) Act of 2018

The PETITION Act would establish a procedure through which the Secretary could declare "petition backlogs" for 90-day and 12-month findings. It would set guidelines and restrictions for the Secretary's work on petitions during a backlog period, and would establish deadlines for completing review of listing and uplisting petitions. Additionally, it shields from judicial review any negative 90-day and 12-month findings for listing or uplisting petitions made due to the expiration of a deadline set in the bill.

The Department appreciates and supports the goals of the PETITION Act to address the workload challenges associated with the petition process. And while we agree with the need to focus efforts on recovery and de-listing, we would like to work with the Committee to determine more appropriate deadlines that would not place additional constraints on the work of the agency.

H.R. 6364—Localizing Authority of Management Plans (LAMP) Act of 2018

The LAMP Act would authorize the Secretary to delegate to a state the authority to manage listed species in that state. It would also expand the existing authority for the Service to establish cooperative agreements with states to also cover agreements with groups of states, political subdivisions of states, Indian tribes, local governments, and non-Federal persons.

The Department appreciates and supports the goals of the LAMP Act to expand the role of state, local, and tribal governments, and individuals in implementing the ESA. The Department would like to work with the Committee on the practical application of this bill and the implications to the public.

The LAMP Act would re-shape the relationship between the Services and non-Federal parties in conserving species under the ESA. By replacing the permitting authorities of the ESA that underlie existing voluntary conservation agreements with a straight-forward exemption from the take prohibitions under the ESA, we are uncertain how this would affect incidental take permitting and look forward to working with the bill's sponsors to better understand their intent. Additionally, the provisions authorizing the Secretary to delegate ESA authorities to a state are silent with regard to the implementing regulations, policies, and procedural manuals that guide the details of implementing the Act across the country. As written, this language has the potential to authorize variable ESA implementation across the country, with different policies and procedures among states and between states and the Services.

We welcome the opportunity to work with the Committee to further consider this legislation and develop provisions that could ensure consistent implementation among Federal and state agencies, and the states themselves.

H.R. 6360—Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species (PREDICTS) Act of 2018

The PREDICTS Act would codify certain Federal regulations that enable the development of HCPs, CCAAs, and SHAs. The bill would also authorize the Secretary to provide grants of up to \$10,000 to assist qualifying landowners.

The Department supports the PREDICTS Act, which would codify several important tools we use to incentivize voluntary conservation and provide regulatory predictability to non-Federal entities. We would, however, welcome the opportunity to work with the Committee to clarify the approval standard for CCAAs and SHAs to ensure that these plans continue to contribute to species recovery.

H.R. 6346—Weigh Habitats Offsetting Locational Effects (WHOLE) Act of 2018

The WHOLE Act would require that when making a determination of whether a Federal action is likely to jeopardize a species, destroy, or adversely modify critical habitat, the Secretary must consider the offsetting effects of all avoidance, minimization, and conservation measures already in place or proposed to be implemented, including habitat conservation measures.

The Department supports the WHOLE Act, which, with one exception, would codify processes already a part of long-standing practice and policy for Federal agency consultation under the ESA. That exception concerns determinations of the effect of Federal actions on designated critical habitat. The legislative language does not limit the offsetting measures to those carried out only within the designated critical habitat. The Department would welcome the opportunity to work with the Committee to improve that language.

H.R. 6354—Stop Takings on Reserves Antithetical to Germane Encapsulation (STORAGE) Act of 2018

The STORAGE Act would prohibit the Secretary from designating critical habitat for any area in a water storage reservoir, water diversion structure, canal, or other water storage, diversion, or delivery facility, where habitat is periodically created and destroyed as a result of changes in water levels caused by the operation of such facility.

The Department supports the intent of the STORAGE Act. While it is current Service practice to not designate critical habitat within the operational pool of water storage reservoirs, if species presence is in direct conflict with the purposes of the facility, there are circumstances where operations and maintenance of conveyance facilities is compatible with the function of critical habitat. The Department would appreciate the opportunity to work with the Committee to refine the language in this legislation.

H.R. 3608—Endangered Species Transparency and Reasonableness Act

The Endangered Species Transparency and Reasonableness Act would require that data used in species listings be made publicly available and that all data used shall be provided to states in advance of listing determination. It broadens the definition of “best scientific and commercial information available” to include data provided by state, county, and tribal governments. It requires the Secretary to submit a report to Congress and make public any expenditures related to litigation. Additionally, the bill would cap attorney’s fees to prevailing parties in ESA citizen

suites at \$125 per hour, consistent with current Federal law governing other actions against the United States.

The Department has worked to address concerns regarding transparency of the data used to make listing determinations. As in previous testimony by this Administration, the Department would recommend modifying this legislation to require the Service to consider all data submitted by states, tribes, and local governments, rather than automatically deeming that data to be the "best scientific and commercial data available" as currently required in the bill. Defining that term to automatically include data submitted by states, tribes, and counties, without regard to its quality, would be a significant departure from scientific integrity standards.

Also as stated in previous testimony by this Administration, this legislation would in effect limit attorneys' fees for successful citizen plaintiffs in ESA cases against the Federal Government. The time and cost of litigation is one of the significant challenges we face in implementing the ESA. As currently drafted, it is unclear whether the legislation would require that all prevailing fee awards be paid through annual appropriations, rather than having the option to pay through the Judgment Fund as is the case under current law. The Department would welcome the opportunity to work with the Committee to clarify this aspect of the legislation.

CONCLUSION

The Department recognizes our shared interest in modernizing the ESA and making it work for wildlife and the American people. We appreciate the Committee's attention to this effort. We support the goals of improving the ESA through cooperative federalism, public-private partnerships, market-based solutions, utilization of the best available science, and effective, sensible regulations. We welcome the opportunity to work with the Committee to address some technical modifications to the proposed legislation. The Department is committed to making the ESA as efficient, predictable and effective as possible in accomplishing its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. While the ESA has had some success since its passage over 40 years ago, there are greater opportunities ahead. The Department looks forward to working with the Committee to address these and other legislative efforts to improve the ESA.

The CHAIRMAN. Thank you, sir. I appreciate that.

To our other witnesses, let me try to explain what we are trying to do here. There are nine bills. If you wish to address all nine bills in the first 5 minutes, we can do that. Then we will come back with specifics afterwards, as we go through them, bill by bill. Or, if you want to just speak on the bills for which you want to speak about, and not the others, we can do that at the same time. So, I give you that option, whether you want to comment on all of them at once, or just on this specific one.

But we are going to talk, first of all, about the Tipton bill. We will ask questions about the Tipton bill before we go to the others.

So, with that, Mr. Johansson.

STATEMENT OF JAMIE JOHANSSON, PRESIDENT, CALIFORNIA FARM BUREAU FEDERATION, SACRAMENTO, CALIFORNIA

Mr. JOHANSSON. Thank you, Chairman Bishop and Ranking Member Grijalva, for the opportunity to testify before you from the American Farm Bureau. I am Jamie Johansson. I am president of the California Farm Bureau Federation. We represent more than 39,000 members across 56 counties, contributing the largest agricultural economy of any state in the Nation.

Our farmers and ranchers provide food, fiber, and feed to our local communities, the Nation, and across the globe. In California, battles over everything from spotted owls to delta smelt have reshaped our rural communities and, sadly, have created tremendous

industries of conflict. All this with little to show in the way of improvements for the species.

This culture of conflict and lack of success is evidence that conservation is at a crossroads. We can either continue down the path of escalating conflict and seemingly endless cycles of listings and lawsuits, or we can take a long, hard look at what the past 45 years of implementing the Endangered Species Act can teach us, as we strive to make the ESA work better.

The law could be better for species, whether listed or unlisted. And better for people, whether farmer or conservationist. There are three reasons this is the case.

First, we all value protecting species from extinction. Our disagreements are not about the goals of species protection, but the best way to achieve that goal.

Second, there is widespread acknowledgment that ESA can be improved to work better for species and people.

Third, the key to the ESA working better is improving opportunities for collaborative conservation by reducing conflict and increasing regulatory certainty. The bills under deliberation today move in the direction of bringing regulatory certainty.

Regarding my first point, I wish to state that we are not here to question the Act's fundamental goal of striving to conserve species from extinction. This goal will not and should not change. What we grapple with today is not whether we should conserve species from extinction, but how we should conserve species from extinction.

To expand on my second point, I believe that there is widespread acknowledgment that the ESA could work better for both species and people. Though everyone may not state it precisely that way, if you look at how the issue is discussed, the conservation groups are increasingly acknowledging the need to take care of landowners who are well positioned to help species.

Meanwhile, farmers and ranchers believe they need to take care of the species if we want to continue to take care of our future. While we all may say it differently, there is a common message that the ESA can and should be functioning more effectively for both species and people.

This leads me to my third point, and the principal reason I am here today. I believe that if the ESA is to work better for species, it must work better for people. This is the reason for your convening today to consider legislation that could provide improvements in areas where the existing law has created unnecessary and unproductive conflict. What we know is that to actually take care of species on the land, we need to work together, not against the people on the land. For this to happen, we must increase the opportunities for collaboration and decrease the opportunities for conflict.

Currently, landowners view the ESA as a threat. The history of the ESA has generally shown landowners that having species or habitat on their land creates a lot of risk, and provides no real benefit. Given that half of listed species spend 80 percent of their lives on private land, this situation offers little opportunity for people or species.

Under the current regulatory climate, the ESA disincentivizes landowners from protecting and growing habitat. We can all agree

that rational landowners should do everything they can to reduce their risk by minimizing habitat or species on their land. Despite this hard logic, I am proud to say that farmers and ranchers are good stewards, and generally accept that risk.

But escalating conflicts and expanding lists of endangered and threatened species are consistently straining the situation now. Now is the time to focus on improvements to the ESA that will encourage collaborative conservation by reducing conflict and improving regulatory certainty.

We appreciate the Committee's hard work to identify aspects of the ESA that can be improved, and offer the American Farm Bureau Federation's support for the measures being considered before the Committee today.

Ideas to prioritize petitions, improve transparency of data and litigation, and provide greater opportunity for state and local governments to participate in management of species are ideas that have been discussed in many forms, and are concepts also included in Senator Barrasso's discussion draft of the Endangered Species Act Amendments of 2018.

As the legislative efforts move forward in the House and Senate, we emphasize the importance of incorporating the breadth of perspectives into the process in order to develop viable and durable solutions that will result in long-term, meaningful improvements to the Endangered Species Act.

Thank you.

[The prepared statement of Mr. Johansson follows:]

PREPARED STATEMENT OF JAMIE JOHANSSON, PRESIDENT, CALIFORNIA FARM BUREAU FEDERATION ON BEHALF OF THE AMERICAN FARM BUREAU FEDERATION ON H.R. 6344, H.R. 6360, H.R. 6346, H.R. 6354, H.R. 6345, H.R. 3608, H.R. 6364, H.R. 6356, AND H.R. 6355

Thank you, Chairman Bishop and Ranking Member Grijalva for the opportunity to testify. I am Jamie Johansson, President of the California Farm Bureau Federation. We represent more than 39,000 members across 56 counties contributing the largest agricultural economy of any state in the Nation. Our farmers and ranchers provide food, fiber, and feed to our local communities, to the Nation, and across the globe.

In California, battles over everything from spotted owls to delta smelt have reshaped rural communities, and sadly, have created tremendous industries of conflict. All this with little to show in the way of improvements for the species.

This culture of conflict and lack of success is evidence that conservation is at a crossroads. We can either continue down the path of escalating conflict and seemingly endless cycles of listings and lawsuits, or we can take a long hard look at what the past 45 years of implementing the Endangered Species Act (ESA or "the Act") can teach us as we strive to make the ESA work better. The law can be better for species, whether listed or unlisted, and better for people, whether farmer or conservationist.

There are three reasons this is the case.

First, we all value protecting species from extinction. Our disagreements are not about the goal of species protection, but the best way to achieve that goal.

Second, there is widespread acknowledgement that the ESA can be improved to work better for species and people.

Third, the key to the ESA working better is improving opportunities for collaborative conservation by reducing conflict and increasing regulatory certainty. The bills under deliberation today move in the direction of bringing regulatory certainty.

Regarding my first point, I wish to state that we are not here to question the Act's fundamental goal of striving to conserve species from extinction. This goal will not and should not change. What we grapple with today is not whether we should conserve species from extinction, but how we should conserve species from extinction.

To expand on my second point. I believe that there is widespread acknowledgement that the ESA could work better for both species and people. Though everyone may not state it precisely that way, if you look at how the issue is discussed, the conservation groups are increasingly acknowledging the need to take care of landowners who are well positioned to help species. Meanwhile, farmers and ranchers believe they need to take care of the species if we want to take care of our future. While we all may say it differently, there is a common message that the ESA can and should be functioning more effectively for both species and people.

This convergence of messages from what traditionally has been sparring groups, was perhaps best reflected in the Western Governors' Association's "Initiative on Species Conservation and the Endangered Species Act." This thorough and inclusive process, in which Farm Bureau was an active participant, brought together stakeholders on all sides of the issue. The initiative involved several years exploring ideas "for improving the efficacy of the Endangered Species Act," and included all manner of positions and viewpoints. A common theme was that improvements could, and should, be made.

This leads me to my third point, and the principle reason I am here today. I believe that if the ESA is to work better for species, it must work better for people. This is the reason for your convening today, to consider legislation that could provide improvements in areas where the existing law has created unnecessary and unproductive conflict. What we know is that to actually take care of species on the land, we need to work with, not against, the people on the land. For this to happen, we must increase the opportunities for collaboration and decrease the opportunities for conflict.

Currently, landowners view the ESA as a threat. The history of the ESA has generally shown landowners that having species or habitat on their land creates a lot of risk and provides no real benefit. Given that half of listed species spend 80 percent of their lives on private land, this situation offers little opportunity for people or species.¹

Perhaps no species is more symbolic and perhaps symptomatic of the ESA's challenges than the northern spotted owl. Listed as threatened in 1990, this listing kicked off the timber wars that reshaped the Pacific Northwest and the ESA. Thriving rural communities lost a significant portion of their economic base because of the costs and restrictions placed on timber harvest. As much as any other species, the spotted owl proved to landowners that endangered species and their habitat were major hazards to be avoided at all costs.

All this, and yet the spotted owl is still not doing well. The primary threat now appears to be the barred owl—a species that over the past century has expanded its range from the east, outcompeting, breeding, and killing the spotted owl.

In sum, the listing harmed our rural communities. The ensuing battles weaponized the Endangered Species Act and led to the creation of a massive industry of conflict. This resulted in turning the ESA into a feared threat to landowners. Currently, the spotted owl is worse off than ever.

Several more examples illustrate the very real conflicts in California, both those experienced in the past and problems we anticipate in the future.

DELTA SMELT: A FAILED SYSTEM

Another example of extraordinary harm, without commensurate benefit, is the crippling effect litigation over the delta smelt has had on California's water system. Questionable science has focused regulatory controls on California's state and Federal water projects because this is the easiest "knob" the regulators have had to turn. Litigation-focused advocacy groups have also turned the smelt into a nuclear weapon in court to further their own narrow agenda.

The real causes of the smelt's decline, however, are much more complex than just the state and Federal projects. In fact, one of the biggest causes appears to be an invasive clam that has wiped out the smelt's primary food supply. While there's not a lot we can do about the clams, the best science today suggests that any threat from the projects can be managed without eliminating the water supply to cities and farms. Working with water users and landowners to improve habitat and food supply are the more effective "knobs" we should be turning.

SALMON: LOST OPPORTUNITY

In Northern California, farmers and ranchers worked for decades to make improvements beneficial to salmon and steelhead. Millions have been invested in

¹U.S. Fish & Wildlife Service, "Our Endangered Species Program and How It Works With Landowners," 2009. <https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf>.

putting in fish screens to prevent juvenile salmon from being pulled into water diversions. Significant amounts of water historically used for irrigation and municipal supply have flowed through the California Bay Delta and out to sea in an effort to improve the survival of salmon. However, these efforts have not had the intended effect of increasing salmon populations. Instead, we are finding that collaborative efforts to allow juvenile salmon to spend time in flooded rice fields are having a much better effect than simply keeping more water in our river systems. This is yet another example of the need for collaboration rather than conflict.

Elsewhere in the battles over salmon, farmers and ranchers sought to work with local, state and Federal agencies to implement a small-scale supplementation program. The constraints of the ESA and bureaucratic reluctance to engage in supplementation (it is out of fashion in the latest conservation thinking) resulted in the project going nowhere. This reinforced in the minds of farmers and ranchers that the real motivations are something other than actually helping species.

SMALL SUCCESS IN COLLABORATIVE CONSERVATION ON WORKING LANDS

There are positive examples of collaboration on working lands during the last two administrations. The Bush administration promulgated 4(d) rules that exempt routine ranching activities from the prohibitions of the Act for the California Tiger Salamander and California Red Legged Frog. In both examples, the U.S. Fish and Wildlife Service (FWS) recognized that ranches provided the bulk of habitat for these species. They saw that continued ranching was more beneficial to the species than preventing the possible deaths of a few critters and potentially driving ranchers to sell for development or switch to more profitable crops.

Another successful example of collaboration came during the Obama administration when the Modoc Sucker (a small fish) was de-listed after extensive work between the agency and ranchers in Modoc and Lassen to improve habitat.

Unfortunately, these positive stories are more aberration than opportunity under the current ESA, as there are few examples that have worked for both people and species. The fact is that very limited circumstances have proven just right enough to fit the narrow opportunities currently provided for in the ESA.

MONARCH BUTTERFLY: A PROMISING FUTURE MODEL

While the spotted owl and delta smelt are stories of how the ESA has failed people and species, the monarch butterfly could shape how we approach conservation in the future. The USFWS received a petition to list the monarch in 2014 and agreed pursuant to a settlement to make a listing decision by June 2019.

We are striving hard, as are many conservation groups, to find solutions that work for species and people. While we believe the solutions to improve habitat are feasible, it is clear the ESA is not flexible enough to ensure that those proactive collaborative conservation efforts are not derailed by litigation.

As we address the monarch butterfly, we have a question before us. Will we continue to allow the ESA to be about conflict, or can we work together to create a path toward conservation that works for species and people?

GOOD STEWARDS

Under the current regulatory climate, the ESA disincentivizes landowners from protecting and growing habitat. We can all agree that rational landowners should do everything they can to reduce their risks by minimizing habitat or species on their land. Despite this hard logic, I am proud to say that farmers and ranchers are good stewards and generally accept the risk. But escalating conflicts and expanding lists of endangered and threatened species are consistently straining this situation. Now is the time to focus on improvements to the ESA that will encourage collaborative conservation by reducing conflict and improving regulatory certainty.

In order for any landowner to work collaboratively to conserve the species, they need to know at the start what will be expected of them, and they must be confident the rules are not going to change once they are in.

Several provisions before the Committee today recognize this point. Providing incentives and regulatory assurances to landowners—topics in the LOCAL Act, H.R. 6344, the LAMP Act, H.R. 6364, and the PREDICTS Act, H.R. 6360—are two of the elements necessary to providing landowners with the real opportunity to engage in collaborative conservation. For future success in species conservation, it is important to recognize the costs of implementing conservation on the land for farmers and ranchers. And it is important to recognize farmers' and ranchers' need for regulatory certainty.

CONCLUSION

As the Committee considers legislation intended to improve the efficacy and efficiency of the ESA, we stand at a crossroads in conservation. No one is suggesting we should turn back. Rather, we are now choosing on which path to move forward. To do nothing is to reject decades of lessons from applied conservation and continue down the path of conflict-based environmentalism that developed in the 20th century, failing species and people alike. We have another, better option. We can take a hard look at the lessons we have learned about conservation and forge a path toward conservation in the 21st century that works with our farmers and ranchers and not against them.

We appreciate the Committee's hard work to identify aspects of the ESA that can be improved and offer the American Farm Bureau Federation's support for the measures being considered before the Committee today. Ideas to prioritize petitions,² improve transparency of data and litigation,³ and provide greater opportunity for state and local governments to participate in management of species⁴ are ideas that have been discussed in many forums, and are concepts also included in Senator Barrasso's discussion draft of the Endangered Species Act Amendments of 2018. As legislative efforts move forward in the House and Senate, we emphasize the importance of incorporating the breadth of perspectives into the process in order to develop viable and durable solutions that will result in long term, meaningful improvements to the Endangered Species Act.

The CHAIRMAN. Thank you.

All right, Commissioner, go through the same thing. If you want to talk about all nine at first, or emphasize just the LOCAL Act, whichever you want to do. You are recognized for 5 minutes.

**STATEMENT OF DAVID SAUTER, COUNTY COMMISSIONER,
Klickitat County, Lyle, Washington**

Mr. SAUTER. Chairman Bishop, Ranking Member Grijalva, and members of the Natural Resources Committee, on behalf of the National Association of Counties, thank you for your invitation to testify in support of your Endangered Species Act modernization package. Counties appreciate your work to ensure the ESA better protects species using the best scientific data, and cooperative efforts between the Federal and local governments.

My name is David Sauter. I am in my third term as a Klickitat County, Washington Commissioner. Our is a rural county of about 21,000 people, and bordered by the Gifford Pinchot National Forest and the Columbia River. I have lived there my entire life, and I have witnessed the detrimental impacts of ESA listings firsthand.

Klickitat County historically relied on a resource-based economy of timber, agriculture, and fishing. However, over the past 20 years, a major timber mill closed after the northern spotted owl listing, resulting in high unemployment and a shuttered community. Farmers and ranchers struggled to comply with management plans written without input of local experts.

We need a new approach to conservation policies focused on good stewardship, without ignoring the needs of communities. We must modernize the ESA.

We appreciate your work on these nine bills to guarantee ESA policies are based on the best scientific data with a maximum level of involvement from counties. My testimony will focus on three

²H.R. 6355.

³H.R. 3608.

⁴H.R. 6345, H.R. 6364.

bills, each of which will promote federalism and greater transparency: H.R. 6345, the EMPOWERS Act; H.R. 3608, the Endangered Species Transparency and Reasonableness Act; and H.R. 6364, the LAMP Act.

The EMPOWERS Act would require Federal agencies to consult with states before making final listing decisions, and mandates Federal agencies explain when their decisions diverge from states' advice. This bill will strengthen the role state and local governments play.

We currently partner with Federal agencies in wildlife management and habitat conservation efforts. States and counties have adopted management plans which may include scientific data that can be used to benefit listed species. Collaboration will benefit species and create better policy outcomes.

For example, the Oregon spotted frog was listed as threatened in 2014. Critical habitat proposals included private lands within the Glenwood Valley. The Klickitat County responded to landowners' concerns by convening meetings with Federal and state wildlife officials. Eventually, 20 landowners signed a cooperative agreement that was incorporated into the frog's critical habitat. It was a win-win for all. Consultation creates strong relationships and local buy-in. The EMPOWERS Act will ensure this level of consultation.

ESA decisions often do not conform to the process under law, but instead are mandated by court decisions through the abuse of our legal system by special interest groups. These lawsuits may also require taxpayers to pay special interest legal fees. From 2002 to 2017, the Department of the Interior entered into 96 separate settlements, paying \$1.7 billion in legal fees.

H.R. 3608 would require information on ESA lawsuits be available online, and put in place the same \$125-per-hour attorney's fees caps for ESA suits as for suits under the Equal Access to Justice Act.

Klickitat County is home to the most wind turbines in Washington State, accounting for nearly one-third of our tax base. Some of these capital-intensive projects were threatened with litigation. Most settled to maintain their tight construction schedules, but this legal threat can have a chilling effect on future developments.

H.R. 3608 steers the ESA back to focus on good stewardship, not lawsuits.

It also defines the term "best available scientific and commercial data" to include data provided by affected local governments. Counties have developed data to assist Federal agencies in species conservation plans. This bill would ensure this data is used when available.

The LAMP Act would allow agencies to enter into cooperative agreements with local governments to improve species recovery and habitat management. Under the LAMP Act, the ESA would become a more collaborative conservation tool that welcomes the input of non-Federal partners. This bill ensures Federal support for locally driven solutions. County governments are partners to Federal agencies in implementing species conservation plans. Allowing these partnerships to flourish will lead to greater efficiencies and better outcomes.

Once again, thank you for holding today's legislative hearing on the ESA. We must work in a bipartisan constructive manner to ensure that our approach to our shared objective of species recovery and habitat conservation is driven by coordination—

The CHAIRMAN. Time is expired.

Mr. SAUTER. Thank you.

[The prepared statement of Mr. Sauter follows:]

PREPARED STATEMENT OF THE HONORABLE DAVID SAUTER, COMMISSIONER, KLICKITAT COUNTY, WASHINGTON ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES ON H.R. 6345, H.R. 3608, AND H.R. 6364

Chairman Bishop, Ranking Member Grijalva, and members of the U.S. House Committee on Natural Resources, on behalf of the National Association of Counties (NACo), thank you for your invitation to testify today in support of your efforts to modernize the Endangered Species Act (ESA). County governments appreciate the Committee's efforts to ensure that this landmark conservation law better protects species and their habitat using the best available scientific data and cooperative efforts between the Federal Government and its intergovernmental partners, including local governments.

My name is David Sauter, and I am serving my third term on the Klickitat County, Washington Board of Commissioners. Klickitat County is bordered by the Gifford Pinchot National Forest to the West and the Columbia River to the South. We are a rural county with a population of about 21,000 people.

THE IMPORTANCE OF ESA MODERNIZATION TO COUNTIES

Klickitat County historically relied on a resource-based economy of timber harvests, ranching, farming and fishing. I have lived in the county my entire life and have witnessed the detrimental impacts of ESA listings firsthand. I have seen a prosperous, well-kept community demoralized and discouraged when its mill closed because of a lack of timber supply due to the listing of the Northern spotted owl—a mill that provided strong, middle class jobs for generations, the closure of which resulted in a blighted community with high unemployment and a reduced standard of living. I have witnessed farm and ranch families struggling to continue generations-old operations as they attempt to comply with resource management plans that were made without meaningful consultation of state and local expertise—the very people that are on the landscape and have direct, real-world experience with local issues. We need a new approach to species conservation policy that ensures good stewardship of resources without ignoring the voices and economic needs of local communities. This is why it is imperative that we modernize the ESA.

The National Association of Counties, which represents America's 3,069 counties, parishes and boroughs, has adopted into the American County Platform several goals for modernizing the ESA to ensure the legislation meets its mandate and serves as a strong part of our Nation's conservation legacy. NACo's platform specifically highlights the importance of the ESA, and further states:

“NACo supports reforming the ESA to mandate that the federal government treat state and county governments as cooperating agencies with full rights of coordination, cooperation, consultation and consistency to decide jointly with appropriate federal agencies when and how to list species, designate habitat and plan and manage for species recovery and de-listing.”

As this language makes clear, American counties support the Committee's efforts to modernize the ESA. We appreciate your leadership in developing common-sense bills that ensure the maximum level of involvement for county governments in ESA processes and that ESA policies are based on the best available scientific data. If enacted, the nine ESA modernization bills under consideration by the Committee would greatly improve how we protect species and conserve their habitat while assuring that our Nation's resource management policies are built through a strong federal-state-local partnership.

While counties hope to see all nine ESA modernization bills under consideration by the Committee (H.R. 6344, H.R. 6360, H.R. 6346, H.R. 6354, H.R. 6345, H.R. 3608, H.R. 6364, H.R. 6356 and H.R. 6355) enacted into law, my testimony will focus on three particularly important pieces of legislation to be considered by the Committee, each of which will promote federalism and greater transparency

under the ESA: H.R. 6345, the EMPOWERS Act; H.R. 3608, the Endangered Species Transparency and Reasonableness Act; and H.R. 6364, the LAMP Act.

H.R. 6345, EMPOWERS Act of 2018

The Ensuring Meaningful Petition Outreach While Enhancing Rights of States (EMPOWERS) Act would require Federal agencies making listing decisions under the ESA to meaningfully consult with state governments before a listing determination is made. It also mandates Federal agencies provide an explanation when their decisions diverge from the findings or advice of a state government.

County governments strongly support H.R. 6345 because it will strengthen the role that state governments and their political subsidiaries play in the ESA process. State game and fish departments assist the Federal Government in species and habitat conservation efforts. Further, states and many counties have adopted their own resource management plans (RMPs), which can provide existing, verifiable and scientific information that the Federal Government can use in its species, habitat or natural resource management plans.

I can give you an example of where this approach has been very successful in my county: the Oregon spotted frog was listed as a threatened species under the ESA in 2014. The U.S. Fish and Wildlife Service (USFWS) initially proposed to include a large portion of the Glenwood Valley of Klickitat County, including private property, as the frog's critical habitat. The residents and the county were highly concerned about the potential impacts that the designation would have on ranching and county road operations. To help address these concerns, our county government facilitated meetings between USFWS, the Washington Department of Fish and Wildlife, and local ranching interests. It took considerable time and effort to build trust between the parties, but eventually these meetings culminated in an agreement that was signed by over 20 private landowners and was incorporated into the critical habitat designation in 2016. It was a win-win for all involved, especially the frogs. This example illustrates what can happen when Federal agencies trust their local partners and engage in meaningful consultation and dialogue before finalizing decisions.

We want to thank Congressman Pearce for sponsoring this common-sense legislation that recognizes the need for the Federal Government to include state and local governing partners in developing the best possible species conservation policies. If Federal, state and local governments craft and implement resource management decisions in good faith, policies are more likely to be accepted by local residents, thus increasing the possibility of future intergovernmental cooperation on other important community issues.

H.R. 3608, The Endangered Species Transparency and Reasonableness Act

Too often, ESA decisions do not conform to the process spelled out under the ESA, but instead are mandated by court decisions forced on the Federal Government through the abuse of our legal system by special interest groups. To make matters worse, these lawsuits may require taxpayers to pay the legal fees of entities who sue on technical grounds to prevent common-sense, locally supported species and habitat management plans from being implemented. According to the U.S. Department of the Interior, from 2012 to 2017, the Federal Government entered into 96 separate settlement agreements or consent decrees and paid out \$1.7 billion in legal fees.¹

This system needs to be fixed to prevent further abuse. This is why counties support H.R. 3608, the Endangered Species Transparency and Reasonableness Act, and urge its adoption by Congress. If enacted, this bill would require USFWS to track, report to Congress, and make available online information on ESA lawsuits and attorney payouts from those lawsuits. This bill would also put in place the same \$125 per hour cap on attorney's fees for suits filed under the ESA as for those filed under the Equal Access to Justice Act.

I can give an example of why this is important: Klickitat County is home to large wind energy farms. We are proud to have the most wind turbines of any county in Washington State and third-most in the Nation behind a couple of counties in Texas. Wind projects now make up nearly one-third of the entire tax base of the county. These are very capital-intensive projects that are on tight construction schedules. Many of these projects were threatened with litigation by third parties and most paid out some form of settlement to maintain their construction schedules. Unfortunately, lawsuits have become a whole new industry in my county, holding up projects until a settlement can be extracted. This cycle of litigation and settle-

¹ https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3368_promoting_transparency_and_accountability_in_consent_decrees_and_settlement_agreements.pdf.

ment is likely to have a chilling effect on the county's flourishing and much-needed wind energy industry. Conservation policy should be based on good stewardship of the land, not profit incentives for special interests. Limiting opportunities to "sue and settle" represents a step in the right direction.

Additionally, under current law, the science used to justify ESA listing decisions may not be publicly available. H.R. 3608 would address this issue by mandating Federal agencies to make publicly available the data used for ESA listing decisions and to make the data accessible through the Internet. The bill also requires the Federal Government to disclose to states all data justifying an ESA listing decision and defines the term "best available scientific and commercial data" to include data provided by affected states, tribes, and local governments. Species listings and recovery decisions should be based on the best available scientific data and consistent, reliable timelines. Counties have developed data that can assist our Federal partners in species conservation plans, and we encourage the Federal Government to use this data where available.

H.R. 6364, LAMP Act of 2018

The LAMP Act would allow the Federal Government to enter into cooperative management agreements with state and local governments, tribes and non-Federal stakeholders to improve endangered species recovery and habitat management. States with strong, scientific approaches to species conservation would also take the lead in species conservation efforts. Under the LAMP Act, the ESA would become a more collaborative conservation statute that welcomes the input and expertise of non-Federal governing partners for species and habitat protection.

Counties support the adoption of H.R. 6364 because this legislation would empower county governments by ensuring Federal support for local management solutions. In a time of strained resources and manpower within the Federal Government, developing cooperative solutions to our environmental challenges can lead to greater efficiencies in decision making and improve long-term recovery. County governments have already served as partners to Federal agencies in implementing various species conservation plans and creating new opportunities for these partnerships to flourish will lead to better outcomes for communities and the environment.

CONCLUSION

Once again, thank you, Chairman Bishop, Ranking Member Grijalva, and Committee members for holding today's legislative hearing on the ESA. We must pull together and work in a bipartisan, constructive manner to ensure that our approach to the mutually shared objective of species recovery and protection is driven by coordination between Federal, state and local governments. We hope Congress acts on and the president signs all of the ESA modernization bills before the Committee and appreciate the opportunity to express counties' support for these important efforts.

The CHAIRMAN. Thank you.

All right, Mr. Dreher, apparently everyone is going through all nine, so go through all nine at first. You have 5 minutes.

**STATEMENT OF ROBERT DREHER, SENIOR VICE PRESIDENT,
CONSERVATION PROGRAMS AND GENERAL COUNSEL,
DEFENDERS OF WILDLIFE, WASHINGTON, DC**

Mr. DREHER. Good morning, Chairman Bishop, Ranking Member Grijalva, and members of the Committee. My name is Bob Dreher, and I am Senior Vice President of Conservation Programs at Defenders of Wildlife, a national non-profit conservation organization dedicated to the protection of all native animals and plants in their natural communities. Thank you for inviting me here today to discuss the nine Western Caucus bills related to the Endangered Species Act that are before this Committee.

My testimony draws on nearly four decades of experience in conservation law and policy, including service with the Federal Government as Associate Director of the U.S. Fish and Wildlife

Service, and as Acting Assistant Attorney General for the Environment and Natural Resources for the Department of Justice. I have represented and advised business clients, state governments, tribes, and environmental groups on environmental matters, and taught Federal natural resources law for almost two decades.

Thanks to the visionary goals and flexible framework Congress established when it passed the Endangered Species Act in 1973, the ESA is the world's most effective law for protecting wildlife in danger of extinction. In its 45-year history, only 11 species of the more than 1,600 on the list have been declared extinct. That is, in itself, a cause for celebration.

But the Act has also contributed to the recovery of 54 species, including iconic species such as the bald eagle, brown pelican, humpback whale, and the American alligator. And many more species have been set on a path to recovery.

The ESA is effective because it requires that decisions under the law be based on the best available science, not politics. It has been improved by continuous administrative reforms that have made the ESA work better, both for imperiled species and for stakeholders affected by its provisions. And the ESA, like many of our bedrock environmental and civil rights statutes, gives individual citizens the right to hold agencies accountable for complying with the law.

Simply put, the ESA works. And it is a good thing it does, because the need for a strong ESA is greater than ever. Humanity is confronted with a global extinction crisis of epic proportions. In the last 40 years, we have lost half of all wild animals on Earth. Extinction is happening at a pace at least 100 times greater than what would be considered normal.

During this biological crisis, what is most needed to improve ESA's effectiveness is to fully fund it. Rather than change the structure of this successful law, Congress should reaffirm our national commitment to protecting our biodiversity heritage, and provide the funding necessary for the ESA to realize its full potential.

Unfortunately, the legislation being considered today does nothing to improve the ESA, and many things to weaken it. The bills would gut the ESA's science-based listing process by mandating reliance on any information, apparently even erroneous or irrelevant data submitted by states and counties. They would create arbitrary barriers to listing species, including prioritizing de-listing of species at the expense of species that may face imminent extinction.

One bill would even allow states and counties to effectively veto decisions to list species, barring the Secretary from acting unless he can prove that information submitted by such governments is incorrect, regardless if it is sufficient to outweigh the scientific evidence showing the need to list.

Another bill would allow the Secretary to delegate management of endangered species to states, which often lack legal authority or resources to conserve imperiled species effectively. More than that, the Secretary could delegate management of endangered species to local governments, corporations, or private individuals, undermining both Federal and state authorities over wildlife.

Other bills would limit designation of critical habitat; force the government to pay landowners to comply with the ESA, which

would swiftly bankrupt the ESA program; and set time limits that automatically approve projects that may take species.

Several bills undermine the rule of law by excluding agency decisions from judicial review. Although not all decisions, I would note, since these manifestly partisan bills typically preclude citizens from challenging decisions not to protect species, while allowing landowners and industry full rights to challenge decisions to protect them.

I have addressed each of these bills in more detail in my written testimony. Taken together, however, the Western Caucus bills are a prescription for extinction. None of these bills would improve species conservation. Each would undermine, sometimes dramatically, the ESA and the fundamental commitment of our Nation to conserve and recover imperiled species.

On behalf of Defenders of Wildlife and our 1.8 million members and supporters, I strongly urge this Committee to reject these dangerous bills.

Thank you for the opportunity to testify. I would be happy to answer any questions.

[The prepared statement of Mr. Dreher follows:]

PREPARED STATEMENT OF ROBERT G. DREHER, SENIOR VICE PRESIDENT OF CONSERVATION PROGRAMS, DEFENDERS OF WILDLIFE ON H.R. 3608, H.R. 6344, H.R. 6345, H.R. 6346, H.R. 6354, H.R. 6355, H.R. 6356, H.R. 6360, AND H.R. 6364

Good morning Chairman Bishop, Ranking Member Grijalva, and members of the Committee. My name is Bob Dreher and I am Senior Vice President of Conservation Programs at Defenders of Wildlife (Defenders), a national non-profit conservation organization dedicated to the protection of all native animals and plants in their natural communities. For 70 years, Defenders has protected and restored imperiled species throughout North America by establishing on the ground programs at the state and local level; securing and improving state, national, and international policies that protect species and their habitats; and upholding legal safeguards for native wildlife in the courts. We represent more than 1.8 million members and supporters.

Before joining Defenders in June 2016, I served as Associate Director of the U.S. Fish and Wildlife Service, serving as the primary policy advisor for the Director. Prior to that, I served in the Department of Justice as Principal Deputy Assistant Attorney General and Acting Assistant Attorney General for the Environment and Natural Resources Division, and previously served during the Clinton administration as Deputy General Counsel of the U.S. Environmental Protection Agency. I have spent my career in conservation law, having represented business clients in private practice and conservation organizations as managing attorney for the Washington, DC office of the Sierra Club Legal Defense Fund (now Earthjustice). I also taught Federal natural resources law as an adjunct professor for almost 20 years at George Washington University Law School and Georgetown University Law Center.

Thank you for inviting me here today to discuss the nine Western Caucus bills related to the Endangered Species Act (ESA) that are before this Committee. I welcome the opportunity to speak about conserving imperiled wildlife under the ESA and the negative impact these bills would have on that important work.

As I will describe in detail, the bills before this Committee today would undermine key provisions of the ESA and result in increased harm to protected species and their habitat. The bills would gut the ESA's science-centered listing process by mandating reliance on any information provided by state and local governments. They would create arbitrary barriers to listing species, including prioritizing delisting species at the expense of species that may face imminent extinction; one bill would even allow states and county governments to effectively veto decisions to list species. Other bills would limit designation of critical habitat, force the government to pay landowners to comply with the ESA, and undermine the rule of law by excluding agency decisions from judicial review. One bill would allow the Secretary to

delegate management of endangered species to local governments, corporations or private individuals, undermining both Federal and state authorities over wildlife.

Taken together, the Western Caucus bills are a prescription for extinction. Rather than adopt any of these proposals, Congress should reaffirm our national commitment to protecting our biodiversity heritage for current and future generations.

THE ESA: A COMMITMENT WORTH KEEPING

Congress passed the ESA in 1973 out of a growing realization that our natural heritage was in peril and needed to be preserved. In section 2 of the law, Congress declared “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.”¹ Congress further recognized that many more species were in danger of extinction and that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”²

With these values in mind, Congress set forth an ambitious goal. The ESA would not only address actions directed at species themselves—such as hunting and trade—but also would “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”³ Congress also pledged to “take such steps as may be appropriate to achieve the purposes of the treaties and conventions” under which our Nation had pledged to the world that we would conserve threatened and endangered species.⁴

The commitment we made as a Nation in enacting the ESA is embodied in its definition of conservation, which is “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”⁵ As the Supreme Court has recognized, the “plain intent of Congress” in enacting the ESA “was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the ESA, but in literally every section of the statute.”⁶ The result is “the most comprehensive legislation for the preservation of endangered species enacted by any nation.”⁷

The ESA works by establishing a framework for the conservation of imperiled species, with specific management actions left to the scientific judgment of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (Services or Service). First, the appropriate Service determines whether a species warrants listing as “threatened” or “endangered.”⁸ In making this determination, the first factor the Service considers is “the present or threatened destruction, modification, or curtailment of its habitat or range.”⁹ Consistent with Congress’ emphasis on habitat preservation, the Service must also at the time of listing and “to the maximum extent prudent and determinable” designate “any habitat of such species which is then considered to be critical habitat.”¹⁰

Once a species is listed, a series of substantive and procedural requirements attach. While section 9 prohibits “take” of endangered species without prior authorization,¹¹ section 7(a)(1) imposes on Federal agencies a substantive obligation to promote the conservation of listed species.¹² Moreover, section 7(a)(2) obligates Federal agencies to consult with the Service whenever they act, authorize, or fund a project that may affect a listed species or its designated critical habitat.¹³ Through consultation, Federal agencies must ensure that their actions will not “jeopardize the continued existence” of a listed species or “result in the destruction or adverse modification” of critical habitat.¹⁴ This consultation process is designed to lessen the impact of Federal or federally permitted activities on species and their critical habitats.

Section 7 consultation protects species while allowing most development projects to proceed with no more than minor modifications. Defenders of Wildlife examined

¹ 16 U.S.C. § 1531(a)(1).

² *Id.* § 1531(a)(3).

³ *Id.* § 1531(b).

⁴ *Id.*

⁵ *Id.* § 1532(3).

⁶ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

⁷ *Id.* at 180.

⁸ 16 U.S.C. § 1533(a)(1).

⁹ *Id.* § 1533(a)(1)(A).

¹⁰ *Id.* § 1533(a)(3)(A), (a)(3)(A)(i).

¹¹ *Id.* § 1538(a)(1)(B).

¹² *Id.* § 1536(a)(1).

¹³ *Id.* § 1536(a)(2).

¹⁴ *Id.* § 1536(a)(2).

every section 7 consultation recorded by the U.S. Fish and Wildlife Service between January 2008 and April 2015, and in that time not one project had been stopped or extensively altered as a result of a finding of jeopardy to a species or adverse modification of critical habitat.¹⁵ Our research proves that consultation does not in theory or practice hamstring private development. To the contrary, it advances the ESA's recovery goals by striking a science-driven balance between conservation and economic activity.

THE ESA IS A PROVEN SUCCESS

Thanks to the visionary goals and flexible framework Congress established, the ESA is the world's most effective law for protecting wildlife in danger of extinction. A remarkable 99 percent of species have survived since being listed. In its 45-year history only 11 listed species have been officially declared extinct.¹⁶ That in itself is a cause for celebration.

The total number of ESA de-listings due to recovery is now 54, with 28 of those overseen by the Obama administration.¹⁷ More recoveries were declared under the Obama administration's watch than all past administrations combined, not because that administration was necessarily more committed to the ESA than prior administrations but because recovery of species takes time. We have achieved dramatic successes through decades of effort with species like the bald eagle, brown pelican, humpback whale, black-capped vireo, the Louisiana black bear, and the Steller sea lion, all of which have recovered to the point where they no longer require Federal protection. But an equal measure of the ESA's success may be the many more species that have been set on a path to recovery, including the iconic grizzly bear, the whooping crane, and the Florida manatee.¹⁸ With adequate resources and commitment, the ESA can save these and other imperiled species.

The ESA has been effective because it requires that decisions under the law be based on the best scientific data available—not politics. It has been improved by continuous administrative reforms that have made the ESA work better both for imperiled species and for stakeholders affected by its provisions. From habitat conservation planning to candidate conservation agreements with assurances that provide regulatory certainty to landowners, the Services have taken advantage of the ESA's inherent flexibility to find win-win solutions. The ESA has also been successful because, like many of our most important environmental and civil rights statutes, it gives individual citizens the right to hold agencies accountable for complying with the law.

Put simply, the ESA works. What is most needed now to improve the ESA's effectiveness is to fully fund it. To clear the backlog of species that require listing decisions, develop recovery plans, and work with stakeholders to promote conservation, the Services must have the necessary resources to achieve the ESA's visionary purposes and goals. Rather than change the structure of this successful law, Congress should provide the funding necessary for the ESA to realize its full potential.

Given its visionary purpose and numerous success stories, it should come as no surprise that the ESA also is broadly popular with the American people. Recently published peer-reviewed research from Ohio State University found that roughly four out of five Americans support the ESA.¹⁹ Previous studies by Hart Research in 2016 and Tulchin Research in 2015 found similar results; between 80 and 90 percent of Americans supported the ESA and agree that saving at-risk wildlife from going extinct is an important goal for the Federal Government.²⁰

¹⁵ Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About A Controversial Provision of the U.S. Endangered Species Act*, 112 PNAS 15844, 15848 (2015), <https://defenders.org/publications/section-7-pnas.pdf>.

¹⁶ U.S. Fish & Wildlife Serv., *Delisted Species*, <https://ecos.fws.gov/ecp0/reports/delisting-report>.

¹⁷ *Id.*

¹⁸ Daniel M. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, *Issues in Ecology*, Winter 2016, at 1.

¹⁹ Misti Crane, *Most Americans Support Endangered Species Act Despite Increasing Efforts to Curtail It*, *Ohio State News*, July 19, 2018, <https://news.osu.edu/most-americans-support-endangered-species-act-despite-increasing-efforts-to-curtail-it/>; Jeremy T. Bruskotter et al., *Support for the U.S. Endangered Species Act Over Time and Space: Controversial Species Do Not Weaken Public Support for Protective Legislation*, *Conservation Letters*, e12595 (2018), <https://doi.org/10.1111/conl.12595>.

²⁰ Tulchin Research, *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, July 6, 2015, <http://www.defenders.org/publications/Defenders-of-Wildlife-National-ESA-Survey.pdf>; Hart Research Associates, *CAP Energy/*

THE SIXTH MASS EXTINCTION

Unfortunately, the need for a strong ESA is greater than ever. Despite significant efforts to prevent extinction, the loss of biodiversity, driven largely by habitat degradation and destruction, remains a rapidly growing problem.²¹ Climate change and ocean acidification, which were barely on the radar when the ESA was written, are only exacerbating the trend.

The result is a global extinction crisis of epic proportion, in which half of all species could be facing extinction by the end of the century. In a 2017 study published in the Proceedings of the National Academy of Sciences, researchers found that of the 27,600 land-based mammals, birds, amphibians and reptile species studied, nearly one-third are shrinking in population numbers and territorial ranges.²² Even more startling, in just the last 40 years, we have lost half of all wild animals on Earth.²³ That is a sobering statistic. Further, the rate of extinction is happening at a pace at least 100 times greater than what would be considered normal. Scientists estimate that by 2050, well within our children's lifetime, 10 percent of all terrestrial species will be "committed to extinction."²⁴

This is what scientists now call the Sixth Extinction. Unlike previous extinction events, it is largely being caused by man himself. Faced with the impact of our own hands on the diversity of life, we have a responsibility to ourselves, to our children and to the planet itself to act. As famed scientist E.O. Wilson has said, "The one process now going on that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us."²⁵ It is up to us to halt and reverse this damage to the web of life.

Biodiversity decline is the proverbial canary in the coal mine, a symbol of what we are doing to the Earth. And what befalls the Earth ultimately will come back to haunt us. As Congress once understood, there are many reasons to be alarmed about the loss of biodiversity, not the least of which is its ultimate impact on humans. Threatened and endangered species provide tangible services and benefits to people, playing important roles in providing us with clean water, food, medicines and more. Beyond such material benefits, species have intangible existence and spiritual value. The value of Earth's biodiversity "is, quite literally, incalculable," the House Report for the ESA stated back in 1973. "Sheer self-interest impels us to be cautious."²⁶

THE WESTERN CAUCUS BILLS WOULD CRIPPLE SPECIES CONSERVATION

So why, when the need for conservation and concern for our future is greater than ever, is this Committee considering a suite of bills that would, each in its own way, undermine the ESA and cripple our efforts to conserve endangered species? If we are to avert this looming extinction crisis we should strengthen the laws and policies, especially the ESA, that protect imperiled species and their habitat. But these bills would do just the opposite. While some of these proposals are solutions looking for a problem, others are direct attacks on the very foundations of the ESA.

Despite their superficially attractive yet often Orwellian acronyms (like the LOCAL Act or the EMPOWERS Act), not one of these bills would enhance the conservation of endangered species in this country or stimulate their recovery. Rather, they would undermine sound science-based decision making, create unnecessary barriers to the listing of species, weaken protections against take, exempt areas from critical habitat designation, decrease opportunities for public participation, and increase burdens on already fiscally-strapped wildlife agencies. Overall, these bills

Environment/Climate Voters Survey, Dec. 2016, <https://cdn.americanprogress.org/content/uploads/2017/01/18040011/FI-CAP-Energy-Enviro-Dec2016.pdf>.

²¹See, e.g., Stuart L. Pimm et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 *Science* 987 (2014); David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 *Am. Inst. Bio. Sciences* 607 (1998); National Research Council, *Science and the Endangered Species Act 72* (1995), <https://www.nap.edu/read/4978/chapter/6#72> ("[T]here is no disagreement in the ecological literature about one fundamental relationship: sufficient loss of habitat will lead to species extinction.")

²²Gerardo Ceballos, Paul R. Ehrlich, and Rodolfo Dirzo, *Biological Annihilation Via the Ongoing Sixth Mass Extinction Signaled By Vertebrate Population Losses and Declines*, *PNAS* E6089–E6096 (July 10, 2017), <http://www.pnas.org/content/pnas/114/30/E6089.full.pdf>.

²³*Id.*

²⁴Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History 167–68* (2014); see also Daniel A. Farber, *Separated at Birth? Addressing the Twin Crises of Biodiversity and Climate Change*, 42 *Ecology L.Q.* 841, 846 (2016) (noting that climate change will exacerbate biodiversity loss).

²⁵Edward O. Wilson, *Biophilia* 121 (1984).

²⁶H.R. Rep. 93–412, pp. 4–5 (1973).

would take a wrecking ball to the ESA, and all to benefit a minority of special interests in a few western states.

H.R. 3608: Endangered Species Transparency and Reasonableness Act of 2018

This bill would subvert the ESA’s bedrock requirement that listing decisions be based on sound science by simply declaring that all information submitted by state, tribal or county governments must be considered as the best scientific and commercial data available, irrespective of its actual merit. The ESA already encourages governments to submit information that may aid the Services in making listing decisions. That information is assessed, like any other, for its accuracy and reliability. Under this provision, information of any quality provided by state, tribal, and county governments—even data that are flatly wrong—would be presumed equivalent, if not superior, to peer-reviewed research from leading species experts. Adding an additional burden, the bill requires the Services to make information that served as the basis for listing and critical habitat determinations publicly available online, but it exempts information that is subject to state privacy laws. This exemption could undermine transparency and encourage states to pass laws shielding commercial data from public inspection to appease special interests.

Notably, the bill also targets citizen enforcement of the ESA by capping and increasing the difficulty of obtaining litigation fees, in addition to requiring publication of yearly reports detailing Federal expenditures related to ESA cases, including settlements and attorneys’ fees. Citizen enforcement is a critical part of the ESA’s design, and central to the rule of law. These provisions could deter citizens from providing a vital check in the form of judicial review of erroneous agency decision making.

H.R. 6344: Land Ownership Collaboration Accelerates Life Act of 2018 (LOCAL Act)

The LOCAL Act would create a major loophole in the ESA’s prohibition on take of endangered and threatened species that could eviscerate protections for species that are already on the brink of extinction. This bill proposes to add provisions under a new section 10(l) that would allow individuals to request a determination from the Secretary regarding whether a particular activity would constitute unlawful take. If the Secretary determines that the proposed activity complies with the law, then any use or action taken by the property owner in “reasonable reliance” would be exempted from the take prohibitions of the ESA. If the Secretary fails to respond to such a request within 180 days, the activity would automatically be exempt from the ESA’s take prohibition.

The LOCAL Act would unreasonably burden the Secretary, who may lack the resources necessary to provide a timely response, while at the same time creating incentives for individuals to inundate the Secretary with requests in the hopes of obtaining authority to take listed species outside of the normal permitting process. After a missed deadline, an automatic no take determination would remain effective for 5 years; if the Secretary responds that the requested activities do not constitute a take, this determination would be effective for 10 years. Under the bill, the Secretary may only withdraw such a determination in the case of unforeseen changed circumstances.

Most disturbing, if the Secretary finds that the proposed use would not comply with the ESA’s take prohibition (or withdraws a no take determination), the LOCAL Act would entitle the landowner to financial compensation for the full market value of its proposed use. This sweeping provision effectively pays property owners to comply with the law and would quickly bankrupt funding for the ESA. The requirement to pay full market value for a proposed use, without regard to the relative extent of the property owner’s loss or the other economic uses to which its property can be put, violates settled constitutional principles governing compensation for regulatory takings and invites speculative and fraudulent claims. The Fifth Amendment of the Constitution guarantees just compensation when an individual’s property is taken for public use, but a mere regulation does not trigger compensation unless the property owner suffers a physical appropriation or a near total loss of a property’s economic value.²⁷ All citizens benefit from government regulation that maintains a healthy environment, and their use of their property can be limited by such regulation without compensation except in the rare case where it rises to a government taking. As Justice Oliver Wendell Holmes, Jr. recognized in the seminal case that defined regulatory takings, “Government hardly could go on if to some

²⁷ See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

extent values incident to property could not be diminished without paying for every such change in the general law.”²⁸ The LOCAL Act thus provides a financial wind-fall without any constitutional basis to selected property owners simply to ensure that they comply with the ESA. This would cripple the ESA’s implementation.

H.R. 6345: Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act of 2018 (EMPOWERS Act)

The EMPOWERS Act would require the Services to engage in an elaborate notice and consultation process with states and counties and would provide states and counties with de facto veto power over listing and critical habitat decisions. Upon finding that a petition to list a species or revise its critical habitat may be warranted, H.R. 6345 directs the Secretary to seek out from state and county governments information related not just to the species’ status but also to the potential impacts of the petitioned action on the locality and invites state and county officials to advise whether such action is “merited.” The EMPOWERS Act thus opens the door to elevating non-biological factors, such as economic costs, in the listing process.

Most concerning, if a state or county objects to a proposed listing or critical habitat determination, this bill would forbid the Secretary from proceeding with the action unless the Secretary demonstrates that information submitted by the locality is “incorrect” and that the action is warranted. The Secretary is thus precluded from listing a species or revising its critical habitat if any information submitted by a locality is correct (or cannot be demonstrated to be incorrect), regardless of whether that information is relevant to the decision or sufficient to overcome other scientific information in the record that supports the action.

As with H.R. 3608, this bill elevates political considerations over sound science. States and local governments have ample opportunities to participate in the listing process and provide relevant information to the Services. The ESA already requires the Secretary to notify states and counties of proposals to list species or designate critical habitat and invite their comments, and requires the Secretary to furnish a written justification to a state if he or she issues a listing or critical habitat regulation that conflicts with the state’s comments.²⁹ A 2016 Obama administration regulation already requires petitioners to notify states of their intention to file a listing petition.³⁰ The elaborate procedure that would be established under the EMPOWERS Act is thus unnecessary to ensure that states and localities can fully participate and submit relevant information in the petition process, and its provisions inviting consideration of non-biological factors in listing and granting states and counties an arbitrary veto over listings and revisions of critical habitat plainly subvert the integrity of the ESA.

H.R. 6346: Weigh Habitat Offsetting Locational Effects Act of 2018 (WHOLE Act)

The WHOLE Act strikes at what many have called the “heart of the ESA”—the section 7 consultation process. Section 7 requires that Federal agencies consult with the Services whenever an action authorized, funded or carried out by the agency could jeopardize the continued existence of a listed species or adversely modify its critical habitat. Formal consultation results in a biological opinion and incidental take statement that sets forth reasonable and prudent measures to minimize the take of listed species. This bill adds a requirement that the Secretary consider the “offsetting effects of all avoidance, minimization, and other species-protection or conservation measures that are already in place or proposed to be implemented as part of the action, including the development, improvement, protection, or management of species habitat whether or not it is designated as critical habitat of such species.”

The Services already consider avoidance, minimization and other conservation measures that are included in a proposed action during consultation, as well as evaluating existing conservation measures that benefit a species as part of the environmental baseline. In doing so, however, the Services evaluate the reliability of such measures, including the extent to which they are funded, the certainty of their implementation and the likelihood that they will in fact provide the projected benefits to the species. Such evaluation is essential, since the environmental record is replete with instances where agencies or project proponents have failed to implement mitigation measures or where such mitigation fails to achieve its expected benefit. The direction in the WHOLE Act to consider “all” such measures appears to direct the Services to consider any mitigation proposal, regardless of how specula-

²⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

²⁹ 16 U.S.C. §§ 1533(b)(5)(A), (i).

³⁰ 50 C.F.R. § 424.14(b).

tive, unfunded or ineffective it may be. Moreover, requiring the Services to consider “the offsetting effects” of existing conservation measures is illogical, since beneficial measures already in place cannot “offset” the detrimental impacts of new actions. The extent to which existing conservation measures have benefited a species is properly considered in evaluating the environmental baseline regarding the status of the species.

H.R. 6354: Stop Takings on Reserves Antithetical to Germane Encapsulation Act of 2018 (STORAGE Act)

This bizarrely named bill prohibits the designation of critical habitat within reservoirs, canals, and other water storage, diversion or delivery facilities where habitat is periodically created and destroyed due to changing water levels resulting from the operation of these facilities. This unnecessary bill would have limited application but risks blocking the designation of critical habitat that may be necessary for a species to survive. The prevalence of reservoirs and water projects throughout areas of the western United States has contributed to widespread losses of riparian habitat that are essential for imperiled species. As the West experiences changes in its long-term hydrological cycle due to climate change, many reservoirs operate at reduced capacity, restoring riparian habitat that may be highly valuable for listed species. Any designation of critical habitat in such areas would have to take into account adverse economic impacts, including constraints on the future operation of the facility, so such designation is unlikely except where changes in the operation of a project create opportunities to restore riparian habitat over a long term without disruption of a project. This bill would preclude consideration of such habitat protection altogether.

H.R. 6355: Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018 (PETITION Act)

The PETITION Act is among the most problematic bills being considered by this Committee. The bill declares, without evidence, that the listing petition process, a key safeguard that allows citizens to petition for protection of species that face extinction, is overloaded because of the intentional submission of frivolous petitions with the express purpose of forcing the Service to miss statutory deadlines or list species that do not deserve protection.

These charges are unfounded. As the Government Accountability Office (GAO) recently found, other than setting schedules for completing actions required under section 4, settlement agreements in deadline litigation “did not affect the substantive basis or procedural rulemaking requirements the Services were to follow in completing the actions.”³¹ There is simply no basis for the claim that deadline settlements lead to species being listed that do not, as a scientific matter, warrant the protections of the ESA. Nor is there any basis for the conspiracy theory that environmentalists intentionally submit unwarranted listing petitions in order to overload the listing system. I am unaware of any court decision or agency determination that has concluded that environmentalists have done so. Although citizen petitions have at times strained the capability of the Services, that is a reflection of the limited resources the Services are provided for listing. Citizen petitions have led to the listing of many species from the loggerhead sea turtle to the polar bear and the red knot that are critically imperiled and fully warrant the protections of the ESA.³²

If the premise that the petition process is being intentionally abused were limited to “findings,” the bill could be dismissed as partisan rhetoric. That demonstrably false accusation underlies highly damaging substantive provisions, however, that would cut the heart out of the ESA by precluding the Services from even considering listing petitions during any period when a backlog of listing petitions exists. Without providing additional resources to avoid such backlogs, this approach would prevent species from receiving the protections of the ESA and could lead to their extinction.

This bill requires the Secretary to declare “petition backlogs” and suspend listing decisions if the number of species included in petitions with missed 90-day or 12-month findings exceeds 5 percent of the number of species for which 90-day or 12-month petitions have been presented over the last 15 years. Once a backlog for these petitions has been declared, under most circumstances, the bill requires the Secretary to prioritize addressing petitions to de-list or down-list species above

³¹ U.S. Government Accountability Office, *Environmental Litigation: Information on Endangered Species Act Deadline Suits*, GAO-17-304 at 19 (Feb. 28, 2017), <https://www.gao.gov/products/GAO-17-304>.

³² See also Editorial, *The Public Role in Species Protection*, N.Y. Times, Aug. 29, 2012, <https://www.nytimes.com/2012/08/30/opinion/the-public-role-in-species-protection.html> (citing examples).

petitions to list or uplist species until the backlog is resolved. The bill would suspend statutory deadlines for responding to petitions to list or uplist species, and automatically deny most petitions to list or uplist species during a petition backlog. The bill also precludes judicial review of decisions denying listing petitions, but not of decisions granting listing or denying de-listing or down-listing petitions, thus depriving citizens seeking to protect species of their rights to seek court redress while empowering industries and property owners who oppose listings and press for de-listing species to challenge decisions adverse to their interests.

The PETITION Act would deny ESA protection for imperiled species due to resource constraints that prevent the Secretary from meeting statutory petition deadlines, and that are wholly the fault of Congress in failing to provide adequate funding for the ESA. It would elevate de-listing of species that are, by definition, no longer in peril over the protection of species that face imminent extinction. It subverts the very purpose of the ESA.

H.R. 6356: Less Imprecision in Species Treatment Act of 2018 (LIST Act)

Like the PETITION Act, the LIST Act also subverts the ESA's science-based process for evaluating whether a species is recovered and should be de-listed. The ESA currently requires that the same process and criteria be used to both list and de-list a species by making a determination on the basis of the best scientific and commercial data available when considering the five listing factors under section 4(a)(1). The courts have held that those factors, and not other considerations such as the goals of recovery plans, must form the basis for any decision to list or de-list.³³

The LIST Act, however, directs the Secretary to de-list species if the Department of the Interior (oddly, the Department of Commerce, which shares the administration of the ESA, is omitted) has produced or received substantial information demonstrating that the species "is recovered" or that the goals of a recovery plan for a species have been met regardless of the statutory factors set forth in section 4(a). This change would subvert the integrity of the ESA because the de-listing process would no longer require a methodical review of the listing factors to ensure that a listed species is not threatened or endangered, elevating recovery goals above the statutory factors that determine whether a species is threatened or endangered. The bill does not define what might constitute "recovery," leaving that critical concept ambiguous and creating the obvious risk that species that still qualify under section 4(a) may lose statutory protection. Moreover, the bill dispenses with rulemaking requirements intended to ensure public transparency and reliability of agency information, directing that the Secretary only publish a notice that a species is being removed rather than the text of a proposed de-listing regulation, as now required by the ESA.

The LIST Act also establishes a one-sided process for de-listing based on the false premise that many species are erroneously listed. The bill would allow for cursory de-listings if the Secretary determines, based on information submitted by third parties or developed by the Department of the Interior (again, oddly omitting the Department of Commerce), that the species was listed based on information that was "inaccurate beyond scientifically reasonable margins of error," fraudulent, or misrepresentative. If the Secretary determines that the listing was less than likely to have occurred absent such information, the species would be cursorily de-listed (without consideration of the statutory factors in section 4(a)) and that determination would not be subject to judicial review. By contrast, as usual in these bills, a decision by the Secretary that finds that the original petition did not contain inaccurate, fraudulent or misrepresentative information would be subject to judicial review by parties interested in forcing the delisting of the species.

Finally, in an apparent attempt to limit citizen petitions, the bill would punish a person who submitted a listing petition containing any information later determined to be inaccurate beyond scientifically reasonable margins of error, fraudulent, or misrepresentative by prohibiting the person from submitting future petitions for 10 years.

H.R. 6360: Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species Act of 2018 (PREDICTS Act)

This bill unnecessarily codifies the existing well-established practice of allowing non-Federal landowners to enter into Candidate Conservation Agreements with Assurances and Safe Harbor Agreements. H.R. 6360 requires that all Incidental Take Permits, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements contain assurances governing permit revocation, changed

³³ *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432–33 (D.C. Cir. 2012).

circumstances, and unforeseen circumstances. But the bill only allows the Secretary to revoke these permits and agreements in very limited circumstances. In contrast to current administrative practice established in Service regulations, the bill would not allow termination for the landowner's failure to implement the agreement or violations of law. The bill thus makes it more difficult for the Secretary to enforce these agreements or alter them in the face of changed circumstances.

H.R. 6364: Localizing Authority of Management Plans Act of 2018 (LAMP Act)

Like many of the bills under consideration, H.R. 6364 would expand the role of the states in implementing the ESA and impair the ability of Federal agencies to conserve species. Section 6 of the ESA allows states and the Federal Government to enter into cooperative agreements, whereby the states propose programs to conserve listed species and the Secretary assists with the management of those programs. The LAMP Act, however, would amend this provision to authorize the Secretary to broadly transfer management of resident listed species to state governments, and to provide Federal funding to support the state program. Unlike the current section 6, states will be permitted to protect only some species or taxonomic groups of species, rather than all species listed under the ESA. In addition, the bill removes language from current law that prevents states from enacting laws that are less restrictive than Federal laws, creating the risk that state programs established under this authority will relax existing protections for listed species.

Proposals to delegate the ESA to the states raise very substantial risks for the integrity and effectiveness of the law. Although states play a vital role in conserving resident species of wildlife, their focus has historically been on the management of game species, and the funding for state fish and wildlife agencies is often derived primarily from hunting licenses and fishing permits. States have in more recent years begun to engage with conserving non-game species, in part stimulated by the provision of Federal funds for such conservation through state wildlife grants. But states still generally lack the legal authority under state law, the biological expertise, or the funds to effectively conserve imperiled species. A recent study by the University of California Irvine School of Law found that few state ESA laws protect all endangered species within their state, that many state ESA laws do not require decisions to be based on sound science, that few state ESA laws require consultation with expert state fish and wildlife agencies on the effects of state approved projects on listed species, that most state ESA laws do not allow citizens to petition for listing or de-listing species, that most state ESA laws fail to provide authority for the designation and protection of critical habitat, that few state ESA laws even protect against harm to listed species' habitat, that virtually no states have authority to plan for species recovery, and—perhaps most revealing—that state expenditures make up only approximately 5 percent of ESA spending.³⁴ As the authors of the study conclude: “[W]ithout significant state law reforms in most states, the proposed devolution of Federal authority and responsibility over threatened and endangered species to states is likely to undermine conservation and recovery efforts, lead to a greater number of species becoming imperiled, and result in fewer species recovered.”³⁵

The LAMP Act would also allow non-Federal parties to manage species on certain public and private lands while being exempted from the ESA's consultation requirement and take prohibition. The ESA currently allows the Secretary to enter into “management agreements” with states that allow the state to manage areas established for the conservation of a listed species. The LAMP Act, however, would allow the Secretary to enter into “cooperative management agreements” with any unit of government or non-Federal person. In addition to expanding the scope of who may enter into such an agreement, the LAMP Act would allow parties to a cooperative management agreement to manage both species and land, as opposed to the current ESA's provisions that states may only manage land. Moreover, the LAMP Act would exempt parties to an agreement from sections 5, 7, and 9 of the ESA, allowing them to forgo consultation on Federal actions and ignore the ESA's take prohibition. These provisions empower local governments and non-Federal parties, such as oil and gas companies, to apply for authority to manage species, undermining the authority of both the Federal Government and the states over wildlife. Such entrants may have subversive motives or insufficient knowledge, pushing imperiled species even further toward extinction. Finally, the LAMP Act would exempt entry

³⁴ Alejandro E. Camacho, et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 *Envtl. L. Inst.* 10837 (2017), <https://www.law.uci.edu/centers/cleanr/news-pdfs/cleanr-esa-report-final.pdf>.

³⁵ *Id.* at 10837–10838.

into cooperative management agreements from review under the National Environmental Policy Act, allowing the Secretary to ignore the potential environmental impacts of entering into such agreements.

CONCLUSION

The ESA has been an indispensable safety net for fish, wildlife and plants. As former Speaker of the House Newt Gingrich wrote in a recent book: “Bold leadership produced the Endangered Species Act in 1973, perhaps the most effective piece of environmental legislation in our country’s history. The Act has been, by any measure, a very successful guardian of wildlife and habitat and any attempt to weaken it should be resisted.”³⁶ Unfortunately, the bills pending before this Committee ignore the ESA’s achievements and popularity and would seriously undermine species conservation.

None of these bills would improve species conservation. Each would undermine the ESA, often dramatically. If these measures are enacted, species deserving of Federal protection will be denied the help they need to survive and recover.

This is not the time to play politics. If the proponents of these bills are really interested in helping species recovery and avoiding further extinctions, they should support critically needed funding increases for the Services rather than advancing these damaging legislative proposals that only undermine the ESA. On behalf of Defenders of Wildlife and our 1.8 million members and supporters, I strongly urge this Committee to reject every one of these dangerous bills.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. GOSAR TO MR. ROBERT DREHER, SENIOR VICE PRESIDENT, CONSERVATION PROGRAMS & GENERAL COUNSEL, DEFENDERS OF WILDLIFE

Question 1. Mr. Dreher, since 1976, your organization, the Defenders of Wildlife has been the litigant in 510 lawsuits. How many dollars in attorney’s fees has Defenders of Wildlife collected as a result of litigation against the Federal Government?

Answer. Since 2009, Defenders of Wildlife has recovered \$824,279.58 in attorney’s fees under the Equal Access to Justice Act or other statutes that provide for an award of fees to a prevailing party in litigation against the United States. This amount represents a fraction of 1 percent of the organization’s annual budget for those years. Defenders of Wildlife does not have records of attorney fee awards prior to 2009.

Question 2. Mr. Dreher, you have opposition to all the bills in the package, which should come as no surprise to anyone given the extremist group you work for. You even spoke against the PREDICTS Act which codifies the Clinton administration’s 1998 “No Surprises” rule. Can you name one reform to the ESA, other than throwing more money at problems you all likely caused, that the Defenders of Wildlife has pursued through congressional legislation and supported over the last 30 years?

Answer. Over the past 30 years, Defenders of Wildlife has supported various amendments to the ESA, including:

1. Endangered Species Act Amendments of 1988
 - 100th Congress—H.R. 1467
2. Endangered Species Recovery Act of 1997
 - 105th Congress—S. 1180, H.R. 2351
3. Endangered Species Recovery Act of 1999
 - 106th Congress—H.R. 960
4. Endangered Species Recovery Act of 2001
 - 107th Congress—H.R. 4579

In addition to these bills, Defenders of Wildlife published a report in 1994, *Building Economic Incentives Into the Endangered Species Act*, advocating for legislative changes to the ESA which would create various tax incentive provisions, develop funds to reward and incentivize private landowners, and require Habitat

³⁶Newt Gingrich & Terry Maple, *A Contract with the Earth: Ten Commitments You Can Make to Protect the Environment Now*, 170 (2008).

Conservation Plans for candidate species. Several of these recommendations were adopted administratively by Secretary of the Interior Bruce Babbitt.

Defenders of Wildlife has also supported a wide variety of legislation which would improve wildlife conservation in conjunction with the ESA. These bills include:

1. The Global Warming Wildlife Survival Act (which later became known as the Safeguarding America's Future and Environment Act)
 - a. 110th Congress—S. 2204, H.R. 2338
 - b. 112th Congress—S. 1881
 - c. 113th Congress—S. 1202, H.R. 5065
 - d. 114th Congress—S. 1601, H.R. 2804
 - e. 115th Congress—S. 2176, H.R. 4490
2. The Protect America's Wildlife Act of 2007
 - a. 110th Congress—H.R. 3663
 - b. 111th Congress—S. 1535, H.R. 2281
3. Wildlife Corridors Conservation Act of 2016
 - a. 114th Congress—H.R. 6448
4. The Scientific Assistance for Very Endangered North Atlantic Right Whales Act of 2018
 - a. 115th Congress—S. 3038, H.R. 6060
5. The Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act of 2016
 - a. 114th Congress—S. 2385, H.R. 2494
6. America's Wildlife Heritage Act
 - a. 111th Congress—H.R. 2807
 - b. 112th Congress—H.R. 3496

Defenders of Wildlife is not currently supporting any proposals for legislative changes to the ESA. Out of the over 110 bills, amendments and riders we have identified relating to the ESA that have been introduced in the current Congress, none would benefit species conservation. Instead, all are harmful to protected species and/or the ESA, including all of the bills that were the subject of the Committee's September 26, 2018 hearing. Defenders of Wildlife works continually to improve the implementation of the ESA, however, through its field programs and through its Center for Conservation Innovation (CCI), which uses data, technology, and interdisciplinary approaches to pioneer innovative, pragmatic conservation solutions. More information about CCI's initiatives can be found at: <https://defenders.org/innovation>.

Question 3. Mr. Dreher, you testified that these bills are and I quote, "all to benefit a minority of special interests in a few western states." I take offense to that. I'd encourage you to look at our website and review the list of the 170 stakeholders throughout the country that are supporting these bills. Is the Florida Farm Bureau Federation from the West? How about the Missouri Sheep Producers? How about the National Association of Realtors, are they solely in the West? How about the U.S. Chamber, solely in the West? And by the way, what is your disdain for the West?

Answer. I don't personally have any disdain for the West, nor does Defenders of Wildlife. We believe that all Americans have a vital stake in the protection of our natural heritage. Defenders of Wildlife works closely with state and local governments and people throughout the West to conserve wildlife and supports western communities through our co-existence programs. For example, we work with ranchers to prevent attacks on livestock through range riders, livestock guard dogs, fladry and trail cameras. Defenders of Wildlife subsidizes construction of electric fences for securing grizzly bear attractants, such as garbage, fruit trees and livestock, in states like Washington, Idaho, Montana and Wyoming. These programs are central to our mission of reducing human-wildlife conflict and working toward sustainable solutions that benefit both wildlife and people.

We can't, however, ignore the fact that the Western Caucus and its members took the lead on sponsoring these nine bills, which are all harmful to endangered species conservation. The goals of many of these bills appear to be to reduce protections for imperiled species, delegate regulatory authority to state or local governments, limit opportunities for judicial review by citizens concerned with protecting imperiled

species, and otherwise facilitate development activities that might be constrained under the ESA. It is no coincidence that pro-development interests, such as oil, gas, mineral extraction and farming interests make up a clear majority of the supporters to these bills. Many of those organizations are from the West or represent interests that are heavily engaged in development of western resources, including such groups as the American Petroleum Institute, the Independent Petroleum Association of America, the National Mining Association, the American Loggers Council, the National Grazing Lands Coalition, the Western Energy Alliance, and a host of others.

The CHAIRMAN. Thank you.
Mr. Wood.

**STATEMENT OF JONATHAN WOOD, ATTORNEY, PACIFIC
LEGAL FOUNDATION, WASHINGTON, DC**

Mr. WOOD. Chairman Bishop, Ranking Member Grijalva, and honorable members of the Committee, thank you for giving me the opportunity to testify on this important issue. My name is Jonathan Wood. I am an attorney with the Pacific Legal Foundation, and also a research fellow with the Property Environment Research Center.

The Endangered Species Act is the Nation's most popular environmental law. Yet, surveys reveal that most of the public has little understanding of how the law works, or what it has achieved. Thus, Congress should heed the public's deep concern for endangered species. But it would be a mistake to assume that because the law polls well, everything is working perfectly and we cannot improve on what we have now.

In fact, the ESA's record of accomplishing its goals is rather mixed. On the bright side, only 1 percent of species protected by the law have gone extinct. Now, that is an accomplishment we can all celebrate. However, only 3 percent of protected species have recovered, and I think we can do better.

To better achieve both of the ESA's goals, we need bold reforms that improve the incentives for states, property owners, and conservationists to work together toward species recovery. That is why I am glad to see that the LOCAL Act provides financial incentives for efforts to protect species and recover habitat, transforming rare species from a liability into an asset.

Similarly, the EMPOWERS Act seeks to better enlist states as partners in conservation. When combined with the reforms proposed by the Administration, these can help boost the rate at which we recover species without sacrificing the law's success at preventing extinction.

But in addition to substantive reforms, we also need process reforms to address some of the persistent points of conflict under the Act. The PETITION Act and LIST Act, for instance, address some of the conflicts that arise under the listing process.

It is undeniable that, historically, the number of petitions filed have exceeded the agency's ability to review them by the strict deadlines contained in the statute. Reviewing petitions is expensive. Even petitions that are meritless may cost the agency upwards of \$150,000 to review. And unfortunately, as the Obama administration explained in a proposed rule in 2016, it is the weakest petitions that can impose the greatest burdens, because they

require agency staff to decipher petitions that may lack any clear logic.

Due to the backlog, listing policy has historically been driven primarily by the interest of whichever organizations petition and sue the most. Science on the threats to species, and the agency's policy judgments, by comparison, have played a reduced role.

Fortunately, the Obama administration found a way to address this problem. It established a system to prioritize petitions based on the seriousness of threats species face, the quality of the data, and whether state and private conservation efforts are ongoing. The PETITION Act would codify this approach, confirming that agencies can prioritize petitions with the most merit over those with the least, which would allow the agency to focus their resources where they can do the most good, rather than having priorities arbitrarily set by litigation.

Another persistent source of conflict is the difficulty in de-listing species. Although the law assigns the same standards and preference for listing and de-listing decisions, this has not been borne out in practice. In my written testimony, I describe several cases where the U.S. Fish and Wildlife Service ignored its own scientists' determination that a species' status had improved.

In the case of the manatee, for instance, the agency dragged its heels for an entire decade, and it likely would have continued to delay the decision if PLF had not filed a petition and sued, sued, and sued again on behalf of affected property owners. The LIST Act would require a prompt de-listing of species, once agency scientists determine they no longer require protection. It would also require prompt de-listing where a species was listed based on bad data.

A problem which a recent Heritage Foundation study found is far more significant than we previously assumed. In fact, if you properly allocate species between whether they recovered, went extinct, or were originally listed in error, that is the largest category, and it trumps the others.

Thus, the proposals in the LIST Act are sensible changes. There is compelling evidence that merely listing a species without devoting resources to its conservation can cause more harm than good. Thus, when species linger on the list, they siphon conservation funding away from the species that truly need it.

In my written testimony, I identify several points that could benefit from further clarification or improvement. Today, I want to particularly caution the Committee about barring judicial review. Undoubtedly, too many ESA issues wind up in litigation. But the solution is to address the underlying incentives behind that problem, as H.R. 3608 would do, by limiting attorney's fees to reasonable rates.

But as I explained in my written testimony, broad bans on judicial review are an invitation for agency mischief.

In conclusion, the reforms we are discussing today appropriately focus on reducing conflict, while providing better incentives for species recovery. That is precisely what we need to achieve the ESA's goals.

Thank you, and I look forward to questions.

[The prepared statement of Mr. Wood follows:]

PREPARED STATEMENT OF JONATHAN WOOD,¹ PACIFIC LEGAL FOUNDATION² ON
H.R. 6355 (PETITION ACT) AND H.R. 6356 (LIST ACT)

MAIN POINTS

- For decades, the U.S. Fish and Wildlife Service has struggled to keep up with a persistent backlog of listing and de-listing petitions.
- The backlog workplan is a sensible, bipartisan response to this problem.
- The public shouldn't have to bring multiple suits to get agencies to listen to their own scientists.

Chairman Bishop, Ranking Member Grijalva, and honorable members of the Committee, thank you for the opportunity to testify on this important issue.

Forty-five years after the Endangered Species Act was enacted, we have learned a lot about how the law works and doesn't work. We can be proud that only 1 percent of protected species have gone extinct. But we should be equally dissatisfied that only 3 percent of those species have recovered. We can and must do better. And that requires a combination of reforms. First, bold reforms are needed to improve the incentives for states, property owners, and conservationists to work together toward species recovery.³ And, second, process reforms must address some of the persistent points of conflict that distract from those recovery efforts.

The PETITION Act and LIST Act address two of the most persistent bureaucratic problems in the administration of the Act. In fact, they codify or build on reforms proposed administratively by both the Obama and Trump administrations. Importantly, these reforms will restore the government's ability to focus on the species that most need protection while spurring the de-listing of species that no longer require it.

The popular but poorly understood Endangered Species Act

The Endangered Species Act is one of our Nation's most popular environmental laws. Surveys routinely reveal broad, bipartisan support.⁴ Almost everyone, regardless of political persuasion, embraces the goals of the Endangered Species Act. However, it's equally clear that most Americans know very little about how the law works and what results it has achieved.

A recent survey by the Association of Zoos and Aquariums, for instance, found that the average American believes there are only 80–100 species on the Endangered Species List.⁵ (There are nearly 1,500.) They do not know that species like the bald eagle have recovered, despite the good news being widely publicized.⁶ Nor can many identify popular species that have recently been listed.

This lack of knowledge is understandable. Social scientists have long observed that the public is rationally ignorant of many important issues because time is limited, acquiring information is costly, and the odds that an investment in further knowledge will affect the outcome are extremely low.⁷ If any of us were quizzed on enough public policy topics, we'd inevitably have our own "what is Aleppo?" moment.⁸

Because people care so deeply about the law's purposes, but understandably know little about its operation, any reform—whether a major reworking of the Act or the

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²Founded in 1973, Pacific Legal Foundation is a nationwide public interest legal group that fights to secure all Americans' inalienable rights to live responsibly and productively in their pursuit of happiness. It has secured 10 wins at the Supreme Court of the United States on behalf of property owners and individuals whose rights were violated by government.

³See, e.g., Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (2018).

⁴See, e.g., Tulchin, et al., *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, Tulchin Research Memo (July 6, 2015), available at <https://earthjustice.org/sites/default/files/files/PollingMemoNationalESASurvey.pdf>.

⁵See Press Release, Association of Zoos and Aquariums, *U.S. Americans Greatly Underestimate How Many Animals on the Endangered Species List, Study Shows* (May 14, 2018), available at <https://www.aza.org/aza-news-releases/posts/us-americans-greatly-underestimate-how-many-animals-on-the-endangered-species-list-study-shows>.

⁶See *id.*

⁷See generally Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* (2013).

⁸See Alan Rappoport, *'What is Aleppo?' Gary Johnson Asks, in an Interview Stumble*, N.Y. Times (Sept. 7, 2016), available at <https://www.nytimes.com/2016/09/09/us/politics/gary-johnson-aleppo.html>.

most minor tweak imaginable—will generate political conflict.⁹ This problem has dogged the agencies charged with implementing the law, regardless of whether the administration is perceived as a friend or foe of environmentalists.¹⁰

We can't even agree on whether the law is a success or failure. Supporters of the Act point to the fact that only 1 percent of species protected by it have gone extinct,¹¹ while critics note that only 3 percent of those species have recovered.¹² To anyone not entrenched in the conflict, the answer would seem obvious: it's a little of both. The Endangered Species Act provides an effective backstop against species extinction but fails to adequately incentivize recovery efforts.¹³ But such a nuanced view often escapes the debate.

All of this is to say that Congress should heed the public's deep concern for the protection and recovery of endangered species. But it would be a mistake to assume that, because the Endangered Species Act polls well, it is working perfectly and cannot be improved. It can.

The chronic listing backlog and its causes

The Endangered Species Act permits any interested person to petition the U.S. Fish and Wildlife Service or the National Marine Fisheries Service urging the listing or de-listing of a species. There is no cost to file a petition and minimal paperwork requirements. In principle, this is a laudable effort to empower anyone to participate in the process, regardless of their resources.

In practice, a handful of well-healed organizations, not plucky citizen-scientists, dominate the petition process. From 2007 to 2011, for instance, two organizations filed 90 percent of listing petitions, according to the *New York Times*.¹⁴ Together, these two organizations have annual budgets exceeding \$15 million and receive significant amounts in attorney's fees paid by the Federal Government.

Although a petition is virtually free to the petitioner, the mere filing of one can impose significant costs on the agencies. Even the most patently inadequate petition requires a response that, in the case of the U.S. Fish and Wildlife Service, has a median cost of \$39,276.¹⁵ If the petition indicates that a listing merely may be warranted—a relatively low bar—the agency must expend another \$100,690.¹⁶ Thus, anyone may easily divert a substantial amount of the agency's resources based on a minimum showing. Where a petition has merit and leads to the recognition of threats to a species, this is a bargain. But that the same resources can be diverted for petitions that don't merit such expenditures is troubling.

In fact, the greatest burdens are imposed by the weakest petitions because they require greater time and effort to decipher. When the Obama administration proposed reforms to the petition process, it emphasized the difficulty of reviewing weak petitions: "It has often proven to be difficult to know which supporting materials

⁹ See Tate Watkins, *Changing the Endangered Species Act could actually help conservation*, Wash. Post (July, 24, 2018), available at https://www.washingtonpost.com/news/posteverything/wp/2018/07/24/changing-the-endangered-species-act-could-actually-help-conservation/?utm_term=.0ef3d3eb8a24 (noting that environmentalists' views on the Trump administration's proposals ranged from the "sky-is-falling" to seeing opportunities for conservation benefits); Editorial, *Endangered Species Scare*, Wall St. J. (July 26, 2018), available at <https://www.wsj.com/articles/endangered-species-scare-1532646111?mod=searchresults&page=1&pos=5>.

¹⁰ See, e.g., Lydia Wheeler, *Endangered species rule changed, angering environmental groups*, TheHill.com (Sept. 26, 2016), available at <https://thehill.com/regulation/energy-environment/297752-rule-changes-petitioning-process-for-animal-protections> (describing environmental opposition to one minor rule change to the petition process proposed and finalized by the Obama administration).

¹¹ See Lisa Feldkamp, *What has the Endangered Species Act ever done for us? More than you think.*, Nature.org (May 8, 2017), available at <https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/>.

¹² See Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (2011) (noting the distressingly few number of successful recoveries, several of which cannot directly be attributed to the ESA).

¹³ See Jonathan Wood, *The Endangered Species Two-Step*, PERC Reports vol. 37 (Sum. 2018), available at <https://www.perc.org/2018/07/13/the-endangered-species-two-step/>; see also Tate Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, PERC Reports, vol. 37 (Sum. 2018), available at <https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/> (describing the challenges and incredible efforts by the Nature Conservancy to restore habitat for the dusky gopher frog).

¹⁴ Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. Times (Apr. 20, 2011), available at <https://www.nytimes.com/2011/04/21/science/earth/21species.html>.

¹⁵ See, e.g., Department of Interior, *Annual Description of Progress on Listing Actions*, 79 Fed. Reg. 72,450, 72,456 (Dec. 5, 2014).

¹⁶ See *id.*

apply to which species, and has sometimes made it difficult to follow the logic of the petition.”¹⁷

This is not merely a question of resources. There is compelling evidence that merely listing a species, without devoting resources to its conservation, may further imperil the species.¹⁸ In other words, resources that would be better spent pursuing species recovery are too often diverted to deciphering weak petitions.

It is no exaggeration to say that Federal listing policy is, to a large extent, dictated by the preferences of whoever is most willing to petition and sue, as lawsuits are often required to receive a response to a petition. Science on the threats to a species and the agency’s policy judgment, by comparison, play a reduced role.¹⁹

Until recently, this problem was getting worse. From 1993 to 2007, the U.S. Fish and Wildlife Service received petitions requesting an average of 20 species’ listings per year. From 2008 to 2011, that number skyrocketed to 308 per year. Much of this increase was driven by the filing of “megapetitions,” those urging the listing of dozens or hundreds of species at a time. In 2011, Gary Frazier, the assistant director for endangered species during the Obama administration, bemoaned that these petitions had derailed the process:

[T]hey’re basically going to shut down our ability to list any candidates for the foreseeable future . . . If all our resources are used responding to petitions, we don’t have resources to put species on the endangered species list. It’s not a happy situation.”²⁰

Because this problem is the result of the underlying incentives of the petition process, more money may not solve the problem. Any additional listing-budget funds would likely be quickly dissipated by the filing of more petitions. And, because the weakest petitions require greater resources to decipher, it may result in throwing more good money after bad.

In any event, more money is not a politically practical solution. In terms of political priorities, the listing budget is a very low priority.²¹ If given the power to allocate significant new funding, even the most ardent supporters of the Endangered Species Act as currently implemented would likely prioritize other actions, such as active recovery efforts, over pouring more into a bureaucratic process.

Solving this problem would require a better allocation of these costs between the agency and petitioners. The backlog problem is not unique to the Endangered Species Act and Congress’ solution to the problem in other contexts could provide a blueprint. To address a long running backlog in the Food and Drug Administration’s review of new medicine applications, for instance, Congress brokered a deal by which pharmaceutical companies would bear the costs of those reviews in exchange for a commitment to reduce delays.²² That reform funded a 77 percent increase in agency staff to review new drug applications and cut approval times in half.²³ Similarly, allowing environmentalists and industry to voluntarily pay for expedited petition reviews under the Endangered Species Act could improve the process for everyone by freeing up agency resources.²⁴

Until the underlying incentives are reconciled, reforms to the petition process can go a long way toward returning, to the agencies appointed by Congress to administer the Act, the decision about which species most urgently require the government’s limited resources. An administrative reform by the Obama administration shows how this can be done.

Codifying a temporary peace in the listing-backlog wars

When the absurdity of the most recent backlog became too much to bear, the Obama administration brokered a temporary peace. In 2011, the Department of the Interior agreed to a settlement that established a 6-year workplan to review the then-pending megapetitions, in exchange for environmental groups submitting fewer

¹⁷ Proposed Revisions to the Regulations for Petition, 80 Fed. Reg. 29,286, 29,287 (May 21, 2015).

¹⁸ See Adler, *supra* n.12, at 13.

¹⁹ See, e.g., Daniel Benjamin, *Public pressure effects species listings*, PERC Reports, vol. 18 (2000), available at <https://www.perc.org/2000/09/01/public-pressure-effects-species-listings/>.

²⁰ See *Wildlife at Risk Face Long Line at U.S. Agency*, *supra* n. 14.

²¹ See Jonathan Wood, *Worried About Cuts to the ESA Listing Budget?*, PERC.org (Feb. 20, 2018), available at <https://www.perc.org/2018/02/20/worried-cuts-esa-listing-budget/>.

²² See Congressional Research Service, *The Prescription Drug User Fee Act: Background and Issues for PDUFA IV Reauthorization* (2007), available at <http://congressionalresearch.com/RL33914/document.php>.

²³ See GAO, *Effect of User Fees on Drug Approval Times, Withdrawals, and Other Agency Activities* (2002), available at <https://www.gao.gov/new.items/d02958.pdf>.

²⁴ See *Worried About Cuts to the ESA Listing Budget?*, *supra* n.20.

such petitions.²⁵ For the most part, environmental groups cooperated, giving the new plan time to work.²⁶

As the initial 6-year workplan neared its conclusion, the Obama administration proposed a rule to formalize it.²⁷ Under that rule, the Service would assign petitioned species into one of five bins, giving each a different priority based on the degree of threat the species faces, data quality, and whether state and private recovery efforts are ongoing. This allowed the agency to focus its limited resources on the petitions that most deserved them.

Because the Endangered Species Act sets firm deadlines to respond to listing petitions, this approach has largely relied on goodwill. At any time, someone could challenge the agency's failure to respond to a petition by the statutory deadline. And a court could order the agency to respond promptly, even if the agency had assigned the species a low priority under the workplan.

The PETITION Act would codify the Obama administration's approach, eliminating this litigation risk. Importantly, it would rely on the Service rather than random litigation outcomes to prioritize listing decisions in the face of budget constraints. It explicitly adopts the Obama administration's methodology and allows it to be relied on anytime that the Secretary of the Interior declares a backlog. This methodology allows the government to focus its limited resources on those petitions that are most likely to result in species protection, rather than allowing those resources to be sapped by weaker petitions without such potential. The bill would also require transparency about implementation, both for the benefit of petitioners and the public. As the bill codifies an administrative reform developed by the Obama administration, it should enjoy broad support. Environmentalists and industry have experience working under this approach, and the early results have been positive.

The bill could be further improved by allowing the Secretary of Interior to adjust which bin a species is assigned to based on updated information. For instance, one of the bins is reserved for species that the Service expects to receive new information on, revealing important data about its status. Once the anticipated study is released, it may be sensible for the species to be reassigned to a higher or lower priority bin, based on the results.²⁸

It would also be useful to clarify what Congress expects to happen after the Service declines a petition under the PETITION Act's mandatory deadlines.²⁹ If such denials serve as a signal to the petitioner that she should provide more and better information when resubmitting, so that a subsequent petition is assigned a higher priority, this would be extremely useful. But if the Service could treat the petition denial as a judgment on the merits binding future petitions, that would be concerning—especially as the bill precludes judicial review of automatic denials based on the bill's deadlines.

Moreover, the Committee should be more concerned generally about the dangers of barring judicial review. Undoubtedly, too many Endangered Species Act issues result in litigation. But the solution is to address the underlying incentives that drive that problem, not to ban all litigation, including litigation that advances the public interest.³⁰ In time, you may be surprised by the novel means agencies devise to abuse these provisions and thwart Congress' will.³¹ Therefore, you should be extremely cautious about enacting any limitation on judicial review.

²⁵ See Juliet Eilperin, *Interior Dept. strikes deal to clear backlog on endangered species listings*, Wash. Post (May 10, 2011), available at https://www.washingtonpost.com/national/interior-strikes-deal-with-conservation-groups-on-endangered-species-listings/2011/05/10/AF7IX2hG_story.html?noredirect=on&utm_term=.158a4003b88a.

²⁶ But see Allison Winter, *Petitions for new species protection wobble balance in FWS settlement, agency says*, E&E News (Aug. 7, 2012), available at <https://www.eenews.net/greenwire/2012/08/07/stories/1059968495>.

²⁷ Fish and Wildlife Serv., *Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act*, 81 Fed. Reg. 49,248 (July 27, 2016).

²⁸ But see PETITION Act, § 4(a)(I)(ii).

²⁹ See, e.g., *id.* § 4(a)(H)(ii)(IV).

³⁰ PLF regularly litigates Endangered Species Act issues on behalf of individuals and organizations whose interests are harmed by over-reaching and counterproductive regulations. We have received minimal attorney's fees for this work in recent years. PLF also notes that the cases in which it has received such fees are those in which the government has ignored its own scientists' recommendation that a species' status be changed. The LIST Act would address this problem, rendering future litigation on this issue unnecessary and eliminating this minimal source of attorney's fees.

³¹ In fact, agencies have long used judicial-review bans to thwart Congress' will. For instance, agencies flagrantly ignored the Regulatory Flexibility Act until Congress amended it by repealing its anti-judicial review provision. See 142 Cong. Rec. H3016 (Mar. 28, 1996) (statement of

Recognizing when species have recovered

There have been depressingly few de-listings under the Endangered Species Act. Although this is primarily due to the lack of incentive for property owners to recover species, it is also due to agencies' stubborn unwillingness to pursue de-listing with the same zeal as they pursue listing. Although the law imposes the same standard on de-listing decisions as applies to listing decisions, the agencies have imposed far higher burdens on the former in practice.³²

Getting a species removed from the list is a daunting task, even where there is no question that the decision is merited. In case after case where the U.S. Fish and Wildlife Service's own scientists have determined that a species' status should be changed, the agency has ignored them. Property owners can only obtain relief in such circumstances by filing several petitions and lawsuits, an ordeal which may be too expensive or intimidating for the average landowner to undertake.

For instance, the Service's scientists determined that the Valley Elderberry Longhorn Beetle should be de-listed in 2006. It ignored this science for 4 years, causing PLF to file a de-listing petition on behalf of an affected property owner. Despite this plea from a property owner and the agreement of its own scientists, the Service . . . did nothing. The property owner had to sue not once but twice before the Service finally proposed de-listing the insect in 2012.³³ However, in 2014, it withdrew its proposal claiming the studies had become too stale—which of course was due to the agency's dilatoriness.

Similar frustrations were felt by property owners affected by the listing of the manatee, although that story at least has a happy ending. In 2007, the Service's scientists determined that the manatee had recovered to the point that its status should be upgraded from endangered to threatened. The agency again ignored its scientists for a prolonged time, prompting PLF to file a petition on behalf of affected property owners. When that petition was ignored too, PLF filed a lawsuit to force a response in 2012. In response to that suit, the Service determined that the species' status should be changed but again did not follow through. So PLF had to sue again. The Service finally reclassified the manatee in 2017, a decade after the science showed this move was warranted.³⁴

Even the bald eagle, the species most cited as evidence of the law's success, fell victim to this bureaucratic morass. When the Service determined the eagle should be de-listed, President Clinton held a press conference to share the news. That was 1999. But no such de-listing was forthcoming. In 2005, PLF sued on behalf of an affected landowner, urging the Service to follow through. Instead, it fought to have the case dismissed. Only after the courts rejected this gambit did the Service belatedly de-list the species in 2007.

Property owners should not have to sue, sue, and sue again to force the Service to do what it has admitted all along should be done. If the government behaved this way with listing decisions, it would be a national scandal. Imagine if the Service determined a species was critically endangered then ignored that determination, even in the face of petitions and lawsuits, which it fought rather than doing the right thing.

The LIST Act would fix this imbalance by directing the Service to initiate the de-listing process once its scientists conclude that a species has recovered or otherwise merits de-listing. That is a sensible change. There is no reason why species should linger on the list long after the science shows de-listing is warranted.

The LIST Act also addresses another serious problem: the large number of species that have been improperly listed based on bad data. The Service acknowledges 19 such mistakes. But a recent Heritage Foundation report shows that the actual number is far higher.³⁵ The data reveal that approximately half of all domestic species

Rep. Ewing); 142 Cong. Rec. H3005 (Mar. 28, 1996) (statement of Rep. McIntosh). Today, agencies hide behind an ambiguous judicial review provision to avoid compliance with the Congressional Review Act. See *Kansas Natural Resource Coalition v. Dept. of Interior*, No. 18-cv-01114 (D. Ks. filed Apr. 10, 2018) (government has moved to dismiss a case seeking the submission of a rule under the CRA based on a theory that would utterly defeat the law's purpose).

³² See 83 Fed. Reg. 35,193, 35,196 (July 25, 2018) (acknowledging this problem and proposing to clarify that the Endangered Species Act requires the same standard be used in both instances).

³³ See Damien M. Schiff, *Service proposes to de-list Valley elderberry longhorn beetle*, PacificLegal.org (Oct. 1, 2012), available at <https://pacificlegal.org/service-proposes-to-delist-valley-elderberry-longhorn-beetle/>.

³⁴ See Pam Wright, *Florida Manatee Status Changed to 'Threatened' As Congress Targets Endangered Species Act*, weather.com (Mar. 31, 2017), available at <https://weather.com/science/nature/news/florida-manatee-endangered-species-regulations>.

³⁵ Robert Gordon, *Correcting Falsely "Recovered" and Wrongly Listed Species and Increasing Accountability and Transparency in the Endangered Species Program*, Heritage Found.

reported as “recovered” under the Endangered Species Act were not endangered in the first place but, instead, listed based on bad data which were subsequently corrected. If these de-listings were properly categorized, the number of species delisted for data error would dwarf the few recoveries.

For instance, the Service listed the Hoover’s woolly star in 1989, speculating that there were as “few” as 35,000 to 300,000 of the plants.³⁶ A full survey was only performed after the species was listed. According to the Service, the actual population size is approximately 135,000,000.³⁷ Yet, despite this several-orders-of-magnitude error, the Service considered the de-listing as a recovery. It credited the listing as the impetus for the survey and then attributed the findings to the listing, even though the survey didn’t increase the size of the population but only revealed the error on which the listing was originally based.³⁸

Species lingering on the lists dissipate resources from those species who need them. In the case of false-recoveries, for instance, the Service incurs years of post-listing monitoring. Given the limited funding for recovery efforts, such misallocations are unacceptable.³⁹

The LIST Act’s solution to this problem could benefit from further clarification, however. The bill wisely directs the Service to act promptly when it determines that a species’ listing depends on a data error. However, it also authorizes the Secretary of the Interior to declare that a petitioner knew a petition contained inaccurate, fraudulent, or misrepresentative information and to deprive such a person of the right to submit petitions for 10 years. It’s not clear whether the aggrieved petitioner would have a right to judicial review of this determination, although she should before being denied such an important right. As discussed above, statutory bans on judicial review can be dangerous licenses for agencies to thwart Congress’ true aims.

This broad grant of power to the Secretary raises the potential for mischief, which should concern both sides of this issue. The Secretary might abuse this power against environmental groups or industry petitioners, depending on the bureaucrats’ political views. Here, as is often the case, it’s best not to confer power to an executive branch official without first considering whether you’d want your fiercest opponent to wield it. Thankfully, concerns about petitioner foul-play could be addressed with less drastic means by, for instance, allowing the Service to consider a group’s past petitions in assessing the credibility of data presented in a subsequent petition. If a group has a history of malfeasance, that should be taken into consideration. But it may not always be dispositive.

Finally, and somewhat repetitively, Congress should clarify the circumstances in which it intends to forbid judicial review—and should minimize such circumstances. The LIST Act provides that a “negative” finding, but not a “positive” one, under §2(b)(H)(i) is subject to judicial review. It’s not clear from the text whether this means judicial review is only available when the Service de-lists a species citing data error or instead only when it maintains the status quo. But, that ambiguity aside, judicial review should be available in either circumstance to ensure that the agency follows Congress’ intent under the bill.

CONCLUSION

We need not tolerate the broken procedures I’ve described in my testimony. They benefit neither people nor endangered species, but instead harm both. Codifying the Obama administration’s backlog workplan is a sensible way to convert this temporary peace into a long-term improvement. Similarly, facilitating more de-listings is an effective way to ensure that limited conservation resources go to the species that need it. It also reduces the need for litigation brought by property owners to force the agencies to listen to their own scientists, which unnecessarily taxes both the property owners and the agencies.

The CHAIRMAN. Thank you, and I appreciate you all staying within the 5 minutes.

Backgrounder (Apr. 16, 2018), available at https://www.heritage.org/sites/default/files/2018-04/BG3300_0.pdf.

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ Ecologists have long observed that scarce conservation funds are routinely misallocated. Most notably, they are doled out to charismatic species at far greater rates than less popular species. See Leah R. Gerber, *Conservation triage or injurious neglect in endangered species recovery*, PNAS (Mar. 29, 2016), available at <http://www.pnas.org/content/113/13/3563>.

Committee Rule 3(d) allows questions from each Member of 5 minutes. It doesn't mean you have to ask a question for each bill. We are going to go through each bill one at a time. If you don't have a question for that particular bill, we will just go by it and wait until we come to yours.

I am going to recognize Members for questions on Tipton's bill, the LOCAL Act, which, once again, codifies voluntary conservation efforts.

I am going to take my first time, and I will yield to Mr. Tipton on your bill. You have up to 5 minutes. Questions only on your bill, though. Everything for this round, only on the LOCAL Act. Go for it.

Mr. TIPTON. Since you are starting with the most important bill, I appreciate that, Mr. Chairman.

Mr. Renkes, has the Department of the Interior actually used voluntary conservation practices in the past?

Mr. RENKES. Yes. In fact, it is one of the most important tools that we have, and we have a number of different variants that create a little bit of an alphabet soup, if you are studying this. But they all work, and they work by incentivizing private landowners with assurances, regulatory assurances, and then working on conservation plans.

We have a number of success stories involving this. One of those is the recovery of the Louisiana black bear. It was due in large part to conservation efforts by private forest owners, farmers, and landowners across the range of the species. Ninety percent of the species' habitat is on private land and the recovery of that species was based on the use of these tools.

So, the stronger they are, the better the conservation is going to be.

Mr. TIPTON. Great. So, you have effectively had success trying to be collaborative with local landowners, in terms of being able to develop policies. Is it pretty much your opinion that is something that we ought to continue to be incentivizing? And what do you see that role being in the future?

Mr. RENKES. We should definitely continue to find ways to incentivize local landowners. I think the way to look at this is we need to turn endangered species from liabilities into assets. Where I come from—which Congressman Young knows is Alaska, but more recently I live in Wyoming—you run into an endangered species approach from local landowners. They call it shoot, shovel, and shut up. And that is not good for species recovery.

So, by creating incentive programs, voluntary incentive programs that you are discussing and the ones that the Department is using, we can change that paradigm and actually make the species conservation an asset for private landowners and states.

Mr. TIPTON. Thank you, sir.

Mr. Johansson, you are a farmer, somebody that actually works the land. Is it safe to be able to make the assumption that you actually care about where you live, want to be able to see species actually recover, it is part of the ecosystem that you rely on for your business?

Mr. JOHANSSON. Absolutely. Nothing gives us greater pride than seeing what we support on our land when it comes to wildlife. And certainly even for our kids, we know we are doing something right.

Mr. TIPTON. When we talk about the ESA, I think there isn't a person on this Committee that will dispute the intent of the ESA. We had the example of bald eagles being recovered, actually, on species recovery. But in terms of some of the actual practice over the period of time, have you seen that the ESA has hindered or helped the ability to be able to recover a species?

Mr. JOHANSSON. Well, I think the thing that hinders farmers the most and the ranchers the most is just simply the fear of the Act, and the unknown, and not having those assurances that the steps we take in good faith, the steps we take that we owe our land and our family and taking care of everything on our land won't be punished down the road with new regulations, new interpretations, or simply a new lawsuit.

I think it has been a hindrance, but I look at the opportunities with your bill, H.R. 6344, that also codifying efforts, voluntary efforts that farmers and ranchers can take, really, to encourage them, also takes into account that one size doesn't fit all farms.

There are large farms, small farms, family farms, and even corporate farms. And all too often, we see that the opportunity to take further steps in preserving species and developing habitat, the small farmers simply cannot afford.

We look at the tremendous success of farm bill, EQIP, working with the NRCS, also the RCDs, the resource conservation districts, in our areas. Tremendously supportive in California. We have been very successful. But not all farms can participate. And those programs generally are funded for about 3 years.

What intrigues me most about your H.R. 6344, it begins to establish longer time frames that farmers will be rewarded, and don't have to show instant success before funding runs out, but truly can look at the long-term vision, and also hope for their property, in terms of species recovery and habitat.

Mr. TIPTON. Thank you, and I appreciate that. Some of the same circumstances we have in my district, we have different terrains, different circumstances. And we have seen, actually, positive responses working with Interior and others to be able to rehabilitate a species using real science and real local processes in a collaborative process.

So, Mr. Chairman, I thank you for holding this hearing and I appreciate our panel for being here today. I yield back.

The CHAIRMAN. Thank you.

Mr. Grijalva, do you have questions for the LOCAL Act?

Mr. GRIJALVA. Yes.

The CHAIRMAN. OK, you are recognized.

Mr. GRIJALVA. Before those questions, I would like to ask for unanimous consent to enter a letter into the record from Dr. Jane Goodall. If anybody could be called an expert on species conservation, it would be Dr. Goodall. She states in her letter, just one section, "The bills being discussed today would undermine these protections, and make it more difficult for endangered species to recover. Surely, we do not want to live in a world without the great apes, our closest living relatives in the animal kingdom, a world

where we can no longer marvel at magnificent flight of the bald eagles, or hear the howl of wolves under the moon, a world not enhanced by the sight of a grizzly bear and her cubs hunting for berries in the wilderness. What would our grandchildren think if these magical images were only to be found in books?"

If no objection, I would like to enter that into the record, Mr. Chairman.

The CHAIRMAN. Without objection, the letter and the words will be entered into the record.

[The information follows:]

PREPARED STATEMENT OF DR. JANE GOODALL, FOUNDER, THE JANE GOODALL
INSTITUTE

Thank you for this opportunity to express my strong support for the Endangered Species Act (ESA) and my strong opposition to the package of nine bills before the House Natural Resources Committee on September 26, 2018. It is my considered opinion that if these bills are passed it will undermine the scientific integrity of the Act and make it more difficult to protect and recover endangered species.

We, as humans, are fortunate to share the Earth with such a magnificent diversity of life forms, but Earth's biodiversity is dwindling at an alarming rate. In just over 100 years, the population of wild chimpanzees has dropped from an estimated 1–2 million (probably closer to 2 million), to as few as 350,000, many of them living in fragmented patches of forest with little hope of long-term survival. This is only one example of the decline in the population of a species the same decline is evident in almost every species of wild animals including many in the United States. Indeed, we are experiencing what science describes as "The Sixth Great Extinction." A 2017 study found that of the 27,600 land-based mammals, birds, amphibians and reptile species studied, nearly one-third are shrinking in terms of their population numbers and territorial ranges. In the last 40 years, we have lost about half of all wild animal species on Earth. Further, the rate of extinction is happening at about 100 times faster than what would be expected from studies of the fossil record.

Given this crisis, it is inconceivable to me that Members of Congress are spending time to discuss efforts to gut the most successful piece of legislation for combating species extinction when we should rather be working to strengthen it. We have a moral responsibility to protect the incredible life forms with which we share this planet for now and for future generations.

Thanks to the ESA, we've been able, to some extent, to counter the rate of extinction. It has been estimated that over 200 species would have been wiped from our planet between 1973 and 2005 if it were not for the interventions of the ESA. Thanks to the ESA, 99 percent of listed species have survived and many more have been set on a path to recovery, including the iconic American Bald Eagle, the Grizzly Bear and the Florida Manatee. The ESA is one of the only pieces of legislation that has long prevented the unique American landscape from turning into barren wasteland and is one of the few that has provided critical protections to imperiled species worldwide—such as elephants and tigers, as well as marine mammals such as whales and turtles who migrate between international waters, thus necessitating international cooperation.

The bills being discussed today would undermine these protections and make it more difficult for endangered species to recover. Surely, we do not want to live in a world without the great apes, our closest living relatives in the animal kingdom? A world where we can no longer marvel at the magnificent flight of bald eagles or hear the howl of wolves under the moon? A world not enhanced by the sight of a grizzly bear and her cubs hunting for berries in the wilderness? What would our grandchildren think if these magical images were only to be found in books?

In addition to undermining the facts provided by science under the ESA, this package of bills would also transfer key authority of wildlife management to state officials who all too often lack the funding and sometimes the political will to adequately address the threats to imperiled species. These bills would also undercut citizen involvement in and enforcement of the ESA, further increasing the risk that species most at risk won't be afforded vital Federal protections until it is too late.

I urge you to reject this package of bills that would threaten species already at risk of disappearing forever, and instead only extend or increase protections under the Endangered Species Act to help secure adequate funding for projects to protect the world's vanishing wildlife.

Mr. GRIJALVA. Thank you very much, sir.

Mr. Dreher, one of the bills you object to is the LOCAL Act, and that requires the government to pay landowners some kind of compensation whenever it appears that there are listed species on the land that would potentially lead to regulation. Can you explain why this is a bad idea, and what it would do to habitat conservation planning, generally, under ESA?

Mr. DREHER. Yes, Mr. Grijalva. Let me start by saying that it has been a cherished dream of the far right in this country for decades to use the takings clause for just compensation of the Fifth Amendment as a means to put a brake on government regulation. They have a very simple perception, and that is that if you make government pay for every single thing it does, the government will shut down. That is what will happen under this provision.

This provision, which is, essentially, a gold mine for speculators, would require the Secretary to pay any person that submitted a proposal for land use development on his or her property. If it, in fact, raised the risk of taking an endangered species, the Secretary would have to pay the full market value of that proposal.

There is nothing to stop that applicant from submitting a similar proposal the next day, or continuing to submit these proposals. And, moreover, the applicant doesn't need to actually invest in anything, but he gets the full market value of a projected scheme. So, if I wanted to make money quickly, this is what I would do, certainly.

And the problem is that, of course, that money is apparently not coming out of the judgment fund. That money would come out of the ESA budget. So, I cannot think of a better way to collapse the effort to conserve endangered species than to create this incredible boondoggle to allow people to file speculative claims of land development.

There are other problems with the LOCAL Act, I think. One of them is just this whole process of allowing property owners to request assurance letters from the Secretary. Among other things, to show how one-sided this bill is, it would automatically grant those requests at the end of 180 days—no matter how jammed the Secretary may be in responding to them—automatically grant them, regardless of whether they actually would take species. And then that authorization would give an exemption from take for 5 years.

So, I mean, this is really not written to conserve species.

Mr. GRIJALVA. Thank you. Mr. Renkes, we didn't have the opportunity to visit with you before. What role does your office play in the issues pertaining to ESA?

Mr. RENKES. My office is involved in the analysis of legislation and regulations impacting the Department of the Interior, and we provide advice and analysis to the rest of the Department, across the entire spectrum of activities that take place at the Department.

So, it is within that context that I am here today to comment on the nine bills.

Mr. GRIJALVA. OK. Given that wide breadth of responsibility, how will the Secretary determine if owners claiming foregone use of the land due to ESA regulations have legitimate plans to implement the use claimed to be foregone—how will the Secretary

determine false claims for a foregone use under the authorities provided in this bill?

How are you going to make those determinations of legitimacy and how do you establish fair-market value for any of those?

Mr. DREHER. Obviously, those are important questions. The idea of incented conservation on private land is a powerful one, and can be an important driver. It obviously has to be something that has procedures involved, like a court takings proceeding would have to judge fair-market value and the legitimacy of the claim.

We are standing ready to work with the Committee and the Committee staff on the bill to flesh out those details.

The CHAIRMAN. All right, thank you. Now, questions to the LOCAL Act, just this bill. We will have the others later.

Mr. Young, do you have questions for the LOCAL Act?

Mr. YOUNG. No.

The CHAIRMAN. All right. Mr. McClintock, questions for the LOCAL Act?

Mr. Gosar, for the LOCAL Act? Yes, you are recognized.

Dr. GOSAR. This is for Mr. Johansson and Mr. Sauter. From your experience in California and Washington State, what benefits are there to be gained for species conservation by the Federal Government coordinating with local governments and private entities?

Mr. JOHANSSON. I would simply say, being from California, coordination between what our state government does and the Federal Government is imperative, because having our own Endangered Species Act in California, all too often we see the state and Federal Government not working hand in hand.

So, we have to know the parameters of what is expected of us as we enter into these programs, how long we are expected to be in them, and then be able to measure the results that are measured fairly between the state government and the Federal Government.

Mr. SAUTER. Thank you for the question, Congressman. Speaking from Washington's perspective, at least the county perspective, there is a huge benefit for this collaboration to take place. When you collaborate at the local level, it really gives you access to information and data that these Federal agencies cannot necessarily get at, because of, I will call it a trust gap between local landowners and Federal agencies.

As a local government guy, I can tell you that county government has great credibility and trust with its citizens, and we have numerous examples where we have been able to collaborate and get information and data to those Federal agencies that would not have happened if the county government was not involved.

Dr. GOSAR. What does the government and what do potentially endangered species miss out on when that coordination fails to take place?

Go in reverse order.

Mr. SAUTER. Yes. I would just kind of reiterate that what happens is that you don't have access to good data, or as complete of good data as you can have when you actually have local buy-in. And, as we all know, and I will tell you as a county commissioner, I need good information to make good decisions.

Dr. GOSAR. Mr. Johansson?

Mr. JOHANSSON. I don't have much more to add to that. Having been a former city councilman and working on a habitat conservation plan for our county, it was extremely difficult because you rely so heavily on data to put together an effective plan.

And, going forward, collaboration is key. And that is all we ask for on our farms and ranches, is that, as we put these plans together, we have reliable information. And the source for that information doesn't just have to come from a state agency. We also know, working with our private businesses, who also have an interest to keep their businesses going, the research they have done, all the way from trail cameras to employed wildlife biologists, those are the resources that we really need to access to make the right decisions.

Dr. GOSAR. The key you made is buy-in. When you have buy-in on the local aspects, where they are thoughtful, and predicated that they are experienced and information is rewarded, it makes a big deal.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Mr. Sablan, to this local voluntary conservation bill?

Mr. SABLAN. Yes. Thank you very much, Mr. Chairman. Actually, I have a question on not just the LOCAL Act, but it embraces all the legislation we have.

The CHAIRMAN. Well, do it one by one. Keep it to the LOCAL Act first, come on.

Mr. SABLAN. OK, because it involves the right of citizens also to hold their government accountable. Thank you.

The Endangered Species Act is especially important to my district, the Northern Mariana Islands, home to several unique species such as the Tinian monarch and the Marianas fruit bat. Additionally, there are 15 Indo-Pacific coral species listed by NOAA's National Marine Fisheries Service as threatened under the Act, including two that have been clearly identified as living on the reefs of the Northern Marianas.

Decisions whether to list a species that is endangered or threatened should be made based on science. Recently I joined letters to the Interior and Commerce Secretaries protesting Trump administration proposals to weaken the ESA and to House leadership to prevent provisions that undermine national conservation policy to be added to appropriations bills.

I am particularly concerned about proposals that undermine citizens' involvement in enforcement of the Act. Many of the positive ESA outcomes in my district have been generated by actions taken by my constituents.

Mr. Dreher, is that correct? In your testimony, you state that the ESA has been successful because it gives individual citizens the right to hold agencies accountable for complying with the law. Can you discuss the importance of this right, and the way in which the bills before us today will diminish it?

Mr. DREHER. I am happy to, Congressman.

The CHAIRMAN. Just confine your comments to the LOCAL Act, though.

Mr. DREHER. The LOCAL Act, I don't think, has provisions that limit judicial review. There are other bills that are before the Committee that would.

The primary thing I think that you would be concerned about with the LOCAL Act is just the fact that it provides economic incentives and payment out of the ESA program, or out of the Land and Water Conservation Fund for conservation, which landowners are otherwise largely either required to do or incentivized to do under existing law.

But this bill does not have, as I read it, restrictions——

Mr. SABLAN. So, my question would apply to which bill before us today?

Mr. DREHER. Two of the bills that have strong restrictions on judicial review: the PETITION Act and the LIST Act.

The CHAIRMAN. All right. Let him go on.

Mr. SABLAN. My question has been asked. When you get to those two bills, please respond to them, if you will.

Mr. DREHER. Thank you.

Mr. SABLAN. Or submit your response for the record. Thank you.

The CHAIRMAN. You will have a chance to go on those bills when we hit those. Do you yield back?

Mr. SABLAN. Yes, I yield back.

The CHAIRMAN. Mr. LaMalfa, for the LOCAL bill.

Mr. LAMALFA. Thank you, Mr. Chairman. I think at this point I will just submit a letter for the record from a local resource conservation district on the local level concept from the Pit Resource Conservation District of Bieber, California.

They have been working with the Forest Service to develop a salvage sale in what is known as the 30,000-acre Cove Fire. They proposed to treat just 1,300 acres of the 30,000, as what they thought they could accomplish. They would have preferred to treat a much larger area, but given the time restraints, they chose to focus on an area of extreme importance to the landscape.

This partnership, using a steward agreement that the RCD is working with the Forest Service in the area. They have an EA, an environmental assessment, under emergency situation determination signed by the chief. All NEPA requirements are met. And locals with RCD staff and local consultants have done the work and completed the effort.

They put it out to bid, and only one bidder came in because of how long it took to get the process done and then award the bid.

Then, last week, the RCD was notified that the Conservation Congress is planning to submit a lawsuit against the Forest Service with the intent of an immediate stop work order. The basis was not only unfounded, but numerous items stated in the court docket were not even factual. The Forest Service and the local RCD have been proactively working together with the contractor to prepare for the potential litigation and severe hardships placed on all parties.

The Pit RCD is requesting support for this process to continue with the salvage that is very vital to forest health.

I would like to submit this letter for the record, please, addressed to Secretary Zinke from Andy Albaugh, the Chairman of the Pit

Resource Conservation District, and the frustration it is with the locals trying to collaborate in an important project like this.

I see Mr. Tipton's bill would probably be quite beneficial in that, in moving this direction.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Huffman, to the LOCAL bill?

OK. Mr. Westerman, to the LOCAL bill?

OK. Mr. Gallego, the gentleman from Arizona. I am sorry, I mispronounced your name. Do you have questions for the LOCAL bill?

Mr. Norman for the LOCAL bill? We are coming to yours next. All right, then let's move on to the next one, which is H.R. 6360, the PREDICTS Act by Mr. Norman.

I am going to offer you 5 minutes to explain your bill, and then see if you have questions for any of the witnesses about your particular piece of legislation.

STATEMENT OF THE HON. RALPH NORMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. NORMAN. Thank you, Chairman Bishop, Ranking Member Grijalva, and members of the Natural Resources Committee. Thank you for allowing me to come before you today and address the Committee. I am proud to be the sponsor of H.R. 6360, the PREDICTS Act.

The PREDICTS Act is part of a larger legislative package to modernize the Endangered Species Act. As a whole, this package makes necessary and common-sense updates to the Endangered Species Act, the legislation that has only had one significant reform in the past 40 years.

This package, this legislation, preserves the intent of the Endangered Species Act, and provides for the protection of endangered species conservation, while also making improvements to the Endangered Species Act that increases transparency, includes states in the decision-making process, and brings accountability to the decisions to list or de-list a species as an endangered species.

Specifically, the PREDICTS Act codifies the No Surprises regulation which provides certainty and rewards the good behavior of public and private entities that faithfully uphold their agreement to help recover endangered species.

This regulation was put in place after agencies responsible for endangered species conservation realized they were not doing as great of a job recovering a species as they would like. And to compensate, these agencies were attempting to retroactively change habitat conservation plans. This "No Surprises regulation" was promulgated in response to these actions, and simply maintains that it was improper to put new mandates on entities that were faithfully and effectively implementing previously agreed-to habitat conservation plans.

The PREDICTS Act highlights the fact that affected species conservation can co-exist with project permitting and economic development. But public and private entities go through a rigorous process to create habitat conservation plans with the Fish and Wildlife Service prior to being given a permit. In fact, in creating these plans, the applicant is required to identify all foreseeable

ways in which a project and its operations may impact species and account for that.

The PREDICTS Act simply ensures that after a plan is agreed to and these public and private entities are executing the plans in good faith, the changes to the plans cannot be made retroactively. In essence, this legislation prevents the imposition of new mandates, and recognizes that faithful and effective compliance with an agreement should not be answered with changes that can be costly and burdensome and creates an added layer of uncertainty.

This legislation also codifies two other existing programs found in Federal agency handbooks, the Candidate Conservation Agreements with Assurances, the CCA, and the Safe Harbor Agreements, the SHA.

Participants in the CCA program voluntarily agree to take actions with the intention of reducing threats to specific species that are not currently on the endangered species list so that species are protected and do not need to be added to the list.

Participants in the SHA program enter into voluntary agreements to take actions to help endangered species recover.

Both of these programs allow for participants to aid in the protection of species, and the PREDICTS Act will allow them to rely on the agreements they enter into.

In summary, the PREDICTS Act codifies the requirements for habitat conservation plans, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements already found in agency regulations. This legislation provides certainty and rewards the good behavior of both public and private entities that uphold their agreements to help recover species while promoting project permitting and economic development.

I yield back.

The CHAIRMAN. Thank you. Let me ask a couple of questions on this particular Act first.

Mr. Renkes, when the Clinton era No Surprises rule took effect, has it had, in your estimation, some positive impact on survival and recovery of listed species?

Mr. RENKES. Yes, it has had a dramatic impact. In fact, prior to that policy coming into effect, there were very few of these agreements entered into. And then I think they had increased by nearly 10-fold.

The CHAIRMAN. Let me come back to you, then.

Mr. Johansson, let me ask you the next question. Why was there hesitancy on farmers, ranchers, those kinds of people to enter in these agreements before this rule was put into effect?

Mr. JOHANSSON. I mean, quite simply, it was a lack of predictability in the program, and confidence that they wouldn't be punished for taking the right answer should they be successful, leading to other species on their land, as well.

So, I think the No Surprises rule had a positive impact on farmers and ranchers turning toward those programs.

The CHAIRMAN. OK. Mr. Renkes, let me come back to you, then. This is still rule status, correct?

Mr. RENKES. That is correct.

The CHAIRMAN. So, if we pass this bill, it codifies what is the rule, so it cannot be adjudicated or changed later on.

Mr. RENKES. That is correct.

The CHAIRMAN. And do you think, as a representative from the Department, that that codification would have a positive impact?

Mr. RENKES. Absolutely, because it increases certainty.

The CHAIRMAN. All right. Thank you. Let me yield back.

Mr. Grijalva, do you have any questions on this one?

Mr. GRIJALVA. Yes. Thank you.

Mr. Dreher, what are your main concerns or considerations the Committee should consider in this piece of legislation that is before us now?

Mr. DREHER. Thank you, Congressman. I do have several concerns. I think the biggest one, the Candidate Conservation Agreements with Assurances, the Safe Harbor Provisions, those have been embodied in Department of the Interior regs for many years. People understand how they work. There are some small changes here that make it more restrictive, make it harder to terminate them.

For example, obviously, under the Fish and Wildlife Service regs, you can terminate for failing to comply with an agreement or for violating the law. Those things aren't embodied in this agreement.

The big thing about this, though, is that it applies to habitat conservation plans. The other two programs both deal with voluntary incentivized conservation, one for candidate species that are not yet protected, another, the Safe Harbor Agreement, if you manage habitat so that it attracts listed species onto your property that weren't there before.

But habitat conservation plans are plans that actually involve development that affects and may harm endangered species. And these kinds of assurances throw out the actual point of the HCP. A habitat conservation plan has to ensure that the species in fact doesn't go extinct, that it isn't actually harmed because of changed circumstances. And it is essential that HCPs actually provide a benefit to the species.

It is like mixing apples and oranges, but in the worst way, because HCPs involve listed species that are actually being harmed by a proposed development. The other two policies are to incentivize conservation agreements for the benefit of species. So, there is a huge difference.

Mr. GRIJALVA. Thank you.

I yield back.

The CHAIRMAN. Mr. McClintock, to this bill?

Mr. Gosar, to this bill?

Dr. GOSAR. Yes. Mr. Dreher, you have had opposition to all the bills in this package, which should come as no surprise to anybody given the group that you work for. You even spoke against this PREDICTS Act, which codifies the Clinton administration's 1998 No Surprises rule.

Can you name me one reform to the ESA, other than throwing money at the problems that you help cause, that the Defenders of Wildlife have pursued through congressional legislation and supported over the last 30 years?

Mr. DREHER. Sorry, Congressman, over how long?

Dr. GOSAR. Thirty years.

Mr. DREHER. The last 30 years, we were certainly instrumental in supporting the revisions to the Endangered Species Act—

Dr. GOSAR. Be specific.

Mr. DREHER. It was before my time.

Dr. GOSAR. I am all ears. We are all ears. You are very prophetic and very detailed. I like the details.

Mr. DREHER. Well, I do not go back far enough with Defenders of Wildlife to tell how far back we did what we did 30 years ago when the Act was last amended—

Dr. GOSAR. Well, what I would like, as a nice project for you, is to list those out for the Committee, so that we—

Mr. DREHER. I will be happy to submit that for the record.

Dr. GOSAR. Thank you.

Mr. DREHER. I will say that we work constantly to try to improve the implementation of the Act, and we work very closely with landowners, with state governments, and with Federal Government agencies to try to improve the implementation of the Act. We have a whole department at Defenders of Wildlife that develops better scientific methods for implementing the Act.

Dr. GOSAR. We will come back to that one. I am ready for that one. Thank you.

Mr. DREHER. All right. Thank you, Congressman.

Dr. GOSAR. We will look forward to your response.

The CHAIRMAN. Thank you.

Mr. Sablan, do you have questions for this PREDICTS Act?

Mr. LaMalfa, for this one?

Mr. LAMALFA. Thank you, Mr. Chairman. I wanted to turn to the California Farm Bureau president, Mr. Johansson, on this bill. We do many things in agriculture that also have the double benefit, whether you are conserving habitat, whether just by the type of crop you are operating, a lot of time in rice it indeed is a much parallel habitat benefit at the same time.

How beneficial do you think this proposed legislation would be, in light of what we have seen with farmers leaving land fallow, whether it is economics, or they are just giving the land a rest, and then finding out that they cannot plant their land back without a very onerous permit process, or being sued, et cetera.

Mr. JOHANSSON. That certainly is a fear right now that farmers live with. We have seen that happen in Tehama County, particularly with a wheat field that hadn't been farmed for about 6 or 7 years, and then, when he went back on there, ran into trouble with water issues, as well, Clean Water Act, and all of that.

One of the things that we have to do is, and this is the problem with these programs, it has to have the flexibility in those programs to understand that farming and ranching up and down—particularly farming—and that oftentimes we don't have the water supply. And coming off historic droughts in California, we do fallow the land, because we were not given the water, perhaps, because we couldn't send them through the pumps down in the south, based on the delta smelt or salmon numbers, and when we pump water.

I think, again, we want to do the right thing for our land. And if we don't have regulatory certainty, we are going to make bad decisions for our farms, and we are going to make bad decisions for our environment and the species on there.

I know you are familiar with the efforts being done with salmon restoration in rice fields, and the multiple benefits of our rice fields, not only for the rice that we eat, but also in flood protection at times, and also in salmon habitat recovery, and then also increasing our number of salmon, and some pretty innovative uses of our rice industry, which, if you remember, had the black mark of burning their rice every fall and winter, but has really turned it around with unique programs.

Mr. LAMALFA. Certainly being able to bail the rice straw and find markets for it has been very positive, as an alternative. But you do run into a disincentive, whether you are allowing habitat to grow on its own, or setting aside, and then maybe you have to do something to manage that habitat, and then someone comes along and says no, you now cannot touch that, which causes disincentive to people not allowing it to grow to begin with in ditches or other areas of their land.

So, with what you see coming on Waters of the United States and, again, the lawsuits that happened in Tehama County, what is the general feeling of agriculture on whether this legislation will be helpful, or some of the others in the package, or the general direction that the regulatory agencies are going?

Mr. JOHANSSON. I think the general feeling that any farmer and rancher in California wants is to be able to look out over his property and know for sure what needs to be done, not only to be farming successful, but how to take care of species, as well as ensure clean water. I think that is the biggest frustration right now, is our own land. We see it one way, and there is a big fear that regulators may see it another way, and have other designs on it.

One of the issues we have with habitat conservation plans is also we see a lot of water irrigation districts entering into them, because as they clean their waterways from weeds, and as they clean out their irrigation ditches, that may also disturb endangered species that have grown up in those ditches, so they also have to enter. And that is something that really—

Mr. LAMALFA. We are talking man-made ditches?

Mr. JOHANSSON. Absolutely, man-made ditches put in by an irrigation district that also has to participate. It is not just the farms that have to participate in our land, it is also our irrigation districts that have to pay that cost, as well.

Mr. LAMALFA. How about the development of habitat conservation plans that rely on the farmer tying up his or her land maybe into perpetuity. I have seen that, where bureaucracies want that so that they can gain long-term predictability for their own ends, such as transportation projects, using the land, the farm land, as their habitat plan. What do you think about that?

Mr. JOHANSSON. The most important part of any habitat conservation plan—and having gone through one in Butte County and the difficulties and difference of opinions—is local control, and farmers being able to determine what is best for them.

The CHAIRMAN. All right, thank you.

Mr. Westerman, to this Act, the PREDICTS?

Mr. Bergman, to the PREDICTS Act?

Thank you. All right, we will now turn to the next—oh, I am sorry, Mr. Costa, I didn't ask you if you had one for this Act, PREDICTS.

Mr. COSTA. No.

The CHAIRMAN. OK. Then we will turn to the next one, which is H.R. 6346, the WHOLE Act by Mr. Johnson, who is not here to present it. Let me just ask two questions, then, very quickly about this and see if anyone else has questions about this one.

Mr. Wood, let me ask you on this particular one, the WHOLE Act, then, how does this bill build upon existing cumulative impact analysis?

Mr. WOOD. The WHOLE Act essentially clarifies that cumulative impact analysis cuts both ways. And that makes a lot of sense. When an agency is looking at a particular project, it should consider that in the context of everything else going on, whether everything else is good or bad for a species, and let that count toward the project.

The CHAIRMAN. All right. Then let me go to Mr. Sauter. Commissioner, can you give me an example, just one example of some kind of habitat designation that would have been helped, especially one that was maybe economically crippling, that could have been prevented or helped if this Act, the WHOLE Act, were in place?

Mr. SAUTER. Yes, thank you for the question, Mr. Chairman. I can think of a couple of different ones, but I will focus on probably the spotted owl, as one that could have been helped. Also, we had the example of the Oregon spotted frog. We have a lot of spotted animals, apparently, in Washington State that could have been helped by this.

The CHAIRMAN. Thank you, I appreciate that.

I yield back. Mr. Grijalva, specifically to this one?

Mr. GRIJALVA. Thank you.

Mr. Renkes, I noticed in your testimony that the Department of the Interior has concerns with this particular piece of legislation, the WHOLE Act. Can you explain what those are?

Mr. RENKES. Yes, thank you. The bill codifies our current consultation practice, and we support it. The off-site mitigation idea can be effective. We want to work with the Committee on the details of how this can work for designated critical habitat. Currently, mitigation has reserved two areas designated as critical habitat, and we like the idea of off-site mitigation. Obviously, the use of mitigation banks has been effective in other circumstances, and we look forward to working with the Committee to see how we can work that out.

Mr. GRIJALVA. Mr. Dreher, do you find it concerning that this legislation requires the Secretary to consider all additional positive measures in determining jeopardy, but does not require the Secretary to consider the cumulative impacts to a species from other activities? And what other concerns might you have with this legislation?

Mr. DREHER. Well, I do. I think that legislation—the issue with mitigation is, of course, the extent to which it is reliable, the extent to which it is binding, the extent to which it is funded, the extent to which it will actually be effective in overcoming these things.

The bill doesn't address the evaluation of the reliability of mitigation at all.

Beyond that, the concern that the Department of the Interior has raised, I think, is a very significant one. Federal agencies are required by section 7 to avoid destroying or adversely modifying critical habitat. And if they are doing that, and they are conserving lesser-value habitat somewhere else that isn't designated as critical habitat, I think it raises serious legal questions about how they could actually comply with section 7's mandate. If they are actually damaging critical habitat, the practice of the Department of the Interior to date has been that if there is any offsetting conservation, it should be with critical habitat. So, it is apples to apples.

Mr. GRIJALVA. I yield back.

The CHAIRMAN. Thank you.

Mr. McClintock, do you have any questions for this bill?

Mr. Gosar, for this bill?

Dr. GOSAR. Yes. I would like to have Congressman Johnson's statement put into the record in its entirety, please.

The CHAIRMAN. Thank you. Without objection, so ordered.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HON. MIKE JOHNSON, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF LOUISIANA

I would like to thank the Chairman and the members of this Committee for having the fortitude to consider the various Endangered Species Act (ESA) reforms before us today.

When Congress passed the Endangered Species Act over four decades ago, it was because they recognized the importance of conserving, protecting and valuing species whose very existence was threatened. The spirit of the law and deep appreciation for preserving these species remains alive and well today. We cannot, however, allow the fear of challenging the status quo prevent us from taking a hard look at the ineffective policies put in place decades ago that have failed to meet the goals of the underlying legislation.

Proponents of preserving this antiquated law despite its obvious failings do a disservice to both the listed species, as well as the surrounding communities. The truth is, while 99 percent of the species classified as threatened or endangered have not gone extinct, the recovery management plans have failed to provide the species with the opportunity to actually grow and thrive. To that extent, barely 3 percent of the populations listed are considered to have rebounded and thus remain on the threatened or endangered lists. Three percent is nowhere near the rate of success we should expect and further illustrates the need for modifications to the ESA.

In addition to failing to help listed species recover, the ESA imposes many burdensome and duplicative regulations on America's hardworking farmers and ranchers. Absent reforms, the ESA will continue to adversely impact their ability to provide food not only to America, but to those all around the world. And to exacerbate the problem, activist groups are employing sue-and-settle tactics to further their ideological agenda and increase the number of species listed under the ESA. As the list grows, however, farmers and ranchers are forced to shift their primary focus from safe food production to navigating and complying with bureaucratic hurdles that threaten their livelihoods.

My bill would require the Secretary to consider the totality of conservation measures already in place, when determining whether a potential Federal action will jeopardize species or habitat loss. Our Nation's farmers and ranchers are already active participants in conservation programs and in implementing protections and mitigation factors on their land to protect habitat and wildlife. Despite our agriculture community proactively promoting conservation measures and seeking guidance from the USDA on best practices, the ESA continues to expand far beyond the original intent of the law.

The time has come for Congress to modernize the ESA, and to that end, my bill, the WHOLE Act, takes a holistic approach to protecting species and preserving habitats. This legislation will ultimately help our Nation's farmers and ranchers get back to doing what they do best—providing a safe, sustainable food source for

Americans. The bipartisan WHOLE Act has received over 160 national endorsements, and I urge my colleagues to support this critical piece of legislation.

Dr. GOSAR. Thank you.

The CHAIRMAN. Mr. LaMalfa, to this Act?

Mr. Westerman, to this Act?

Mr. Bergman, to this Act?

Mr. Costa, to this Act?

Mr. COSTA. I am sorry, which bill?

The CHAIRMAN. The WHOLE, Johnson's H.R. 6354. No?

Mr. Sablan, no?

Mr. Gallego, no?

OK, then let us turn to the next one, which is H.R. 6354.

Mr. Gosar, you are recognized to introduce your bill.

Dr. GOSAR. I will just put my opening statement into the record.

[The prepared statement of Mr. Gosar follows:]

PREPARED STATEMENT OF THE HON. PAUL A. GOSAR, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA

Good morning. Today, we are here to discuss in-depth the nine bills that comprise a bipartisan legislative package that will bring the Endangered Species Act into the 21st century. We call it the Western Caucus ESA Modernization Package after the 79-Member Caucus I chair, but it's a package that applies evenly across the entire country. Moreover, it has the support from 165+ organizations ranging from the American Farm Bureau, the U.S. Chamber of Commerce, the National Association of Realtors, American Loggers Council, Safari Club International, the National Association of Conservation Districts, Western Energy Alliance, Americans for Limited Government, the Competitive Enterprise Institute, the National Association of Home Builders, the National Association of Counties, the National Water Resources Association and the National Rural Electric Cooperative Association, just to name a few.

The Endangered Species Act serves a noble purpose that is necessary to the conservation of many species. However, it is clear that this legislation has fallen short of its intended goal. A less than 3 percent recovery rate for endangered species is anything but the mark of a successful law.

With this in mind, our members came together to address point by point many of the shortcomings of the Endangered Species Act. Our bipartisan legislative package offers much needed legislative improvements that not only assist the law in meeting its original purpose of conserving and recovering endangered species and their habitats, but also does not stand in the way of economic development and job creation that is beneficial to the American people. Species conservation and economic development are not zero-sum. They are both attainable goals that can be accomplished.

What is even more important is that the Endangered Species Act works for people, not against them. Unfortunately, many hardworking Americans throughout the country have felt the inefficiencies of this law firsthand. One such person is Mary Thoman, a rancher from Wyoming. In a *USA Today* Op-Ed she wrote on August 29, 2018 entitled, "Yellowstone grizzly bears are not an endangered species—but ranchers like me are," she writes, "Special interest groups are suing the Federal Government to have the grizzly bear population in and around Yellowstone National Park returned to the endangered species list—contrary to the recommendations of research. If those special interest groups succeed, state and local officials will no longer be able to effectively manage the population that lives in their backyards. And grizzlies are bound to grow too numerous and pose a greater threat to those who live in the area."¹ As a result of the special protections given to the grizzly bear population, Marry Thoman was forced to give up the grazing lands that their family had ranched on since 1978. This is unacceptable and unfortunately, indicative of the current issues with the law.

¹Thoman, Mary A. "Yellowstone grizzly bears are not an endangered species—but ranchers like me are." *USA Today*, Gannett Satellite Information Network, 29 Aug. 2018.

Sadly, the current processes under the law have enabled gross exploitation by special interest groups that stand to profit from abusing the current system. An authorized agency should not be forced to allocate most of its resources on combating litigation, it should be focused on protecting and recovering species. Moreover, hardworking Americans like Mary should not be forced from the lands that they have worked on for decades because of special interest groups that stand to profit from listing species that are not endangered. Stories like Mary Thoman's are why Americans are coming together to support the legislation being discussed here today—legislation that will offer clarity, flexibility, and assistance for authorized agencies, state, local and tribal officials, and everyday Americans.

Our Nation is blessed with an abundance of biodiversity and a richness in species distribution across the 50 states and territories. Everyone here agrees with the premise that we must make all reasonable efforts to protect species facing extinction. Agreeing on that premise means that we can go forward in good faith to analyze and propose improvements of the Endangered Species Act to the benefit of all involved parties—species, industry, government and citizenry alike. It's an issue that pits every interest imaginable against one another, but our job as Federal legislators is to balance these interests appropriately and enshrine that proper balance in legislation.

We believe to have done just that with this bipartisan legislative package. I appreciate all the Western Caucus, Natural Resources and other Members who have invested in this package and contributed to making it a success. I am grateful for the support of the more than 165 stakeholders and organizations throughout the country.

I thank Chairman Bishop and his team for all their hard work on these bills and for hosting today's hearing, and with that I yield back.

The CHAIRMAN. OK. Then I will yield my time to you. Do you have questions for these witnesses on your Act?

OK. Mr. Young, to this one?

Mr. McClintock, to this one?

Mr. McCLINTOCK. No.

The CHAIRMAN. Mr. LaMalfa, to this one?

Mr. LAMALFA. Which one?

The CHAIRMAN. The STORAGE.

Mr. Westerman, no?

Mr. Bergman?

Mr. Grijalva?

Mr. GRIJALVA. I am going to leave the dead horse be.

The CHAIRMAN. Mr. Costa to this one, STORAGE? OK.

Mr. COSTA. Thank you, Mr. Chairman and Ranking Member, for holding this hearing, and I think it is really time the Committee take a serious look at modifications of the Endangered Species Act.

I would like to thank those who are testifying here today for your insight and your perspective, specifically a good friend that I have worked with for many years, Jamie Johansson from the California Farm Bureau. Having been a member of the California Farm Bureau for over 30 years, I have worked with you and folks for many years.

Because of the number of bills that we have before us and the limited time for the hearing, I want to just speak generally about the bills.

The Endangered Species Act, obviously, I think as most of the witnesses noted, has laudable goals. We ought to be able to be good stewards of the environment and ensure that we don't act in ways in which species go extinct. But clearly, I think with climate change and other factors, species go extinct, and that is just a reality. And while the ESA has been passed and implemented for

four decades now with the best of intentions, like any legislation or law, it is not perfect, and I think it is time we take a serious look at how we can improve it and reform it.

And I say that to my Democratic friends, as well as to my colleagues on the other side. The fact is, I think the way it operates today, it is a blunt tool. And I know firsthand from a lot of experiences that I have been involved in the San Joaquin Valley in California, who have been harmed by the application of the Endangered Species Act, limiting the movement of water in California, resulting in the fallowing of farm land, reduced economic productivity that has all sorts of socio-economic effects in farm communities with both farm workers and farmers, crime, social ills, unemployment, and you can go on.

There are several pieces of legislation, I think, that have good ideas before us. I think they need some refinement. And members of the Committee, I think trying to develop a process in which we can work together in a bipartisan way is going to be the key as to whether or not we have success. Underlying the STORAGE Act, which we have before us right now, the LOCAL Act and the PREDICTS Act, I think deserve consideration and further refinement.

In addition to one important concern that I have regarding the future of the ESA, is that there is little accommodation for the Act impacts to non-migratory aquatic species whose ecosystems are being modified by the impact of climate change and loss of other factors that have created greater damage. Some of these, in some cases, they have gone too far to save. Our economic attempts of trying to save them is likely to fail, like the discussion of trying to return a spring run of salmon to the San Joaquin River in which water temperatures are a big issue.

So, let me ask some questions. Mr. Johansson, you talked about both the delta smelt and the salmon as examples in your testimony. And we know that the State Water Board is looking at unimpeded flows to improve the water quality for the fisheries. But they are discounting the impacts of lack of habitat, they are discounting invasive species, they are discounting non-discharges into the waters.

How do we strive to create a balance if we are going to fix some of these problems without taking into account all of the science?

Mr. JOHANSSON. I think we are doing that on our own right now, in agriculture, having gone through what we did with the delta smelt and the biological opinions—a biological opinion, by the way, that also relied on intuition, in which the species was managed through intuition, which was very disturbing to us, as someone who always has to demonstrate that our farms operate on sound science and proven science.

I bring to fact, and it is very close to Congressman LaMalfa's farm there, a rice ranch there that had a situation with a spring run chinook salmon that only averaged about maybe 10 salmon a year coming up the Butte Creek. Proactively, understanding that maybe some of their water diversions may be having an impact, that water district took the proactive approach to start to fix their infrastructure, and now actually get about 10,000 salmon a year coming up there. So, we are doing that.

We are also doing that, as I mentioned earlier, in our rice fields, in terms of creating that habitat.

Mr. COSTA. Right.

Mr. JOHANSSON. And trying to demonstrate that, as the Water Board talks about flows, it is not about flows, it is about functional flows, and making sure that that water is released at the right time, based on that species. But we have allowed the Endangered Species Act in addressing salmon to come into just a small box and not look at what really is going on in the entire ecosystem.

Mr. COSTA. Right. And thankfully, your testimony—

Mr. MCCLINTOCK [presiding]. The gentleman's time has expired.

Mr. COSTA. Yes. I know, my time has expired, but—

Mr. MCCLINTOCK. Further questions on H.R. 6354?

Further questions, any others on the Republican side?

Dr. GOSAR. I am going to be last.

Mr. MCCLINTOCK. OK, well, you are going to be last, then. I am going to claim time and yield to Mr. Gosar.

Dr. GOSAR. Mr. Dreher, since 1976, your organization, the Defenders of Wildlife, have been the litigant in 510 lawsuits. How many dollars in attorney's fees has the Defenders of Wildlife collected as a result of litigation against the Federal Government?

Mr. DREHER. I will be happy to provide that number for you. I have no idea, sitting here today.

Dr. GOSAR. We will expect that for the record.

Mr. DREHER. I will say that it is an infinitesimal part of our budget. It does not factor into our budgeting—

Dr. GOSAR. No, I am a believer that the facts set us free.

Mr. DREHER. Yes.

Dr. GOSAR. You contradict yourself in your written statement by saying you support science-based process for the ESA, and that is why you oppose the LIST Act, yet you oppose H.R. 3608, which requires public availability on the Internet of the best scientific and commercial data available for the ESA decisions.

It seems like you like cherry-picking your science. Your allegation against the LIST Act is baseless, by the way, as that bill actually allows for the totality of science to be considered. Why does your organization hate science?

Mr. DREHER. You know, Congressman, we call it as we see it. We object to legislation—

Dr. GOSAR. Well, I find it very interesting that you like to cherry-pick, because that is the perfect term for what you actually do—

Mr. DREHER. We object to provisions that we think, in fact, are objectionable. We object to legislation that we think, in fact, dis-serves the purposes of the Act.

It is not our fault if the legislation that is before us we think is bad for the ESA. That is our job to call that out.

Dr. GOSAR. Let me ask you a question, then. That goes back to my previous question. What have you supported to change that legislation in the better for the critters?

Mr. DREHER. Well, I don't know—

Dr. GOSAR. And you couldn't do that for me. You couldn't site a single example. Yet, you are articulate about everything else.

Mr. DREHER. And I think that is a commentary on the partisan nature of the dialogue right now about the ESA, and it has been a highly partisan issue for 20 years.

There have not been bills put forward by the Congress that actually would serve the purposes of ESA, and so we have not supported those bills.

Dr. GOSAR. That is your opinion.

Mr. DREHER. Yes.

Dr. GOSAR. But to the gentlemen to your left and right, that is quite opposite, in contrary, and a number of people on this dais up here. We are not against critters. We want to see this work. We want to see that make it forward. So, we have to start looking at the people standing in the way, and that is you.

Let me go further. You testify that the ESA was a proven success, and tried to brag about its success rate. This is another lie. The Committee points out that one of the mammals—and I quote—“In the 45 years since its enactment, less than 2 percent of species have recovered enough to warrant removal from the list of endangered and threatened species.”

Did you fail algebra? I am a healthcare provider, and if I have a success rate like that, something is wrong. Something is wrong with that. I want to go back to raise that number. So, I should be doing everything I possibly could with the people to my left and the people to my right to make a success story.

That is why, when you start looking at prime examples like the Mexican gray wolf, where the courts actually had to intervene because of the management plan, if that is the management plan we were going with, no wonder the Mexican gray wolf can't be a success story. It is unbelievable, just unbelievable.

You testified that these bills are, and I quote, “all to benefit a minority of special interests in a few states.” I take offense to that. I would encourage you to look at our website and review the list of the 166 stakeholders throughout the country that are supporting these bills. Is the Florida Farm Bureau Federation from the West? No. How about the Missouri Sheep Producers? How about the National Association of Realtors? Are they really solely in the West? How about the U.S. Chamber, are they solely in the West? And by the way, what is your disdain for the West?

Mr. DREHER. I have no disdain for the West. I think—

Dr. GOSAR. Your actions seem to predicate it.

Mr. DREHER. I do not mean to suggest any disdain for any part of the country. I think the commitment the American people have to the ESA is something that is nationally felt.

I think there are particular circumstances in the West, including the predominance of federally owned land, and the long-standing sort of resentment in the West toward the presence of the Federal Government that exacerbate concerns over the ESA. And I do think that the concerns over the ESA in some instances are higher in some places in the West. But that is not in any way denigrating the sensibilities of the people that live in the West. That is an issue that we need to work with proactively.

We should be trying to find solutions, as you say, Congressman. And we try very hard to find solutions. We actually pay for, for example, range riders to try to protect people's cattle from wolves and

grizzly bears. We engage constantly in this sort of cooperative behavior.

Mr. MCCLINTOCK. Mr. Sablan.

Mr. SABLAN. I would like to yield my time to Mr. Costa, please.

Mr. MCCLINTOCK. Mr. Costa is recognized.

Mr. COSTA. Thank you very much. Mr.—is it Dreher?

Mr. DREHER. It is Dreher, sir.

Mr. COSTA. OK, I concur with you, I think we all recognize that the ESA, the Endangered Species Act, has become very political over the last two decades.

From your perspective, would you, shortly, because I want to get to some other questions—have you recommended changes to deal with science, as it has changed over the last four decades, and implementation, and regulation, process, and court rulings? Do you or part of your coalition just like it the way it is? You think it works?

Mr. DREHER. Congressman, I think there is a myth that the Act, because it is old, is outdated, as if it is a—

Mr. COSTA. I didn't say that. I didn't say that.

Mr. DREHER. I know. I am trying to respond to your question, sir. I mean it is part of what other people say about the bill.

I think that the structure of the Act itself is very straightforward and does not need changing. What it actually needs is to be well implemented. We focus a great deal of attention on how to improve the implementation of the Act so that it works better for species and for stakeholders, and we could demonstrate that that makes a difference. But it needs to be funded.

Mr. COSTA. OK. But we have had administrations that have funded it better than other administrations.

I think there are two criticisms that I would raise. One is that I don't think there is a good accounting—with all the changes in our environment, what is the art of the possible.

I just think this notion that somehow—there has been a lot of science on salmon in the Northwest, all the way up to the Alaska Peninsula, and how in some areas, with climate change, you are just not going to restore that. Would you agree or disagree?

Mr. DREHER. I think climate change is unsettling a lot of our expectations. You are absolutely right. Conservationists—

Mr. COSTA. And I think we need to take that into account.

Mr. DREHER. I agree.

Mr. COSTA. I think this whole effort is a balancing act. And I think you have to get the best bang for your buck. We have to make some—I mean, we are going to have some agricultural land that is going to go out of production. Nobody likes that. That is the reality, in terms of our water supply.

But there is no accounting on the other end as to what species you can save and which you cannot. And that is where I think my criticism rises.

Mr. Johansson, you talked again about the science that we are dealing with, and water issues in California. The fact is that we are trying to come together now on some compromises on fixing a broken water system in California. What do you think is the outlook in the next 4 months as to whether or not this host of issues on the delta, the water fix, and other issues involving the ESA, the

likelihood that we are going to be able to work through the current challenges?

Mr. JOHANSSON. I think, unfortunately, we have a situation with the ESA, where it is the initial blunt instrument that stops us, and that is—

Mr. COSTA. That is what I said in my comments. That is what you said.

Mr. JOHANSSON. That is what stops us from pumping. But it goes from there, because it goes all the way up into the upper watershed in our Sierras. And the inability to manage our forests and our public lands properly because of, again, the Endangered Species Act. So, therefore, the water doesn't make it down to the river.

But also, too, it stops us—we just really haven't looked at the science. And it allows someone who may want to send more water to the ocean, or divert it to whatever purposes they deem more important, but aren't looking at the fact that it isn't just flows that provide the smelt with benefit. That is, the dangers to the smelt come from other biological purposes, as well, not just—

Mr. COSTA. That is why re-consultation of the opinions is very important right now.

Mr. JOHANSSON. Absolutely. And, I think that is the struggle ahead of us in California, is how do we proactively get around this ESA by doing efforts up in our forests and in our rice fields and on our farms that help us get around the ESA and try to demonstrate that we can do this, that the old logic, or how we look biologically at the fish in the stream, there really are different options that farmers can participate—

Mr. COSTA. And as you noted in your comments, the better management of our forest lands, the better issue of healthier forests, and less of these horrific fires that we have had to deal with in recent years all over the West.

Mr. JOHANSSON. We have created a situation in California where either we are under water or on fire. We are letting these extremes take over because we are not appropriately dealing with what is happening on the ground and what we can do better.

Mr. COSTA. Thank you.

Mr. MCCLINTOCK. Further questions on H.R. 6354?

On the Republican side?

Mr. Gallego.

Mr. GALLEGO. Thank you, Mr. Chair.

Mr. Dreher, we kind of touched on this earlier, when you were talking specifically about these bills would take a wrecking ball to the ESA and all to benefit a minority of special interests in a few western states. I, too, am a westerner from Arizona, like Congressman Gosar. But I wanted to give you some more time to actually go deeper and elaborate what you were specifically thinking about when you made those comments.

Mr. DREHER. Thank you, Congressman. These bills appear to want to create special breaks for people that want to develop their land in ways that will, in fact, affect adversely endangered species. That is the primary thrust of about half of them. So, they really are a pro-land development set of bills. They are very one-sided.

It is conspicuous in one sense, in the sense that at least twice they exclude judicial review for, for example, organizations like

mine that try to protect species, and allow judicial review for organizations like my colleagues sitting next to me, that may be defending property owners that are opposed to protection. I don't mean any slight on him, I think we both have the same entitlement to use the courts to hold agencies accountable to the law.

I think that when you have bills that attempt to grease the skids, or to create special procedures that would allow property owners to get exemptions from the way the Act works, these are kind of special pleading. These are bills that really are being advanced for particular special interests, in many cases.

I don't know what special interests they are being advanced for, I have not been part of the development of these bills, and I don't mean to disparage the Congressmen that have introduced them, but I do think the effect of them is going to be to make it easier to develop land in a way which will hurt endangered species, and that is not, I think, consistent with the intent of the Act.

Mr. GALLEGO. Are there any specific groups that you are thinking about or have seen in the past? I have been involved in this game for a little while, both on the state side also, as a state legislator, so I have some idea of who you are talking about. But I think an education for anyone else here, are there any particular groups that you have seen in the past using this type of movement to essentially benefit themselves?

Mr. DREHER. Well, there has been a constant tension in the development of resources in the West. Right now, the theme of the Administration is to have as much one-sided development of oil and gas and mineral interests as possible on the Federal lands. And the Endangered Species Act and other Federal statutes can be significant checks on that kind of activity.

So, if there are ways to carve loopholes in this. One of the things that frankly scares me, but maybe only because I don't understand it, but there is a provision in one of these bills that would allow the Secretary to delegate management of a species to a private individual or, apparently, a corporation. I would not want endangered species managed by Exxon.

Mr. GALLEGO. I yield back.

Mr. MCCLINTOCK. Further questions on H.R. 6354?

Seeing none, that concludes the consideration of H.R. 6354.

The Committee will now take up consideration of H.R. 6345 by Congressman Pearce. Any questions on H.R. 6345?

Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman.

Mr. Dreher, first of all, despite some of the questioning, I do want to extend belated gratitude to Defenders. They were principal members of a grouping in Pima County in Arizona, where I was a supervisor that put together the Sonora Desert Conservation Plan, along with screaming and kicking of the homebuilders. And now they find it a wonderful management tool.

And for other stakeholders in that community, it is a plan that worked, habitat for the species was protected for the pigmy owl, and the consequences have been positive on both ends: economically, habitat protection, a bond package passed by the voters to buy additional open space and land for habitat protection, and that was a consequence of collaboration. And the presence of the

Defenders, in terms of expertise and advocates that you brought to that issue was very, very important. So, my belated thanks for that effort, sir.

Mr. Dreher, H.R. 6345 requires the Secretary to consult with each state and county in which a species is located before the species is considered for protections under ESA. This process could create a massive amount of bureaucracy. Hypothetically, let's pretend endangered species like the whooping crane, that is not currently listed—whooping cranes can be found in 17 states and over 700 counties—the bill would require the Federal agency to consult with over 700 different chief executives to determine whether the species deserves protection. What is fundamentally wrong with that?

Mr. DREHER. I think you have identified at least a couple of the major concerns. The first is obviously just the burden this would place on an already over-burdened Department of the Interior and Fish and Wildlife Service. I think, in fact, the Department of the Interior has expressed concerns about that burden in its testimony, as well.

I think there is much more in this bill that is troublesome. It goes far beyond saying that it is important for the Department of the Interior to solicit information from state and local governments. And I think there are already provisions in the Act that require that. There already are clear policies from the Department of the Interior that encourage the coordination with and collaboration with states and with local governments to collect information.

This bill sets up a very odd provision that says that if a state or county objects to a listing, then the Secretary can only move forward if he can prove that information that the state or county submitted was incorrect.

Mr. GRIJALVA. If I may, Mr. Renkes, on that point, that the bill would preclude the Secretary from proceeding with a petition for action if a chief executive advises the action is not warranted unless the Secretary can demonstrate the chief executive is wrong, is incorrect, how would a Secretary demonstrate just information received by the chief executive is incorrect? Who would be the arbiter to determine whether the chief executive or the Secretary is correct? Who decides that?

Mr. RENKES. As I understand the bill, it would essentially create a rebuttable presumption that the information coming from the state is correct, and then, if the Secretary found that that information was incorrect, he or she would provide a response and a record of decision explaining those reasons.

Mr. GRIJALVA. And that explanation would finalize it?

Mr. RENKES. I believe that record of decision, since they used the words "record of decision," would be subject to review.

Mr. GRIJALVA. Review through the courts, reviewed through—so the scenario is set up for—OK.

Do you have any other concerns, Mr. Dreher or Mr. Renkes, on this legislation?

Mr. RENKES. No, we support the bill. We support the idea of the involvement of states. We are doing it now. The Fish and Wildlife Service has an agency goal of 100 percent of participation of states in the listing process and, in fact, gives states a seat at the table

to consider all the scientific information that comes in to determine whether that information is the best available science, and then that goes into the construction.

Mr. GRIJALVA. But it doesn't have veto power, those chief executives, those states, those counties. This bill provides, essentially, veto power over any listing.

Mr. MCCLINTOCK. The gentleman's time has expired.

Mr. GRIJALVA. Thank you.

The CHAIRMAN [presiding]. All right. To this bill, Mr. Gosar?

Mr. Westerman, EMPOWERS?

Mr. Bergman?

OK.

[Pause.]

The CHAIRMAN. Let's go to the next one, which is Mr. McClintock's bill, H.R. 3608. You are recognized to introduce your bill.

Mr. MCCLINTOCK. Thank you.

STATEMENT OF THE HON. TOM MCCLINTOCK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MCCLINTOCK. Thank you, Mr. Chairman. H.R. 3608 is based on a very simple principle, that sunlight is the best of disinfectants. It was originally sponsored by Chairman Doc Hastings in the 113th Congress.

The bill requires the government to publish all science underpinning ESA determinations and the costs imposed, and caps attorney's fees at \$125 per hour, as consistent with the Equal Access to Justice Act.

When this was last considered by the Congress, over 25 organizations, including the U.S. Chamber of Commerce, the Family Farm Alliance, the National Rural Electric Cooperative Association, the American Farm Bureau Federation, the National Association of Counties, the National Cattlemen's Beef Association, the National Water Resources Association, Washington Farm Bureau, Oregon Farm Bureau, Public Power Council, and National Association of Conservation Districts all supported the measure. It passed with bipartisan support both out of this Committee and out of the House of Representatives in the 113th Congress.

The bill has four components aimed at improving transparency. It requires data used by Federal agencies for ESA listing decisions to be made publicly available and accessible through the Internet. This provision would allow the American people to actually see what data is being used to make key listing decisions.

Second, it requires the U.S. Fish and Wildlife Service to track, report to Congress, and make available online the funds expended to respond to ESA lawsuits, the number of employees dedicated to litigation, the attorney's fees awarded in the course of ESA litigation, and settlement agreements. The American people should know all of the money that is being diverted from species recovery in order to cover lawyers' fees and other litigation costs.

Third, the measure requires the Federal Government to disclose to affected states all data used prior to any ESA listing decisions, and requires that the best-available scientific and commercial data used by the Federal Government include data provided by affected

states, tribes, and local governments. It is important to hear from the state and local governments and the tribes when making decisions that will affect their land management. Restoring good stewardship of our public lands should be our ultimate goal.

Fourth, it places reasonable caps on attorney's fees, and makes the ESA consistent with another Federal law. The Equal Access to Justice Act limits the hourly rate for prevailing attorney fees to \$125 per hour. However, no such fee cap currently exists under the ESA, and attorneys have often been awarded huge sums of taxpayer-funded money. This provision places the same \$125-per-hour cap on attorney's fees for suits filed under the ESA that currently exist under the Equal Access to Justice Act.

I do want to clear up a misunderstanding expressed by a Member earlier. It does not require that state and tribal and local governments that have submitted reports be accepted as the best-available science. Rather, their work must be considered among the reports that ultimately form the decision.

This is important for a number of reasons, not the least of which state witnesses and local governments, and tribal governments, which often have a great deal of information on the local conditions, have simply been ignored during previous consideration of listing decisions.

There is a growing tendency on the left to hide scientific data that is contrary to their own predetermined conclusions. That is not science. Science welcomes debate. Science welcomes challenge. And it relies on the ability of independent researchers to replicate its data. When someone says you are not allowed to ask questions, you are not allowed to look at the data, you are not allowed to debate the issue, you are not allowed to look at the full scope of the data, that is not a scientist talking, that is a politician—and an authoritarian one, at that.

So, this measure opens up the information that is available so the public can look at it, the science can be debated and challenged, and the best possible decision rendered under the terms of the Endangered Species Act.

In my remaining time I want to note the presence of Jamie Johansson, the President of the California Farm Bureau Federation. His presidency of that federation has been a breath of fresh air. Agriculture has suffered a number of setbacks in recent years in California, and Mr. Johansson's leadership of the Farm Bureau comes at an absolutely critical time.

In the remaining 19 seconds, Mr. Johansson, any comments on the bill?

[Laughter.]

Mr. JOHANSSON. Well, thank you—

The CHAIRMAN. Actually, wait.

Mr. JOHANSSON [continuing]. For the kind words. I will quickly say that I think this bill would fully expose—

The CHAIRMAN. Wait, wait, hold on. Wait a minute, wait. Start him over again.

I am going to yield my time to you for questions, if you have any, which you do.

Mr. MCCLINTOCK. Just for Mr. Johansson to wrap up.

The CHAIRMAN. Go ahead, then.

Mr. JOHANSSON. All right. I would say thank you for the kind words.

And really quickly, acknowledging that you gave me more time—but I think this bill would surely show, in its implementation, the industry of conflict that has developed around the ESA, which I talked about earlier, which is an unfortunate place that we find ourselves and our farms and ranches, not getting solutions, but constant conflict.

Thank you, Congressman.

Mr. MCCLINTOCK. I yield back.

The CHAIRMAN. Thank you.

Do you have questions on this bill?

Mr. GRIJALVA. Yes.

The CHAIRMAN. OK.

Mr. GRIJALVA. First, Mr. Chairman, I have two questions, but I ask unanimous consent to enter a letter into the record of over 1,500 scientists and experts urging Congress not to weaken the Endangered Species Act, and it is specifically addressing portions of this legislation, if there is no objection.

The CHAIRMAN. Without objection, as long as you don't read it.

[The information follows:]

THE UNION OF CONCERNED SCIENTISTS

September 25, 2018

Dear Representative:

This week, the House Committee on Natural Resources is holding a legislative hearing on several proposals that threaten the important role of science in implementing the Endangered Species Act, and allow for politics to intrude into decisions about which species need protection, H.R. 3608, H.R. 6345, H.R. 6355, and H.R. 6356. The Union of Concerned Scientists, representing more than 500,000 members and supporters across the country, urges you to oppose all of these bills which undermine one of our nation's most effective science-based laws for protecting imperiled species on the brink of extinction. We are especially concerned about H.R. 3608, H.R. 6345, H.R. 6355, and H.R. 6356. Together, along with the other five bills that the committee is scheduled to hear testimony on, they would threaten the integral role of science in carrying out the Endangered Species Act.

H.R. 3608, deceptively named "The Endangered Species Transparency and Reasonableness Act," would undermine the Endangered Species Act's science-based determination process by declaring any information provided by states, tribes, or counties to constitute "best available science," regardless of the scientific merit of that information. Decisions to list or delist a species are already required to use the best available science, which of course can include state, tribal, and local scientific studies when they are conducted in accordance with well-established scientific standards. Best available science is a culmination of the efforts undertaken by scientists and wildlife experts at the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), where they conduct studies, gather data and other information from the scientific community and the public, including state, local, and tribal government and industry.

H.R. 6345, the "Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act," would insert economic considerations into the listing decision process and would give states arbitrary veto authority over listing decisions. The Endangered Species Act rightfully requires listing decisions to be made based on the best available scientific and commercial data. By giving states and local governments the arbitrary ability to object to science-based decisions to protect imperiled species, it politicizes the process of species conservation and makes it more difficult for agencies to rely on the best information.

H.R. 6355, the "Providing ESA Timing Improvements that Increase Opportunities for Nonlisting Act," would provide a fast track to prioritize delistings and downlistings of species in the event of a backlog. While this sounds like a method

to ease the backlog, this is not accompanied by a similar mechanism, to fast track listings, nor is it addressing the funding problem at the root of the backlog at the agency. This is a misrepresented attempt to push the agency to make unscientific decisions to delist and downlist species because they have been historically starved for funding.

H.R. 6356, the “Less Imprecision in Species Treatment Act,” is a bill meant to intimidate and push scientists and the public out of the petition process. This bill would keep petitioners from submitting another petition to list imperiled species for 10 years after ‘knowingly’ including inaccurate information in a listing petition. Scientists and communities should not fear presenting their research in petitions in case the agency deems it a misrepresentation and locks them out of any future process.

Earlier this week, more than 1,500 scientists¹ asked Congress to protect the Endangered Species Act. These ill-advised proposals would only weaken the Act and hinder science-based policymaking.

In addition to the four bills listed above, we also stand in solidarity with our partners in opposition to H.R. 6344, H.R. 6346, H.R. 6354, H.R. 6360, and H.R. 6364. Combined with these egregious anti-science bills, all of these proposals attempt to substitute politics for scientific judgment and make it harder for the public to engage in wildlife stewardship. **We urge you to oppose all nine of these ill-informed pieces of legislation that undermine our nation’s most effective science-based conservation law, the Endangered Species Act.**

Sincerely,

ANDREW A. ROSENBERG, PH.D.,
Director, Center for Science and Democracy

Mr. GRIJALVA. Mr. Dreher, H.R. 3608 undermines the citizen suit provision of ESA. Elaborate on that situation and elaborate on the double standard. Some of my colleagues are very supportive of restrictions on attorney’s fees pertaining to ESA, but support such a restriction in other areas that are particular to them. If you could elaborate on that, sir, I would appreciate it.

And, also, the issue of who has a monopoly on the best-available science, and do states, local counties, tribes, and private entities, do they have a particular monopoly on what is good science, and the science being generated by the agencies is not good science because it has been scrubbed?

Although that seems to be the practice going on in this Administration with regard to climate change and anything that approaches science. But that is another issue.

Mr. Dreher?

Mr. DREHER. Thank you, Congressman. I think the first issue you referred to is the limitation on attorney’s fees. A number of environmental statutes provide for a provision of attorney’s fees to prevailing parties in order to incentivize citizen enforcement of the law.

And an important part of maintaining the rule of law is to hold agencies accountable, and recognizing that many people do not have resources to hire high-priced lawyers. Corporations often have the money to hire major law firms, but citizens groups often don’t. And individual citizens certainly don’t.

So, this would cap those fees using the Equal Access to Justice Act. One consequence of that I would call out is that the Equal Access to Justice Act awards fees from the agency’s budget. So, this

¹ <https://s3.amazonaws.com/ucs-documents/science-and-democracy/esa-letter-final-september-25-2018.pdf>.

is, again, a way of siphoning off money from the listing and protection and recovery of endangered species to pay attorney's fees. Attorney's fees that are currently paid out under the ESA are paid out of the judgment fund, as they are under the Clean Water Act and under the Clean Air Act, and other major environmental bills.

The other point is the issue about the best-available science. I certainly think that states and counties and localities may well have valid science that should be considered, and I think that if this bill did nothing more than to encourage the Department of the Interior to consider all such material that was provided by governments, it would be fully consistent with the Department of the Interior's existing policy, and it would be something that certainly Defenders of Wildlife would support.

The problem is the actual language of the Act. And this is not the only bill that has recited this. There have been several other bills each Congress that declare that the term "best available scientific and commercial information" includes data submitted by a state or tribal or a county government.

So, imagine the problem that you have, I mean the sponsor's statement about encouraging scientific debate. The whole point about choosing and selecting what is the best-available science involves scientific evaluation by scientists of the actual validity and reliability of scientific studies and information that they rely on, on what the data is.

This would declare that information, which may be completely erroneous, it may be irrelevant, or it may just have data of conflicts, or it may just be in conflict with other scientific information—it may, in fact, be a validly conducted study, but it may be an outlier in the field of species conservation, but this would declare that the Service has to rely upon it. That is what the meaning of "best available scientific and commercial information" is. That is what they have to actually make their decisions on.

So, it kind of throws out the whole issue about evaluating that science to determine if it is valid. And that is, I think, why so many scientists are objecting to this.

The CHAIRMAN. You good?

Mr. GRIJALVA. Thank you.

The CHAIRMAN. Do you have any questions for this one?

Dr. GOSAR. First of all, I would like to respond to the 1,500 scientists about weakening the ESA. At a 2 percent success rate, that is hardly success. That is hardly success, by anybody's standards. So, we ought to be looking at trying to mitigate that. And that is why, Mr. Dreher, I came back at you to see where we should go, based on your intuitions.

It is not good enough just to allow this to occur and just say, well, these are fundamentally flawed. It is what are your solutions. And that is why I asked my first questions to you, and you couldn't answer them. And that is what is so sad about this, is that everybody's heart is in the right place, to mitigate this. I mean, you have a conflict of interest. And that is why I asked about the money, is to find out how much exactly you have actually benefited from, not just in the financial dollars, but in delays and deliberative stoppages of any program or anything that could actually benefit. So, I find that kind of interesting, that you would look at that.

Mr. Renkes, what right do states, local governments, tribes, and industries have to know what the Federal Government is up to? And why does it matter whether states are consulted, and whether these entities know the internal deliberations of government?

Mr. RENKES. Let me say the Administration supports the thrust of this bill, and a maximum amount of transparency. And I think the right that they have to know is the right to know that these decisions are based on the very best information, which is the goal of the Act. And having the best information will result from transparency of the data that is provided.

I believe this Administration has mentioned before, made it 100 percent agency goal to bring the states to the table and actually—it used to be that in the administration of this Act, that science would be reviewed in a corner, and not revealed and not transparent to the public in some cases. But now, the states are invited to the table to review all of the information that comes into the agency, and then participate with the Service in the creation of the science document that is used in the listing process.

So, it is that kind of transparency that this bill advances, and we think it is a good thing for the Act.

Dr. GOSAR. So, walk with me for a minute in regards to an issue you probably are aware of, and that is forest thinning. And the tribal involvement, because I look at this intentionally from that standpoint.

We have the Rodeo and Chediski fires over in the eastern part of Arizona, and the tribe was very upset because of the neglect and the destruction that occurred. So, what they did is they took it upon themselves on their tribal lands to thin the forest in an appropriate, prescribed application that may not have been part of the Federal Government's. And it actually worked.

Would that be an example of how that interaction would occur for best-available science?

Mr. RENKES. After the listing decision has been made, and you have a recovery plan, or have that conservation plan, I think that then you want continued input and continued involvement of the local governments and tribes and the states, because they have the best available local knowledge. And I think—

Dr. GOSAR. That shows you the success is the implementation on the floor. And I think that this bill is important in that regard, because it shows you a real time evaluation of success.

Mr. RENKES. That is correct.

Dr. GOSAR. Thank you. I yield back.

The CHAIRMAN. Mr. Westerman, do you have a question on this one?

Mr. Bergman, on this one?

Mr. LaMalfa, do you have a question on this one? You do have one, though?

Mr. LAMALFA. You need me to come over there?

The CHAIRMAN. Tell you what. Give your question, then come here.

He's chairing from right there for a second.

Mr. LAMALFA [presiding]. All right. Give me a second here. Thank you.

OK, Mr. Johansson, let's come back to this on the attorney's fees angle of this. I think that is a very important component in the bill, and something I have tried to advance previously in other legislation, as well, in that the incentive—and we kind of talked about it with this letter I submitted up there earlier—is that there is a giant incentive to sue, just for the heck of it, because there is a good chance of recovery.

And with the cap in the fees, what do you see on all this stuff we have been talking about in California, especially where we have salvage, fire salvage operations that try to happen, and a litany of lawsuits that come from that, and then we were talking about on the land use, et cetera. If these fees were capped at something that is more reasonable, what do you see as far as the frequency of continued lawsuits that appear to some of us as being pretty frivolous, because there is no downside?

Mr. JOHANSSON. Well, I would say—and I repeat what I said earlier, in terms of exposing an industry of conflict that really has developed around the ESA and people or organizations that thrive on litigation. It is the first thing they are going to turn to, is to litigate and to challenge.

So, by posting a transparency of what we are spending on those fees, or what is being spent on those fees also is important in terms of when we discuss how much we are funding the ESA, what truly is going into the ESA, in terms of our implementation of it. We have to recognize the litigation aspect of it. There is no one who goes into a habitat conservation plan or any other sort of conservation plan without the advice of attorney, because that is your first decision, probably, in complying with the ESA, if you have to, is who is the good attorney.

So, we would hope that it would minimize the litigation, and we could go forward with conservation.

Mr. LAMALFA. OK. Thank you, I will yield.

Mr. YOUNG. Then recognize me.

[Pause.]

Mr. LAMALFA. I would recognize Mr. Young. Did you have a question?

Mr. YOUNG. No question.

Mr. LAMALFA. Oh, no? OK. All right. Then no further questions on this bill.

We will jump to Mr. Young's bill, H.R. 6364. And I will recognize Mr. Young.

**STATEMENT OF THE HON. DON YOUNG, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF ALASKA**

Mr. YOUNG. Thank you, Mr. Speaker, Mr. Chairman. First, let me tell you what is wrong with this whole program. I am the only one that has ever voted on this Act. And when we voted on it, it was 10 pages long. And it is now 386 pages long, not by congressional action, by action of the agencies that implement the Endangered Species Act. That is what is the problem.

And I want to stress that. And I will tell you I have little respect for the Defenders of Wildlife or any other group that uses this Act as it never was intended. I remember the testimony before us. Unfortunately, it was written wrong, but it was to protect animals

that were endangered, birds that were endangered, but not all this other stuff. But we did put it in there that frogs would be protected, flies would be protected, hopping mice would be protected, without consideration of the science and how it affected other species.

So, Mr. Chairman, I can suggest one thing. My little bill just requires that the counties and states, the tribes work together with the Federal agencies to come to an agreement on what is the best way to protect the animals and the species, including the frogs. That is what we are trying to do.

But the Act itself has been misinterpreted and misused, primarily to take property away from the private individual and impede progress, which deeply disturbs me, because that is not what America is all about.

Mr. Sauter, the LAMP program, that is my Act, authorizes Federal agencies to delegate greater authority to the states and tribes, et cetera. In your experience, do you believe the states, along with the tribes and counties and local municipalities, have the capability of managing species in a professional manner, protecting them, and still going forth with everyday life?

Mr. SAUTER. Thank you for the question, Congressman. Yes, absolutely. I think there is ample evidence. And I have evidence as far as my own personal experience as a county commissioner. We work on wildlife programs, we conserve species, we save habitat all the time. And I think there is this erroneous assumption that local and state and tribal—maybe not so much tribal—cannot be trusted to look after species, that we don't care about species, that we don't want to see species recovered. That is simply not true.

Our view is that the best people, the people that have the most to gain from all of this, are actually those local landowners.

Mr. YOUNG. I happen to agree with you. And, by the way, most species that are put on the list come from outside interests, have nothing to do with the agencies. They are proposed, or they will sue to put them on the list. People don't look at that. Again, misusing the Act itself.

Mr. Renkes, congratulations, by the way, appearing before this Committee for the first time. Do you believe increased support from agencies of state and local-driven conservation efforts and species management can lead to more effective outcomes of species and the communities most impacted by them?

Mr. RENKES. Yes, Congressman. The Department appreciates and supports the goals of the LAMP Act. And anything we can do to increase the involvement and the participation of the states and tribes and local governments is better for the conservation of endangered species.

Mr. YOUNG. Mr. Chairman, I just have a little personal experience. I was originally from California until I got smart and went to Alaska. As you know, I had a ranch there, and my brother ran it. And we have a grove. My father set aside 20 acres.

Along came California's Fish and Wildlife and Federal Fish and Wildlife, and said we set that grove up, my dad did, for preservation of species, long before it was popular. And because we had an abundance of golden garter snakes, they were told that we would

have to put a buffer zone in 1,000 yards long, away from that little grove. We couldn't farm it.

Mr. Renkes, you said shoot and shovel—what is it? Shoot, shut up, and shovel.

Mr. RENKES. Shoot, shovel, and shut up.

Mr. YOUNG. I used the hoe, and I shoveled, and I shut up. But the idea that they were going to punish the ranch because we protected something, that is how stupid this bill is. It was never intended for that.

So, Mr. Chairman, this is a good piece of legislation. All these bills deserve merit. And if we don't do it, in fact, the Act itself eventually will be defeated by the people. I yield back.

Mr. LAMALFA. Yes, Mr. Chairman, I think that hearkens back to the PREDICTS Act from a little while ago, the conversation we are having—can I predict that I can set my land in a certain way and be able to use it if I need to in a different way later? And you cannot predict that because they pronounce it on your private property.

Let me turn to Mr. Grijalva. Do you have questions? Or any of your other colleagues on that side of the aisle there?

Mr. GRIJALVA. Which one are we on, LAMP?

Mr. LAMALFA. H.R. 6364, by Mr. Young.

Mr. GRIJALVA. Oh, Mr. Young's bill.

Mr. Dreher, do you have concerns on this legislation, sir?

Mr. DREHER. I do, sir. Defenders of Wildlife fully appreciates and supports the role of state governments in managing resident species of wildlife, and we certainly support anything that would help to encourage collaboration between states and the Federal Government and other stakeholders, including groups like ours and including property owners, to try to engage in endangered species conservation.

There are significant concerns about widescale delegation of the ESA to the states. There was a very comprehensive study done by the University of California Irvine School of Law that examined the authorities that state governments have to protect endangered species, and found things that were actually a little shocking, like almost no state has authority to actually try to recover an imperiled species that is listed under state law. Very few of them require expert consultations. Very few of them protect plants.

Almost none of them protect the whole list of endangered species that the Federal Government protects. And, maybe most revealing, only 5 percent of the money that is spent on endangered species conservation is spent by the states.

So, there are real concerns about the capacity and authority of the states to step up and take this kind of leadership role on endangered species conservation away from the Fish and Wildlife Service and the National Marine Fisheries Service. That is not to say they shouldn't work hand in hand, and they absolutely should, and as they do, whenever they do, we applaud that. But we are concerned about that.

But I would say the other thing that really gives me pause, because I have never actually seen this before, is the suggestion in this particular bill that the Secretary could delegate management of entire species or groups of species, as well as habitats of those

species, to private parties. And I don't know what a non-Federal party is, but it could include, as far as I can tell, an oil and gas company or a mining company. I have never seen anything like this in the discussions about the endangered species conservation program, and I don't know how far it could go. It would exempt those parties from take and from the requirement to consult.

If you have delegation of authority not to a state—states, after all, are kindred spirits to the Federal Government in their commitment to conserving endangered species. But private parties?

So, I think this bill raises very, very significant and large concerns about what it might do to the endangered species program.

Mr. GRIJALVA. Thank you.

If I may, Mr. Chairman, just because we were talking about the litigation part on the other legislation, a 2017 GAO report on Endangered Species Act deadline litigation, only approximately 13 cases were filed per year on deadline lawsuits from 2005 to 2015. Moreover, only half of the cases were brought by environmental groups, with the rest by a variety of plaintiffs, including the California Cattlemen's Association, the Florida Homebuilders Association, and finally, of the 141 cases filed in the 10-year period of deadline lawsuits, 72 were resolved through settlement.

And I mention that because of all the civil cases brought against the Federal Government, less than one-half of 1 percent are with EPA and Interior. The rest are commercial litigation cases, so security litigation cases, prisoner litigation cases, and other mostly commercial cases.

So, I suggest that before we make this the issue of the lawsuit and a citizen's right to access the court for redress, and handcuff that process, that we look very carefully, because this is not the boogeyman that it is being made out to be by the proponents of limiting the ability of the citizen to access the courts for redress.

I yield back, Mr. Chairman.

Mr. LAMALFA. All right. Thank you, Mr. Grijalva. Would Mr. Gosar like to be recognized?

Mr. Westerman? OK.

I will touch upon a little bit. Mr. Wood, on this bill, with what Mr. Young was talking about there, like on a management of their own land, they had set aside that 20 acres, for good reasons, and then found that they didn't have control of their land any more. Can you elaborate a little bit on what you see from the legal angle of how does a landowner carry that battle these days on regaining their control of managing their land, even though they might have a species on that that they are actually helping to propagate, but not enough to change the use of that land, and not have a buffer zone, et cetera?

Mr. WOOD. It often is very difficult. One of the biggest challenges with the Endangered Species Act the way it is written and the way it is implemented is that it often punishes the landowner who provides habitat for rare species, when what we really need is greater incentives to restore and enlarge existing habitat, because it is often too small for the most imperiled species.

So, from the property-owner's perspective, it could be really dangerous to create or restore habitat, because you are essentially setting yourself up for far greater regulation. And many of the things

that have been done by administrations of both political parties and that are codified in many of these bills will make that situation better by providing more certainty to landowners, as well as additional incentives to do that important work.

Mr. LAMALFA. Mr. Johansson, same thing on that. Again, because it seems to be a disincentive for people I know of in various Ag. industries to do that good thing and leave something on some set-aside land, and then lose control of it because you let trees grow too long on that piece of land, or something of that nature.

Mr. JOHANSSON. That is the fear, and this our hope, to remedy, and why California Farm Bureau, American Farm Bureau is here today, is to bring in the certainty that doing the wrong thing—or excuse me, doing the right thing won't end up being the wrong thing, in terms of the longevity of your farm and your family on that land.

Mr. LAMALFA. Yes, because the results I see is that people are going to leave their land barren and so highly maintained that a weed can't grow or a tree can't grow on areas that they don't want it to take over, and then lose that control. So, thank you.

Anybody else on the panel have any last thoughts on H.R. 6364?

OK, all right. With that we will move on to H.R. 6356 by Mr. Biggs of Arizona, called the LIST Act of 2018. I will throw this over to our colleagues here.

Mr. Gosar.

Dr. GOSAR. Mr. Wood and Mr. Renkes, at present do we make enough of an effort to distinguish between species that are experiencing population decline as a consequence of human versus non-human factors at the petitioning and listing stage?

I will start with you, Mr. Renkes.

Mr. RENKES. The listing decision is based on the definition in the Act. I am not sure if that is what your question was getting at.

Dr. GOSAR. Well, do we make a distinction that are consequences of human versus non-human factors in the petitioning process?

Mr. RENKES. In the Act, there is a definition of endangered and threatened species, as you know. And a five-factor analysis is supplied. And in those five factors, the last, fifth factor, is natural or man-made factors that affect the continued existence of the species.

Dr. GOSAR. Mr. Wood?

Mr. WOOD. I agree. The Act, as written, doesn't distinguish between those two different types of threats. And one of the challenges of the implementation is that the response required will be very different, based on whether a threat is man-made or natural.

And the regulatory approach contained in the Act doesn't do as good of a job creating the incentives we need for novel and innovative solutions, particularly to those natural threats, where a species is competing with another species. Telling a farmer he can't plow isn't going to change that underlying natural phenomenon.

Dr. GOSAR. Give me an example in regards to how the law differentiates.

Mr. WOOD. Well, as I said, in terms of the listing, it doesn't. It says—

Dr. GOSAR. I am sorry, it is the opposite. Tell me, by law, how it doesn't differentiate, and how it could be effective.

Mr. WOOD. So, for example, the spotted owl in the Pacific Northwest was listed based on fears that logging would eventually damage too much habitat. Well, today the main threat to that species is competition from another species of owl. Limiting the ability for timberland owners to harvest their land and their trees is not going to change the underlying dynamics of that shifting ecosystem and the competition the owl is facing.

Dr. GOSAR. Well, obviously, species went extinct before humans came around. We just happened to accelerate those rates through habitat modification. Do you think that is a useful distinction, one that could easily be readily measured and implemented in consideration under the ESA, Mr. Wood?

Mr. WOOD. Well, I think, certainly given how popular the Act is, no one wants to just accept extinction. It may be impossible to prevent all of it, but it is something we all care about.

I think what is important is to stress how those challenges make it even more necessary to focus on flexibility and free market, or voluntary, conservation means. That is what is going to accomplish those solutions we need. Regulating landowners doesn't address any of those problems.

Dr. GOSAR. So, more of a—not you can't, but how can you help with verifiable outcomes, right?

Mr. WOOD. Exactly.

Dr. GOSAR. Mr. Wood, why does the distinction between threatened and endangered matter?

Mr. WOOD. Well, obviously, the biggest reason why it matters is that endangered species are on the verge of going extinct. Those are the ones that most critically need protection. The reason why it matters legally is that Congress made different judgments for the two types of species. Threatened species don't require the same regulatory protections endangered species do.

Historically, the Service hasn't honored that distinction, but the Administration has recently proposed to restore it. And that rule change will provide a lot more flexibility for states and private property owners to pursue active recovery efforts. And I think it will actually boost the rate at which we recover species.

Dr. GOSAR. So, do you think Congress should reinforce that distinction and that it would benefit species conservation?

Mr. WOOD. Absolutely. I think that is clear from the text of the statute, as written. But codifying and emphasizing it, I think, would be absolutely helpful.

Dr. GOSAR. Would you agree with that, Mr. Renkes?

Mr. RENKES. Yes, I would, and it is a major thrust of the current regulations.

Dr. GOSAR. This seems like this is a kind of a common-sense bill that is looking at outcomes and looking at all resources into that predication. Wouldn't you agree, Mr. Wood?

Mr. WOOD. Yes.

Dr. GOSAR. Supporting species, right?

Mr. WOOD. That is exactly right. For instance, the last thing we talked about, empowering states, is something that builds on efforts by the Obama administration to better engage with states. I think most people realize we need changes like this to incentivize more active efforts to recover species.

Dr. GOSAR. OK, thank you.

Mr. LAMALFA. Mr. Grijalva.

Mr. GRIJALVA. Mr. Wood, I think earlier today you discussed judicial review of endangered species listings for the Wyoming gray wolf and grizzly bears. In your testimony, you caution the Committee against “enacting any limitation on judicial review.” However, many of these bills, including this one, do just that.

So, can you explain why that is problematic, and why the caution?

Mr. WOOD. Sure. I found, in reviewing other statutes that preclude judicial review, that they are essentially invitations for agency mischief. And, often, the result is to undermine Congress’ will.

That said, I recognize that too many ESA issues result in litigation, so something should be done. But I think the answer is to deal with the underlying incentives behind that litigation, like the amount of attorney’s fees, and not to ban access to the courts.

Mr. GRIJALVA. Mr. Dreher, another reaction to that opinion, something to agree on, or not?

Mr. DREHER. Well, there has been talk among the members of the Committee about the need for sunshine and transparency. And one of the ways to ensure that is to allow the American public to actually look at what has been happening in a government decision, regardless of where you stand or what interest you represent, to know what it is and, if it is improper, to actually contest it against the standards of the law. That is what the courts are all about. That is what the rule of law is all about.

I think, if there are too many conflicts over the ESA, the issue should be to try to resolve those conflicts, and to try to establish better ways to collaborate together. But denying American citizens their rights to go to court to indicate their civil rights is just not something I think this Committee should be doing.

Mr. GRIJALVA. Thank you.

Mr. Dreher, one other question. And speaking of science, in all the legislation that we are seeing as a package on dismantling the ESA, one subject that doesn’t come up, and it is a scientific issue, is the issue of climate change and its impact on habitat and impact of species on their recovery. Can you, from your perspective and expertise, talk a little bit about how that is also part of changing the discussion around species protection and recovery efforts?

Mr. DREHER. Yes. I think climate change is the huge and growing threat to life on this planet, frankly. And, certainly, to the balance that we have and that we know about. It has unsettled, I think, all of our expectations in the field of conservation. We used to think that we could restore habitat in areas to a pristine, pre-Columbian state. Now we are facing the fact that we are changing the climate so severely that we—but the point about all of this is that what climate change does is exacerbate the pressures that we are putting on species.

Most species are endangered because of the pressures of human development. And climate change exacerbates that. So, any rational process for trying to conserve biodiversity, including one under this Act, has to take climate change into effect. And that complicates things.

It means we have to think about, for example, do we need to protect vacant habitat, where a species doesn't currently live, but where it will have to move? Species are having to move upslope, they are having to move north, they are having to move away from temperature gradients that put them at risk. So, it may become crucially important to do conservation planning that establishes where those trends are, and—

Mr. GRIJALVA. Accessing corridors, that is another discussion that I have heard, as well. Yes, I think when you are talking about this very vital and important legislation, the ESA law—not only anticipating what is coming, but accepting that as real science, I think helps mitigate recovery, both of species and protection and conservation of habitats. And all this legislation, and most of what we see on this Committee, in terms of environmental issues, the issue of climate change is a non-issue, a non-factual issue. I just wanted to get your response to that.

And I yield back.

Mr. DREHER. Well, we are worried that proposals by the Administration would eliminate consideration of climate change in administering the ESA.

Mr. GRIJALVA. Yes.

Mr. DREHER. We are also worried, frankly, that the most important thing we need to do is develop better ways to work together and collaborate. And the kind of accusations in this bill, accusing environmentalists of explicit bad faith, are entirely unfounded, and not, I think, helpful to establish the kind of dialogue we need.

Mr. LAMALFA. All right, thank you.

Mr. Westerman? OK.

I will have one for Mr. Renkes. As just a practical matter and summarizing the bill and what that looks like for the Secretary, for the Department, again, giving the power to the Secretary to de-list when, again, objective, scientific data clearly demonstrates a species is recovered, and also to act on wrongfully listed species, where the rubber meets the road, what does this really look like for the Secretary and for your Department there?

Mr. RENKES. We agree with the focus—

Mr. LAMALFA. Let me juxtapose this with—we talked about gray wolf earlier, where in 2009 it was originally proposed to be de-listed, and in my own backyard we have the valley elderberry long-horn beetle that was also submitted for de-listing at least 8 or 9 or 10 years ago, as well, by Fish and Wildlife. So, mix that into your answer, too, please.

Mr. RENKES. We agree with the focus of recovery and getting species off the list. And the regulations—public comment just closed on and by the way, we received 180,000 comments on the regulations, representing the input of over a million people. And that comment period closed on Monday.

But one of the provisions in those regulations makes it clear that the standard for getting on or off the list is the same. It is the definition in the Act. And it is really the definition in the Act that is going to control in each of the 5-year reviews of the species, or when someone petitions for a down-listing or a de-listing.

So, this LIST Act, we think, really would enhance the ability to move through that list. I think right now we have 533 petitions

under review, and 506 of those are past the 12-month deadline for a decision.

Mr. LAMALFA. To add new species to the list?

Mr. RENKES. Yes.

Mr. LAMALFA. And none of them are de-listing or down-listing?

Mr. RENKES. Oh, no. Some of those—

Mr. LAMALFA. What does that list look like?

Mr. RENKES. The de-listing and down—I don't have those numbers in front of me. We could get those to you.

I am not familiar with the beetle issue that you raised, but I am somewhat familiar with the wolf. And the Service has maintained that the wolf had recovered, and it has gone through the courts, and now it has been settled for the Wyoming, Rocky Mountain population. And we are still waiting on a decision, I believe, for the Midwestern population of the wolf.

Mr. LAMALFA. Whereas, the Secretary could be empowered, having looked at all the information, to go ahead and make the move, instead of more waiting, right?

Mr. RENKES. Right.

Mr. LAMALFA. All right. Mr. Wood, would you care to weigh in on that thought?

Mr. WOOD. I think that is right, and it presents two sides of the problem. You mentioned the valley elderberry longhorn beetle, something I discussed in my written testimony. That is a case where the Service's scientists said the science is there, this species status needs to be upgraded, and nothing happened. A petition was filed, and still nothing happened.

And by the time the agency got around to acting, it said, well, now that science is too old and we have to start all over. It just shows that de-listing hasn't been treated as a sufficient priority to get the ball moving.

And, of course, the other challenge is the courts, that when a species gets de-listed, it will be challenged, and courts will strike the decision down even in situations where the species has recovered. It has happened with the gray wolf, and it has happened with the grizzly bear.

Mr. LAMALFA. I recall on the elderberry beetle they actually did have the data on that. And then I don't know if it was good to de-list in 2008—just because they waste more time on that doesn't mean that now that data isn't good any more.

But my understanding is they didn't like the data they had, and they contracted for a different style of gathering the data on how they counted the beetle. It is a never-ending circus, really.

OK. Any more questions on this one from the panel?

With that, we will close out on H.R. 6356 and go to H.R. 6355 by Mr. Westerman, the PETITION Act.

Well done, Mr. Westerman, taking an eight-letter acronym, putting that together, that is pretty creative.

STATEMENT OF THE HON. BRUCE WESTERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. WESTERMAN. Pretty creative. Thank you, Mr. Chairman, and I thank the witnesses for being here today.

Mr. Chairman, the gentleman from Alaska, Mr. Young, alluded to this a little bit in his remarks, but as I have researched the ESA I have found that it was a highly partisan Act, highly partisan piece of legislation that was passed back in the early 1970s. I use that term "partisan," meaning that it is something that is to be prejudiced in favor of a particular cause. And there was a particular cause. That cause was to protect critically imperiled species from extinction.

And the legislation wasn't partisan by today's standards, because it passed the Senate with a vote of 92 to 0, and it passed the House with a vote of 390 to 12. There were very good intentions for the ESA, and we cannot deny the benefits we have seen because of implementation of the ESA. We have seen eagles, falcons, whales, grizzly bears, different birds, butterflies, and plants, all that have recovered because of the Endangered Species Act.

But this hearing has given us a chance to explore the idea that there are updates needed to the ESA, and specifically my PETITION Act provides protections from abusing the process. It actually starts the listing procedure.

Forty-five years ago, when the ESA was conceived, it was laudably designed so that anyone could work with the government to save a species. That is a good thing. As such, there is no cost to petition the Service, and the agency must thoroughly respond to each individual request within 90 days, even if the petition contains unsubstantiated information. Further, if the agency fails to respond within this limited time frame, then whoever petitioned Fish and Wildlife can take them to court.

On the surface, this is all well and good. If my Federal Government ignores me, I get to take them to court. The problem is the process is being abused. Unlike the vision of citizen scientists banding together to save one or two species, a handful of well-funded organizations have overwhelmed the listing procedure.

From 2007 to 2011, just two organizations were responsible for 90 percent of all submitted petitions. These two groups, each with annual budgets exceeding \$15 million, drove the average number of yearly petitions from 20 to well over 300. Fish and Wildlife Service has simply not been able to keep up with this increase, and, as a result, has been repeatedly drug into court and forced to accept settlements that undercut both the established listing procedure and Federal scientists.

Some would suggest that Fish and Wildlife just needs more money and more people. Mr. Chairman, there are nearly 22,000 plant and animal species in the United States alone, and there is no limit to how many can have ESA petitions filed on their behalf. These organizations have subverted well-intentioned policy. Rather than submit scientifically sound petitions, well-funded organizations can simply overwhelm the Service and then sue to achieve their desired result. This subversion is incredibly harmful, not only to the American taxpayer, but to species recovery, as a whole.

My bill, the PETITION Act, attempts to reverse this problem. By allowing the Secretary of the Interior to declare a petition backlog, and then allow the Fish and Wildlife scientists to prioritize which petitions need immediate attention, my bill allows for a fair and orderly consideration of all new petitions, not just the ones funded by large activist organizations.

The structure of my bill is nothing new to Fish and Wildlife. In fact, part of the PETITION Act codifies the backlog structure put in place under the Obama administration, when frivolous petitions began to stack up.

Overall, the purpose of my bill is to update a 45-year-old law to protect the Endangered Species Act from the current abuse it receives. Under the current structure, well-funded groups are drowning out sound science and species with true and immediate need.

I am eager to conclude this testimony today, and I look forward to working with any member of this Committee to update the Endangered Species Act in a sound and responsible manner that gets back to doing what it was originally designed for. Again, that is to protect critically imperiled species from extinction.

With that, I yield back.

Mr. LAMALFA. All right, thank you, Mr. Westerman.

Mr. Grijalva.

Mr. GRIJALVA. Mr. Dreher, again, backlog petitions are an issue for implementing the ESA. We have the approach being represented in Mr. Westerman's legislation. Do you think there is a better approach, that one idea would be to increase the resources to the implementing agencies to meet this heightened demand, in terms of backlog. Beyond that, any other ideas, suggestions?

Mr. DREHER. Thank you, Congressman. The thing is that the petition workload has been a burden. I have spent more than 2 years at Fish and Wildlife Service and 4½ years defending Fish and Wildlife Service at the Department of Justice.

I was there when we faced the multiple species petitions that were filed in 2011, that proposed hundreds of species for listing. What happened there was, I think, responsible management. The Department of Justice and the Fish and Wildlife Service developed a plan.

First, we took all those listings and all the deadline suits and put them into one court. Then we came up with a settlement approach that established a reasonable schedule that we could actually manage. And we got the commitment of the petitioners, the plaintiffs in those cases, to that schedule, and we have implemented it. It is difficult, but it can be done. But it does require resources.

What this bill, unfortunately, does is to penalize the endangered species that Mr. Westerman says that he is seeking to protect. Under his scenario, if a backlog is established, a new petition that could be filed that brings to the attention of the Service a species that it had not previously recognized was in imminent risk of extinction would have to be ignored. They could not move on it. And then it would be denied after 180 days, automatically denied. And that could not then be judicially reviewed, all until they managed to bring the backlog down.

And the only thing they can do until they bring the backlog down is to grant petitions to de-list, so it is an extremely one-sided

ratchet. It forces the Fish and Wildlife Service to spend all of its time on species which are, at least by definition, no longer in need of protections of the Act. So, although it is important to get them de-listed, and it is important for the success of the Act to show that they are recovered, they are not at risk. And it forces the Fish and Wildlife Service to spend all of its time and money on those species, instead of species that may be brought to its attention that, in fact, are critically imperiled.

So, it is really a one-sided bill, and I think would do serious damage to the ability of the Fish and Wildlife Service and the National Marine Fisheries Service to respond to legitimate petitions.

And I guess I should just add that many of the species that are listed under the Act have been brought to the Service's attention by citizens. That is why this Congress created the petition process. It is an analog to the citizen suit provision, yet recognizes that the agencies aren't perfect, and in some cases they are going to sit on their hands. And what citizens have to do to make this Act work is be able to submit information and make the agencies grapple with it. That is all the petition process does.

Mr. GRIJALVA. Thank you. Mr. Dreher, you discussed the current extinction crisis. Can you elaborate in the time we have left a little more on that extinction crisis, the reality of it, and ESA's important role in addressing that crisis?

Mr. DREHER. Well, I was about to say I would be happy to, Congressman. It is not a happy subject. I think we are becoming aware, societally—scientists are becoming aware, responsible government decision makers, the public is becoming aware of the effects of the relatively unchecked development by the human species of the entire face of the planet. There is almost no part of the planet at this point that does not bear the effects of human development.

We have lost half of all wild animals in the last 40 years. As many as 10 percent of all species on Earth will be endangered within the next 30 or 40 years, and that may be a very low estimate. That is according to the National Academies of Science. So, we are facing an extinction event that is comparable to what happened when the Earth was hit by comets that wiped out the dinosaurs.

And it is our doing, which means that we bear the responsibility, the moral, the ethical, and the practical responsibility of trying to conserve the planet that we live on.

The Act is the most visionary and the most effective law in the world to do that. Many other countries have endangered species legislation that really does nothing, except identify species that are going under, but don't have any actual program for recovery. So, the Act is something we should all, I think, commend for its effort.

Mr. GRIJALVA. Thank you. I yield back.

Mr. LAMALFA. The gentleman yields back. We need to recognize Mr. Gosar?

OK, Mr. Westerman.

Mr. WESTERMAN. Thank you, Mr. Chairman.

Mr. Wood, in your testimony you mentioned that the Obama administration sought a cease-fire with the environmental groups suing the Federal Government. In fact, as part of that cease-fire,

the previous administration imposed a prioritization framework to a process that is actually codified in my bill.

In your opinion, what is the status of that cease-fire? Has it ended?

Mr. WOOD. The settlement itself has ended. But after that the Obama administration proposed a rule to finalize it. And it has been working. But, of course, it could be upended at any time. Unless Congress acts to codify that approach, at any time a petitioner could go to court and get an order to jump the line. And I think that would be a mistake.

The Obama prioritization schedule properly focuses on the species that most need protection, rather than the weaker petitions that might get ordered by a court.

Mr. WESTERMAN. So, Mr. Renkes, what is the current state of the petition backlog?

Mr. RENKES. Currently, there are 533 petitions pending; 506 of those are past the 12-month deadline.

Mr. WESTERMAN. Is that backlog increasing or decreasing?

Mr. RENKES. The Service is working to decrease the backlog, and they estimate now that it will take about a decade to work through that backlog.

Mr. WESTERMAN. Does the Federal Government anticipate the risk of major settlements from lawsuits increasing as a result of the state of the backlog?

Mr. RENKES. Each species is taken on its own, and the determination is made of the best-available science, based on the definitions in the Act. So, the settlement process really doesn't put pressure on the decisions that are made by the Service in that regard under the Act.

Mr. WESTERMAN. And the mass petition settlement was mentioned earlier. Mr. Wood and Mr. Renkes, can you compare the treatment of a petition considered under normal conditions with one which is part of a mass petition settlement of a backlog such as happened in the recent years and decade?

Mr. WOOD. Well, I am sure one of the other witnesses can testify a little bit more on the challenges it presents to the Service, but I think it is laudable that the Obama administration took on the problem of mega-petitions, recognizing that they make it a lot harder to decipher and resolve a petition, and proposed a rule to get rid of it.

But to a large extent, the backlog crisis we saw in 2011 was the result of indecipherable petitions proposing to list hundreds of species at a time. And that is an incredibly challenging problem that I hope is done.

Mr. WESTERMAN. And Mr. Wood, in your testimony you also mentioned that the Federal listing policy is largely dictated by whoever is most willing to petition the government.

Mr. Renkes, is this characterization accurate, in your opinion?

Mr. RENKES. Yes.

Mr. WESTERMAN. Mr. Wood, the settlements from these suits, then, undercuts sound, balanced science produced by the Federal Government?

Mr. WOOD. It doesn't affect the outcome. That still has to be done, based on the requirements in the Act.

But what it does is shift the decision about what species and what petitions to prioritize from the Service and the science to court orders. And those are inherently subject to arbitrariness.

Mr. WESTERMAN. Mr. Wood, is there any reason to suspect that some of the petitions that are submitted to Fish and Wildlife are actually submitted precisely in order to jam the system's resources and create a petition backlog, making the government vulnerable to lawsuits?

Mr. WOOD. Yes, it is certainly hard to speculate about the intent behind the groups that filed the petitions. You occasionally get the sort of smoking gun quote saying, "Thankfully, this species existed, because we wanted to stop some particular project."

But I think the fundamental problem is that Congress chose the agency to make the decisions about how to prioritize and protect species, and the backlog problem and the petition process is taking that away. And that is why a solution is so necessary.

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

Mr. LAMALFA. Mr. Westerman, you mentioned the 92 to 0 vote in the Senate back in 1973, was it?

Mr. WESTERMAN. That is correct.

Mr. LAMALFA. Do you think that group of Republicans cared more about the environment then than they do now? Is that what you attribute that to?

Mr. WESTERMAN. It was 92 to 0. We can't speculate, but we can look at results.

Mr. LAMALFA. All right. I appreciate that. OK, we will wrap up here.

Oh, Mr. Gosar, you wish to—

Dr. GOSAR. Yes.

Mr. LAMALFA. OK.

Dr. GOSAR. I just wanted him to go first, because it was his bill.

Mr. LAMALFA. OK.

Dr. GOSAR. Mr. Wood, is there ever a good theoretical rationale for a major petition and listing settlement with respect to the merits of such listings?

Mr. WOOD. No, and the Service has long taken a position that a settlement cannot dictate the outcome of a petition.

Dr. GOSAR. Are such mass settlements, in your opinion, good solutions to the backlog and to litigation with respect to the goals of the Act?

Mr. WOOD. In 2011, that was probably the best we could get. But a formalized rule—and, in fact, Congress codifying the approach selected by the Obama administration is far preferable, because it provides certainty.

Dr. GOSAR. In your opinion, would there ever be an efficient use of Fish and Wildlife Service or NMFS resources that would devote serious resources and time to analyzing the petitions that are put into the low-priority bins?

Mr. WOOD. If the higher priorities have been exhausted, then, of course. But as long as we are going to have a backlog, it makes sense for the Service to focus on the species that most require consideration.

Dr. GOSAR. Well, that makes some sense.

Mr. Dreher makes the allegation of such a dire circumstance with climate change, with very few countries initiating and helping out. Don't you think that we ought to be reviewing and utilizing every asset that we actually have, if those circumstances are so dire?

Mr. WOOD. Well, I am not sure more money can solve the problem. That would just spur more—

Dr. GOSAR. I didn't say money, I said resources. And what I am looking at is a group of them, whether they be farmers, whether they be corporate entities, whether they be a local county board of supervisors. I think those are all considered assets.

Mr. WOOD. I agree. This isn't a challenge just being faced by the Federal Government. It is something that states and private individuals care about. So, the more we engage with everyone who has a stake in the outcome for these species, the better off we will be.

Dr. GOSAR. And don't you think that if we did it in a methodology that our mission is to ensure the success of the species. Don't you think that is drive enough?

Mr. WOOD. I am sorry, I missed the last part of the question.

Dr. GOSAR. Don't you think that is drive enough, that if our goal is to preserve these species, then we ought to look at enabling and empowering any and everyone to have a say in it.

Mr. WOOD. Absolutely right. And that is the only way you are going to get the active efforts you need.

And to borrow an example from my own past work, we represented property owners affected by the designation of the Utah prairie dog. And there, they have been subject to this burdensome regulation for decades without any progress. Thanks to a lawsuit, we got power shifted back to the states, and now that is the model to recover that species. Even the Service admits that that is the better approach.

Dr. GOSAR. So, I guess my question to you is I can have my cake and eat it, too, right?

Mr. WOOD. I think so. I think the conflict we see is unnecessary, that so many people care so deeply about recovering species that if we engage with them better, we will get better outcomes.

Dr. GOSAR. You hit a great point there. So, why is it that Mr. Dreher—his efforts are higher in priority than, let's say, the oil and gas companies?

Mr. WOOD. I don't—

Dr. GOSAR. Aren't they both noble, if we get the results?

Mr. WOOD. Absolutely. And often, industries like the oil and gas companies, farmers, and others have been key partners in protecting and recovering species. And PLF supported the Obama administration's efforts to do that, including in defending a case brought by the Defenders of Wildlife to blow up one of those sorts of compromises.

So, I think you are exactly right. We shouldn't look at anyone as an enemy in this challenge. This is something we need all hands on deck, and we have to work with each other.

Dr. GOSAR. But in the conversation today, Mr. Dreher used the "boogeyman" over and over and over again as oil and gas companies. And I find that disingenuous, because we all inhabit this

planet together, and we are going to have to collaborate and cooperate together to make it work.

And particularly when you look at the things that we cannot control, like plate tectonics, molten mass, and elliptical orbit around an irregular solar mass, that is changing dramatically as we speak—so, I mean, it behooves us to use all those assets. And that is why, Mr. Dreher, I came at you very hard, is that if you find those problems, you ought to be addressing those with us.

This is an attempt to start that conversation. And if you are part of that solution, you are remanded to make changes to facilitate the effectiveness of that law. And doing nothing isn't the answer.

Thank you, I yield back.

Mr. DREHER. Mr. Congressman, I really would ask a right to reply. I have actually been accused of a number of things by the Congressman, and have not had a chance to respond to him.

As I have said, I think Defenders of Wildlife—and I personally—

Mr. LAMALFA. The time has expired for Mr. Gosar's time.

Mr. DREHER. So, there is no opportunity to reply to personal attacks?

Mr. LAMALFA. Ten seconds.

Mr. DREHER. All right. We work very hard for conservation of species, including things like range mapping, trying to actually find out where the species are. We are trying to make things actually work better, and that is a much better outcome than anything in any of these bills. So, we are trying to make the Act work.

Mr. LAMALFA. Thank you.

About 6 minutes left on votes. If you two fellows want to take off, I will finish up. Or you are welcome to stay, too.

I want to just come back, as we finish on this bill, to Mr. Johansson. What we hear about is, again, with this backlog, with just a blizzard of petitions that come into the various departments asking for yet another listing. And you hear the results sometimes, when they get so far behind, they want to just settle them all to back off the lawsuits that then will come.

So, what you see is deals being cut, basically to placate the environmental organizations with Ag, with grazing, timber, minerals, all that, basically feeling like they are barely hanging on in the negotiations.

For example, in one of the areas in my district, Lassen National Forest, you have the martin, red-legged frog, the spotted owl, maybe others that are all overlapping in their time frame for what would allow timber harvest, and you are down to a limit of a little less than 30 days, mostly in September, that you can do logging operations, because of this overlapping.

What do you see with your experience, whether that applies to grazing on certain listings, or timber? How widespread is this settle process and limitation on doing the types of things we need to be doing outdoors for industry?

Mr. JOHANSSON. I am not familiar with the specifics of, as you say, the settle—

Mr. LAMALFA. Not on that one, but in general. When they settle—

Mr. JOHANSSON. Well, unfortunately, it becomes a business decision, and it doesn't become what is the right thing to do, or what do I have to do to make my farm better, or my timberland better, or my grazing land better, but it becomes a business decision. And we are seeing those business decisions being made, which is less and less mills in our forest.

Also, too, in Lassen National Forest, the grazing permits that are allowed, those aren't even all allocated. Even what they do allow for cattlemen to graze up there aren't doing it, because it is simply becoming cost-prohibitive, in terms of everything you have to comply with under ESA and other issues, as well.

But, there is a loss of opportunity, and you are seeing that in our rural communities.

Mr. LAMALFA. And what have you seen on the positive side for grazing, maybe, with helping on fire control or even limiting noxious weeds, things like that?

Mr. JOHANSSON. I think it is a lack of grazing, and one of the things, in terms of—we just had an important bill in California which we could get you the wording for, that would liberalize what we can do in our state lands, and making sure that we can better fight wildfires, and that which we have been having the last few summers.

So, yes, at the end of the day we could do much better. And I thank you for the opportunity to talk on these nine bills that go toward that end.

Mr. LAMALFA. Mr. Renkes, again, what has your experience been in the Department when you get a blizzard of petitions and you fall behind just because there are so many that you then feel the pressure that you are going to get sued? Tell me what that looks like from your scenario.

Mr. RENKES. Well, the way that has played out, it has been the exposure to litigation, and then the diversion of resources to fight litigation, as opposed to working on recovery plans or other aspects of the Act that would help. So, there really is no defense that we have against litigation over petitions that are overdue.

We are in a position right now, as I mentioned, where we have a decade worth of work to reduce to deal with the current backlog.

Mr. LAMALFA. As I recall, there was a backlog where about 700, maybe just a few short years ago, that it was easier for previous administrations to just try to make deals on so many of them to get them off their back. If you could, elaborate on that a little bit.

Mr. RENKES. I am not—

Mr. LAMALFA. And how this legislation can help, instead of having to settle in a hurry, but more methodical.

Mr. RENKES. Well, yes, I can speak to that. I am not familiar with the settlement process in the previous administration in any detail, but this bill would, by creating this petition backlog status and changing some of the rules, reduce the pressure of litigation on that process and allow those resources to be dedicated to actually dealing with the petitions at hand. That could be very helpful, and we support the bill in that regard.

Mr. LAMALFA. OK, thank you.

Mr. Wood, please touch on that, too, from your perspective.

Mr. WOOD. I agree. Codifying the approach adopted by the Obama administration will provide the agency cover, and give certainty to everyone that the prioritization schedule that has been adopted is law, and cannot be blown up by litigation.

Mr. LAMALFA. OK, all right, thank you. We are really on the edge on time here. So, indeed, I want to thank the witnesses, all of you, for your travel, for your time here today, and your expertise.

The members of the Committee might have additional questions. We will ask you to respond to those in writing. Under Committee Rule 3(o), members of the Committee must submit those witness questions within 3 business days following today's hearing by 5:00 p.m. on that day. The hearing record will be held open for 10 business days for those responses.

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

[Whereupon, at 5:12 p.m., the Committee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

PREPARED STATEMENT OF THE HON. ANDY BIGGS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF ARIZONA

I thank Chairman Rob Bishop and Ranking Member Raúl Grijalva for holding this important legislative hearing. I am honored to join Western Caucus Chairman Paul Gosar and colleagues in introducing the Western Caucus ESA Modernization package. This package includes my bill, the LIST Act of 2018, which makes a number of improvements to bring the ESA into the 21st century.

The LIST Act authorizes the Secretary of the Interior to de-list species from the endangered species list when he receives an objective, measurable, and scientific study demonstrating a species has recovered; and penalizes those who intentionally submit false or fraudulent data in order to cause a species listing. The Act does not eliminate protections for truly endangered species. Rather, these actions will allow the Federal Government to focus resources toward protecting species that actually need it.

The ESA is one of the most intrusive Federal policies on western states. Over the last four decades, ESA regulations, including the listing of endangered species, have done more to infringe on private property and states' rights than they have to recover endangered species. The ESA was created to protect threatened species and their habitats; however, biased science and de-listing regulations are often used to harm western priorities instead of protecting endangered species.

Hundreds of species are listed as endangered under the ESA, including the infamous Gray Wolf. Scientific data shows that this species has fully recovered and no longer needs Federal protection, but inexplicably remains on the list. This listing allows unelected Federal bureaucrats, in the name of protecting the Gray Wolf, to limit the use of public lands. It also prevents farmers and ranchers from protecting their land and livestock from these predators.

ESA listings are meant to give short-term support for species recovery; it is not supposed to turn into a permanent classification. Current regulations make it much easier for the U.S. Fish and Wildlife Service to list new species as endangered instead of examining the current list for potential removal. Over the last 45 years, less than 2 percent of the total species listed have eventually been de-listed—42 distinct species out of 2,386 to be exact. Unfortunately, several of the bureaucratic processes for de-listing recovered species have broken down or failed entirely.

Listing a species is not insignificant. These classifications impose costly requirements on private landowners and Federal agencies, and limitations on private and public project proposals.

Radical environmental groups exploit false or fraudulent data in order to cause a species to be listed as endangered. Oftentimes, newly discovered or poorly understood species are quickly listed and later turn out to be ecologically abundant. This leads to unnecessary costs and burdens for everyone impacted by the listing.

The Arizona Farm Bureau, which is headquartered in my district, warns that "as the law is written today, the Fish and Wildlife Service is forced to rely on existing

data however faulty it might be, and petitioners know this and use the lack of scientific evidence to force listings.”

ESA regulations not only harm westerners, but Americans across the country. Mr. Chairman, we have an opportunity to make a significant change by cutting job-killing regulations and passing legislation to fix their unintended consequences. The Western Caucus ESA modernization package is long overdue and will help millions of Americans around the country by protecting local interests—not special interests.

Rep. Bishop Submissions

List of 170+ organizations and letters of support endorsing H.R. 6356, H.R. 6345, H.R. 6344, H.R. 6355, H.R. 6364, H.R. 6360, H.R. 6346, H.R. 6354, and H.R. 3608

Aethon Energy	Land Conservation Assistance Network
American Exploration & Mining Association	National Aquaculture Association
American Exploration & Production Council	National Association of Conservation Districts
American Farm Bureau Federation	National Association of Counties (NACo)
American Highway Users Alliance	National Association of Home Builders
American for Limited Government	National Association of Realtors
American Loggers Council	National Cotton Council
American Petroleum Institute	National Endangered Species Act Reform Coalition (NESARC)
American Sheep Industry Association	National Grazing Lands Coalition
Colorado River Energy Distributors Association	National Mining Association
Family Farm Alliance	National Rural Electric Cooperative Association
Federal Forest Resource Coalition	Neiman Timber Company
Free Market America	Safari Club International
Hardwood Federation	United Water Conservation District
Healthy Forests Healthy Communities	U.S. Chamber of Commerce
Independent Petroleum Association of America	Western Energy Alliance
Intermountain Forest Association	

Agribusiness & Water Council of Arizona	La Paz County Supervisor Duce Minor
Arizona Cattle Feeders Association	La Paz County Supervisor D.L. Wilson
Arizona Farm Bureau Federation	Minnesota State Cattlemen's Association
Arizona Mining Association	Missouri Sheep Producers
Arizona Pork Producers Council	Mohave County Supervisor Buster Johnson
Arizona Rock Products Association	Mohave County Supervisor Gary Watson
California Wool Growers Association	Montana Woolgrowers Association
Campbell County Board of Commissioners	New Mexico Association of Conservation Districts
Colorado Cattlemen's Association	New Mexico Cattlegrowers' Association
Colorado Farm Bureau	New Mexico Federal Lands Council
Colorado Pork Producers Council	New Mexico Wool Growers
DC Cattle Co LLC	Oregon Water Resources Congress
Florida Farm Bureau Federation	Pima Natural Resource Conservation District
Food Resource Group	Salt River Project
Hawaii Aquaculture and Aquaponics Association	Utah Mining Association
Idaho Farm Bureau Federation	United Dairymen of Arizona
Idaho Water Users Association	Wyoming Senate President Eli Bebout
Imperial Irrigation District	Yavapai Cattle Growers Association
Lake Havasu Area Chamber of Commerce	Yuma County Chamber of Commerce
La Paz County Supervisor Holly Irwin	

Arizona Sportsmen's Groups:

Apache County BigGame Forever	Mognlian Sporting Association
Arizona BigGame Forever	Northern Arizona BigGame Forever
Arizona Deer Association	Phoenix BigGame Forever
AZ Bass Nation	Southwest Fur Harvesters
Bass Federation	Sportsmen's Business Alliance
BASS Junkyz	SRT Outdoors
Flagstaff BigGame Forever	Tuscon BigGame Forever
Malihini Sports Association	Wild at Heart Adventures
Mesa/Gilbert BigGame Forever	

Colorado Sportsmen's Groups:

Boulder BigGame Forever	Colorado Sportsmen Make America Great
Centennial BigGame Forever	Colorado Springs BigGame Forever
Colorado BigGame Forever	Colorado Wool Growers
Colorado Mule Deer Association	Grand Junction BigGame Forever
Colorado Outfitters Association	Pagosa Springs BigGame Forever

Idaho Sportsmen's Groups:

BigGame Forever Idaho	Northern Idaho BigGame Forever
Idaho Falls BigGame Forever	Pocatello BigGame Forever
Idaho for Wildlife	Save Western Wildlife
Idaho Sportsmen for Wildlife	Twin Falls BigGame Forever

Montana Sportsmen's Groups:

BigGame Forever Gallatin City	Citizens for Balanced Use
BigGame Forever Missoula	Montana Sportsmen for Wildlife
BigGame Forever Montana	Montana Trappers Association
BigGame Forever Park County	Southwest Montana SCI
BigGame Forever Sweet Grass County	

Oregon Sportsmen's Groups:

Oregon United Sporting Dog Association.

Utah Sportsmen's Groups:

Sportsmen for Fish and Wildlife	Utah BigGame Forever
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Washington State Sportsmen's Groups:

Boeing Employees Everett Gun Club	Ruffed Grouse Society—WA
Borderline Bassin' Contenders	Safari Club International—Central WA
Capitol City Rifle/Pistol	Safari Club International—Columbia Basin
Cascade Mountain Men	Safari Club International—Inland Empire Chapter
Cascade Tree Hound Club	Safari Club International—Northwest
Cedar River Bowmen	Safari Club International—Seattle Puget Sound

Citizens for Responsible Wildlife Management	Safari Club International—Southwest Washington
Double U Hunting Supply	Seattle Sportsmen's Conservation Foundation
Edison Sportsmen's Club	Skagit Sportsman and Training Association
Inland NW Wildlife Council	Tacoma Sportsmen's Club
KBH Archers	Vashon Sportsmen's Club
Kittitas County Field & Stream	Washington Falconer's Association
National Wild Turkey Federation—South Sound Longbeards	Washington for Wildlife
North Flight Waterfowl	Washington Game Fowl Breeders Association
Northwest Sportsman's Club	Washington Muzzleloaders Association
NW Field Trial & Hound Association	Washington State Archery Association
Okanogan Hound Club	Washington State BigGame Forever
Pacific Flyway	Washington State Hound Council
Pateros Sportsman's Club	Washington State Hunter Heritage Council
Paul Bunyan Rifle and Sportsmen's Club	Washington State Trappers Association
Pheasants Forever Chapter #257	Washington Waterfowl Association
Pierce inlandCounty Sportsmen's Council	Washingtonians for Wildlife Conservation
Richland Rod & Gun Club	Wildlife Committee of Washington.

Morning Consult Poll

Available at: https://morningconsult.com/wp-content/uploads/2018/09/180941_crosstabs_POLITICO_v1_HS.pdf

Rep. LaMalfa SubmissionPIT RESOURCE CONSERVATION DISTRICT,
BIEBER, CALIFORNIA

September 14, 2018

Secretary Ryan Zinke
U.S. Department of the Interior
Mail Stop 6242
1849 C Street, NW
Washington, DC 20240-0001

Dear Mr. Zinke:

The Pit Resource Conservation District (RCD) has been working with the USFS Modoc National Forest staff to develop a salvage sale on the 30,000+ acre Cove Fire area. The RCD proposed to treat a minimal 1,380 burned acres that include: 1) hazard trees along roads and trails; 2) salvaging fire-killed conifers; 3) fuels treatments; and 4) site prep and reforestation. The RCD would have preferred to have treated a much large area, but given the time restraints, chose to focus on areas of extreme importance to the landscape. The partnership was made possible by using a Stewardship Agreement that the RCD currently has with the Forest Service to expedite the process and assure that valuable timber resources would be utilized and important reforestation efforts could be attained. An Environmental Assessment (EA) was completed and an Emergency Situation Determination (ESD) was signed by the Chief. All NEPA requirements were fully met, and the RCD staff and local consultants led this effort. Pre-advertisements and advertisements were noticed in the newspapers of record and a list of potential bidders was also noticed by email. A bid packet along with timber cruise information was compiled and interested bidders contacted the RCD for the information. The process to complete all required activities was very lengthy which caused the sale date to be moved several times. This action precluded several interested parties as they were concerned that the timber might not be marketable due to the bluing and bug infestation possibilities. On July 20, 2018, a public meeting was held to accept and award the bid. There was only one bid received which was awarded to Tubit Enterprises, Inc. Tubit began the removal process around the end of July and has been actively working on the project since.

Last week, the RCD was notified that Conservation Congress was planning to submit a lawsuit against the Forest Service with the intent of an immediate stop work order. The basis of the lawsuit is not only unfounded but numerous items stated in the court docket are not factual. The Forest Service and the RCD have been proactively working together with the Contractor to prepare for the potential litigation and severe hardship this will place on all parties.

The Pit RCD is requesting your support with this process. We believe that salvage is vital to forest health and we strongly advocate for the utilization of burned timber which promotes economic vitality and helps restore the landscape for public and wildlife benefit. The RCD is also interested in future outcomes regarding litigation and would like to request that an effort be made to amend current legislation to include language that would prevent frivolous lawsuits. It is the belief of the RCD that if those parties that are interested in prosecuting be responsible for court costs and damages incurred through their actions, this type of litigation could be greatly reduced. To that end, we ask that your office work to promote such legislation to assist in future endeavors.

Thank you for your attention to this extremely time sensitive issue and we look forward to hearing from you. Please contact our Project Manager, Todd Sloat or Business Manager, Sharmie Stevenson for additional information or questions.

Sincerely,

ANDY ALBAUGH,
Chairman.

Rep. Grijalva Submissions

Alaska Wilderness League * American Bird Conservancy * American Rivers
 Animal Welfare Institute * Blue Heron Productions * Born Free USA * Braided River
 Center for Biological Diversity * Clean Water Action * Defenders of Wildlife
 Delaware Ecumenical Council on Children and Families * Earthjustice * Earthworks
 Endangered Habitats League * Endangered Species Coalition * Environment America
 Environmental Protection Information Center * Friends of Blackwater, Inc.
 Friends of the Earth * Great Old Broads for Wilderness * Hip Hop Caucus
 Howling For Wolves * Humane Society Legislative Fund
 International Marine Mammal Project, Earth Island Institute * Klamath Forest Alliance
 League of Conservation Voters * National Audubon Society
 National Parks Conservation Association * Natural Resources Defense Council
 NY4WHALES * Oceana * Oregon Wild * Public Interest Coalition * Quality Parks
 RE Sources for Sustainable Communities * Save Animals Facing Extinction
 Save Wolves Now Network * Sierra Club * Students for the Salish Sea * The Bay Institute
 The Humane Society of the United States * the Jane Goodall Institute
 Maine Wolf Coalition, Inc. * The Rewilding Institute * Trap Free Montana
 Trap Free Montana Public Lands * Turtle Island Restoration Network
 WE ACT for Environmental Justice * Wildlands Network * Wolf Conservation Center
 Wolf Haven International

September 25, 2018

Re: Please Oppose H.R. 3608, H.R. 6344, H.R. 6345, H.R. 6346, H.R. 6354, H.R. 6355, H.R. 6356, H.R. 6360, and H.R. 6364 (the “Expanded Wildlife Extinction Package”)

Dear Representative:

The House Natural Resources Committee meets this week for a legislative hearing on nine bills. This package of legislation would dramatically weaken the Endangered Species Act and should be labeled the “Expanded Wildlife Extinction Package.” These bills would undermine the role of science in the listing process, transfer undue authority to state officials, make it more difficult for species to gain federal protections (and easier to lose them), and undercut citizens’ vital role into helping to enforce the law. **On behalf of our millions of members and activists nationwide, we urge you to oppose the “Expanded Wildlife Extinction Package.”**

Science shows that we are currently facing a devastating sixth mass extinction. According to the latest scientific studies, three-quarters of all species could disappear in the coming centuries.¹ The Endangered Species Act is America’s most effective law for protecting wildlife in danger of extinction. It serves as an essential safety net for imperiled plants, fish, and wildlife. Since its enactment, ninety-nine percent of listed species have avoided extinction and many more have been set on a path to recovery, including the iconic American bald eagle, the grizzly bear and the Florida manatee. The Endangered Species Act has seen such remarkable success—even in the face of dramatic underfunding—because it relies on best-available scientific data to make listing decisions and empowers citizens to participate in and ensure adequate implementation of the law. The bills before Committee attack these fundamental strengths and the very foundation on which the ESA was written, representing a clear and present danger to wildlife preservation nationwide.

The Endangered Species Act is our nation’s declaration of the fundamental value of protecting species from extinction. Recent peer-reviewed research from the Ohio State University shows that roughly four out of five Americans support the law.² Members of Congress should recognize this broad public support and protect the

¹“Accelerated modern human-induced species losses: Entering the sixth mass extinction,” *ScienceMag*. 2015. <http://advances.sciencemag.org/content/1/5/e1400253>.

²Jeremy Bruskotter, John Vucetich, Ramiro Berardo, “Support for the Endangered Species Act remains high as Trump administration and Congress try to gut it.” *The Conversation*, July 20, 2018.

Endangered Species Act so that it can continue working to save our nation's remaining plants, fish and wildlife from extinction. We therefore urge you to oppose these harmful bills.

H.R. 3608 (“The Endangered Species Act Transparency and Reasonable-ness Act”) would undermine the use of sound science in Endangered Species Act listing decisions by declaring that state and local data is by definition the best available science, regardless of whether it is scientifically inferior. Under current law, the federal government already works extensively with the states, considers state and local data when making listing decisions, and notifies affected states of proposed listing determinations. This bill also threatens to undercut citizen enforcement of the Endangered Species Act. Indeed, under H.R. 3608, citizens who successfully challenge illegal government actions under the Endangered Species Act would be subject to fee recovery restrictions that could make it difficult for them to obtain counsel. In doing so, this bill would make it easier to violate the law with impunity.

H.R. 6344 (“Land Ownership Collaboration Accelerates Life Act”) would create a loophole in the Endangered Species Act's prohibition on take³ of endangered species by requiring the Secretary to determine, upon the request of an individual, whether a given activity complies with the law. If the Secretary does not provide a written determination of compliance within 180 days of receiving the request, the proposed activity will be automatically deemed *not* to constitute unlawful take of a species, effective for five years. If the Secretary determines that the proposed activity is in compliance with the law, then *any* use or action taken by the property owner in “reasonable reliance” would not be considered a violation of the law, and would remain effective for 10 years. This loophole could result in the harm and/or death of endangered and threatened species, as well as in the destruction of critical habitat. Most disturbing, if the Secretary finds that the proposed use would not comply with the Endangered Species Act's take prohibition (or withdraws a no take determination), H.R. 6344 would entitle the landowner to financial compensation. Thus, the government would have to expend taxpayer dollars simply to ensure compliance with the law. This potential cost would cripple enforcement of the Act.

H.R. 6345 (“Ensuring Meaningful Petition Outreach While Enhancing States Rights Act”) would severely undermine the Endangered Species Act's science-based listing process by giving state and local governments de facto veto authority over decisions to list species as threatened or endangered. Under H.R. 6345, if the Secretary finds that a species' listing may be warranted, he or she must solicit information and advice from each state and county in which the species is located. If the state or county advises that the listing is not warranted, the Secretary may not proceed unless he or she demonstrates that the information submitted in support of an unwarranted finding is incorrect.

H.R. 6346 (“Weigh Habitats Offsetting Locational Effects Act”) would increase the likelihood that a federal agency action would jeopardize the continued existence of a threatened or endangered species or result in the destruction or adverse modification of critical habitat. The Section 7 consultation process is designed to prevent this outcome in part by reviewing a federal agency action's negative effects and considering any offsetting measures, such as avoidance, minimization, or mitigation. Yet H.R. 6346 would allow the Secretary to consider non-binding offsetting measures. In doing so, this bill increases the risk that a federal agency action will have detrimental impact on a species or its habitat.

H.R. 6354 (“Stop Taking On Reserves Antithetical to Germane Encapsulation Act”) would restrict designations of critical habitat for threatened or endangered species. Specifically, the bill would prohibit the Secretary from designating as critical habitat any area in water storage, diversion, or delivery facilities where habitat is periodically created and destroyed as a result of changes in water levels caused by the operation of such facility. This could prevent the designation of a sufficient amount of a critical habitat necessary for a species to survive.

H.R. 6355 (“Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act”) would undercut citizens' ability to participate in and ensure adequate implementation of the law by weakening the citizen petition process and limiting judicial review. H.R. 6355 would automatically trigger denials of petitions to list or uplist species in the event of a “petition backlog” as declared by the Secretary under the procedures set forth in the bill. Once the backlog has been declared, the Secretary would be required to prioritize petitions to delist or downlist species over petitions to list or uplist species. In effect, the bill would

³The term “take” is defined in the Endangered Species Act to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

create additional barriers to listing species and automatically deny most listing petitions in the event of a declared backlog. What's more, these automatic negative petition findings would be exempt from judicial review.

H.R. 6356 ("Less Imprecision in Species Treatment Act") would make it easier to delist species that may not be fully recovered, while simultaneously deterring the public from petitioning to list imperiled species deserving of protection. First, the bill would require the Secretary to delist a species without regard to the Endangered Species Act's listing requirements if he or she receives "substantial scientific or commercial information" demonstrating that a species is recovered or that recovery goals set for a species have been met. Second, if the Secretary determines that a listing was in error, the bill would shield a subsequent delisting decision from judicial review. In doing so, this bill eliminates a vital check on delisting decisions that may not have been based on the best available science. Finally, the bill would prohibit a citizen from submitting a listing petition for 10 years if they "knowingly" included inaccurate, fraudulent, or misrepresentative information in a listing petition, but does not adequately define how such an inquiry would take place.

H.R. 6360 ("Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species Act") would weaken existing regulations governing cooperative conservation efforts between the Fish and Wildlife Service and landowners. Agency regulations currently allow landowners to voluntarily enter into Candidate Conservation Agreements with Assurances, which address conservation measures for species that are anticipated to be listed, and Safe Harbor Agreements, which address conservation measures for listed species. These agreements benefit landowners because they grant "take permits" and provide assurances that if circumstances involving a species change, they would not be required to undertake additional conservation activities. H.R. 6360 would weaken requirements for landowners entering into such agreements and make it more difficult to terminate agreements if a landowner fails to meet his or her responsibilities.

H.R. 6364 ("Localizing Authority of Management Plans Act") would undermine the ability of federal agencies to conserve threatened or endangered species by delegating significant management authority to state governments and individuals and removing a prohibition against state laws that are less restrictive than the Endangered Species Act. The Endangered Species Act currently allows states and the federal government to enter into cooperative agreements, wherein states propose programs to conserve listed species and the Secretary assists with management of these programs. However, H.R. 6364 would delegate management to the states and non-federal parties with little to no federal oversight. Furthermore, the bill would allow states to enact laws regarding the take of listed species that are less restrictive than federal laws, effectively allowing less protective laws to replace federal Endangered Species Act protections.

Please protect the Endangered Species Act, our nation's most effective and important law for species conservation, by voting "no" on the "Expanded Wildlife Extinction Package," including **H.R. 3608, H.R. 6344, H.R. 6345, H.R. 6346, H.R. 6354, H.R. 6355, H.R. 6356, H.R. 6360, and H.R. 6364. These bills constitute an extreme assault on our nation's wildlife, public participation, and one of our most popular and successful laws.**

Thank you for your consideration.

Sincerely,

Alaska Wilderness League
American Bird Conservancy
American Rivers
Animal Welfare Institute

National Audubon Society
National Parks Conservation Assoc.
Natural Resources Defense Council
NY4WHALES

Blue Heron Productions	Oceana
Born Free USA	Oregon Wild
Braided River	Public Interest Coalition
Center for Biological Diversity	Quality Parks
Clean Water Action	RE Sources for Sustainable Communities
Defenders of Wildlife	Save Animals Facing Extinction
Delaware Ecumenical Council on Children and Families	Save Wolves Now Network
Earthjustice	Sierra Club
Earthworks	Students for the Salish Sea
Endangered Habitats League	The Bay Institute
Endangered Species Coalition	The Humane Society of the United States
Environment America	The Jane Goodall Institute
Environmental Protection Information Center	The Maine Wolf Coalition, Inc.
Friends of Blackwater, Inc.	The Rewilding Institute
Friends of the Earth	Trap Free Montana
Great Old Broads for Wilderness	Trap Free Montana Public Lands
Hip Hop Caucus	Turtle Island Restoration Network
Howling For Wolves	WE ACT for Environmental Justice
Humane Society Legislative Fund	Wildlands Network
International Marine Mammal Project, Earth Island Institute	Wolf Conservation Center
Klamath Forest Alliance	Wolf Haven International
League of Conservation Voters	

GREENLATINOS

September 26, 2018

Hon. RAÚL M. GRIJALVA, *Ranking Member, House Committee on Natural Resources, 1329 Longworth House Office Building, Washington, DC 20515.*

Re: OPPOSITION TO Endangered Species Act ROLLBACKS

Dear Ranking Member Grijalva:

On behalf of GreenLatinos—a national network of Latino environmental and conservation advocates—I write to you with concerns over the continued rollbacks and legislative attacks to the Endangered Species Act (ESA); one of this nation’s bedrock environmental laws. The ESA is one of our most important conservation laws. Over 99% of the species that have received ESA protection are still with us today, and 90% of listed species are on track to meet their recovery goals.

GreenLatinos conducted a post-election survey in 2016 that found that 97% of Hispanic voters felt that they and those that represent them have “a moral responsibility to take care of the earth—the wilderness and forests, the oceans, lakes, and rivers.” It is our view, this protection of critical landscapes and habitat extend to the rich biodiversity that those habitats support—especially those species that are threatened or endangered.

Tomorrow, your committee will mark up several bills that would further weaken the critical protections enshrined in the ESA. GreenLatinos has deep concerns with

any attempts to weaken such protections, in particular with H.R. 6345 (Rep. Pearce)—The EMPOWERS Act; H.R. 6355 (Rep. Westerman)—The PETITION Act; H.R. 3608 (Rep. McClintock)—The Endangered Species Transparency and Reasonableness Act; and H.R. 6346 (Rep. Johnson)—The WHOLE Act. The goal of each of these bills is to weaken the ESA, not to make it “work better,” and enacting these bills into law would drive to the extinction of fish, wildlife, and plants in America and around the globe.

The ESA has strong support among our membership, and among the 27.3 million Latino voters that our organization and its members interface with regularly in communities across the country. It does not need to be “reformed” or “modernized.” It is an effective law that gives all stakeholders an incredible amount of flexibility to proceed with projects in a way that protects biodiversity.

We urge you to consider these views and encourage you and your fellow committee members to defend the ESA and its protective provisions from being weakened by the continued attacks represented through these ESA rollback bills.

Thank you for your attention to this matter.

Sincerely,

JESSICA M. LOYA,
National Policy Director.

September 25, 2018

Dear Members of Congress:

As denominations representing a broad spectrum of religious traditions and more than 10 million congregants, we write to you today unified in our support for the protection of God’s precious and good creation and in particular the Endangered Species Act. This bedrock piece of conservation law has been extremely effective in preventing species from becoming extinct and we urge Congress to uphold this critical piece of legislation. Dismantling it or entangling it in unnecessary and damaging modifications or loopholes will only serve to diminish its effectiveness.

Our Scriptures are filled with messages about taking care of Creation. In those passages, we are reminded that the world belongs to God and we are instructed to be stewards of God’s earth. The story of Noah’s ark sets forth an example for us to follow as we care for creatures great and small. God’s instructions were clear to Noah: protect each and every one, two by two. We note that in the story, following the flood, God’s covenant with Noah and his descendants as well as with the entirety of Creation makes it clear that God views Creation, both human and non-human, as valuable and as being in relationship with one another.

It is with this perspective that we view the Endangered Species Act, a modern day Noah’s Ark that can preserve the creation that God has bestowed in our care. Any action, legislative or otherwise, that weakens the Endangered Species Act or puts economics or individual interests before our duty as stewards runs contrary to our moral charge.

Because of our strong conviction that God entrusted the care of Creation to us, including the most vulnerable species, religious denominations over the years have released policy statements urging that we, as a nation, uphold our duty to steward God’s creatures. In 1993, the General Synod of the United Church of Christ passed a resolution entitled “Respect for Animals,” that reminds church members that God has given humanity responsibility for the care and protection of all living creatures.

Following that resolution, a 2001 statement passed by the 213th General Assembly of the Presbyterian Church that called for government “face the severity of thus (mass extinction) threat, and to take the steps in practice, polity and systemic change that will prevent mass extinction and preserve the biodiversity essential to the flourishing of life.” The United Methodist Church, one of the largest religious denominations in the country, also issued a policy statement on the “Preservation of the Diversity of Life,” which stated “that the wondrous diversity of nature is a key part of God’s plan for creation. Therefore, we oppose measures which would eliminate diversity in plant and animal varieties, eliminate species, or destroy habitats critical to the survival of endangered species.” Inspired by the commandment of Bal Taschit, do not destroy, the Union for Reform Judaism passed a resolution in 1991 calling on the government to “protect our current wilderness areas, create new ones, and work to protect ecologically sensitive and endangered bioregions of the world” and “ensure the continuation of animal and plant species.”

The set of nine bills introduced this summer run counter to our stewardship mandate for species protection. Taken collectively, these nine bills would work to undermine the current Endangered Species Act, which has been one of our most successful tools for preventing extinction. This package of bills creates loopholes, allows for state veto rights, limits legal recourse, and resurrects barriers to listing species. These bills are not science-based and will undercut the ability of current and future endangered and threatened species to survive.

We urge the House Natural Resources Committee to reject this package of nine bills that would be detrimental to the Endangered Species Act and thus to God's creation.

Sincerely,

Rev. Jimmie R Hawkins, Director,
Presbyterian Church (USA) Office of
Public Witness

Rabbi Jonah Pesner Director,
Religious Action Center for Reform
Judaism

Rev. Sandy Sorenson, Director,
Washington Office
United Church of Christ, Justice and
Local Church Ministries

Rev. Dr. Susan Henry-Crowe,
General Secretary,
General Board of Church and
Society, The United Methodist
Church

**Comments of the Attorneys General of Massachusetts,
California, Maryland, New York, Oregon, Pennsylvania,
Rhode Island, Vermont, Washington, and the District of
Columbia**

Available at: https://ag.ny.gov/sites/default/files/multistate_ag_comments_on_esa_listing_interagency_cooperation.pdf

