

**OVERSIGHT: MODERNIZATION OF  
THE ENDANGERED SPECIES ACT**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON**  
**ENVIRONMENT AND PUBLIC WORKS**  
**UNITED STATES SENATE**  
**ONE HUNDRED FIFTEENTH CONGRESS**  
FIRST SESSION  
\_\_\_\_\_  
FEBRUARY 15, 2017  
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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FIFTEENTH CONGRESS  
FIRST SESSION

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## **OVERSIGHT: MODERNIZATION OF THE ENDANGERED SPECIES ACT**

**WEDNESDAY, FEBRUARY 15, 2017**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:06 a.m. in room 406, Dirksen Senate Building, Hon. John Barrasso (Chairman of the Committee) presiding.

Present: Senators Barrasso, Inhofe, Capito, Boozman, Fischer, Moran, Rounds, Ernst, Sullivan, Shelby, Carper, Booker, and Harris.

### **OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING**

Senator BARRASSO. I will call this hearing to order.

I would like to start by welcoming the newest member of the committee, Senator Richard Shelby from Alabama, who has been appointed to the Committee with the confirmation of Jeff Sessions from this Committee to be the Attorney General.

Welcome, Senator Shelby.

Senator SHELBY. Thank you. Mr. Chairman, I am here to support you and do some good things for the environment, right?

Senator BARRASSO. Yes, sir.

Senator SHELBY. And for jobs.

Senator BARRASSO. Then you are on the right committee. Appreciate you being here.

Senator SHELBY. No. 1, support the Chairman, right?

Senator BARRASSO. As we discussed before and as Governor Freudenthal can attest, I do not need your support when I am right.

Senator SHELBY. I know. We understand. I will be with you when you are right.

Senator BARRASSO. Thank you, so much. Welcome to the Committee.

I call this hearing to order.

The Endangered Species Act, which is the topic of this discussion, was enacted to conserve species identified as endangered or threatened with extinction and to conserve ecosystems upon which those species depend.

Those of us from Wyoming know the important role the Endangered Species Act plays in responsible environmental stewardship. Wyoming is one of the most beautiful States in the Nation. We are

home to Yellowstone and Grand Teton National Parks, numerous national forests, pristine lakes, and scenic waterways.

Our wildlife is diverse and abundant. We have thriving populations of grizzly bears, wolves, elk, and bison, to name a few. People travel from around the world to come to Wyoming because our State's natural resources are spectacular.

We in Wyoming are not alone in our natural bounty or in our resolve to conserve species within our borders. Every State in our Nation works hard and invests heavily to protect the unique species of that State.

States throughout the west are collaborating tirelessly with stakeholders to conserve species like the sage grouse throughout the west, the Arctic grayling fish in Montana, the El Segundo blue butterfly in California, and the Columbian white-tailed deer in the Pacific Northwest.

The Great Lakes region—like the west—grapples with the gray wolf. In the southeast, specifically in North Carolina, it is the red wolf; in the Great Plains, the lesser prairie-chicken; in the south and elsewhere, the northern long-eared bat; and in the Northeast and Midwest, the rusty patched bumblebee.

99.4 percent of counties in the United States are home to at least one species listed as endangered. That is according to a recent analysis of Fish and Wildlife Service data done by the National Association of Counties.

Here is the problem. The Endangered Species Act is not working today. We should all be concerned when the Endangered Species Act fails to work.

States, counties, wildlife managers, home builders, construction companies, farmers, ranchers, and other stakeholders are all making it clear that the Endangered Species Act is not working today.

A major goal of the Endangered Species Act is the recovery of species to the point that protection under the statute is no longer necessary. Of 1,652 species of animals and plants in the United States listed as either endangered or threatened since the law was passed in 1973, only 47 species have been delisted due to recovery of the species.

In other words, the Fish and Wildlife Service has concluded that less than 3 percent of species in the United States under the protection of the Endangered Species Act have recovered sufficiently to no longer necessitate the protection of the statute. As a doctor, if I admit 100 patients to the hospital and only 3 recover enough under my treatment to be discharged, I would deserve to lose my medical license.

The Western Governors' Association, the Association of Fish and Wildlife Agencies, and other stakeholder groups have been working to identify challenges with the Endangered Species Act and opportunities to make the statute work better. The Bipartisan Association of Western Governors has taken on this cause because the Endangered Species Act has not been updated in any significant way for almost 30 years. Wyoming's current Governor, Matt Mead, has played an especially important role by leading the WGA's Species Conservation and Endangered Species Act Initiative.

Governor Mead has worked with other western States to develop an Endangered Species Act policy for the WGA, including specific

recommendations for improvements to species conservation and to the Endangered Species Act. The western Governors unanimously adopted the Endangered Species Act policy at the WGA meeting last June.

This year, the Western Governors' Association continues to lead efforts to identify consensus-based solutions to modernize statutes, regulations, and policies to make the Endangered Species Act work better for wildlife and for people.

As our Committee explores the need to modernize the Endangered Species Act, I hope we can emulate the bipartisanship leadership that we had here on this Committee and that the WGA has demonstrated in this Act.

When I talk about the bipartisanship in this Committee, I hope we can replicate last year's bipartisan success when the entire Committee joined together—Republican and Democrat—to modernize the Toxic Substances Control Act, achieving the first major environmental reform in that area in roughly 40 years.

With that, I would like to turn to the Ranking Member, Senator Carper, for his testimony.

**OPENING STATEMENT OF HON. THOMAS R. CARPER,  
U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator CARPER. Thank you, Mr. Chairman.

It is great to be with all of you this morning. To the current Governors and other special guests, thank you for joining us from across the country.

I have a statement I am going to read in just a minute, but I want to preface it by saying this. Unfortunately, on the Democratic side, we have some emergency meetings that have been called, and we will be in and out of the hearing.

I apologize for that. It is not something we had planned, but we value your testimony and are going to participate as much as we can.

Coming in, I spoke with the Governor and with Matt who works for our Chairman, behind me is Christophe Tulou who when I was Governor was our Secretary of Natural Resources and Environmental Control, someone I worked with for many years. We have some very smart people at the desk, Dan and Jamie and our other guests.

A question I would like us to ask is why do we have the ESA? Why do we have the Endangered Species Act? Why did we create it all those years ago? Do we still need it? Is it perfect? Is it written in stone?

I have been reading through the Old Testament, and they talk about tablets and stone. Well, it is not in stone.

Everything I do I know I can do better. I think that is true for all of us. It is probably true for most statutes, but I want to make sure that at the end of the day the original purpose for the Endangered Species Act to preserve the species that the good Lord put on this planet to share this planet with us, that we have done them no harm.

At the same time, going back to our new member, Richard Shelby, just a kid here, welcome aboard.

To make sure that while we make some improvements to the Endangered Species Act, we do so in a way that is true to the original intent of the law.

I am also always interested in how we create a more nurturing environment for job creation and job preservation. I know he is, too. All of us are. I hope we will be true to that, too.

Here is my statement.

According to the International Union for the Conservation of Nature, better known as IUCN, almost one-third of all known species of plants and animals, 22,784 species, are currently at risk of extinction.

According to Harvard conservation biologist E.O. Wilson, one of the world's preeminent scholars on biodiversity, if we continue on our current path half of all species worldwide are likely to go extinct in the next century.

That is a troublesome warning that if allowed to become reality would have tremendously detrimental implications for our global ecosystem.

There is much talk in the halls of Congress these days about "modernizing" the Endangered Species Act and a host of other environmental protections. In each case we need to be very thoughtful about what modernization means, the proposals we review, and the consequences they would inflict.

Nowhere is that exercise of wisdom and humility more appropriate than when we explore changes to the Endangered Species Act, a lifeline that Congress first extended in 1973 to species struggling to adapt to a world forever altered by the presence of one species in particular—us, human beings.

The House Committee on Merchant Marine and Fisheries, on which I once served a long time ago when Richard and I were in the House together, soberly noted in its report to accompany the original Endangered Species legislation: "If the blue whale, the largest animal in the history of this world, were to disappear, it would not be possible to replace it, it would simply be gone, irretrievably forever."

The value of this law, however, is not just the inherent value of the animals and plants that share this planet with us but also the benefits we gain from protecting the places where they live and thrive.

The National Fish and Wildlife Foundation estimate that the natural habitats we have protected in the lower 48 States alone provide a total roughly of \$1.6 trillion per year in benefits. I had to look twice at that number, \$1.6 trillion per year in benefits.

It comes as little surprise, then, that the Endangered Species Act passed Congress in the 1970s nearly unanimously. While much has changed over the past 40-plus years, apparently our desire for thriving species and healthy habitats has not.

As we consider our witnesses' views on the need to modernize the Act, we should also keep in mind its purpose: to prevent the extinction of species and to do our best to restore those at risk. I, for one, am reluctant to do anything to compromise the successes we have achieved.

Another observation is: it has been a long time since we in Congress last reauthorized the Endangered Species Act. What I find in-

teresting is that given the opportunity to make changes, the compulsion over time was not to weaken but rather to strengthen the law, to make it more effective in protecting species in peril.

For example, Congress adopted an amendment to address the position of the Reagan administration and ensure that listing decisions were based solely on biological and scientific factors, not economic calculations. That was in the Reagan administration.

At that same time Congress also saw fit to set deadlines to ensure that Federal agencies made responsive and timely determinations in response to the listing petitions they received.

As a former Governor I will be especially interested in our witnesses' perspectives on the proper role and the success of States in managing species so they do not end up on threatened and endangered species lists.

Along those lines I am particularly curious whether all of our government agencies at all levels have the resources they need to protect species and help them recover if they end up in peril.

I have a unanimous consent request, Mr. Chairman, that the rest of my statement be entered for the record. I ask unanimous consent to also offer for the record a letter we received from 31 conservation organizations highlighting their support for the Endangered Species Act.

Chairman BARRASSO. Without objection, they are entered into the record.

[The prepared statement of Senator Carper was not received at time of print. The referenced letter follows:]

1/24/17

**Alaska Wilderness League \* American Bird Conservancy \* American Rivers  
Born Free USA \* Center for Biological Diversity \* Clean Water Action  
Conservation Northwest \* Defenders of Wildlife \* Earthjustice  
Endangered Species Coalition \* Environment America \* Friends of the Earth  
Howling for Wolves \* International Fund for Animal Welfare  
League of Conservation Voters \* National Parks Conservation Association  
National Wolfwatcher Coalition \* Native Plant Conservation Campaign  
Natural Resources Defense Council \* Oceana Oregon Wild \* Rocky Mountain Wild  
Sierra Club \* The Humane Society Legislative Fund \* The Humane Society of the United  
States \* The Wilderness Society \* Turtle Island Restoration Network \* WildEarth  
Guardians \* Wild Virginia \* World Wildlife Fund \* Wyoming Untrapped**

February 15, 2017

The Honorable John Barrasso  
Chairman  
Environment and Public Works Committee  
United States Senate  
Washington, DC 20510

The Honorable Tom Carper  
Ranking Member  
Environment and Public Works Committee  
United States Senate  
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

The Senate Environment and Public Works committee meets today for an oversight hearing to discuss the “modernization” of the Endangered Species Act (ESA). Given that the ESA has proven highly effective at both saving species from extinction and recovering those that have rebounded as a result of their protection under the law, we strongly believe this is nothing more than a thinly veiled attempt to weaken or perhaps gut one of America’s most popular and effective conservation laws. With this in mind, and for the multitude of reasons outlined below, the undersigned organizations write on behalf of our millions of members and activists to express strong opposition to legislating on the ESA.

To assert that the ESA is in need of “reform” or “modernization” is to overlook the fact that the law has a near-perfect record of success in protecting wildlife in danger of extinction. By U.S. Fish and Wildlife Service’s (FWS) own statistics, the ESA has saved more than 99 percent of listed species from going extinct. In addition, numerous species have been brought back from the brink of extinction and their recovery and delisting has been celebrated as they have moved from the ESA’s protection back to state-led stewardship. Given this incredible success, it should come as no surprise that the ESA is also extremely popular, earning the support of 90 percent of voters. The American public expects that our rich biological heritage will be preserved for future generations to enjoy and the ESA ensures that the nation meets that expectation.

Yet despite the ESA’s proven record of success and immense popularity, members of Congress have repeatedly tried to weaken or gut the law under the guise of reform. In the 114<sup>th</sup> Congress alone, we saw more than 130 individual legislative attacks on the ESA, both to remove protections for specific species and to undermine the law itself. These attacks are often made in the name of corporate

interests, placing short-term economic gain above long-term conservation efforts and demanding changes that would create significant barriers to species protection.

Moreover, industry opponents to the ESA frequently cite statistics that are wholly misrepresentative not only of the law's effectiveness, but of the science behind species recovery. Recovery within a relatively few years is simply inaccurate as a metric for success. Furthermore, species are often only listed under the ESA after decades of decline, and only once they have reached "emergency room status." The ESA saves species by preventing extinction and setting them on the long road to recovery. That is the measure of the law's profound success.

The ESA contains immense flexibility including incidental take permits for land use and other otherwise prohibited activities; cooperative agreements to encourage collaboration and to provide assistance to states for conservation projects; and candidate conservation agreements to avoid the need for a formal ESA listing. This flexibility has repeatedly served to reconcile the imperative to save species from extinction and industry concerns. Further, the framework of the law is flexible enough to make improvements administratively, as has been done numerous times over the years.

Recognizing the proven success, immense popularity, and flexibility provided under the law, there is simply no justifiable explanation for legislative changes to the Endangered Species Act. Thank you for your attention.

Sincerely,

Alaska Wilderness League  
 American Bird Conservancy  
 American Rivers  
 Born Free USA  
 Center for Biological Diversity  
 Clean Water Action  
 Conservation Northwest  
 Defenders of Wildlife  
 Earthjustice  
 Endangered Species Coalition  
 Environment America  
 Friends of the Earth  
 Howling for Wolves  
 International Fund for Animal Welfare  
 League of Conservation Voters  
 National Parks Conservation Association

National Wolfwatcher Coalition  
 Native Plant Conservation Campaign  
 Natural Resources Defense Council  
 Oceana  
 Oregon Wild  
 Rocky Mountain Wild  
 Sierra Club  
 The Humane Society Legislative Fund  
 The Humane Society of the United States  
 The Wilderness Society  
 Turtle Island Restoration Network  
 WildEarth Guardians  
 Wild Virginia  
 World Wildlife Fund  
 Wyoming Untrapped

Senator CARPER. With that, I say thank you all, and welcome.

Senator BARRASSO. As Senator Carper mentioned, there are some additional meetings that members may have to get to, and there are two roll call votes. Members may be coming and going throughout the testimony, but I want to thank all the witnesses for being here today.

As you know, your entire statement will be included in the record. We ask that you try to keep your statements to 5 minutes so that we may have time for questions.

I would like to start by first introducing the first guest, Hon. David Freudenthal, who served as the Democratic Governor of Wyoming from 2003–2011. Governor Freudenthal served as U.S. Attorney for Wyoming from 1994 to 2001 and before that as an attorney in private practice.

Governor Freudenthal has returned to his roots and currently serves as an attorney providing legal counsel on domestic and international environmental and natural resource issues.

In each of his positions, Governor Freudenthal has accumulated a wealth of experience with the Endangered Species Act. I hope that Governor Freudenthal will tell us about his extensive leadership in balancing stakeholder interests from across the political spectrum to effectively and efficiently address challenges posed by the grizzly bear, the wolf, the sage grouse and other species.

Governor Freudenthal, it is a distinct honor to welcome you here today as a witness before the Environment and Public Works Committee so that we might benefit from your years of experience and your insight on this important topic.

As a Democrat, your presence underscores the bipartisan opportunity that we have to modernize the Endangered Species Act.

Thank you for traveling to Washington today. We look forward to hearing your testimony.

Senator CARPER. Mr. Chairman, may I just add, how does a Democrat with a name like Freudenthal get elected Governor of Wyoming? I was hoping you would address that in your opening remarks.

Senator BARRASSO. We can start with his overall strength—his wife, Nancy; his talent; the upbringing he had in Thermopolis, Wyoming, where my wife is from as well.

Senator CARPER. I have heard a lot of good things about Thermopolis.

Senator BARRASSO. It is Hot Springs County down to the roots.

Senator CARPER. That explains it.

Senator BARRASSO. He is a beloved figure and many say the best Governor in the history of the State of Wyoming.

Senator CARPER. Are you going to sit there and take that?

**STATEMENT OF DAVID D. FREUDENTHAL,  
FORMER GOVERNOR, STATE OF WYOMING**

Mr. FREUDENTHAL. Mr. Chairman, Ranking Member, and members of the Committee, thanks for the opportunity to appear.

It really does offer a tempting rebuttal but in the interest of the economy of time, I will move on to the substance of the matter. However, he is correct that his best asset and mine are our spouses. As you know, politics is a team sport.

When I was younger, in law school I wrote a Law Review article extremely critical of the ESA. This would have been about the time of TVA v. Hill, one of the early acts, the snail darter.

Over time, I have significantly changed my view in that I think we need a statement about the preservation of species. I think it is important that we do it, but it is equally important that we do it in a way that functions properly.

You read the goals, and they are very noble, and the language is very noble, yet Congress gave an incredibly broad grant of authority which has been sort of used and abused over the period of time by different Administrations and by court decisions.

Now we have this mechanism that by and large has sand in the gears, I think, in terms of making it work. As much as a member of the executive branch, it offends me to have to ask for legislative action; I actually believe that we have to amend it in a way that protects the original goals but makes it so that it functions.

As you can tell from my testimony I have war stories as long as my arm, but I want to summarize the basic points I think need to be looked at.

First of all, I think the listing process has to be disciplined. One of the reasons that the system does not work is it is just too flooded. The gate for getting in is too low. We do not require enough information from somebody filing a petition to invoke the power of the Federal Government.

It not only affects the species, but it affects the rights of a lot of other people, both property rights and personal rights. That threshold for invoking the power of the Federal Government should be raised.

I do not mean that it should be raised that it becomes prohibitive, but it needs to be more than what occurs now. I give Mr. Ashe credit. They have offered some rules which were pretty strong, but by the time they were adopted by their own response and the comments it essentially said, this is the status quo.

They inserted some things that I think are valuable, one species per petition, but they lost a lot of the ground they had in terms of the nature of the requirements of a petition, in part because a lot of that is not defined in the statute and the case law has been fairly fluid.

They also abandoned what I thought were some of the best components of the original rewrite of the listing process which was to empower the States because even though all wisdom resides in DC, all knowledge resides in the field.

The local game and fish people not only know the biology and the species, but they know the ground. That gives them a different perspective. It is not perspective as anybody who has been Governor can tell you, game and fish agencies are not stooges for economic development. They are advocates for those interests; you appoint people to those agencies because they believe in that mission.

Yet somehow that gets discounted as it works its way through the system and the decisionmaking is centralized in DC.

I also think that this vagueness in the statute leads to what I call moving the goalpost. We went through it on wolves; we went through it on grizzly bears; and we went through it on the sage grouse. You think everything is done and is fine, and then here

comes somebody with a new theory, and Fish and Wildlife moves the goalpost.

As you can tell from my testimony, we have been at bears forever, and we have been at wolves forever. The sage grouse, I will tell you, while they ended up not listing it, by the time they were through integrating it into the Federal land plans we may have been better off with the listing because at least the rules were clear. You knew what you could do under section 7 and section 10 of the statute.

I am hopeful that it will work out, but there are days—both when I was Governor and since then in private practice—that you wonder whether or not at least with listing you had some kind of a framework.

I also think that you need to rethink warranted but precluded which has to do with this kind of I call it wildlife purgatory. You are either listed, or you are not, so you are just hanging out there.

What happens then, particularly for public land States because remember public land States are hit most severely by this because of the interaction of NEPA, ESA and all of the land planning because nearly everything involves Federal action which triggers the application of the statute.

What happens is that the Land Management Agency has essentially become a species management agency by virtue of—for the Forest Service it is called species of concern, and for BLM it is called the sensitive species. They, in effect, impose listing standards on the management of those species because there are candidate species.

The other thing is I have come to believe, particularly when I was Governor, we required mitigation for a couple of large, significant oil and gas developments where the spacing was such and some of that stuff was on 5-acre spacing. That clearly has an impact on the habitat.

The mistake we made, not that I made many mistakes when I was Governor, I made a lot, but one of them was that we allowed the resource to be dissipated into what I call postage stamp chunks. We did not think about the species life cycle to make sure it was preserved so mitigation became kind of watered down.

I have become a big believer that mitigation that is the preservation of the very best of the habitat and the very best of the species on a genetically diverse basis is really important. It will only occur if you guys amend this statute to place some kind of discipline in what it is going to be.

Our course I cannot leave as a former Governor without endorsing the work of the Western Governors' Association. Remember that is a group made up of both coastal States and inland States. It deserves serious consideration as you move forward on bipartisan basis, particularly on the funding aspect because there is no free lunch. ESA is as large an unfunded mandate as you have out there.

We learned that both as Governor and then again as a member of the blue ribbon panel which I reference in my testimony.

With that, I look forward to the dialogue and the questions.

[The prepared statement of Mr. Freudenthal follows:]

MODERNIZATION OF THE ENDANGERED SPECIES ACT  
TESTIMONY BEFORE THE SENATE COMMITTEE ON ENVIRONMENT &  
PUBLIC WORKS

Dave Freudenthal

February 15, 2017

Chairman Barrasso, Ranking Member Carper, Members of the Committee

Thank you for the opportunity to provide comments on the difficult task of modernizing the Endangered Species Act (ESA). I do not need to highlight the difficulty of the task you have undertaken. The ESA is as controversial as it is important. There have been several prior attempts to modernize the ESA. All have fallen victim to the inability of the various interests to reach common sense compromises in the interest of the public well-being. The ESA contributes much to America, but we now have 40 years of experience to guide thoughtful updates to the statutory framework.

My comments are more practical than academic. They are informed by decades of legal practice, nearly 8 years as United States Attorney under President Clinton, 8 years as Governor of Wyoming and ongoing private practice working with clients in Wyoming and other parts of the United States. Obviously, this time period has included both Republican and Democrat administrations in Washington,

D.C. I have found the people involved, even those with which I deeply disagreed, to be good and decent individuals.

My current practice is generally natural resource based clients including wind, oil and gas, coal and the largest Habitat Conservation Bank in the United States, a greater sage-grouse habitat bank encompassing more than 500,000 acres. I have been asked to discuss a few of my experiences in actually trying to work with, and sometimes around, the ESA. While I share “fly-over country’s” general unease with the federal government, protection of endangered or threatened species is an appropriate and necessary role for the federal government.

As a former member of the federal executive branch and Governor, I naturally favor executive branch action as opposed to legislative action. But in this case, legislative action is needed to affect mid-course corrections to focus the ESA on its original objectives and to improve its operation in our current circumstance. The original, groundbreaking legislation granted broad authority to the executive branch. Over time, the mix of regulations, court decisions, policy guidance and individual agency actions by Presidential administrations of differing but still well intentioned views have created a nearly unworkable system.

I would commend to the Committee the excellent work of the Western Governors Association. The wonderful Governor of Wyoming, Matt Mead, undertook a serious, bi-partisan effort to engage stakeholders and formulate a

series of thoughtful, experience based recommendations for improving the implementation of the ESA. The recommendations reflect a growing consensus about areas to be addressed within ESA modernization. I hope the Committee will take seriously the good work of Governor Mead and his colleagues. I would reference particularly the discussion of the regulatory insertion of the precautionary principle and the discussion of state/federal cooperation.

However, my comments are strictly my own and should not prejudice your view of the Western Governors Association efforts.

#### LISTING PROCESS

A higher content threshold should be established, in statute, for consideration of petitions to list. I am aware of the recent USFWS rule making, effective October 27, 2016 clarifying the petition process (50 CFR Part 424.14). Nothing in the clarifying rules suggests the examples I cite could not happen again. The final rule is more a codification of current practice than groundbreaking. The rule as first proposed was more ambitious and significantly enhanced the role of the states in the petition process. These provisions were largely abandoned in the Final Rule. Much has been made of the USFWS providing a definition of “substantial information”. A term, which is not, but should be, defined in the ESA. The Final Rule states:

“For purposes of this section, ‘substantial scientific or commercial information’ refers to credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition is warranted....” (42 CFR 424.14(h)(1)(i).

As the USFWS notes in the response to Comments, this simply represents the longstanding state of the law.

“These concepts are in no way new to the Services’ practice; this is how we have and must evaluate petitions.” Federal Register Vol. 81, No.187; page 66473. In general, the USFWS Response to Comments preceding final adoption makes clear that nothing has actually changed. (See: Federal Register Vol. 81, No. 187 September 27, 2016, pp. 66462-66484.)

Currently there is no *meaningful* screening of petitions and what is required only involves the best credible scientific and commercial data that is “available”. See 16 U.S.C. § 1533(b)(1)(a). A higher threshold of reliable data and species specific knowledge, including a mandate to deploy the most current advancements in genetic and other scientific thinking, does not seem too much to ask of someone seeking to invoke the power of the federal government. Especially when the logical results of the exercise of such federal power impacts the personal and property rights of so many other people.

By way of example, an individual found a single Narrow-foot Hygrotus diving beetle (*Hygrotus diversipes*) by a highway bridge in Wyoming in 1964. Little data was collected in the intervening 40 years, save several field collection efforts. Despite admonitions from scientists in Wyoming that more data should be collected before jumping to any conclusions about the beetle, a petition was filed to list the species under the ESA. The petition itself noted the lack of important data related to the beetle, but none-the-less called on the federal government to list the species based on “available science.”<sup>1</sup> USFWS continues to kick the proverbial can down the road to this day to buy time to collect more data to determine if the species should be listed – an effort that should have been undertaken by and required of the petitioner before engaging us all in a wild-beetle-chase. To date, Wyoming has spent almost \$110,000 in state funds, funds that could have been directed to on-the-ground habitat work to conserve mule deer, bighorn sheep and other wildlife, to complete the inadequate homework of the petitioner. Given the absence of a viable threshold, the burden of proof seems to

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<sup>1</sup> With regard to the beetle, an important historical footnote is that the species was targeted by activists for the express purpose of slowing oil and gas development in northeast Wyoming. The state received copies of correspondence between certain environmental groups wherein they discussed the need to find an obscure species in the area of known oil and gas development for the specific purpose of hobbling such development. Hugh Leech’s discovery and publication related to the Narrow-foot Hygrotus diving beetle in 1964 remains that obscure species today.

immediately shift to those who could be impacted by the potential listing, especially considering the tremendous, negative economic implications of a listing.

A second, but certainly related factor at play in this context is the “precautionary principle,” which encourages movement towards listing based on the absence of data. Again, the person or business impacted by a potential listing bears the burden of proving a negative—that is proving the species should not be listed. A higher threshold would also prevent USFWS and other from spending time on ill conceived petitions. In Wyoming, there was an attempt to list a snail, named the Black Hills mountain snail *by the petitioners* (proposed *Oreohelix cooperi*) based on the shape of the male snail’s reproductive organs. I use the terms “named by the petitioners” and “proposed” because, prior to the filing of the petition, neither “Black Hills Mountain snail” nor “*Oreohelix cooperi*” were used to describe a distinct species of snail. The “cooperi” was previously considered to be a subspecies of another type of snail. It was only through the petition that this “new” species was announced to the world. There was no peer reviewed literature or other scientific study presented to support such an assertion of a new species, other than the musings of the environmentalist petitioners *in the petition*. Functionally, the species was created out of whole cloth by the petitioners. Ultimately, we were forced to spend over \$60,000 on genetics studies to sort out the petitioners’ knotted science – a task that should have been required of them

before the petition was accepted by USFWS. Again, the burden of proof fell to those potentially impacted by a listing instead of being required, in the first instance, of the petitioner.

The availability and accessibility of incredible scientific tools has changed drastically since the ESA was drafted. Genetic study is readily available, unlike in the dark ages of 1973. Perhaps the day has come to require that petitioners do more than simply recount what is “available” and impose an expectation that they meet a modern standard of science in their listing requests, especially when they are “doing science on the fly” as was the case with the Black Hills snail.

Beyond the petitioning process, recovery efforts would be enhanced by requiring a listing decision to include the specific conditions necessary to achieve a de-listing. The listing process is intended to encourage public and private actions to preserve and recover a particular species or subspecies. However, the current process does not establish the necessary conditions to meet these objectives. Public and private actions to preserve or recover the species would be more focused and effective if the statutes required the listing notice, which is a formal rulemaking under the Administrative Procedure Act, to also include the conditions necessary to achieve a delisting.<sup>2</sup> Public and private actions are more likely to be

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<sup>2</sup> By extension, then, any changes to the recovery criteria would have to be accompanied by full, notice and comment rulemaking.

forthcoming if specific objectives are identified at the outset. If the agency possesses sufficient knowledge of the threats to a species to list, it should also possess sufficient knowledge to define the requirements to delist at the same time.

You will hear from numerous people about the problems created by the 90 day and one-year timeframes for review and decision-making. Those problems are real and need to be resolved. As noted, significant part of the solution should be the imposition of a higher content threshold for consideration of a petition. In effect, this is a form of triage for the multitude of petitions received by the agency. Defacto triage occurs within the agency by the simple decision of what to focus on each day. A higher content threshold would help ensure effective triage given limited resources.

The flip-side of the listing process is de-listing. De-listing has not been a priority for USFWS. For instance, there appears to be substantial agreement, including from USFWS, that the Utes' Ladies Tresses (a plant) should be de-listed but such action is not a priority for the agency. Manpower is usually cited as the reason for delay but the process could be simplified by specifying, at the time of listing, the requirements to delist and adhering to them absent a rulemaking or new petition that presents information to suggest that delisting is not warranted.

#### SECTION 6 "COOPERATION WITH THE STATES"

Section 6 is, perhaps, the most under-utilized provision of the ESA. Within the ESA, there is much discussion about Cooperative Federalism and State/Federal Partnership. In reality, the states are at best limited partners and at worst viewed as adversaries. States expend resources but lack decision-making authority. There is a healthy, and intended, tension built into our federal system. States and the federal agencies often possess different views about issues, and even how to achieve shared goals. But, USFWS understands the ultimate authority rests with them and, absent statutory direction from Congress, shared information and decision-making remains the exception and not the rule. A few examples illustrate the issue.

#### GRIZZLY BEARS

Grizzly bear management remains controversial to this day. Grizzly bears are magnificent animals and a species truly worthy of preservation. The current controversy started in 1973 with, the then controversial, closing of open pit garbage dumps in Yellowstone National Park. The Interagency Grizzly Bear Study Team was created the same year. Wyoming suspended grizzly bear hunting in 1974 and the bear was listed as threatened in 1975. In 1982, USFWS published the Grizzly Bear Recovery Plan. It was revised in 1991, 2007, and 2011. Each time the geographic area encompassed by various requirements was expanded and the population numbers and management prescriptions were expanded. These

requirements, as a practical matter, applied to both private and governmental activities. At the same time, the number of grizzly/man encounters grew. The State of Wyoming was required to spend tax and hunter license fee dollars to support this federal activity. Wyoming's Game and Fish Department has spent more than \$43 million on Grizzly Bear management since 1980. Each time we neared de-listing, the goal posts for recovery were moved, the USFWS cited "...best available science and commercial data." This term is guided by some USFWS guidance, but remains largely subject to USFWS interpretation, even when the state game and fish agencies actually have as much knowledge as their federal counterparts and more on the ground experience. Congressional guidance in this area would be appropriate.

Through litigation and administration changes, the grizzly bear management and delisting process became more contentious and difficult at each turn. Even when USFWS sought to delist in 2007, successful litigants stalled the process based on speculative threats, which may or may not be related to the original basis for listing and have since been discounted through peer reviewed science. And now, when state and federal biologists agree that a robust and genetically diverse population exists, de-listing has stalled again. The disagreement between Wyoming and the federal government revolves around a desire by USFWS to retain post de-listing control of grizzly management. This is contrary to the ESA,

which makes delisting the final federal decision subject to review five (5) years later. Post de-listing management is the responsibility of the States and not the federal government. Section 6 was crafted to foster cooperation. Our experience with the grizzly bear suggests we can do better to achieve this objective.

#### GRAY WOLF

Plans for the re-introduction of the Gray Wolf into the Greater Yellowstone Ecosystem began in the 1980's when Wyoming had a Democrat Governor and America had a Republican President. The plan was for the re-introduction of Gray Wolves into Yellowstone Park as a "non-essential, experimental population". The expectation was the wolf population would remain within and be managed within the area encompassed by Yellowstone National Park, Grand Teton National Park, John D. Rockefeller Memorial Parkway and the adjacent US Forest Service designated Wilderness Areas. Then in 1994, the USFWS decided to designate the entire State of Wyoming as part of the wolf recovery area for the "non-essential, experimental population". While I love my State, few would argue the entire state is suitable wolf habitat. Throughout the ensuing years, through USFWS policy changes and litigation the Gray Wolf population continued to grow and the area over which USFWS asserted management control also continued to expand. And the number of wolf/man encounters escalated. Wyoming's Game and Fish Department has spent more than \$9 million dollars of license fee and tax funds

since 1980 to support this federal priority. (And again, the USFWS mandates applied to government and private activities.) The pattern of “moving the goal posts” was again repeated by USFWS. The Gray Wolf remains listed today.

This pattern of “moving the goal posts” is both frustrating and nearly impossible to fold into the management of the resources and politics of a State. Each time, USFWS would rely upon the phrase “...the best available science and commercial data”. What is left out of the discussion, and why cooperation is not real, is that USFWS remains the sole custodian of the determination of what constitutes “...the best available science and commercial data”.

#### SAGE GROUSE

Wyoming, over the past several decades, confronted a series of listing petitions for the sage grouse. Wyoming is home to roughly 40% of the country’s sage grouse population. Rather than continue to react to events, we chose to develop a sage grouse management plan designed to preserve sufficient birds and habitat to avoid a listing. In 2007, with the able assistance of Steve Allred, then Interior Undersecretary, we convened a series of meetings with stakeholders. Steve attended some of the meetings, more importantly he empowered the local USFWS and BLM personnel to work closely with Wyoming and he kept Washington D.C. out of the mix.

Together, they developed, what became known as the “Wyoming Sage Grouse Core Area Strategy”. It was not designed to save every bird, every blade of grass or sagebrush stand. The design focused instead on preserving more than enough birds and habitat to avoid a listing. After much controversy, we adopted a plan and enforced it. It protected nearly 15 million acres of important habitat and most of the sage grouse population.

USFWS ultimately made a warranted but precluded finding for multiple sage grouse listing petitions relying substantially on the Wyoming effort to avoid a full listing.<sup>3</sup> The decision was tested in an Idaho federal court. The Judge reluctantly upheld the decision but made clear the issue would be revisited, unless the federal government acted to create appropriate sage grouse protections and adequate regulatory mechanisms on federal lands.

Amending BLM Resource Management Plans (RMPs) and similar US Forest Service planning documents was the logical approach to address the concerns raised by the Judge. Unfortunately, this is when discussions moved from the States and the federal field offices to Washington, D.C. From my perspective, four policy preferences or attitudes account for the ensuing struggle between the

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<sup>3</sup> A “warranted but precluded” finding by USFWS does not terminate federal protections. Such a finding automatically makes the species a “Sensitive Species” for BLM land management pursuant to BLM Manual 6840, section O.2A.

States and the Department of the Interior. While each of these may be viewed as appropriate policy objectives, they are not directly required by the ESA

First, the original Wyoming Core Area Strategy was morphed into an effort to save every bird, every blade of grass and generally preserve the “Sagebrush Ecosystem”. A requirement, which is not in the ESA.

Second, it became a vehicle to move the BLM land management further from its “multiple use, sustained yield” mission, implied in the Federal Land Policy and Management Act (FLPMA), and into a species management agency. A pattern began decades ago but accelerated in recent times. While the Supreme Court in *Kleppe v. New Mexico* recognized managing wildlife as part of BLM mission, it could hardly have contemplated that mission would supplant most of FLPMA.

Third, the RMP revisions for sage grouse became a vehicle to implement a vision of larger landscape scale planning. The RMP drafting efforts were continually overshadowed by USFWS in combination with the USGS announcing new science, adding ideas and ultimately designation of important habitat and withdrawal recommendations. Landscape scale planning makes sense as a scientific matter but such policy preferences should be developed and articulated broadly rather than slipped into RMP revisions specifically for sage-grouse.

Fourth, the command and control model that has supplanted “Cooperative

Federalism” encouraged a “one size fits all” preference for dealing with the States. While this is administratively attractive, it fails to account for the wide variations of topography, land ownership, bird numbers, habitat conditions, threats to birds and habitat and history among the States encompassed by the sage grouse range. The Wyoming strategy would not work in Montana or Nevada.

Committee members are no doubt thinking “that is all interesting, but what does it have to do with modernizing the ESA?” Please consider the following.

Amend the ESA to recognize that it is logical to consider state boundaries in the determination of “distinct population segments” or DPS (including revisions to the definition of “significant portion of the range” under the DPS policy) for purposes of listing and delisting. While not outwardly appearing to serve as biological considerations, the reality is that the presence or absence of thoughtful state management plans inherently affects the conservation status of a species or habitat. By accounting for changes in management philosophy “at the state line” through the listing status of the species, each state could manage species differently and be judged accordingly. Species do not recognize political boundaries, be they State or National Park boundaries as we learned with wolves and bears.

Recognition of State boundaries should be an option but not a mandate. This option would allow each state to craft its own response to ESA requirements or leave it to the federal agencies. In this manner, states would not be penalized by

the action or inaction of another state or be conscripted into an issue they do not choose to address. Further, it would allow USFWS to narrowly tailor a listing to those areas that should be listed – because of known threats or the presence or absence of a thoughtful management plan – and those that should remain outside the purview of the ESA.

As a real example, I would offer Wyoming's experience with the Preble's meadow jumping mouse. The Preble's range extends from Colorado to northern Wyoming. As you might surmise, a Preble's mouse living around or within urban Denver, Colorado, faces a much different set of circumstances and threats than a Preble's living near rural Wheatland, Wyoming. When it was listed under the ESA, the USFWS acknowledged as much. Unfortunately, listing is an "all or nothing" proposition – even though the mice in Wyoming are fat and happy irrespective of whether they are listed or not. In time, the USFWS was able to implement special rules, known as 4(d) rules under the ESA, to relieve Wyoming agricultural producers and others impacted by the listing from the oppressive take requirements of the ESA, but not before many farmers and landowners nearly lost their livelihoods. In my view, the Preble's should have never been listed, at least in Wyoming, because there were no or at least very limited threats to the species in my state. This said, because even the USFWS knew that its main interest was in controlling the threat of urban development for the protection of the mouse, the

4(d) rule should have been published *simultaneously* with the listing rule to spare Wyoming and its economy what USFWS and other admitted was needless pain.

Require USFWS to articulate the recovery or listing avoidance goals in a clear and concise manner. Once done, they could be modified only through public notice and rulemaking. This would give substance to Section 6 of the ESA, which encourages cooperation with the States. Under the current practice, USFWS will not provide concrete guidance, arguing that such guidance would be “predecisional”. Instead, they assert certain practices or actions are necessary but may not be sufficient to avoid a listing or achieve recovery. A conversation often accompanied by a wink and a nod. A perfect example is USFWS suggesting certain areas were important sage grouse habitat to be protected and essentially forcing a withdrawal proposal by BLM. At the same time USFWS was arguing it could not mandate such action. If USFWS wants to direct land management, they should own the decision.

I recognize that the insertion of policy preferences cannot and should not be legislated out of the system. However, it would be appropriate to require those preferences be measured against the specific objectives of the ESA as related to an individual species and not an entire landscape such as the Sagebrush Ecosystem.

Finally, I must add my voice to that of the Western Governors Association on the matter of funding. I recently had the honor of Co-Chairing with John L.

Morris, Founder and CEO of Bass Pro Shops, the “Blue Ribbon Panel on Sustaining America’s Diverse Fish and Wildlife Resources”. This is a non-partisan panel representing outdoor recreation, the retail and manufacturing sector, the energy industry, conservation and sportsman organizations along with state game and fish directors. The geographic reach of the members is nationwide.

One of the significant lesson learned is the unfunded mandate nature of the ESA. While very noble in intent, the ESA has matured into full blown, unfunded federal mandate. State recreation agencies and game and fish departments are stretched to the breaking point by the costs of managing fish, wildlife and recreation resources. One of the unintended consequences of passage of the ESA in 1973 was severely taxing these already stretched resources.

Our federal government simply “helicopters in” with ESA requirements. States are compelled to respond to listing petitions, species management directives, creation of adequate state regulatory mechanism, information requests, data and analysis disputes and meeting, after meeting, after meeting, etc.

USFWS actually has no choice but to pressure the states. USFWS lacks sufficient scientific, manpower and data resources to meet the federal mandate. I would add from experience, USFWS also lacks sufficient enforcement resources. I am not advocating a great expansion of the USFWS budget. States remain the front line in these efforts so resources should be directed to them. This can be

done as recommended by the Western Governors or as recommended by the Blue Ribbon panel or a device of your own creation. But, we must concede “there is no free lunch”. And the states lack the resources to feed the appetite of the ESA unfunded mandate.

#### MITIGATION

Mitigation, including compensatory mitigation, is an important tool for the preservation of a species. A rational mitigation policy is based on avoidance, minimization and compensation for that which cannot be practically avoided or minimized. In properly balancing the needs of the economy and our cherished environmental values, compensatory mitigation is an important asset. Practically unavoidable impacts have traditionally been measured against a “no net loss” policy. This approach is logical and legally supportable.

The recently announced USFWS mitigation policy and other, associated Department of the Interior guidance go too far. The rule adopted a “net conservation gain” policy. It is a distinct overreach. I have read the recent Interior Department Solicitor’s Opinion attempting to legitimize “net conservation gain”. Suffice to say, I found it unpersuasive. When it takes 31 pages of discussion containing no citation to specific statutory language dictating “net

conservation gain”, you know you are attempting pile up gravel and call it a marble monument.

If we are serious about species preservation, we should focus compensatory mitigation on preserving the best habitat on a scale capable of sustaining a genetically diverse population preferably over an extended timeframe. As a starting point, the compensatory mitigation timeframe needs to be at least equal to the timeframe over which the impacts extend. There are various existing and evolving models for the provision of compensatory mitigation. Some are government sponsored and some are purely private sector initiatives. The general categories are project proponent sponsored, in lieu fee programs, habitat exchanges and habitat banks. The clearest federal guidance exists for Habitat Banks. This is one of the few areas, in which I actually support federal legislation. I do not support the federal government being in the business of providing compensatory mitigation for projects. I do support codification of a set of standards and then allowing the private market to develop mechanisms that respond to those standards. Markets work but they work best when the marketplace signals are clear and consistent.

Mitigation is recognized in the ESA, but the issue is not specifically within the scope of my remarks but habitat and species preservation will not occur without disciplined compensatory mitigation. During my term as Governor,

Wyoming created a Wildlife and Natural Resources Trust Fund. We also had experience with so called "postage stamp" mitigation, which is the preservation of unconnected parcels which may or may not aid the life cycle of the species in question.

I would encourage the Committee to schedule time to receive testimony on the compensatory mitigation issue. As our population and economy grow, the number of unavoidable conflicts will escalate. Compensatory mitigation, properly applied with discipline and focused on the objectives of the ESA can be a powerful tool, particularly in encouraging private investment in critical habitat.

#### ESA ENFORCEMENT

During my time as U.S. Attorney and in my current practice, I have had experience on both sides of the table, in various parts of America, related to the enforcement of the ESA. Most of the experience is related to Department of Justice criminal investigations and prosecutions. The enforcement provisions of the ESA are adequate but you may want to consider inserting language encouraging the use of civil remedies prior to criminal enforcement. When a matter arises and is referred to the Department of Justice for criminal enforcement, there may or may not have been adequate investigation conducted to determine that it is a criminal matter. Once at Department of Justice criminal, there is a tendency to ignore civil disposition. This is due in part to the pre-disposition of

prosecutors and in part due to the public pressure surrounding ESA matters. The sense of proportionality can be lost. There is a large difference between intentional and incidental take, with or without a permit. There is also a substantial difference between the loss of one member of a species and a pattern of violation. While these judgments are properly left to the discretion of the prosecutor, you may want to require some higher threshold before matters are referred for federal prosecution.

#### ABANDON CANDIDATE DESIGNATION

While the logic behind the determination that a species might be “warranted” for listing but precluded by other priorities made sense when it was embedded into the ESA, I believe that our collective experience with these “candidate species” supports abandonment of the idea. First, there is no room for “purgatory” in wildlife management. In my view, a species should either be listed and subject to ESA protection or management should be left with the states. There is either sufficient urgency and concern that the hammer of the ESA is required or there is not. Today, the candidate designation is the regulatory equivalent of a “punt” and has been used far too often to make it meaningful. At some point, the candidate species list became so long that it lost its value in terms of helping order ESA priorities. Second, as a practical matter, there are simply not enough federal resources in the listing and delisting budgets to fully address *listed* species – no

less candidates. Third, the candidate “safety blanket” has become a favored litigation tool for environmental groups – leading to the mega-settlements of the Bush and Obama eras and further diminishment of sparse federal resources that could and should be used to recover truly threatened and endangered plants and animals. Finally, although it is a “punt” of sorts, it is not without effect in terms of federal land management determinations. After being named a candidate, a species enjoys significant protection – as if it were listed – when federal land management and other agencies take actions that might overlap its range. USFWS and NOAA should fully own the regulatory responsibility that attends a listing and not engage in a system that leaves us with “de facto listings” that only serve to hobble other federal and state agencies. This is especially true considering the massive number of candidates that have been “listed” and the reality that USFWS and NOAA do not have the resources to make a final “list” or “no list” decision for each of them. As a result, they languish on the list and serve as a burr under the saddle of both environmentalists and the regulated public.

#### SUE AND SETTLE

A lawyer mentor of mine told me that a “bad settlement is usually better than a good lawsuit.” This advice is valid only if you have standing in the settlement discussion and approval process. States, businesses and individuals often have vital interests at stake in litigation brought by environmental groups.

These vital interests are not part of the confidential settlement discussions or the agreement on terms. Even when afforded the post settlement opportunity to comment, it proves to be a futile exercise. The train has left the station.

This issue is difficult because we do not want to encourage continuation of litigation that should settle. However, it may be appropriate to compel disclosure of the existence and substance of ESA settlement discussion in significant cases impacting numerous non-parties. I would point to the settlement entered by USFWS agreeing to processing schedules for numerous listing petitions as a case in point.

#### ATTORNEY AND EXPERT WITNESS FEES

With some adjustments, I support the ESA provisions allowing judicial review of agency action. However, the unrestricted payment of attorney and expert witness fees merits review. We have created an entire industry of interest groups and law firms that rely on these provisions for income and salary. This is particularly true now that the practice of law is more of a business than a profession.

I would recommend the following steps for consideration.

1. Establish a benchmark for reasonable attorney and expert witness fees. A "one size fits all" benchmark would not work since attorneys generally charge more in Washington D.C. or New York than in

Denver or Santa Fe. However, it may be appropriate to benchmark their fees against the amount the federal government pays private lawyers who act as public defenders in federal criminal cases. I recall these are subject to regional adjustments.

2. The amount awarded to litigants, law firms and expert witnesses should be published in the Federal Register, whether awarded by a judge or part of a “sue and settle” agreement. Most especially in the latter case.

#### CONCLUSION

I would again encourage you to seriously consider the work of the Western Governors Association. In particular, the section related to State/Federal cooperation, the precautionary principle, “foreseeable future” and judicial review. I would also encourage you to take advantage of those who have been through the battles to amend the ESA in the past. My friend and former colleague, Steve Quarles, lives in DC and is a true expert with experience dating back to the Wild Horse and Burro Act and beyond.

Thank you.

Senate Environment and Public Works Committee  
Hearing entitled, "Oversight: Modernization of the Endangered Species Act"  
February 15, 2017  
Questions for the Record  
Governor David D. Freudenthal

Chairman Barrasso:

1. The U.S. Fish and Wildlife Service, the Wyoming Game & Fish Department, and other stakeholders have limited resources to fund species conservation and recovery programs.

According to then- Fish and Wildlife Director Ashe, in testimony before the House at the time, FWS was allocated \$20.9 million for endangered species listings and critical habitat designation in FY 2011; the agency spent more than 75% of that (or \$15.8 million) taking substantive actions required by court orders or settlement agreements resulting from the litigation.

In other words, sue and settle cases and other lawsuits have effectively driven the ESA regulatory agenda — and taken resources away from species conservation and recovery programs.

Do you agree that litigation regarding the ESA is a problem that needs to be addressed?

Please explain.

ESA litigation has become the driving force in ESA activity by the USFWS. Whether by design, coincidence or shared values, deadline litigation combined with settlements have created judicial mandates, which have been prioritized by the agency over other activities. The original objectives of the ESA have been hijacked by purpose driven litigation. Two legislative actions would help return the ESA to its original noble purposes.

First, remove ambiguity. Clearly define, by legislation, the ambiguous terms, which have led to expansive rulemaking and litigation. As passed, the original statute left many terms undefined. This was logical at the time as there was limited experience with this type of legislation. With 40 years of experience, it is time to codify our experience. My earlier testimony identified potential areas for modernization.

Second, remove the financial incentive from the litigation equation by restricting the amount of fees recoverable and/or requiring some judicial determination as to whether the agency position was unreasonable, prior to the award of fees. Administrative actions should be subject to judicial review. However, the generous litigation reward system around the ESA should be addressed. I originally suggested capping fees---a suggestion which has not

enjoyed broad support among the legal community. As an alternative, consider mandating the court undertake a determination as to whether the position taken by the agency was unreasonable or frivolous as a matter of policy or judgment before awarding fees. A court may conclude an agency position is ultimately not in accord with the law or supported by the record. But, this is a very different conclusion than a determination that the position originally asserted by the agency was frivolous or completely unreasonable.

**Ranking Member Carper:**

2. If you were in our shoes, what would you do to find consensus for proposed changes to the ESA?

I was honored by the opportunity to testify before the Committee. The nature of the questions from both sides reminded me what a difficult task you confront. The hints of leave everything "as is" and "throw it all away" were certainly in the air. Neither of these seem like springboards to constructive changes. Add to this the role of outside interest groups on all sides demanding 100% allegiance and using ESA Modernization as a rallying cry for fundraising, it will be difficult to achieve the goal of working together you and the Chairman articulated at the outset.

I would start from the "set up" question you asked the panel, which related to the rate of species extinction worldwide. I am still not a scientist and cannot speak to the study predictions you referenced, however all of the data shows an accelerating rate of extinction. Accepting this fact does not suggest the ESA should be left to operate as it does today, nor does it suggest it should be scrapped. It is important to recognize the ESA by itself cannot solve the accelerating rate of extinction; in fact, the ESA is a tool to deal with the symptoms rather than the causes of accelerated extinction rates. History demonstrates the resources available for ESA implementation will always be relatively limited. Even within these limitations, ESA can, if properly focused on the species of biologic importance and the known degree of risk factors to those species make a significant contribution. If we can start from the premise that the ESA is a tool to address symptoms of larger problems and not the answer to those problems nor a symbolic battleground between right and left, progress can be made on improving the mechanics of the ESA.

3. Please identify three (3) areas where there is the greatest opportunity to find consensus for changes in the ESA.

I offered a number of suggestions in the testimony but will highlight 4 thoughts.

1. **LISTING PROCESS:** USFWS attempted to address the listing process with a proposed rule on May 21, 2015 (80 FR 29286). The apparent intent was to make the process more sophisticated and efficient. The proposal was a relatively modest attempt to focus ESA implementation on petitions based on substantial and credible information. The proposal also enhanced the role of the States. If we want the listing process to work, the first step has to be to limit the petitions to those of importance, which are supported by credible and substantial scientific information. Since this proposal originated within the Obama administration, it seems like a good place to start. Many of the deadline issues, delay complaints and rushed decision-making could be addressed by better triage of the petitions as submitted.
2. **Section 6 "COOPERATION WITH STATES":** This entire section is permissive in terms of USFWS cooperation with the states. And USFWS, regardless of the party in power, has chosen to disregard these provisions. This language should be mandatory and not permissive.
3. **BEST AVAILABLE SCIENCE:** Most people agree agency decisions should be based on reliable, credible, impartial, scientifically sound information and data. Amending such language into the provisions related to "best scientific and commercial data available" and "best scientific data" would be a logical reflection of such agreement.
4. **De-Listing Criteria:** USFWS evaluates risk factors and species condition at the time of listing. It is not too much to ask that a decision to list also include a statement as to the conditions that must exist for de-listing. The agency will resist this suggestion because of the alleged added work. If the agency has sufficient knowledge to list, it should also possess sufficient information to define conditions necessary for delisting.

Senator Capito:

4. In recent years, I heard from many West Virginians concerned that the potential listing of the Northern Long-Eared Bat would prove a nearly insurmountable obstacle to development in our state. The bat was listed as "threatened" under the ESA in 2015. On April, 27, 2016, the Fish and Wildlife Service (FWS) found that a critical habitat determination was "not prudent" at this time, preventing my entire state from being burdened with significant constraints on agriculture, mining, construction, and infrastructure. While this was the right conclusion, the uncertainty surrounding the process served to chill investment in areas that could be designated as critical habitat.

I find the Northern Long-Eared Bat example to be instructive for this Committee as we seek to modernize and improve the ESA to prevent overreach at odds with science and economic interests.

- a. Governor Freudenthal, in your experience protecting critical habitats, what is the impact on economic development during and following the designation process?

We have limited experience with critical habitat designations. The more common approach by USFWS in public land states is to establish recovery zones, management areas or other designations of wide ranges of habitat. This works for USFWS because ESA attaches directly to federal land management agencies decisions from grazing to oil and gas to outfitters' camps. The habitat designations are usually accompanied by management prescriptions and proposed stipulations attached to federal permitting actions. These zone designations and critical habitat designations have an impact on economic development and resource utilization. The impact is generally negative unless the land purchaser is an "amenity buyer" seeking their own undisturbed piece of the West. Most of the information is anecdotal. I am not aware of a reliable study or data source that would be responsive to your question.

- b. Do you feel that the risk or uncertainty associated with the mere potential of a designation negatively impact investment and economic development?

Markets despise uncertainty and potential or threatened designation create uncertainty. The market will discount value and economic development potential in direct proportion to the perceived nature and extent of the designation.

5. In the case of the Northern Long-Eared Bat, the FWS estimates the species' range covers half of the territory of the continental United States (including all or part of 37 states and the District of Columbia) and one-third of Canada. Estimates are that the population has declined by 90 percent, the result of White-Nose Syndrome (WNS), which is caused by an invasive European fungus. However, those declines are not the result of habitat loss or economic development — indeed the incidence of WNS spikes among the bat populations when they hibernate in large groups in caves during the winter, not when they are foraging across forests during the summer.

- a. While the potential designation of the Northern Long-Eared Bat's vast range is a particularly egregious example, are there other examples of large areas having a final designation as critical habitat and what has been the impact on people living and working in those areas?

I am unable to answer this question.

- b. How can we better align our conservation efforts to address the actual causes of population declines — preventing and combatting WNS in the case of the Northern Long-Eared Bat — rather than succumbing to a knee-jerk inclination to ban economic activity over broad swathes of the country?

The problem you allude is very real in the West. In the case of sage grouse, much of their population cycle is tied to predation, West Nile/Bird Flu and the simple availability of food and the weather during nesting and brood rearing. While all of these are recognized risks, none of them need a permit from the federal government. So, as you suggest; the burden falls upon those seeking to undertake economic activity because it is easier to regulate than finding federal or state dollars to fund disease research or selected habitat preservation or restoration. The Blue Ribbon Task Force has recommended expanded federal assistance to State Game and Fish Agencies to address at risk and potentially listed species as determined by the State. The funding would be by formula and hopefully without USFWS interferences.

- c. Does the FWS have the authority to tailor its responses to the particular threats facing particular species, or is the agency largely stuck with the blunt instrument of critical habitat designation?

USFWS has a variety of options available but could be more creative, particularly if we forced greater use of 4(d) and allowed distinct population segments to be defined, in part, by political boundaries.

- d. How can this Committee improve the statute to prevent designations of large areas as critical habitat if that is not appropriate for the relevant conservation challenges?

Prior to the Obama administration, the rules relating to critical habitat designation required the “critical habitat” to be occupied by the species in questions. Limited exceptions existed but this was generally the rule. The Obama USFWS expanded the idea of critical habitat to include unoccupied areas that might be potentially occupied at some point in the future. Congress should codify the pre-Obama administration rule.

It would also be appropriate to strengthen the language in 16 USC 1533 to require that areas in which the cost benefit analysis indicates non-designation conclusion, not be included in the designation.

- e. What are the states' roles in informing the designation of critical habitats and what are their roles in enforcing compliance?

Section 6 on cooperation with the States has largely been ignored since the Act was passed. USFWS consults with the states but the degree of consultation is within the discretion of USFWS. The States have no real say in these matters. In the public land states, as discussed before, enforcement really occurs through the federal permitting process within the land management agency.

6. Governor Freudenthal, I am intrigued by some of the proposals raised in your written testimony to modernize the listing petition process, particularly:
- a. requiring petitioners to complete the relevant scientific surveys themselves, rather than outsourcing data gathering to state and local stakeholders;
  - b. requiring petitioners to identify what "success" for the requested conservation effort looks like; and
  - c. directing the FWS to approve delisting criteria when a species is added to the list to prevent an indefinite listing that may no longer be warranted.

I have again discussed these in response to questions. I remain convinced adjustments along these lines are in the best interests of the important species and the economy.

7. Governor Freudenthal, what are the costs to states of conducting scientific surveys when the FWS outsources data collection on species to your agencies prior to a listing?
- a. What is the cost-share of this activity between the states and the federal government?
    - i. Do the petitioners bare any of those costs? Should they?
    - ii. Are there costs associated with unfunded mandates imposed on private sector stakeholders?

There is no specific cost contribution by USFWS. State game and fish agencies receive some federal funding for other purposes but I am not aware of any ESA earmark. As my testimony demonstrates, the amount spent by the state can vary from thousands to millions, as is the case with bears and wolves. Petitioners bear none of these costs. Petitioners should at least be required to provide the best scientific data at their cost, to trigger the listing process. Private sector stakeholders bear their own costs.

- b. Do these outlays interfere with the states' efforts to conduct more material conservation initiatives?

Absolutely. State game and fish agencies, as well as state recreation agencies, have limited budgets to accomplish their in-state mission. Dollars spent dealing with ESA are not available for the agencies' state mission.

- c. Can you give examples where the FWS has failed to delist species, even well after population or habitat preservation targets — backed by science — have been met?

Gray wolves, Grizzly Bears and Utes's Ladies Tresses

- d. Does the FWS have the authority to incorporate "delisting" criteria at the time a species is listed, or are statutory changes necessary to permit this?

They absolutely have authority to incorporate "delisting" criteria. However, the only way they will actually undertake this activity is if the statute is amended to mandate it.

8. There are examples of court cases compelling the FWS to make critical habit designations or list species as threatened or endangered. Many more do not lead to a designation, but these frivolous lawsuits tie up FWS resources and personnel, at the taxpayers' expense.

- a. How can we disincentivize frivolous, sue-and-settle lawsuits against the FWS in this arena?

Addressed in previous questions.

- b. What share of legal challenges related to the ESA go against the federal government for its role in administration as opposed to the states for their share of implementation?

- i. Does the federal government assist the states in any way in addressing legal challenges to their implementation of ESA requirements?

States are not challenged under the ESA as it is a federal responsibility. Most of the State involved ESA litigation involves States suing USFWS over a decision they have made. To the extent states intervene in support of USFWS decisions, the federal government provides no assistance to the states.

Senator Wicker:

9. I am sympathetic to the western states like yours that have struggled with the highest profile species problems. But now, the listing work plan has identified many species in every state that are going through the process and litigation. It seems we have two options for dealing with this. One is to try to begin efforts to diagnose and respond to suspected problems with the species identified. The other is to lawyer up and fight against agenda-driven abuse of the Endangered Species Act. What are the most important pros and cons to choosing which way to

The reality is we have and will continue to pursue both approaches. To the extent States can afford to support research and data collection to rationalize the listing process, that is always the preferred course. If a listing can be dealt with at the petition process level that is better than litigation. Unfortunately, there will continue to be litigation costs for the States and for the private sector. The "cautionary principle" (as discussed by the Western Governors Association) combined with a less than precise statute has led to a regulatory and agency bias in favor of listing. Even when they do a "warranted but precluded" determination, the problem remains. Such a finding is like the Sword of Damocles over a state or region.

The best answer is for Congress to amend the ESA to make it work better for all of the parties involved. Everyone has suggested changes but there is so little trust around these issues, nothing happens.

Senator BARRASSO. Thank you very much, Governor Freudenthal.  
 Senator CARPER. I want to again thank you very much for what you said, Governor.

You mentioned Richard Nixon. You also mentioned as Governor, you did not make many mistakes. We know that is not true. We have another recovering Governor over here who knows that.

Not many Democrats quote Richard Nixon. I do. One of the things that Richard Nixon said is the only people who do not make mistakes are the people who do not do anything. As we take up his work we want to be careful that we do not make any significant mistakes. Maybe some tiny ones would be OK, but we want to make sure that we are temperate in that.

There are no Democrats here. That is very unusual, especially on an issue like this which is especially important to all of us. We are going to be in and out of our other meetings as quickly as we can, so do not take our absence as we are not interested.

You will get questions for the record, a number of those, and I will just telegraph a picture if I can.

One of the things I always look for in a diverse panel like this where we have a contentious issue is to try to develop within the panel consensus. What can we agree on? To the extent we can keep that in mind in the context of your testimony, questions and answers to questions and certainly to questions for the record, I would really appreciate it.

Thank you all so much. I apologize.

Senator BARRASSO. Thank you, Senator Carper.

Our next witness is Gordon S. Myers, Executive Director, North Carolina Wildlife Resources Commission and President of the Southeastern Association of Fish and Wildlife Agencies.

Thank you so much, Mr. Myers, for joining us. We look forward to hearing your testimony.

**STATEMENT OF GORDON S. MYERS, EXECUTIVE DIRECTOR,  
 NORTH CAROLINA WILDLIFE RESOURCES COMMISSION;  
 PRESIDENT, THE SOUTHEASTERN ASSOCIATION OF FISH  
 AND WILDLIFE AGENCIES**

Mr. MYERS. Thank you very much for the opportunity to be here.

Good morning, Chairman Barrasso, Ranking Member Carper, and Committee members.

I am Gordon Myers, Executive Director of the North Carolina Wildlife Resources Commission. Thank you for this opportunity to testify on modernizing the ESA on behalf of my fellow State Fish and Wildlife directors.

The States appreciate the value of the ESA as a landmark Federal law to protect and recover imperiled species. After nearly half a century of implementation, we have learned much about the conservation of listed species, their recovery needs, and how to facilitate and not proscribe private landowner involvement.

The ESA gives explicit direction on how Congress expected the Federal-State jurisdictional relationship to work. Section 6 states, "In carrying out the program, the Secretary shall cooperate to the maximum extent practicable with the States." Unfortunately, the section 6 authorities available to the States have never been fully realized.

Attached to my written statement is the Association of Fish and Wildlife Agencies' general principles for improving implementation of the ESA. AFWA continues to actively participate in the Western Governors Species Conservation and ESA Initiative led by Governor Matt Meade of Wyoming.

As a general observation, the States believe that addressing life needs and habitat requirements of declining species before triggering ESA protection is the most prudent, economical, and biologically sound approach to managing species tending toward listing.

We are working with Congress to identify permanent and dedicated funding sources to build much needed capacity for the species of greatest conservation need. Today I will share six recommended improvements to the ESA and briefly highlight examples that demonstrate State-led conservation delivery.

First is to increase opportunities for Fish and Wildlife agencies to take a more formal and active role to fully participate in all aspects of ESA implementation as intended by Congress.

Second is to restore the distinction between threatened and endangered species to reflect original congressional direction, thereby providing greater flexibility to manage these categories differently.

Third is to improve the listing process, making sure to consider a more realistic timeframe for listing decisions, how to best utilize available science, give weight to State data and its interpretation by the States, and to prove the quality of petitions that are submitted.

Fourth is to require recovery teams to develop science-based recovery plans for listed species and further require that after recovery plan population or habitat objectives are reached, the Secretary must initiate delisting process.

Fifth is to relocate critical habitat designations to the recovery plan development process and give the Secretary more discretion to designate or not designate critical habitat.

Finally, sixth is to expedite the process for down or delisting of recovered species.

Throughout the Nation, States are leading or supporting many innovative efforts to keep common species common, prevent declines of at risk species, and recovery of threatened and endangered species.

I will share two examples. The first focuses on the Tar River spiny mussel, a federally endangered mussel restricted to the Tar and Neuse River Basins in North Carolina. Between 2014 and 2016 the State, along with our partners, augmented existing populations by introducing more than 9,500 Tar River spiny mussels propagated at one of our State conservation aquaculture facilities.

Follow up surveys indicate high survival and growth rates as well as suggest propagation and stocking into best available habitat—including unoccupied habitat—have tremendous potential to assist in species recovery.

However, potential ESA regulatory impacts associated with introductions form a barrier to gaining support.

Let me also share an example of how the States are coordinating and focusing resources on at risk species. Following the 2010 megapetition filing that covered 404 aquatic species across the South-

east, the States developed the Southeast At-Risk Species Program in partnership with the Fish and Wildlife Service Southeast Region Office.

This broad partnership among the States, the Fish and Wildlife Service, universities, corporate and private partners focuses surveys, monitoring, and research on priority at-risk species. It integrates and documents voluntary conservation actions all the while working across jurisdictional boundaries throughout the Southeast.

To date the outcomes have been extraordinary. Four species have been listed as threatened rather than endangered, eight species have been down-listed to threatened, and 93 species have been precluded from listing.

These range-wide conservation partnerships are capable of remarkable conservation outcomes. After all, many hands make light work.

Much has changed since the ESA was enacted 44 years ago. We cannot do the same thing over and over and expect different results. To realize the greatest potential of our partnerships, it is time to make substantial investments in capacity while also modernizing the ESA to fully engage our States and private partners to conserve and recover at-risk and listed species.

Thank you once again for this opportunity this morning.  
[The prepared statement of Mr. Myers follows:]

TESTIMONY OF GORDON MYERS  
EXECUTIVE DIRECTOR  
NORTH CAROLINA WILDLIFE RESOURCES COMMISSION  
PRESIDENT  
SOUTHEAST ASSOCIATION OF FISH AND WILDLIFE AGENCIES

BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
*“Oversight: Modernization of the Endangered Species Act.”*

FEBRUARY 15, 2017

Good morning Chairman Barrasso and Senator Carper, and members of the Committee. My name is Gordon Myers, and I am the Executive Director of the North Carolina Wildlife Resources Commission (Commission). I am also President of the Southeastern Association of Fish and Wildlife Agencies (SEAFWA), and I sit on the Executive Committee of the Association of Fish and Wildlife Agencies (AFWA), of which all 50 states are members. In those capacities, I also represent the views and positions of SEAFWA and AFWA today, and I very much appreciate the opportunity to testify today on modernizing the Endangered Species Act (ESA).

The state fish and wildlife agencies (states) appreciate the value of the ESA as a landmark federal law to protect and recover the imperiled species listed under the Act. The ESA was last amended and authorized in 1988. Since then, Congressional authorization has been realized through the annual appropriations bills for the respective agencies. Enacted in 1973, over the almost 44 years of implementation, we have learned much about the conservation of listed species, their recovery needs, and how to facilitate, not proscribe, private landowner involvement. It is time to apply that knowledge to improving the ESA to better achieve the conservation and recovery of listed species and to better enable, not direct, the participation of private landowners. I will share today our recommended improvements to the ESA, and some state success stories.

Let me quickly describe the jurisdictional authorities for fish and wildlife in the state-federal relationship. States have broad police powers and authority for the conservation and management of fish and wildlife within their borders, including on most federal land. Congress has repeatedly confirmed that authority. Fish and wildlife conservation was one of “The powers not delegated to the United States by the Constitution, . . . [and thus] are reserved to the States respectively, or to the people”. Only Congress can give a federal agency authority to preempt the states’ authority for management of fish and wildlife, and then only for certain federal actions. The ESA is one example, but in doing this, Congress explicitly affirmed that the federal authority they gave the federal agency exists concurrent with the pre-existing authority of the state agency (defined in the ESA as the state fish and wildlife agency).

Section 6 of the ESA gives the Secretary explicit direction on how Congress expected the federal-state jurisdictional relationship to work. It starts with Sec. 6.(a) GENERAL—“ In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States”. Section 6 goes on to describe agreements that the Secretary may enter into to allow a qualified state to implement the ESA. These cooperative agreements contemplated that the Secretary upon the state’s demonstration of the appropriate authority and adequate program design would authorize an approved state to lead ESA activities, directing research and management of

listed species, not just apply the Secretary's program for each species. The legislative history of the ESA demonstrates that Congress intended that states with qualified endangered species programs lead in the conservation and recovery of threatened species (see Sen. John Tunney's 1973 floor remarks in consideration of S.1983).

Congress also authorized the Secretary to grant funds to the qualified states for implementing the ESA, but no funds were ever granted to the States under Section 6 to fulfill Congress' intent that States lead in the conservation of threatened species. Unfortunately, this has created missed conservation opportunities to restore species by state experts who are closest to the species, understand the recovery needs, and have the community relationships necessary to achieve recovery.

Unfortunately, the Section 6 authorities available to the states have never been fully realized by the states, and Section 6 became only a funding mechanism to direct limited appropriated funds to the states. Admittedly in the first dozen or so years of the ESA, only a few states had the capacity and political support to realize the authorities under Section 6. Hence, the Secretary through the U.S. Fish and Wildlife Service (FWS) exercised through rule and policy, a very significant portion of the ESA authority. There are a few exceptions where a state and the FWS have a Section 6 Cooperative Agreement that creates a more sophisticated state-federal partnership for implementing the ESA. Since the mid-1980s, in general the states have enhanced their staff, expertise, habitat management techniques, science capability for listed species, relationships with private landowners and local communities, and political support that would enable them to more fully exercise their authorities and roles in implementing the ESA as Congress originally envisioned and if it was modernized to meet today's species restoration needs. Some state budgets are challenged to provide the dedicated and permanent fiscal resources consistent with their desires and abilities to launch into implementation of an enhanced ESA.

We support the ESA but believe that it should be modernized to meet today's restoration challenges. As state agencies and managers of fish and wildlife resources held in trust for the public and for the benefit of future generations, we would like to see more constructive and collaborative efforts from interested stakeholders that more directly advance the conservation and recovery of species of interest. We all have an interest in recovering species listed under the ESA and together could do more if concerns and stakeholder interests were directly focused on habitat conservation and recovering listed species rather than redirecting limited federal and state fiscal resources away from on the ground conservation activities.

As an observation, the states believe that addressing the life needs and habitat requirements of declining species before they reach the point where ESA application is required, is the more prudent, economic and biologically sound approach to managing species tending toward listing. Through State Wildlife Action Plans, the states have comprehensively identified species of greatest conservation need and outlined the key actions needed to conserve them. Further, we have funding source recommendations from a Blue Ribbon Panel on Sustaining America's Diverse Fish and Wildlife Resources co-chaired by Governor Freudenthal and Bass Pro Shops founder and CEO John L. Morris, and are working with Congress to identify a permanent and dedicated funding source. We would be happy to discuss this further.

I include as an attachment, the AFWA General Principles for Improving Implementation of the Endangered Species Act, approved on March 18, 2016 by all State fish and wildlife agency

Directors assembled in their Business Meeting in Pittsburgh, PA. AFWA continues to actively participate in Western Governors' Species Conservation and Endangered Species Act Initiative led by Governor Matt Mead (WY) and continues to coordinate with those staffs. The two sets of modernization ideas are congruent, and AFWA in cooperation with the Governors is utilizing both sets of ideas as we contemplate future ways to improve implementation of the Act and more quickly recover species listed under the ESA.

Let me now describe the ESA priority improvements of the AFWA. First, increase opportunities for state fish and wildlife agencies to take a more formal and active role and fully participate in all aspects of ESA implementation as intended by Congress, through the authority of Section 6 Cooperative Agreements. States have broad expertise, experience and often comprehensive data sets and analyses on listed species because before they were listed, the species were under state management jurisdiction. These data and the states' interpretations should be more readily utilized by our federal partners throughout ESA processes. States should be afforded the opportunity to participate in all implementation aspects of the ESA from listing decisions, to recovery plan development and conservation recovery efforts on the ground, to providing guidance to private landowners in the use of federal incentive programs that provide them more certainty, to decisions regarding down-listing and delisting of recovered species.

Second, restore the distinction between threatened and endangered species to reflect Congressional direction, providing greater flexibility to manage these categories differently. Congress intended that the states have the opportunity to lead the management of threatened species, including the provision of "take" as a means of conservation of the species. Unfortunately, the FWS (but not NOAA) promulgated a default rule (50 CFR 17.31) in the mid-1980s that applies all Section 9 restrictions for endangered species also to threatened species unless the Secretary determines otherwise. This essentially eliminated the distinction between the two listing categories because by statute, endangered species Section 9 provisions could only be applied to threatened species if the Secretary explicitly declared it.

Third, improve the listing process. This involves a consideration of adjusting the listing process decisions to a more realistic time frame in order to appropriately utilize the best available science and improving the quality of petitions submitted that should also reflect the best available science. We support a provision authorizing a prioritization process for species considered for listing in order to focus resources and energy on the species most in need of immediate recovery efforts, with a clear path for other petitioned species. The process needs to insure that all state species data are utilized and considered, giving great weight to the state data and its interpretation by the state agencies in decision-making. In some cases, this may preclude the need to list a species under the ESA because of the quantity and quality of state data. However, states' data must be shared between state and federal partners in a way that upholds State privacy laws and respects private property rights.

Fourth, require recovery teams to develop science based recovery plans for listed species, providing opportunities for the states to lead recovery planning and implementation. Recovery can be expedited by supporting and continuing state level initiatives and partnerships to recover listed species. Further, require that once an approved recovery plan's population and/or habitat objectives are reached, the Secretary must initiate the delisting process.

Fifth, relocate critical habitat designation to recovery plan development, and give the Secretary more discretion to designate or not designate critical habitat based comprehensively on continued implementation of state conservation plans or initiatives, state lessons-learned, economic implications for communities, funding availability, and other aspects that directly impact the recovery of a species. The scope of critical habitat should be better defined and clear guidance given to when designations are needed or required.

Finally, create more specificity and flexibility in the delisting process to alleviate lengthy and unnecessary burdens on local communities by allowing both the listing and delisting of a species by a Distinct Population Segment (DPS) of a species, and other improvements. Unfortunately, there are less statutory details provided for the delisting process, and we deduce that Congress assumed that delisting, which is the objective of the ESA, would quickly follow the recovery of a species because protections of the ESA were no longer required. Unfortunately, that has not been the case and delisting can take decades and require overcoming many obstacles even after species' recovery goals are met. Further, once a species is delisted, it should return to state jurisdiction for sustainable conservation as designed by the state, with a report to the Secretary after 5 years.

North America's conservation model and its delivery system is the foremost model around the globe. The fundamental tenets of this model along with the collective efforts of partners have resoundingly contributed to its effectiveness, and contributions of state fish and wildlife agencies are foundational. Collectively, state fish and wildlife agencies provide more than 50,000 full and part-time employees, including more than 11,000 biologists and 8,400 certified law enforcement officers to manage, conserve, and protect the public's wildlife resources and their habitats.

Across the Southeast and throughout nation, the states are leading and supporting many innovative and collaborative efforts to keep common species common, prevent declines of imperiled species, and recover threatened and endangered species. There are many groundbreaking state-led conservation partnerships across the region that have yielded significant conservation outcomes, including the historic delisting of the Louisiana black bear, range-wide collaborative conservation of the Gopher Tortoise, and innovative Red-cockaded woodpecker recovery efforts within the eastern North Carolina Sentinel Landscape. I will briefly share a few other examples that demonstrate state capacity to focus, coordinate, and integrate resources to deliver effective conservation.

The first example focuses on a state-led recovery partnership for the Spotfin Chub (*Erimonax monachus*), a federally threatened minnow found in western North Carolina, east Tennessee, western Virginia, and north Alabama. The Spotfin Chub recovery plan calls for reestablishment of the species into suitable habitat within its historic range. A section of the Cheoah River in western North Carolina was determined a suitable reintroduction location following river restoration pursuant to Santeeelah Reservoir FERC relicensing. In 2008, the Commission partnered with the FWS, Conservation Fisheries, Inc., the U.S. Forest Service, Alcoa Power Generation, Inc. and others to collect broodstock, propagate the species, and ultimately reintroduce it into the Cheoah River. Staff from the Commission collected broodstock that were taken to Conservation Fisheries for propagation. The resulting fry were then taken to a state-owned hatchery operated by the Commission for grow out. The propagated fish were released into the Cheoah River when they reached one year of age. Between 2008 and 2016, over 5000 Spotfin Chub were propagated and released or translocated to the Cheoah River. Follow up surveys indicate that the Spotfin Chub restoration in the Cheoah River has been a success. The Cheoah River Spotfin Chub reintroduction

location was differentiated from other potential sites because it was highly unlikely to result in additional regulatory burden. The reintroduction area is relatively remote and already designated as critical habitat for Appalachian Elktoe, a federally endangered mussel. The Commission has identified several other suitable reintroduction areas and should the species be similarly reestablished, the species would likely be considered recovered and could be de-listed. Unfortunately, regulatory impacts that accompany the presence of a federally listed species have proven to be a significant barrier to implementing additional recovery efforts. It is ironic that the regulatory provisions meant to protect the Spotfin Chub and other federally listed species is inhibiting the recovery of these species. The Commission is currently propagating four other federally-listed species and others petitioned for listing. If a means of reintroducing these species into historic habitat without the threat of increased regulatory burden could be formulated, effective conservation actions could be implemented which could lead to the protection and potential recovery of these species.

The second example focuses on the Tar River Spinemussel (*Elliptio steinstansana*), a federally-endangered mussel species restricted to the Tar and Neuse river basins in central and eastern North Carolina. In 2007, the Commission worked in partnership with the FWS and North Carolina State University to collect broodstock, propagate, and ultimately augment remaining populations of these federally endangered mussels. Between December 2014 and September 2016, the Commission and partners released over 9,500 propagated Tar River Spinemussels at four locations in Fishing and Little Fishing creeks in the Tar River basin. To measure program success, 1,310 mussels were individually tagged, measured, and released into an experimental reach of Little Fishing Creek in 2014 and 2015. Follow up surveys indicated high survival and good growth of the stocked mussels. Preliminary results suggest that propagation and stocking of Tar River Spinemussels into the best available habitat has the potential to bolster dwindling populations and assist in the recovery of this species. An important follow up step in this state-led effort is to determine mechanisms to stock propagated mussels into currently unoccupied suitable habitat without introducing regulatory constraints associated with the presence of a federally listed species.

The last example focuses on a pioneering approach to unify human, financial, data, and other resources across the Southeast. Following the 2010 filing of the so called “mega-petition” by the Center for Biological Diversity and others that covered 404 aquatic species in the southeast, state fish and wildlife agencies comprising the SEAFWA developed the Southeast At-Risk Species (SEARS) program in partnership with the FWS Southeast Region Office. The purpose of this program is to cooperate and coordinate among the states to address the conservation needs of at-risk species. A first task was to develop a work plan to guide the activities of the states. The plan includes the following five elements:

1. Develop and implement an information sharing network.
2. Establish a criteria framework for species prioritization.
3. Develop a regional research and survey process
4. Conduct regional conservation activities
5. Speak with one unified voice

Implementation of this plan has resulted in numerous beneficial actions to date. The states categorized species into bins related to conservation and information needs associated with each species. This categorization approach later became the foundation of the system adopted by the FWS for their national work plan.

The outcomes of this approach have been remarkable. This focused, coordinated, and integrated allocation of human, financial, and other resources across the Southeast has already accomplished the following:

- Four species have been listed as threatened rather than endangered,
- Eight species have been down-listed to threatened from endangered,
- 84 species were determined to not need protection under the ESA, could be listed as threatened rather than endangered, or could be down-listed or removed altogether, due to proactive conservation efforts, and
- The voluntary conservation efforts developed for these species also provide benefits for many more species (both imperiled and common) on the landscape.

The SEAFWA states are also similarly committed to integrate agency resources across territorial jurisdictions to develop species status assessments. For species where information is lacking, states are coordinating survey and monitoring activities. These actions will provide much needed information to determine each species' conservation status. Most importantly, activities of the SEARS program have led to needed conservation actions. A prime example is the Candidate Conservation Agreement for the Sicklefin Redhorse, a large fish found in western North Carolina and northern Georgia. This agreement involved two states, the FWS, two power companies, and the Eastern Band of Cherokees. This agreement, which contains numerous conservation actions for the species, led directly to a decision by the FWS not to list the species. Such examples demonstrate the benefits and capabilities of the states and FWS to work shoulder-to-shoulder for the range-wide conservation of species and their habitats.

In the more than four decades since the landmark ESA was enacted, the state-of-the-art for conserving fish, wildlife, and their habitats has evolved considerably. Great strides have been made to fill critical knowledge gaps, build professional capacity, and conserve and protect key habitats. As outlined in the preceding examples, range-wide conservation partnerships among state, federal, non-governmental organization, and private citizens are capable of remarkable conservation outcomes. It is time to apply state-of-the-art conservation to improving the ESA to better achieve the conservation and recovery of listed species and to better enable the full participation conservation partners. Thank you once again for this opportunity to testify. I would be happy to answer any questions.



## **General Principles for Improving Implementation of the Endangered Species Act**

*Adopted March 18, 2016*

**Objective Statement:** Improve Endangered Species Act implementation to ensure its future by making it a more effective conservation program for fish and wildlife, and more acceptable to private landowners. This improved implementation would be directed and managed by state and federal fish, wildlife, and natural resource professionals.

**Principles for Improvement:**

- 1: Enables more effective and consistent conservation and protection of species.
- 2: Ensures fish, wildlife and natural resource professionals make Endangered Species Act decisions.
- 3: Facilitates the opportunity for robust utilization of state fish and wildlife agency concurrent jurisdictional authorities in Endangered Species Act implementation as Congress originally intended.
- 4: Focuses on management actions that will recover species to the point that provisions of the Endangered Species Act are no longer necessary, and the species can be delisted or down-listed.
- 5: The approach is apolitical and politically viable because it has bipartisan support.
- 6: Better incentivizes private landowner participation in application of the Endangered Species Act.

**Recommendations for Improvement:**

**I. Implement Preventive and Restorative Management:** improve cooperation between state and federal agencies to preclude the need to list species by addressing species life needs and habitat requirements, more fully recognize and integrate state-led conservation efforts, and improve processes and guidelines for listing decisions. Secure funding sources for these actions.

**II. Elevate the Role of State Fish and Wildlife Agencies:** increase opportunities for state fish and wildlife agencies to take a more formal and active role and fully participate in Endangered Species Act implementation actions as intended by Congress under Section 6 Cooperative Agreements.

**III. Improve the Listing Process:** make the best decision within a more realistic timeframe; prioritize species considered for listing; and insure all state fish and wildlife data are utilized and fully considered in the listing determination whether such data are published or not; and include state agency expertise in the process of interpreting these data and drawing conclusions.

**IV. Require the Development of Science-Based Recovery Plans for Listed Species Directed by Recovery Teams:** enhance States' role including the opportunity to lead recovery planning and implementation, expedite recovery by supporting state level initiatives and partnerships; and increase flexibility and feasibility for recovery plan applicability.

**V. Relocate Critical Habitat Designation to Recovery Plan Development and Create More Flexibility:** create more flexibility for the Secretary to exercise discretion to designate or not designate critical habitat, better define the scope, scale and basis for critical habitat designations and include clear guidance on when such designations are needed or required.

**VI. Revise Down-listing and De-Listing Processes:** increase reliance on and give great weight to recovery plan population and habitat objectives to inform the initiation of the delisting or down-listing process and create more ecological and geographic flexibility for downlisting and delisting valid listable entities, regardless of how they were originally listed; expedite down-listing and de-listing processes to realize conservation successes and reduce unnecessary regulatory burdens.

**VII. Restore the Distinction between Threatened and Endangered Species Categories:** return to Congressional intent providing greater flexibility to manage these listed species differently; afford state fish and wildlife agencies the opportunity to manage threatened species as Congress intended; and allow take as a possible means of "conservation" in the Act.

**VIII. Fully Utilize State Conservation Agreements, Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, Safe Harbor Agreements and Habitat Conservation Plans:** provide consistency and guidance on utility.

**IX. Provide Certainty and Incentives for Private Landowners:** enhance clarity and increase conservation incentive options available; expedite the process for concluding these conservation agreements to enhance certainty to private landowners.

**X. Enhance Endangered Species Act Funding:** sufficient funding should facilitate successful conservation outcomes, species recovery, and delisting; enhance funding to states and federal agencies for all aspects of Endangered Species Act implementation.

**XI. Improve Implementation of 10(j) Experimental Populations to Enhance Species Recovery:** provide guidance on when the use of 10(j) experimental populations are appropriate and standardize post delisting monitoring plans.

**XII. Science and actual conservation work to recover species should drive Endangered Species Act decision making:** devolve the role of litigation and more fully realize Congressional intent for Endangered Species Act implementation.

**XIII. Establish more Consistent Implementation Procedures and Processes:** improve consistency and timeliness of administrative processes and actions implemented under the Act.

**Senate Environment and Public Works Committee Hearing entitled,  
“Oversight: Modernization of the Endangered Species Act” February 15, 2017  
Questions for the Record: Executive Director Gordon S. Myers**

Chairman Barrasso:

1. The science used in Endangered Species Act decision-making provides the very foundation for a listing decision. Yet many stakeholders are concerned that the science being used in these listing decisions is not always the best available science.

Do you believe state-level data, analyses, and reports are sufficiently taken into account by the Fish and Wildlife Service?

*ANSWER. No, these state data and analyses are not being given significant or sufficient consideration in the listing decision-making process. Since many of these petitioned species are fully under state authority prior to listing, the state fish and wildlife agencies often have the best and most complete data and analysis. The North Carolina Wildlife Resources Commission (Commission) and the Association of Fish and Wildlife Agencies (Association) believe that the ESA needs to be amended to give great weight to state data and analysis during the listing decision-making by the Secretary. We recommend that there be a rebuttable presumption created in statute for state data and analysis that the Secretary can overcome only by a written statement that the state data and analysis are deficient in fact and inconsistent with the best available science.*

*There is also a real concern among state fish and wildlife agencies that once state data are turned over to the FWS or NOAA that those data in entirety will be subject to the Freedom of Information Act (FOIA). Not only do state data contain sensitive information about species, they may also identify specific landowner property. Neither of those data should be available to the public.*

*A federal court has also precluded the FWS from requesting listing data only from the state and requiring a broader solicitation of data. That ignores the fact that the state as a sovereign has concurrent authority over listed species; no other entity or organization has that authority.*

2. One of the most frequent problems attributed to the Endangered Species Act concerns the petition process for listing species. Under the current law, the Fish and Wildlife Service has 90 days to make an initial determination as to whether a petition for listing presents substantial scientific or commercial information indicating that the petition action may be warranted. If so, the agency has 12 months to conduct a status review of the candidate species.

Are current statutory deadlines for determining whether a species warrants listing feasible and appropriate, in your opinion? If not, is there another approach or set of timelines that are more practicable?

*ANSWER: The Commission and Association find great favor with the approach adopted by the FWS in dealing with the multi-species listing petition. It is essentially a work plan that allows the prioritization of species based on threat, using bins in which to categorize species and specifying a deadline for action on the species in that bin. In no case shall the deadline exceed 7 years. By dealing with the deadline up front in the work plan, it will take a lot of pressure off of the FWS to meet the statutory deadlines once a warranted determination is decided. The statute should direct the establishment of the work plan with guidance for its construct, and authorize the Secretary to address details in regulation.*

3. Do you share the opinion of critics of more expansive state involvement in ESA implementation that state budgets, politics, and other challenges would make it too difficult for states to efficiently and effectively coordinate recovery actions?

*ANSWER: No. Compared to 25 years ago when those may have been constraints on fuller state engagement, they are not impediments now. States have great experience in restoring game species, sustaining and recovering non-hunted or non-fished species, and recovering listed species. States have spent far more to recover many listed species than the federal government has spent, as you well know from grizzly bear and wolf recovery in Wyoming. Plus, the Western Governors endorse full state involvement in implementing the ESA. Also, as demonstrated by the Southeast states in the implementation of their Southeast At-Risk Species Program, the states have the necessary commitment and capability, and will succeed in recovering listed species.*

Ranking Member Carper:

4. If you were in our shoes, what would you do to find consensus for proposed changes to the ESA?

*ANSWER: the Governors have a great start at doing just that. It is not an exaggeration to say that an endangered species issues crosses the desk of every western governor every day. And with the many species proposed for listing, or listed, in the southeast, we are fast reaching that level. Governors have to solve problems for their citizens that are realistic, pragmatic, balanced, and respectful of the need to sustain natural resources through science-based management. Great weight should be given to their recommendations, which have been arrived at through several public listening sessions. Unfortunately, the ESA has engendered great dogmatism because of its absolute obligatory language which trumps other federal statutes. Perhaps the greatest biggest consensus building incentive for responsible changes to the ESA is the uncertainty of the Act's survival without change.*

5. Please identify three (3) areas where there is the greatest opportunity to find consensus for changes in the ESA.

*ANSWER: 1. Enhance the role of the states in carrying out the provisions of the ESA by giving them the opportunity to lead and co-manage. Sect 6 cooperative agreements can be amended to reflect the authority and capability of the state to fulfill the obligations of the Act.*

*2. Improve the efficiency of and quality of the data used in listing decisions, including the use of a work plan to prioritize species by threat and set deadlines for action in each category.*

*3. Give greater emphasis and funding to developing recovery plans with recovery objectives established by a recovery team and upon achieving those objectives, the Secretary must initiate the delisting process.*

Senator Capito:

6. In recent years, I heard from many West Virginians concerned that the potential listing of the Northern Long-Eared Bat would prove a nearly insurmountable obstacle to development in our state. The bat was listed as “threatened” under the ESA in 2015. On April, 27, 2016, the Fish and Wildlife Service (FWS) found that a critical habitat determination was “not prudent” at this time, preventing my entire state from being burdened with significant constraints on agriculture, mining, construction, and infrastructure. While this was the right conclusion, the uncertainty surrounding the process served to chill investment in areas that could be designated as critical habitat. I find the Northern Long-Eared Bat example to be instructive for this Committee as we seek to modernize and improve the ESA to prevent overreach at odds with science and economic interests. Mr. Myers, in your experience protecting critical habitats, what is the impact on economic development during and following the designation process?

*ANSWER: The timing of the non-discretionary obligation to designate critical habitat does not allow for a more thoughtful and thorough analysis of both its’ value to the listed species or its’ economic impact. We recommend moving that designation concurrent with developing the recovery plan and giving the Secretary more discretion, including the option to not designate critical habitat. With the accumulation of additional data in the recovery plan development process, this should allow for better science-based decisions and more opportunity to minimize disruptive economic consequences.*

a. Do you feel that the risk or uncertainty associated with the mere potential of a designation negatively impact investment and economic development?

*ANSWER: potentially but the remedy described in my answer above can help solve that.*

7. In the case of the Northern Long-Eared Bat, the FWS estimates the species' range covers half of the territory of the continental United States (including all or part of 37 states and the District of Columbia) and one-third of Canada. Estimates are that the population has declined by 90 percent, the result of White-Nose Syndrome (WNS), which is caused by an invasive European fungus. However, those declines are not the result of habitat loss or economic development – indeed the incidence of WNS spikes among the bat populations when they hibernate in large groups in caves during the winter, not when they are foraging across forests during the summer.

a. While the potential designation of the Northern Long-Eared Bat's vast range is a particularly egregious example, are there other examples of large areas having a final designation as critical habitat and what has been the impact on people living and working in those areas?

*ANSWER: The designation of critical habitat for the Canada lynx in the northern U.S. is such an example. It is similar to the Northern Long-Eared Bat because designation of critical habitat will not maintain the species and may actually cause its decline by prohibiting active forest management. The lynx depends on rabbits and hares for its prey, which are obligate to early forest succession stages. The lynx is on the southern ecological periphery of its range, and the U.S. population is expected to remain about what it is now, with or without ESA designation. It never should have been listed. Impacts of critical habitat designation adversely impact forest products industry jobs from harvest to milling and the associated businesses.*

b. How can we better align our conservation efforts to address the actual causes of population declines – preventing and combatting WNS in the case of the Northern Long-Eared Bat – rather than succumbing to a knee-jerk inclination to ban economic activity over broad swathes of the country?

*ANSWER: Establish a category that differentiates listed species that are affected by threats such as disease or other factors for which application of the ESA would not improve their population.*

c. Does the FWS have the authority to tailor its responses to the particular threats facing particular species, or is the agency largely stuck with the blunt instrument of critical habitat designation?

*ANSWER: Under the existing statute, as federal courts have repeatedly directed, the Secretary has a non-discretionary obligation to designate critical habitat. We recommend moving critical habitat into the recovery planning process and giving greater discretion to the Secretary, including the option to not designate critical habitat.*

d. How can this Committee improve the statute to prevent designations of large areas as critical habitat if that is not appropriate for the relevant conservation challenges?

*ANSWER: Adopt in the statute the Association's and WGA recommendations as described in answer number 6.*

e. What are the states' roles in informing the designation of critical habitats and what are their roles in enforcing compliance?

*ANSWER: The states have no statutorily designated role but may submit recommendations if they choose when they submit listing data. The states have no role in enforcing compliance.*

8. Mr. Myers, what are the costs to states of conducting scientific surveys when the FWS outsources data collection on species to your agencies prior to a listing?

*The FWS does not technically outsource data collection for species surveys. However, the FWS and states work cooperatively to attain the data necessary to make listing determinations. North Carolina collects data on many petitioned species annually using funds from State and Tribal Wildlife Grants (65% federal -35% state cost share). The North Carolina Wildlife Action Plan sets priorities for this work. If there is a petition to list a species, surveys for that species become higher priority for Commission.*

*When a petition is filed, our staff assess what data we have on-hand to determine what will be needed to assist USFWS in a species review during the 12 month finding. These efforts may include data compilation, data collection, field surveys, contracted work, coordination with adjacent species within the species' historical range. I will share an example using the Center for Biological Diversity petition filed in April 2010 with 404 species. Thirty-five of the species occur in NC; 27 of which are fishery species and 8 are water dependent. Here are a few examples of species and estimated expenses that includes some details on the level of effort:*

1. **Carolina Madtom** - \$170,516.29 (includes contracted work and agency staff hours; includes data collection since the petition was submitted)
2. **Brook Floater** - \$47,342.99 (only agency staff labor; result of two efforts: 1) fieldwork on Catawba and Yadkin right after the petition was filed; and 2) staff expanded range in the last two years which found significantly expanded populations)
3. **Grandfather Mountain Crayfish** – \$34,482.50 (include contracted work and agency staff hours; includes data collection after the petition was filed)
4. **Carolina Pygmy Sunfish** - \$15,281.09 (only agency staff labor [also with free volunteers] and coordination with South Carolina which was initiated after petition was filed)

5. **Chowanoke Crayfish** - \$71,130.68 (only agency staff labor and coordination with Virginia which was initiated after petition was filed)

- a. What is the cost-share of this activity between the states and the federal government?

*Much of our efforts rely upon State and Tribal Wildlife Grants to fund surveys for petitioned species. The cost share is typically 65% federal and 35% state funds. Some states, including North Carolina, use Pittman-Robertson Grants to fund survey work for birds and mammals. The cost share for Pittman-Robertson Grants is 75% federal and 25% state.*

- i. Do the petitioners bare any of those costs? Should they?

*Petitioners bear only the costs of filing, which include compiling support for petitions. Petitioners should be required to compile only data from primary sources such as peer-reviewed science publications and federal and state agencies. Data from secondary sources, such as web sites or popular literature, should not serve as petition support.*

*Further, petitioners should bear the burden as the responsible requestor, including the costs associated with the 90-day finding. It is important to note that a 3-month period is not adequate time for field surveys, so mosts costs at this point in the process are data compilation and coordination expenses.*

- ii. Are there costs associated with unfunded mandates imposed on private sector stakeholders?

*I am not sure I fully understand the question. I assume it refers to data collection and listing. Based on that assumption, I am not aware of any unfunded mandates for petitioned species imposed on private sector stakeholders by the petition process; however, because the entry bar is set so low for petitioning, there are many costs associated with regulatory uncertainty. Fears of potential listing and associated consequences of listing can have a deeply chilling effect on prospective private sector investment.*

- b. Do these outlays interfere with the states' efforts to conduct more material conservation initiatives?

*Again, because the entry bar is set so low for petitioning, the petition process can interfere with state efforts to conduct hands-on conservation of declining species. (aka implementing the State Wildlife Action Plans). State and Tribal Wildlife Grant funding has increased our capacity to implement on-the-ground conservation measures for species being considered for federal listing; however, lack of funding still limits our state's ability to do so for most at-risk species. Thus, we must prioritize our actions. The State and Tribal Wildlife Grants were meant to provide states*

*the capacity to prioritize and implement conservation actions at a state level. The current petition process lacks appropriate filters. As a result, petitioners often inadvertently set state resource allocation priorities so the states can ensure the on-hand species data is adequate and in a format to aid the FWS in their petition review and finding by the legal deadline. Additionally, a 12 month review is only one survey year and is not enough time to have an opportunity for collecting new data for these species, especially if states lack historical data. These surveys are typically determined and conducted by state agency staff and not federal employees. So the true interference from petitioned species is the opportunity lost due to changed work priorities. When a petition is filed, all current projects are placed on hold until petitioned species are assessed.*

*Further, state's ability to conduct more material conservation actions are hindered by the regulatory burdens of the ESA itself. For example, North Carolina has hatchery propagation capability and capacity to produce large quantities of several different federally-listed species. A very effective conservation strategy would be to propagate these species and stock them into currently unoccupied habitat within the species' historic range. However, the increased regulatory burden that would result on local landowners, businesses, and municipalities from stocking a federally listed species into currently unoccupied habitat makes it impractical to do so. Adding much needed regulatory flexibility would be an effective step in promoting meaningful species conservation.*

c. Can you give examples where the FWS has failed to delist species, even well after population or habitat preservation targets – backed by science – have been met?

*Recovery plans are required for all federally listed species and establish goals to delist species. Unfortunately, recovery plans have not been completed for all federally listed species and many are only partially developed. Furthermore, our knowledge of listed species changes over time which directly impacts the triggers that should be used for determining delisting qualifications. Recovery plans often are not updated to reflect new information or data. Legally, without a recovery plan that includes triggers to define recovery, a species can not be delisted. Each year, state biologists continue to conduct species specific surveys that inform range and population status. Often, these surveys reveal new populations and species habitat conditions directly informing the species population status. Outside of North Carolina is the Grizzly Bear in the Greater Yellowstone Ecosystem. Recovery goals have been met for more than two decades, yet this population segment remains listed due to court intervention and fluid delisting criteria. The recovery criteria should be more flexible to allow best available science to inform when a species is recovered and when delisting is appropriate. As an aside, it is also relevant to point out that 30 years after the introduction of a nonessential experimental population of red wolves in Northeastern North Carolina, the FWS has been unable to meet its recovery goals of a self-sustaining population on federal lands. Yet, the program continues to utilize limited recovery resources without progress towards recovery. There is no evidence to support potential reversal*

*of this trend, yet due to litigation and because there are also no triggers to discontinue the experiment, those limited resources continue to be expended on this program.*

d. Does the FWS have the authority to incorporate “delisting” criteria at the time a species is listed, or are statutory changes necessary to permit this?

*Often, a recovery plan is not completed for many years after a species is federally listed. Assembling species experts and compiling the data to support the recovery planning process may take longer than the time allotted in the ESA. When recovery plans are written, the criteria for delisting should utilize best available science should be clear and concise with specific triggers that would initiate delisting.*

9. There are examples of court cases compelling the FWS to make critical habit designations or list species as threatened or endangered. Many more do not lead to a designation, but these frivolous lawsuits tie up FWS resources and personnel, at the taxpayers’ expense.

a. How can we disincentivize frivolous, sue-and-settle lawsuits against the FWS in this arena?

*ANSWER: As a start, require all litigants to report to Congress any federal reimbursed attorney fees they receive from litigation. Also, most litigation under ESA is against process, eg missing deadlines. Directing the FWS to implement a listing work plan prioritizing species based on threat and assigning deadlines to the different categories will significantly reduce process litigation.*

b. What share of legal challenges related to the ESA go against the federal government for its role in administration as opposed to the states for their share of implementation?

*ANSWER: There are very few legal challenges to the states under the existing statute because the Secretary is the final decision-maker.*

c. Does the federal government assist the states in any way in addressing legal challenges to their implementation of ESA requirements?

*ANSWER: I am unaware if that has ever happened.*

Senator BARRASSO. Thank you very much, Mr. Myers.

Our next witness is James Holte, who is President of the Wisconsin Farm Bureau Federation.

Mr. Holte, thanks so much for joining us. We look forward to your testimony.

**STATEMENT OF JAMES HOLTE, PRESIDENT,  
WISCONSIN FARM BUREAU FEDERATION**

Mr. HOLTE. Good morning, Chairman Barrasso, Ranking Member Carper, and members of the Committee.

My name is Jim Holte. I am a beef and grain farmer from Elk Mound, Wisconsin. I also serve as President of the Wisconsin Farm Bureau Federation and as a member of the American Farm Bureau Federation Board of Directors.

I appreciate the opportunity to speak with you today about the Endangered Species Act and specifically one of the listed species that impacts many farmers throughout the State of Wisconsin, the gray wolf.

I included many pertinent statistics about Wisconsin's population in my written testimony which I hope you will take some time to review. Today, I would like to share with you a story of one of our young farm families from Medford, Wisconsin, which has experienced devastating wolf depredation.

I have heard many personal stories from farmers about the loss of livestock and how it has impacted their farms, lives, and their families. These stories are powerful, emotional, and very real.

The story of fourth generation farmers Ryan and Cheri Klussendorf takes place in June 2010. They own and operate a 100-cow rotationally grazing dairy farm and had just moved a group of young calves out to pasture for the summer.

In early July they received a call in the middle of the night from a local county sheriff that a large group of young cattle were out in the roadway not far from their farm. This occurred several more times over the next 2 months as passing motorists knocked on their door in the middle of the night because cattle were out and agitated.

In late August there was another middle of the night visit from the local sheriff resulted in a citation for animals at large.

Ryan was able to start farming at the age of 21 because he was able to keep costs low by grazing cattle. Now, the liability he faced every night while his cattle were on pasture was a serious public safety hazard with potentially devastating impacts to his life.

They asked the local district attorney and sheriff's office for help but were told "There is nothing we can do for you. Buy a gun."

On the morning of November 7, 2010, the family started chores. Some of the cows were already in the barnyard to be milked, which was rather unusual because they normally are brought in from the pasture.

As Ryan headed to the pasture to bring in the rest of the cows, he found what was left of cow 2042. The gruesome scene told the story of the deadly attack on this 3-year-old cow. She was bitten in the back of the leg until all the tendons and ligaments were severed, she was dragged down from behind after she could no longer stand, and the pack of wolves started eating her alive.

The pasture was a blood bath, and her corpse was unidentifiable other than the tags from ears were found 100 feet away. This was the worse summer of Ryan's life. His stomach sinks every time the phone rings late at night; he sleeps with a window open no matter the time of the year so he can listen to the traffic on the road.

He springs out of bed at night thinking there is a knock at the door when it is only the icemaker in the kitchen. This happened more than 6 years ago, and yet the events during the summer of 2010 impact every decision the Klussendorfs make for their cattle and their farm management practices.

All of Ryan and Cheri's cows are now within 200 feet of their farmyard at night. Calves are no longer put on pasture. The cost has been burdensome, but the emotional toll, the increased stress on the family and the animals has been tremendous.

Ryan was a husband, a father, and a farmer. Right now, he cannot protect his cows and his family's livelihood without the risk of being prosecuted because it is illegal to shoot a wolf in Wisconsin. The graphic images of this incident are included in my written testimony.

The Klussendorfs are not the only farmers who have been impacted, which is why the Wisconsin Farm Bureau continues to support the decision to delist the gray wolf and allow State wildlife officials to manage wolf populations.

Interactions between farmers, their livestock, rural residents, and wolves continue to escalate without a remedy in sight. During the last 15 years the gray wolf's endangered status has undergone numerous changes. Many have not been based on scientific evidence that the population numbers for this species have been met and exceeded but flaws in the Act make these decisions prone to politics and legal battles.

While the recovery status of the gray wolf in the Western Great Lakes Region continues to be fought in courtrooms and determined by Federal judges, Wisconsin farmers continue to have their hands tied when it comes to protecting their livestock and their livelihoods.

Congressional action needs to occur, and our farmers continue to lobby Congress for this change. The ESA has been successful for species recovery, but it has failed to remove the species once the population adequately recovered.

Congress intended for the ESA to protect species from extinction. However, it prioritizes species listing over actual recovery and habitat conservation. The law fails to provide adequate incentives for working land species conservation and imposes far reaching regulatory burdens on agriculture.

Reform of the ESA should include a focus on species recovery and habitat conservation that respects landowners. Coordination with other State and Wildlife agencies to leverage private incentive-based conservation efforts can better achieve long term conservation goals.

I appreciate the actions and efforts by this Committee to address needed reforms to the Endangered Species Act and the serious nature of the gray wolf situation in Wisconsin.

Thank you for your time. I would be happy to answer any questions you may have.

[The prepared statement of Mr. Holte follows:]



Testimony before  
Committee on Environment & Public Works  
United States Senate

**The Gray Wolf: Modernization of the Endangered  
Species Act**

February 15, 2017  
Washington, D.C.

*Offered by*  
**James Holte**  
*On Behalf of*  
**Wisconsin Farm Bureau**

1. Wisconsin Wolf Management Plan, October 27, 1999. P. 15
2. Wisconsin Gray Wolf Monitoring Report, 15 April 2015 Through 14 April 2016
3. Wisconsin Wolf Harvest Zone Map
4. Wisconsin Wolf Season Reports 2012, 2013, 2014
5. Wisconsin Annual Wolf Damage Payment Summary
6. Testimony of Ryan Klussendorf from the Great Lakes Wolf Summit, September 15, 2016
7. Cow 2042 & Cow 2042 (2) Photos
8. Wolf Depredation Photos

Good morning Chairman Barrasso, Ranking Member Carper and members of the committee. My name is Jim Holte and I am a beef and grain farmer from Elk Mound, Wisconsin. I also serve as President of the Wisconsin Farm Bureau Federation and as a member of the American Farm Bureau Board of Directors. I appreciate the opportunity to speak with you today about the Endangered Species Act and specifically, one of the listed species that impacts many farmers throughout the state of Wisconsin, the gray wolf. I have heard many personal stories from farmers about the loss of livestock and how it has impacted their farms, lives and their families. These stories are powerful, emotional and very real. Today, I will share one farmer's story as well as some facts, figures, concerns and updates to our efforts dealing with gray wolves in Wisconsin.

I'd like to start with some Wisconsin-specific wolf statistics. Wisconsin's Wolf Management Plan has a population recovery goal of 350 animals<sup>1</sup>. As of April 2016, the state's overwinter wolf population minimum was 866-897 animals.<sup>2</sup> (p.3) That is an increase of 16.1% from the previous year (746 wolves). Overwinter population means that counts occur during the winter when wolf populations are at their lowest and populations essentially double once new pups arrive in the spring and uncounted wolves are factored in.

Wolves were federally delisted in January 2012. In April 2012, Wisconsin authorized a wolf hunting and trapping season. Six zones were created within the state<sup>3</sup>, each with individual harvest quotas based on various factors. Three hunting seasons occurred before the wolf was relisted as endangered in December 2014. There was a total of 528<sup>4</sup> wolves harvested during the hunting seasons over those three years and a population reduction of less than 9%. We saw livestock depredation damage payments significantly decrease (\$60,000-\$75,000 per year<sup>5</sup>) in the three years that a wolf hunting and trapping season was in place. Since the relisting of the wolf in December of 2014, Wisconsin's wolf population has grown from 660 animals to 897 and depredation damage payments exceeded \$200,000 for 2016.

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Under the umbrella of the Endangered Species Act, the gray wolf's federal status has undergone extensive changes over the last 15 years. This is not due to the biological or scientific evidence that population numbers for the species have met and exceeded their recovery goals, but flaws in the Act that make these decisions prone to politics and legal battles based on procedural technicalities. While the recovery status of the gray wolf in the Western Great Lakes region continues to be fought in courtrooms and determined by Federal Judges in Washington, D.C., Wisconsin farmers continue to have their hands tied when it comes to defending their livestock and livelihoods. It is illegal for farmers in the Western Great Lakes region to protect their livestock from depredating wolves and there is no mechanism to manage the population.

Farmers' livestock are their livelihoods. Not only do acts of depredation increase stress to farmers and their families, they consume valuable time and negatively impact a farmer's bottom line. Depredations are quantifiable and measurable factors that can be charted, trended and accurately determined, but wolf damage includes unquantifiable factors that cattle and other livestock experience from stress due to increased predatory pressures. Some examples of these livestock stressors include: loss of pregnancy; reduced pregnancy rates; decreased rate-of-gain; changes in calving/birthing procedures due to the unsafe nature of leaving pregnant livestock to give birth in pastures; increased mowing of tall grasses around pastures; upgrading fencing and other wolf deterrent practices. All of these factors are costly. They can be difficult to measure but are directly related to the increase in the wolf population and interactions wolves are having with livestock in Wisconsin. Wolf populations have increased more than 300% in Wisconsin since 2000<sup>2</sup> (p.14) and the pressures for food and territory have forced lone wolves and packs to travel farther south to find new habitat. This has led to an increase in livestock depredations and damage payment from \$18,630 in 2000 to more than \$200,000 in 2016.<sup>5</sup>

I'd like to share with you a story of one of our young farm families from Medford, Wisconsin who has experienced devastating wolf depredation on their farm.

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*Ryan and Cheri Klussendorf are fourth generation farmers who own and operate a 100-cow rotational grazing dairy farm. Their nightmare began in June of 2010 when they moved a group of young calves out to the pasture for the summer. In early July, they received a call in the middle of the night from the local County Sherriff that a large group of young cattle were on the roadway not far from their farm. They promptly recovered the agitated and sweat-covered calves and returned them to their pasture. Several more times that month and in early August they received middle of the night visits from passing motorists because once again, the cattle were found agitated and out of the pasture or on the road. In late August, another middle of the night visit from the local Sherriff's office resulted in a citation for having animals at-large. At this time, the Klussendorfs thought the cattle were being chased by coyotes. All fences were well maintained and more than adequate to contain their livestock.*

*Each time cows get on the road, there is a real possibility one could get hit. Cattle are the most valuable investment and sole income generators on their farm. Not to mention, what if there was an accident and a person was injured or killed?*

*Ryan was able to start farming at the age of 21 because he was able to keep costs low by grazing cattle. Now, the liability he faced every night while his cattle were on pasture was a serious public safety hazard with potentially devastating impacts to his life. They asked the local District Attorney and Sherriff's office for help but were told "there is nothing we can do for you, buy a gun."*

*They changed some of their farming practices, to keep younger cattle closer to the barns, but nothing helped. On the morning of November 7, 2010, a day that Ryan will never forget, the family got up and started doing chores. Some of the cows were already in the barnyard ready to be milked. This was very unusual because normally they are brought in from the pasture. As Ryan headed to the pasture to bring in the rest of the cows he found what was left of cow 2042.<sup>7</sup> The gruesome scene told the story of the deadly attack on this three-year-old cow. She was bitten in the back leg until all the tendons and ligaments were severed. She was drug down from behind after she could no longer stand and the pack of wolves started eating her alive. She eventually succumbed to her lethal injuries. The pasture was a blood bath and her corpse was unidentifiable other than the tags from her ears that were found 100 feet from her corpse.*

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*Four days later all charges for animals at-large were dismissed and an apology issued from the local Sherriff's office. This was the worst summer of Ryan's life. His stomach sinks every time the phone rings late at night, he sleeps with the window open, no matter the time of year so he can listen to the traffic on the road and he springs out of bed at night thinking there is a knock at their door, when it's only the icemaker in the kitchen. This happened more than six years ago and yet the events during the summer of 2010 impact every decision they make for their cattle and farm management practices. All of Ryan and Cheri's cows are within 200 feet of their farmyard at night. Calves are no longer put on pasture. The costs have been burdensome due to building maintenance, feed management and manure hauling but the emotional costs of increased stress and trauma for the family and animals has been tremendous. Ryan is a husband, father and farmer. Right now, he cannot protect his cows and his family's livelihood without the risk of being prosecuted.<sup>6</sup>*

Ryan and Cheri Klussendorf are not the only farmers who have been impacted, which is why the Wisconsin Farm Bureau Federation continues to support the decision, made in 2011 by the United States Fish and Wildlife Service (USFWS), to delist the gray wolf in the Western Great Lakes region and allow the Wisconsin Department of Natural Resources (DNR) to implement the Wisconsin Wolf Management Plan. The latest population estimates of gray wolves in Wisconsin is the highest on record at almost 900 animals and far exceeds the targeted management goal of 350 wolves specified in the plan. Since implementation of the first gray wolf hunting and trapping season in Wisconsin in 2012, the DNR's management plan has been conservative, science-based and designed to maintain the prescribed wolf population while managing it to minimize conflicts with Wisconsin farmers and others.

Not only have wolves increased their depredations on domestic livestock such as calves, cattle, sheep, horses, guard animals, pigs, goats, domestic fowl and domestic deer, but depredations to pets and hunting dogs have also risen.<sup>8</sup> In 2016, 22 hound dogs and six pet dogs were reported for damage payments. The threats that these predators pose to rural residents is evident in the Wisconsin DNR's 2015-2016 Wolf Monitoring Report that states, "One wolf was euthanized by USDA-WS in response to a verified human health

1. Wisconsin Wolf Management Plan, October 27, 1999. P. 15
2. Wisconsin Gray Wolf Monitoring Report, 15 April 2015 Through 14 April 2016
3. Wisconsin Wolf Harvest Zone Map
4. Wisconsin Wolf Season Reports 2012, 2013, 2014
5. Wisconsin Annual Wolf Damage Payment Summary
6. Testimony of Ryan Klussendorf from the Great Lakes Wolf Summit, September 15, 2016
7. Cow 2042 & Cow 2042 (2) Photos
8. Wolf Depredation Photos

and safety threat during the monitoring period<sup>2</sup>.” (p. 4-5) These predators are smart, and easily learn new behaviors. As their numbers continue to increase without restrictions, we dread the day this “threat” becomes a human mortality.

As wolf populations continue to increase, interactions between farmers, their livestock, rural residents and wolves continue to escalate without a remedy in sight. Congressional action needs to occur and our farmers continue to lobby Congress for this change. Currently, two pieces of legislation sit in various stages of procedure that would delist the gray wolf in the Western Great Lakes region and Wyoming. S. 164, and H.R. 424 would reinstate the USFWS 2011 decision to delist the gray wolf and that decision would not be subject to judicial review. The gray wolf is a great example of the Endangered Species Act functioning positively and negatively. It has been successful for the purpose of species recovery but it has failed due to unsuccessful removal of the species once the population adequately recovered and no longer required the support provided by the law. Congress intended for the ESA to protect species from extinction. However, the law fails to accomplish this, instead it prioritizes species listings over actual recovery and habitat conservation. The ESA was enacted in 1973 and has more than 1,600 species currently listed. Less than 2% of these species have been removed from the list during the 44-year life of the law. The law fails to provide adequate incentives for working lands species conservation and it imposes far-reaching regulatory burdens on agriculture. Farmers and ranchers consider it their personal responsibility to be stewards of the land, however the ESA creates many challenges for them to balance agriculture production with wildlife habitat. Reform of the ESA should include a focus on species recovery and habitat conservation that respects landowners and prioritizes basic human needs over those of endangered species. Coordination with state wildlife agencies to leverage private, incentive-based conservation efforts can better achieve long-term conservation goals.

I appreciate the efforts by this committee to address the needed reforms to the Endangered Species Act and the serious nature of the gray wolf situation in Wisconsin. There is a legitimate need for states to have more control of wildlife management while still maintaining some level of federal oversight. Thank you for your time and I would be happy to answer any questions you may have.

1. Wisconsin Wolf Management Plan, October 27, 1999. P. 15
2. Wisconsin Gray Wolf Monitoring Report, 15 April 2015 Through 14 April 2016
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## **Addendum**

**WISCONSIN GRAY WOLF MONITORING REPORT  
15 APRIL 2015 THROUGH 14 APRIL 2016**

Jane E. Wiedenhoeft, David M. MacFarland, Nathan S. Libal, and Jean Bruner

BUREAU OF WILDLIFE MANAGEMENT  
Wisconsin Department of Natural Resources  
P.O. Box 7921  
Madison, Wisconsin 53707

### Introduction

This report describes wolf management and monitoring activities conducted in Wisconsin during the wolf monitoring year, April 15<sup>th</sup>, 2015 to April 14<sup>th</sup>, 2016. Gray wolves (*Canis lupus*) reverted to federally endangered status in the Western Great Lakes region as a result of a federal court decision in December 2014. They have been in this status for the entire monitoring period.

### Wolf Population Monitoring

Wolf population monitoring was conducted using a territory mapping with telemetry technique, summer howl surveys, winter snow track surveys, recovery of dead wolves, depredation investigations, and collection of public observation reports. A full description of methods is provided by Wydeven et al. (2009). Data are reported by wolf management units (WMU's) established in 2012 (Figure 1). Wolf monitoring methods were similar to the previous year.

Observation reports were collected from the public and agency staff. A total of 279 reports of wolf or wolf sign observations were recorded. This is 16% fewer than the 334 reports recorded the previous year (Wiedenhoef et al. 2015). Additional reports were received but lacked sufficient information on date, location, or circumstances for recording. Forty-eight reports (17%) were verified as wolves by submitted photos. One hundred six reports (38%) were considered to be "probable" wolves. Photos were submitted for 17 of these reports and were inconclusive but considered to be probable wolves. Photos were requested, but not received, for an additional 3 reports. Descriptions provided for the remainder of these reports supported a designation of probable wolf. Eighty-one reports (29%) lacked adequate evidence or descriptions to determine species and were designated as possible wolves. Some reports were likely mis-identifications. Photos were submitted for 7 of these reports, but were inconclusive. Photos were requested, but not received, for an additional 2 of these reports. Forty-four reports (16%) were considered to be "not likely" wolves. Photos were submitted for 17 of these reports. Species found included coyotes (12 photos), coyote tracks (1 photo) domestic dogs (2 photos), domestic dog tracks (1 photo), and tracks including dog, coyote, and bobcat (1 photo). Photos were requested, but not received, for 1 additional report. A field check was conducted for 1 report which found evidence of coyotes and a coyote den. Twenty-five additional reports were considered not likely wolf based on the descriptions provided. Verified, probable, and possible wolf observations are shown in Table 1 and Figure 1. Reports of packs outside known occupied pack range were forwarded to the biologist responsible for the geographic area for further monitoring to attempt to verify pack presence. Reports from outside the winter count period were used to help direct winter tracking effort. Consistent with our historic methodology, confirmed and probable reports within the winter count period were incorporated into count data.

During summer 2015, 131 howl surveys were conducted with 54 packs detected (Table 2). Pups were detected in 65% of the detected packs. This compares with a pup detection rate of 73% of 52 packs responding during howl surveys in summer 2014 (Wiedenhoef et al. 2015). A more thorough analysis of wolf howl data is in process.

During winter 2015-16, a total of 17,759 miles of track surveys were conducted by WDNR and volunteers, with 162 of 167 survey blocks tracked (Figures 2 & 3). Tribes tracked an additional 2 survey blocks; 3 blocks that were considered inactive were not tracked. A total of 222 packs were detected in Wisconsin (Figure 4, Table 3). One wolf from a pack considered to be primarily in Michigan and 1 radio collared wolf being monitored in Minnesota were also detected (Figure 4). Of

the 208 packs detected in winter 2014-15, 21 (10%) were not detected at all and 7 (3%) were detected as loners in winter 2015-16. Forty of the 222 packs detected in winter 2015-16 had not been detected the previous winter. Of these packs, 12 (5%) had been detected previous to winter 2014-2015, 15 (7%) had been detected as loners in 2014-15, and 13 (6%) had not been previously detected. An average of 3.4 surveys were conducted per pack or area surveyed.

During the 2015-2016 monitoring period 60 wolves were monitored by telemetry (Table 3). Average pack territory size was 61.3 mi<sup>2</sup> for 37 packs with ≥20 telemetry locations. This included 20 territories determined from satellite and VHF locations (avg. = 71.7 mi<sup>2</sup>) and 17 territories with only VHF locations (avg. = 49.1 mi<sup>2</sup>). Average territory size was largest in WMU 1 (67.6 mi<sup>2</sup> n=18) and WMU 5 (60.5 mi<sup>2</sup> n=8). The large average territory size in WMU 5 was likely due to the high percentage (88%) of territories determined from satellite and VHF locations. Research trapping resulted in capture of 22 wolves and telemetry collars were placed on all of them. Three wolves were trapped and removed from captive cervid facilities. Telemetry collars were placed on 2 of them before release. Recreational trappers reported an additional 10 wolves incidentally captured that DNR personnel were also able to place collars on before release. Telemetry collars were deployed on a total of 34 of 35 wolves captured during the monitoring period (Table 4), including 12 adult, 6 yearling, and 2 pup females, and 10 adult, 3 yearling, and 1 pup males.

In April, 2016 the statewide minimum wolf population count was 866-897 wolves, an increase of 16.1% from the previous year (Table 3 & Figure 5). This included increases in 4 of the 6 management units and decreases in 2 units, ranging from -19.4% in WMU 5 to +67.7% in WMU 4. Some of the decrease in unit 5 was likely due to better knowledge of pack boundaries in several packs with GPS collared wolves. The count included 838-869 wolves living in 222 packs, or an average of 3.8 wolves per pack, which is back to the level packs had stabilized at prior to delisting in 2012. An additional 28 non-pack associated wolves were detected. State wolf management is based on the minimum count off Native American reservations. The off reservation minimum count in April 2016 was 829-860 wolves. More detailed information on the 2015-2016 wolf count can be found on the Wisconsin DNR website, [http://dnr.wi.gov/topic/wildlifehabitat/documents/Carn\\_Track\\_Blocks\\_Results.pdf](http://dnr.wi.gov/topic/wildlifehabitat/documents/Carn_Track_Blocks_Results.pdf).

#### Statewide Wolf Distribution

Contiguous wolf pack range was estimated to be 20,500 mi<sup>2</sup>. The main range encompassed 20,374 mi<sup>2</sup> and included northern and central forested regions of Wisconsin (Figure 1). A 126 mi<sup>2</sup> area in Dunn County comprised the remainder of probable wolf pack range. A single wolf was detected during winter surveys in the Dunn County area, but the area has a history of pack habitation so was included in the probable pack range calculation. Using the 2016 minimum population count of 866-897 wolves, wolf density is estimated to be 1 wolf per 22.9 to 23.7 mi<sup>2</sup> of contiguous wolf range, calculated by dividing contiguous wolf range by the minimum population count range.

#### Wolf Mortality

Mortality was monitored through field observation and mandatory reporting of control mortalities. Cause of death for wolves reported dead in the field was determined through field investigation or by necropsy when illegal activity was suspected or where cause of death was not evident during field investigation. A total of 38 wolf mortalities were detected during the monitoring period (Table 5,

Figure 1). Detected mortalities represented 5% of the minimum 2014-2015 late winter count of 746-771 wolves (Wiedenhoeft et al. 2015).

Vehicle collisions (45%) and illegal kills (34%) were the leading causes of death for detected mortalities. One wolf (3%) was trapped and euthanized in a human health and safety concern case. Human caused mortality represented 82% of known cause detected mortalities overall.

The sole cause of mortality detected due to natural causes was intra-specific aggression (5%). No mortalities due to disease were detected. Mortalities due to natural causes are difficult to detect unless the animal is wearing an active telemetry collar.

Cause of mortality could not be determined for 5 (13%) of the cases.

Twelve collared wolves died during the monitoring period, 11 of which were being actively monitored at the time of death (Table 5). Of those being actively monitored, cause of death could not be determined for 3 collared wolves. For the 8 where cause of death could be determined, 4 (50%) were illegally killed, 2 (25%) were killed by vehicle collision, and 2 (25%) died from intra-specific aggression. For an analysis of estimated rates of undetected mortality in Wisconsin wolves see Stenglein et al. 2015.

#### Disease / Parasite Occurrence in Wolves & Body Condition

General body condition was reported for 33 wolves that were captured and collared for monitoring (Table 4). Thirty-one (94%) were reported to be in good or excellent body condition, 1 (3%) was reported to be in fair body condition, and 1 pup trapped in a cervid enclosure (3%) was reported to be emaciated and in poor condition. Average weight of 8 live-captured adult males was 85 lbs. (range 72 to 106 lbs.), and average weight of 11 adult females was 69 lbs. (range 60 to 77lbs.). Monitoring for mange was conducted by inspection of 35 wolves live-captured for research monitoring, and inspection of 38 wolf mortalities (Table 4). Symptoms consistent with mange were noted in 1 dead wolf (14%) and none of the live captures. Ticks were monitored by inspection of live-captured wolves. Ticks were noted on 21 (60%) of captured wolves.

#### Wolf Depredation Management

Wolf depredation incidents were investigated by United States Department of Agriculture – Wildlife Services. During the monitoring period, Wildlife Services investigated 160 wolf complaints and 1 complaint was investigated by DNR wardens. Fifty-two incidents of wolf depredation to livestock and 6 incidents of wolf threat to livestock were confirmed on 34 different farms during the monitoring period (Table 6). This included 11 of 38 farms classified as chronic wolf depredation farms (29%). Livestock depredations included 49 cattle killed and 1 injured, 2 guard animals killed, 1 horse killed, 12 domestic fowl killed, and 2 captive white-tailed deer killed. The number of farms affected increased 6.2% from 2014-15 when 32 farms were affected. This follows a decrease of 26% from 2012-13 when 43 farms were affected (MacFarland & Wiedenhoeft 2013) to 2014-2015.

Twenty-five incidents of non-livestock depredation and 7 incidents of non-livestock threats were confirmed during the monitoring period. This included 18 dogs killed while actively engaged in hunting activities, and 6 dogs killed and 3 injured outside of hunting situations. One wolf was

euthanized by USDA-WS in response to a verified human health and safety threat during the monitoring period.

#### Regulatory Changes Affecting Wolf Management

There were no significant regulatory changes during the reporting period.

#### Law Enforcement

Population monitoring and law enforcement efforts detected 13 wolves illegally killed within the monitoring period. Law enforcement staff conducted 5 investigations and issued 1 citation during the reporting period (Table 7).

#### Information on Wolf Prey Species

White-tailed deer are the primary prey species for wolves in Wisconsin. Units used for monitoring Wisconsin deer are counties, or in some cases, partial counties. Counties were assigned to the wolf harvest zone that the majority of the county falls in to compare deer density changes in the wolf management units (Table 8). White-tailed deer density estimates increased 8% statewide from the previous year estimate (Rolley 2015, Rolley 2016). Recommendations from the County Deer Advisory Council and approved by the Natural Resources Board are to increase deer populations in counties in wolf management units 1 through 5 and maintain the deer population density in most counties in unit 6. There is no indication that prey density is negatively impacting the wolf population.

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**Table 1.** Verified, probable and possible wolf observations reported by natural resource agency personnel and private citizens in Wisconsin, 15 April 2015 to 14 April 2016.

Wolf Mgmt. Unit	Number of Sightings	Wolves Seen	Track or Sign Observations	Total Wolf Observations
1	24	40	35	59
2	23	39	22	45
3	9	13	3	12
4	6	6	2	8
5	14	42	11	25
6	64	69	22	86
<b>Statewide</b>	<b>140</b>	<b>209</b>	<b>95</b>	<b>235</b>

**Table 2.** 2015 Wisconsin wolf howl survey data.

Wolf Mgmt. Unit	Howl Surveys	Packs Detected	Detected Packs with Pups	% Detected Packs with Pups
UNIT 1	42	17	13	76
UNIT 2	41	17	10	59
UNIT 3	13	2	1	50
UNIT 4	4	1	1	100
UNIT 5	19	12	8	67
UNIT 6	12	5	2	40
<b>TOTAL</b>	<b>131</b>	<b>54</b>	<b>35</b>	<b>65</b>

**Table 3.** Pack and lone wolf summaries for Wisconsin in winter 2015-2016.

Wolf Mgmt. Unit		# of Packs	# of Wolves in Packs	Loners	Total # of Wolves	Change from 2014-2015	# of Telemetry Monitored Wolves <sup>a</sup>	Average Annual Pack Territory <sup>b</sup> (mi <sup>2</sup> )
1	Off Reservations	83	317-328	7	324-335		28	
	On Reservations	3	12	3	15		3	
	Total	86	329-340	10	339-350	9.7%	31	67.6 (n=18)
2	Off Reservations	51	216-225	5	221-230		12	
	On Reservations	5	22	0	22		1	
	Total	56	238-247	5	243-252	50.9%	13	52.5 (n=7)
3	Off Reservations	29	93-97	3	96-100		3	
	On Reservations	0	0	0	0		0	
	Total	29	93-97	3	96-100	17.1%	3	48.2 (n=3)
4	Off Reservations	13	50	2	52		0	
	On Reservations	0	0	0	0		0	
	Total	13	50	2	52	67.7%	0	55.1 (n=1)
5	Off Reservations	29	103-109	1	104-110		11	
	On Reservations	0	0	0	0		0	
	Total	29	103-109	1	104-110	-19.4%	11	60.5 (n=8)
6	Off Reservations	9	25-26	7	32-33		2	
	On Reservations	0	0	0	0		0	
	Total	9	25-26	7	32-33	-5.9%	2	-
Statewide	Off Reservations	214	804-835	25	829-860		56	
	On Reservations	8	34	3	37		4	
	Total	222	838-869	28	866-897	16.1%	60	61.3 (n=37)
Outside WI				2	2		1	

<sup>a</sup>Wolves are counted in the primary WMU they were monitored in, though they may have been monitored in multiple WMUs.

<sup>b</sup>Pack territory size is only calculated for packs with ≥20 radiolocations for the period 15 April 2015 to 14 April 2016.

**Table 4.** Research capture summary, body condition, and detection of ectoparasites in captured wolves and mortalities in Wisconsin from 15 April 2015 to 14 April 2016.

	n	Body Condition			# (%) w/Mange	# (%) w/Ticks
		Good	Fair	Poor		
<b>Unit 1</b>						
Research Captures	18	16 (89%)	1 (6%)		0	14 (78%)
Mortalities	7				1 (14%)	
<b>Unit 2</b>						
Research Captures	7	5 (83%)		1 (17%)	0	2 (29%)
Mortalities	11				0	
<b>Unit 3</b>						
Research Captures	1	1 (100%)			0	1 (100%)
Mortalities	3				0	
<b>Unit 4</b>						
Research Captures	0				0	0
Mortalities	3				0	
<b>Unit 5</b>						
Research Captures	7	7 (100%)			0	4 (57%)
Mortalities	6				0	
<b>Unit 6</b>						
Research Captures	2	2 (100%)			0	0
Mortalities	8				0	
<b>STATEWIDE AVERAGES</b>						
Research Captures	35	31 (94%)	1 (3%)	1 (3%)	0	21 (60%)
Mortalities	38				1 (14%)	

**Table 5.** Detected wolf mortality in Wisconsin 15 April 2015 to 14 April 2016.

Cause of Death	Wolf Management Unit						State Total	% of Total
	1	2	3	4	5	6		
<b>Human Caused Mortality</b>								
Agency Control	1						1	3%
Vehicle Collision	1	6 <sup>b</sup>	2	2	4	2	17	45%
Illegally Killed	4 <sup>a</sup>	2 <sup>a</sup>	1	1 <sup>a</sup>		5 <sup>a</sup>	13	34%
Capture Related							0	
Unknown Human Caused							0	
<b>Total Human Caused</b>	<b>6</b>	<b>8</b>	<b>3</b>	<b>3</b>	<b>4</b>	<b>7</b>	<b>31</b>	<b>82%</b>
<b>Natural Mortality</b>								
Disease / Injury							0	
Intra-specific Aggression		1 <sup>a</sup>				1 <sup>a</sup>	2	5%
Euthanized (non-control)							0	
Unknown Natural Causes							0	
<b>Total Natural Causes</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>2</b>	<b>5%</b>
<b>Unknown Causes</b>	<b>1<sup>a</sup></b>	<b>2<sup>b</sup></b>	<b>0</b>	<b>0</b>	<b>1<sup>a</sup></b>	<b>1<sup>c</sup></b>	<b>5</b>	<b>13%</b>
<b>Total Detected Mortality</b>	<b>7</b>	<b>11</b>	<b>3</b>	<b>3</b>	<b>6</b>	<b>8</b>	<b>38</b>	

<sup>a</sup>Includes 1 radio collared wolf<sup>b</sup>Includes 2 radio collared wolves<sup>c</sup>Radio collared wolf unmonitored at time of death

12 radio collared wolf mortalities, including 1 unmonitored at time of death

**Table 6. Wolf depredation management in Wisconsin, 15 April 2015 to 14 April 2016.**

	Wolf Management Unit						State Total
	1	2	3	4	5	6	
<b>Livestock Cases</b>							
Depredation	20	3	23	1	0	5	52
Threat	4	1	0	0	0	1	6
Chronic Farms Affected	7	2	2	0	0	0	11 of 38 (29%)
Total Farms Affected	15	2	10	1	0	6	34
Cattle Killed	17	3	24	1		4	49
Cattle Injured			1				1
Horses Killed	1						1
Guard Animals Killed	2						2
Captive Deer Killed		2					2
Poultry Killed						12	12
<b>Non-Livestock Cases</b>							
Depredation	14	3	2	0	4	2	25
Threat	4	1	0	0	2	0	7
Dogs Killed While Actively Engaged in Hunting Activities	12	1	2		3		18
Dogs Injured While Actively Engaged in Hunting Activities							0
Dogs Killed While Not Engaged in Hunting Activities	3	2				1	6
Dogs Injured While Not Engaged in Hunting Activities	1				1	1	3
<b>Control Actions</b>							
Wolves Euthanized for Control	1	0	0	0	0	0	1

**Table 7. Summary of law enforcement activity during the reporting period.**

Wolf Related Complaints Received	3
Wolf Related Investigations Conducted	5
Citations Issued	1
Verbal Warnings Issued	0
Illegally Harvested Wolves Recovered	2
Unknown Cause of Death Wolves Found	0
Other Dead/Injured Wolves Recovered	8
Total Wolves Recovered	10

**Table 8.** White-tailed deer density estimate in wolf management units in 2014 & 2015.

Wolf Mgmt. Unit	# of Deer Mgmt. Zones	Deer Range (mi <sup>2</sup> )	2014 Post-Hunt Deer Density (Deer/mi <sup>2</sup> )	2015 Post-Hunt Deer Density (Deer/mi <sup>2</sup> )	% Change	2015-17 Deer Population Objective
1	6	6,516	12.0	13.1	+8%	Increase
2	6	4,573	16.0	16.2	+1%	Increase
3	4	3,141	23.0	25.6	+12%	Increase
4	4	2,305	27.0	24.8	-8%	Increase
5	7	2,315	24.0	28.1	+17%	Increase
6	53	16995	44.0	48.3	+9%	Maintain
<b>TOTAL</b>	<b>80</b>	<b>35,845</b>	<b>30.5</b>	<b>33.0</b>	<b>+8%</b>	

Deer range and post-hunt deer estimates based on Robert Rolley, 2016, Final 2015 Deer Population Estimates for Wisconsin Deer Management Units, WDNR unpublished data.

Deer population objectives from County Deer Advisory Council Final 2015 – 2017 Deer Population Objectives Approved by the Natural Resources Board, <http://dnr.wi.gov/topic/hunt/cdac.html>.

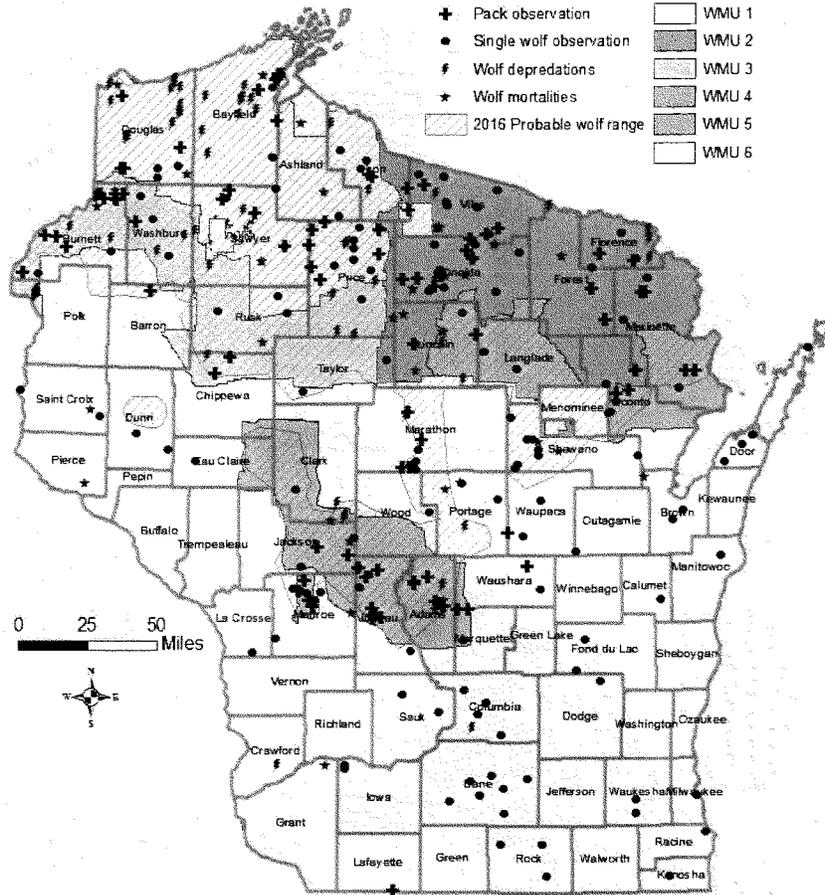


Figure 1. Probable wolf pack range, wolf mortalities, verified and probable wolf depredations, and verified, probable and possible wolf observation reports in Wisconsin 15 April 2015 to 14 April 2016.

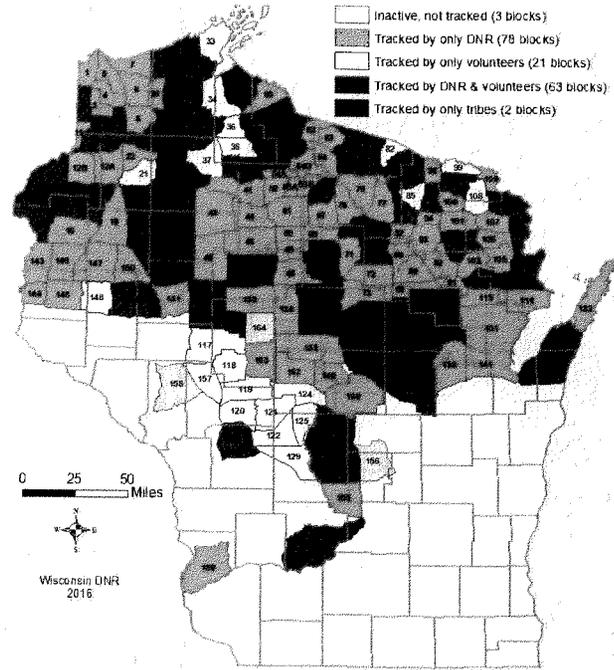


Figure 2. Wisconsin carnivore survey blocks tracked: winter 2015-2016.

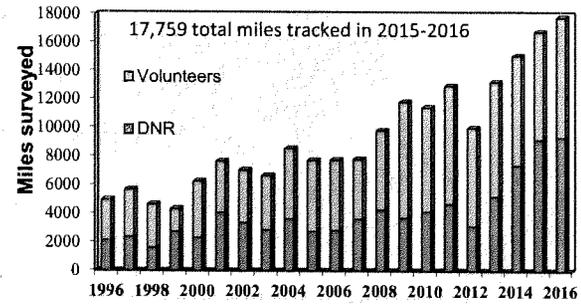


Figure 3. Carnivore track surveys in Wisconsin by WDNR & volunteers 1996-2016

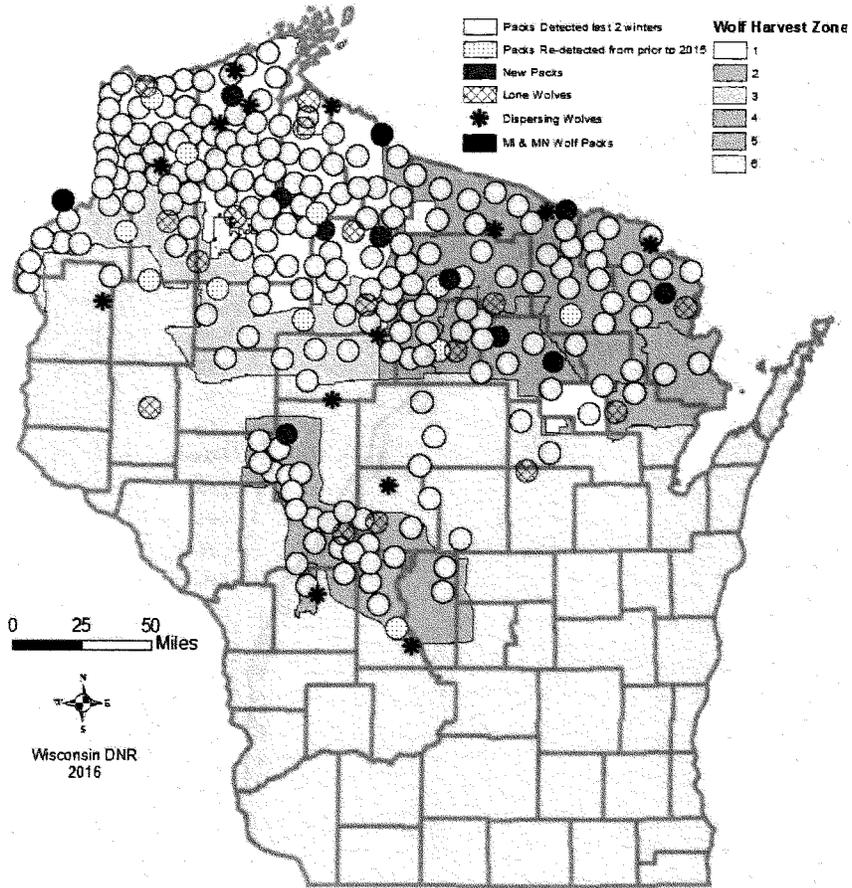


Figure 4. Wolves detected in Wisconsin in winter 2015-2016.

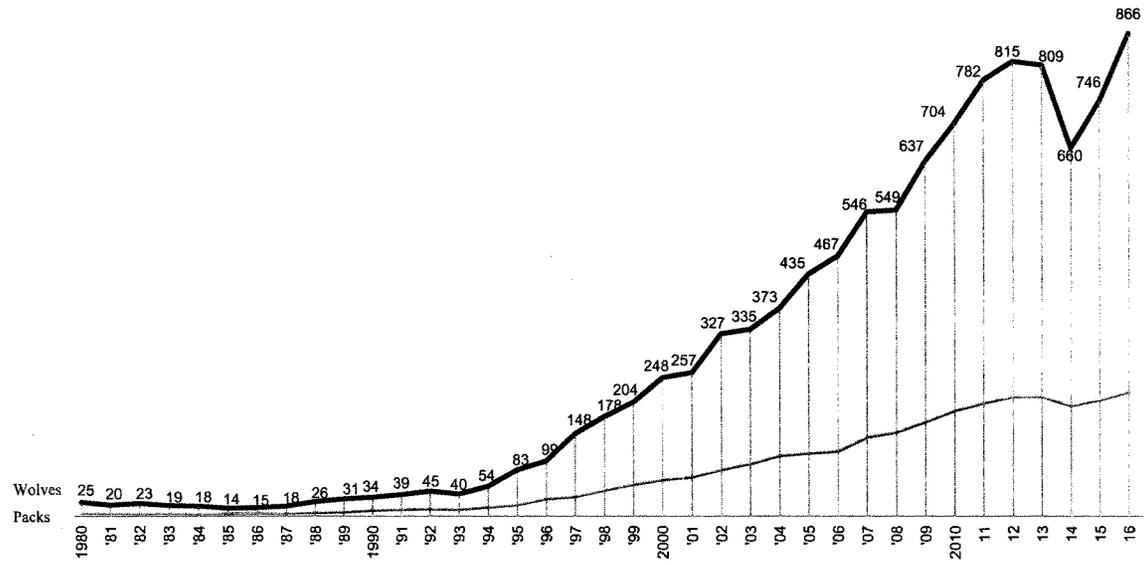


Figure 5. Changes in Wisconsin Gray Wolf Population: 1980-2016.

## Wisconsin Wolf Season Report 2012

**Federal Delisting of Wolves** – Federal delisting of wolves occurred on January 27, 2012, following years of de-listings and re-listings resulting from a number of court cases, even though the Midwest wolf population exceeded recovery goals for many years.

**Statutory Direction:** Act 169 was approved by the Governor in April 2012. This statute authorizes and requires a wolf hunting and trapping season. Numerous season and application details were described in the statute. Act 169 authorized the Department to delineate harvest management zones, set harvest quotas, and determine the number of licenses to be issued to accomplish the harvest objective.

**Wolf Season Emergency Rule:** Act 169 required that the department draft an emergency rule for implementation of the statute with a 2012 season. After work by the Wolf Season Ad Hoc Team, public meetings, meeting with the Wolf Science Team and Stakeholders Team, review of wolf season public survey responses, consultation with the Voigt Task Force and Great Lakes Indian Fish and Wildlife Commission (GLIFWC) staff and attorneys, consultation with other tribal representatives, and public testimony to the Natural Resources Board (NRB), the emergency rule was adopted by the NRB on July 17, 2012.

**Harvest Goals:** The goals of the prescribed harvest were to: begin to reduce the statewide wolf population toward the wolf management plan population goal; maintain a sustainable wolf population; reduce conflicts, particularly in areas with the greatest past or potential future conflicts; and learn for adapting harvest management prescriptions in subsequent years.

**Quotas and Expected Impacts:** The NRB adopted a total harvest quota of 201. University of Wisconsin-Madison modeling predicted a population reduction of about 14% (8-19%) if this quota was reached and other mortality factors occurred as expected. The predicted impacts included the assumption that tribes would take the harvest quota allocated to them, which did not occur. Winter wolf surveys will provide information useful for determining impacts of the 2012 season.

**Approach to Zones:** Six zones were delineated based on wolf habitat value and human conflict potential. Harvest quotas were set for each zone based on 20% (zones 1, 2, 5), 40% (zones 3, 4) and 75% (Zone 6) of the mid-point of the minimum wolf count in each zone.

**Reservation Restrictions:** Zero quota areas were established for state-licensed hunters and trappers within the reservation boundaries of the Bad River, Red Cliff, Lac Courte Oreilles, Lac Du Flambeau, Menominee and Stockbridge-Munsee reservations.

**Tribal Quota:** The department set one-half of the 2012 wolf harvest quota aside for Ojibwe tribes based on Voigt case requirements and based on wolf counts within the area of each zone delineated as ceded territory. This tribal quota amounted to 85 wolves, leaving 116 for state-licensed hunters and trappers.

**Licenses Available:** The number of state licenses was set at 10 times the quota allocated to state hunters and trappers, based on the expectation that success rates would be better than that seen in Idaho and Montana with the amount of road access and trapping interest in Wisconsin. Approximately 75% of applicants notified of the opportunity to buy a license actually purchased one. Most applicants were residents. Most applicants had purchased some kind of license from the department in the past. The number of licenses purchased and activity of licensees was sufficient to reach harvest quotas in all zones well before the end of the hunting and trapping season.

**Known Mortalities by Zone:** We have tallied mortalities detected through harvest registration, radio-telemetry, depredation control action reports, and reports from staff and the public. Recorded mortalities were as follows for 2012.

Cause	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Total
Licensed Harvest	32	19	19	5	23	19	117
Depredation control	38	0	29	0	1	8	76
Vehicle collision	4	7	3	1	4	5	24
Illegal Kill	8	0	5	1	3	4	21
Unknown	1	2	0	0	2	0	5
<b>Total</b>	<b>83</b>	<b>28</b>	<b>56</b>	<b>7</b>	<b>33</b>	<b>36</b>	<b>243</b>

**Sex of Harvested Wolves:** The harvest was comprised of 59% males and 41% females.

**Method of Harvest:** Trapping accounted for 52% of the harvest, with hunting accounting for the remainder. Additional information will be available once responses from returned trapper and hunter surveys are summarized. Due to a lawsuit that was not resolved until after the season closed, dogs were not used for hunting wolves in 2012.

**Tribal Harvest:** The Ojibwe did not authorize tribal members to hunt for wolves. The reported tribal wolf harvest on off-reservation lands was zero.

**Expected Mortalities:** All detected mortalities were within the levels expected when modeling was used to predict the impact of the harvest quotas on the population. For example, the depredation control harvest of 76 was less than the 10% of winter count mid-range (85). Both the number of reported road kills and reported illegal kills were less in 2012 than in 2011.

**Zone Closures:** Successful wolf hunters and trappers were required to report harvested wolves within 24 hours. Zones were closed either when they were close to the harvest quota or had reached the harvest quota. Wolf harvest trends were reviewed daily to predict how soon the harvest might increase to the quota and, therefore, how soon the zone should be closed.

Zone	Date Closed
1	December 2
2	November 16
3	December 23
4	November 16
5	December 12
6	December 14

**Wolf Harvest Distribution:** Wolf harvest was distributed across occupied areas of the wolf zones, with harvest coming from 30 counties.

**Depredation Control Activities:** The USDA Wildlife Services (USDA WS) was contracted to remove wolves from farms with depredation problems. Landowners were given permits for wolf removal where they have had problems on their land or nearby. USDA WS removed 57 wolves from farms with a history of depredation problems. A total of 129 permits were issued to landowners with a history of depredation problems or who owned land near such situations, and 16 wolves were removed under authority of these permits. An additional three wolves were killed in the act of depredation by landowners without permits. Most of the depredation control wolf kills occurred in areas of Zones 1 and 3, where there has been a history of substantial depredation problems. For Zone 3, most of the depredation control wolf removals were associated with 2 farms, 1 of which was located near the Minnesota border.

**Wolf Management Revenue:** Ear-marked revenues from wolf application fees and license purchases were roughly equivalent to the total costs of depredation compensation and the USDA WS depredation control contract. The revenue was \$289,865.50.

**Dogs Reported Killed by Wolves:** One pet dog and 7 hunting dogs (while hunting bears, bobcats, and coyotes) were reported killed by wolves in 2012.

**Depredation Compensation Costs:** The amount of compensation to be paid for loss of livestock and dogs is estimated to be approximately \$120,000 for the period of April 16 to the end of 2012.

**Wolf Carcass Data:** Teeth and female reproductive tracts were collected from registered wolves for data on age and reproductive status that will be useful for evaluating wolf population trends and impacts of seasons. Data are not yet available.

**Law Enforcement Visits with Public:** Wardens across the state reported that they heard overwhelming support from most people they had contact with during the fall and winter wolf season, including both hunters and non-hunters who supported a managed wolf harvest. Overall, the season was a very positive experience for most who participated. Many deer hunters

commented on the importance of having a wolf season to reduce the population and were pleasantly surprised to see the high level of success amongst hunters and trappers.

#### Law Enforcement Activity Report:

# of Wolf Hunting related complaints received:	15
# of Wolf Trapping related complaints received:	11
# of Wolf related Investigations conducted:	30
# of Social Media Wolf related complaints/calls received:	33
# of Hunting related citations issued:	5
# of Trapping related citations issued:	5
# of Verbal Warnings Issued:	9
# of incidentally trapped wolves recovered:	4
# of Illegally harvested wolves recovered:	14
# of shot & unrecovered wolves found:	2
# of Unknown cause of death wolves found:	1
# of Other dead/injured wolves recovered: (car-kills, etc.)	4

#### Plans Going Forward

**Wolf Permanent Rule:** A request to go to hearings on a permanent rule was approved at the December 2012 NRB meeting as required by Act 169. The Act allows the emergency rule to remain effective until the permanent rule is adopted and gives no deadline for adoption. The draft permanent rule is basically a replica of the emergency rule; however, the department and board will consider amending the rule based on tribal and public feedback. The plan at this point is to hold public hearings in the winter of 2014 and request board approval in June 2014 at the same time as approval is sought for the revised Wolf Management Plan and the proposed 2014 harvest quotas.

**Wolf Management Plan Revision:** The department's goal is to draft an updated wolf management plan for approval in June 2014. Preliminary plans call for gathering initial input from a roundtable of stakeholder group representatives, followed by drafting of a revised plan by a department wolf advisory committee, followed by additional meetings for feedback from the roundtable and through a number of public meetings.

**Wolf Surveys:** Wolf survey blocks have been assigned to department staff and/or trained volunteer trackers for all blocks where wolves have been detected. Requests have gone out to department staff and potential volunteers to report any wolves detected in unassigned blocks, with observations followed up for verification. The department's intent is to get as complete a winter count as possible.

**Quotas for 2013:** Wolf count data should be compiled in April. The department wolf advisory committee will be asked to develop quota recommendations in late April or May. The Natural Resources Board will be asked to approve quotas in June. The state drawing for hunting and trapping license will occur in August. Tribal declarations will be needed by the end of July. The 2013 season starts on October 15.

## Wisconsin Wolf Season Report 2013-14

### **Abstract**

Wisconsin wolf hunters and trappers harvested 257 wolves during the 2013-14 season. This was a 119% increase from the 2012-13 harvest of 117 wolves. The 2013-14 harvest was comprised of 134 males and 123 females.

### **Background**

Wisconsin requires non-Chippewa hunters and trappers to obtain a wolf permit to harvest a wolf. Permits are issued through a 2 stage process. The first 50% of permits are issued through a random lottery in which all applicants are entered. The second 50% of permits are issued based upon the cumulative preference points of applicants which give unsuccessful applicants from prior years a greater chance to obtain a permit. Each permit allows the harvest of one wolf by any legal method. Legal methods include trapping with foothold traps and cable restraints, hunting with the use of electronic calls, bait and the aid of dogs.

Wisconsin's wolf season opens on October 15<sup>th</sup> of each year. Trapping with foothold traps and hunting with the aid of bait and calls are legal throughout the season. Trapping with cable restraints and hunting with the aid of dogs become legal methods on the Monday following the gun deer season, in 2013 these became legal methods on December 2<sup>nd</sup>. The state is divided into 6 wolf management zones (Figure 1). Wolf permits authorize hunting and trapping in any open zone. The Department has the authority to close wolf zones as zone specific quotas are reached. If quotas are not met the season closes on February 28<sup>th</sup>.

### **Methods**

Wisconsin requires state-licensed wolf hunters and trappers to register their wolf using a 2 stage registration process. Within 24 hours of harvest, permit holders are required to inform the Department by phone of the location, sex and method used. This information is used to track harvest by unit and make unit closure decisions. By the 5<sup>th</sup> day of the month following harvest, hunters and trappers are required to present the pelt and skinned carcass to the department for final registration and tagging of the animal. The department collects a pre-molar for aging purposes, a genetic sample, and a reproductive tract from females.

### **Results**

#### **Wolf season**

Of 16,672 total applicants (table 1), 2,510 (15.1%) received authorization to purchase a wolf permit. The state-wide wolf quota was set at 275 with 251 available to state license holders, the total wolf harvest in the 2013-14 season was 257 representing a 32.4% harvest rate (table 2) compared to 117 in the 2012-13 season. Males comprised 52.1% (134) and females 47.9%

(123) of the total harvest. Wolf harvest was distributed across the 6 management units according to unit specific quotas (table 2, figure 2).

Of the 257 wolves harvested, trapping with foothold traps accounted for 180 (70.0%), 77 (30.0%) wolves were harvested by hunters. Of the 77 wolves harvested by hunters, 35 (13.6%) were hunted with the aid of dogs. One wolf was harvested with archery equipment; firearm was the method of harvest for all other animals (table 3). No wolves were harvested with the use of cable restraints.

All zones opened to wolf harvest on October 15<sup>th</sup>. The first zone closure (zone 2) occurred on October, 23<sup>rd</sup>, the final zone (zone 3) closed on December 23<sup>rd</sup> (table 2). The 2012-13 season also closed on December 23<sup>rd</sup>, however the rate of harvest early in the 2013-14 season was greater (figure 3).

#### **Biological Sample Collection**

Successful license holders are required to submit wolf carcasses to the Department. The primary objective in carcass collection is to obtain biological samples. Carcass collection and handling procedures were designed for this purpose, not as an investigatory tool. A genetic sample and a tooth for aging was collected from every carcass received. A reproductive tract was collected from every female.

At the time of registration, both the pelt and carcass are available for inspection by trained DNR personnel conducting the registration. This provides an opportunity to evaluate the animals for evidence of harvest violations. Given the heightened public interest in wolf hunting with the aid of dogs, the Department conducted an additional evaluation of a sample of carcasses to assess potential dog related injuries to wolves. This evaluation was led by the DNR wildlife veterinarian, assisted by the DNR wildlife health section chief, an investigative warden, a USDA-Wildlife Services damage specialist, and the DNR large carnivore specialist.

Twenty seven skinned carcasses were examined. The outer exposed tissue layer of the carcasses was severely desiccated. Due to the condition of the carcasses, subcutaneous hemorrhaging and edema, as well as presence or absence of injuries that didn't extend further into the muscle layers could not be assessed. Evaluation of these carcasses was inconclusive. One evaluation was conducted of a carcass with the pelt removed only from the shoulder and head. The cause of death for this wolf was a bullet wound but the carcass showed evidence of minor trauma consistent with bite wounds which occurred prior to death. Available evidence did not allow for conclusive determination of the species responsible for the bite wounds. Law enforcement personnel investigated the events surrounding the harvest of this animal and found no evidence of a violation.

Trauma consistent with gunshot wounds was found in all carcasses.

#### **Law Enforcement Activities**

Department law enforcement personnel conducted a total of 31 wolf hunting/trapping related investigations and issued 21 citations during the 2013-14 wolf season (table 4).

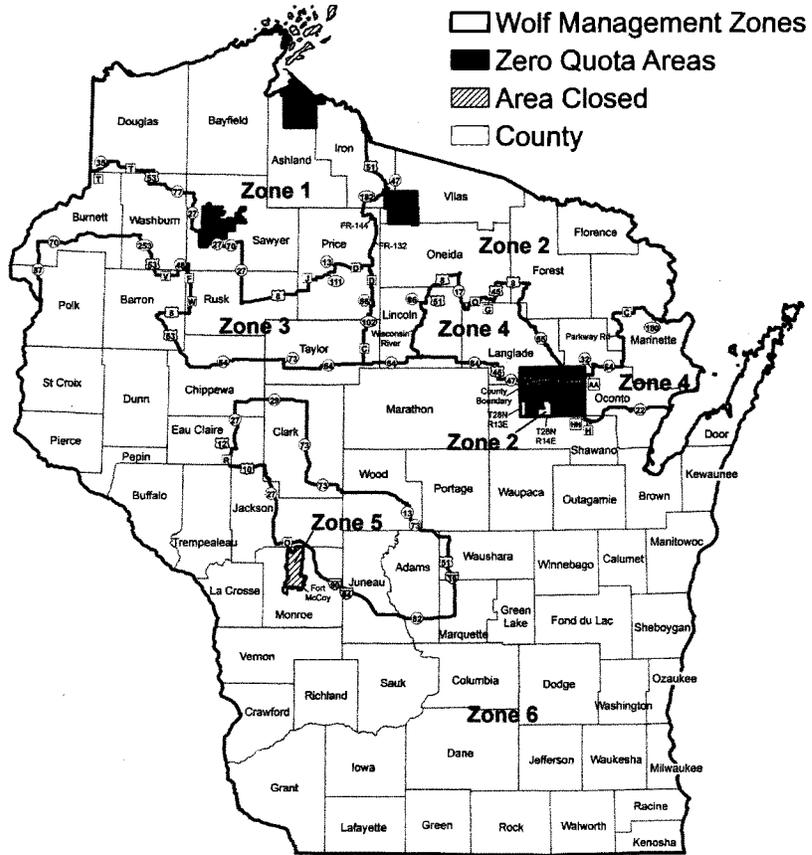


Figure 1: Wolf management zones

Table 1: Wolf permit applications

	Resident	Non-resident	Total
Harvest permit	11,917	191	12,108
Preference point	4,433	131	4,564
Total	16,350	322	16,672

Table 2: Wolf quota, harvest and closure date by management zone.

Zone	2013 off reservation winter count mid-point	Total quota	State-licensed quota	Harvest	Harvest Rate as % of winter count	Closure date
1	334	84	76	77	23.1	10/30/13
2	154	31	28	29	18.8	10/23/13
3	105	79	71	75	71.4	12/23/13
4	25	13	12	12	48.0	11/5/13
5	141	35	34	35	24.8	10/30/13
6	33	33	30	29	87.9	11/7/13
Total	792	275	251	257	32.4	12/23/13

Table 3: Method of harvest by management zone.

Unit	Gun	Bow	Foothold Trap	With the aid of Dogs	Total
1	12		65		77
2	5		24		29
3	13	1	26	35	75
4	1		11		12
5	5		30		35
6	5		24		29
Total	41	1	180	35	257

Table 4: Summary of law enforcement activity during the wolf season

	Oct.	Nov.	Dec.	Jan.	Feb.	Total
# of Wolf Hunting related complaints received:	7	3	4	1		15
# of Wolf Trapping related complaints received:	26	5				31
# of Wolf related Investigations conducted:	18	7	5	1		31
# of Hunting related citations issued:	1	1	1			3
# of Trapping related citations issued:	12	6				18
# of Verbal Warnings Issued:	14	6	2			22

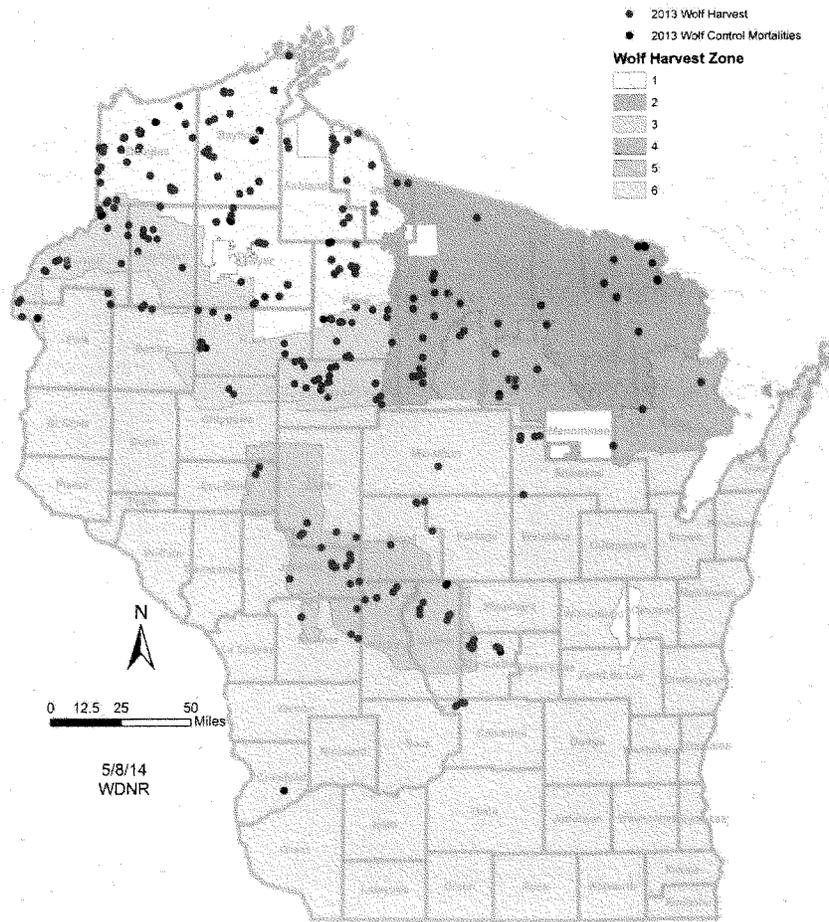


Figure 2: Location of 2013 wolf harvest and control mortalities.

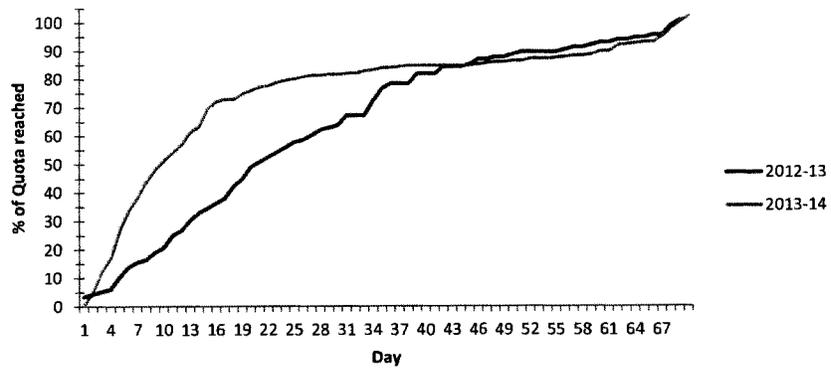


Figure 3: Rate of harvest in the 2013-14 and 2012-13 wolf seasons

## Wisconsin Wolf Season Report 2014-15

David MacFarland and Jane Wiedenhoef

### **Abstract**

Wisconsin wolf hunters and trappers harvested 154 wolves during the 2014-15 season. This was a 60% decrease from the 2013-14 harvest of 257 wolves. The 2014-15 harvest was comprised of 87 males and 67 females.

### **Background**

Wisconsin requires state-licensed hunters and trappers to obtain a wolf permit to harvest a wolf. Permits are issued through a 2 stage process. The first 50% of permits are issued through a random lottery in which all applicants are entered. The second 50% of permits are issued based upon the cumulative preference points of applicants which give unsuccessful applicants from prior years a greater chance to obtain a permit. Each permit allows the harvest of one wolf by any legal method. Legal methods include trapping with foothold traps and cable restraints, hunting with the use of electronic calls, bait and the aid of dogs.

Wisconsin's wolf season opens on October 15<sup>th</sup> of each year. Trapping with foothold traps and hunting with the aid of bait and calls are legal throughout the season. Trapping with cable restraints and hunting with the aid of dogs become legal methods on the Monday following the gun deer season, in 2014 these became legal methods on December 1<sup>st</sup>. The state is divided into 6 wolf management zones (Figure 1). Wolf permits authorize hunting and trapping in any open zone. The Department has the authority to close wolf zones as zone specific quotas are reached. If quotas are not met the season closes on February 28<sup>th</sup>.

### **Methods**

Wisconsin requires state-licensed wolf hunters and trappers to register their wolf using a 2 stage registration process. Within 24 hours of harvest, permit holders are required to inform the Department by phone of the harvest location, sex and method used. This information is used to track harvest by unit and make unit closure decisions. By the 5<sup>th</sup> day of the month following harvest, hunters and trappers are required to present the pelt and skinned carcass to the department for final registration and tagging of the animal. The department collects a pre-molar for aging purposes, a genetic sample, and a reproductive tract from females.

### **Results**

#### **Wolf season**

Of 9,334 permit applicants, 1,500 (16.1%) received authorization to purchase a wolf permit. An additional 5,005 individuals applied for a preference point bringing the total number of applicants to 14,339 (table 1). The state-wide wolf quota was set at 156 with 150 available to state license

holders, the total wolf harvest in the 2014-15 season was 154 representing a 23.8% harvest rate (table 2) compared to 257 and 32.4% in the 2013-14 season. Males comprised 56.5% (87) and females 43.5% (67) of the total harvest. Wolf harvest was distributed across the 6 management units according to unit specific quotas (table 2, figure 2).

Of the 154 wolves harvested, trapping with foothold traps accounted for 124 (80.5%), and 30 (19.5%) wolves were harvested by hunters. Of the 30 wolves harvested by hunters, 6 (3.8%) were hunted with the aid of dogs. Three wolves were harvested with archery equipment; firearm was the method of harvest for all other animals (table 3). No wolves were harvested with the use of cable restraints.

All zones opened to wolf harvest on October 15<sup>th</sup>. The first zone closure (zone 2) occurred on October, 18<sup>th</sup>, the final zones (zones 3 and 6) closed on December 5<sup>th</sup> (table 2). The rate of harvest in the 2014-15 season was faster than experienced in the previous 2 seasons (figure 3).

#### **Biological Sample Collection**

Successful license holders are required to submit wolf carcasses to the Department. The primary objective in carcass collection is to obtain biological samples. A genetic sample and a tooth for aging was collected from every carcass received. A reproductive tract was collected from every female. Data analysis will be completed by summer 2015.

In response to concerns over the use of dogs in wolf hunting, the Natural Resources Board directed the DNR to establish a voluntary program to evaluate wolf carcasses at the time of pelt removal. The purpose of this program was to provide additional information on the prevalence of bite related injuries in harvested animals. Successful hunters and trappers were asked if they would like to participate during the call in registration process. Personnel from USDA-Wildlife Services traveled to the participant and collected information as the pelt was removed from the animal. Eight evaluations were conducted with no bite related injuries observed. All 8 animals were harvested with the use of foothold traps.

#### **Law Enforcement Activities**

Department law enforcement personnel conducted a total of 19 wolf hunting/trapping related investigations and issued 6 citations during the 2014-15 wolf season (table 4).

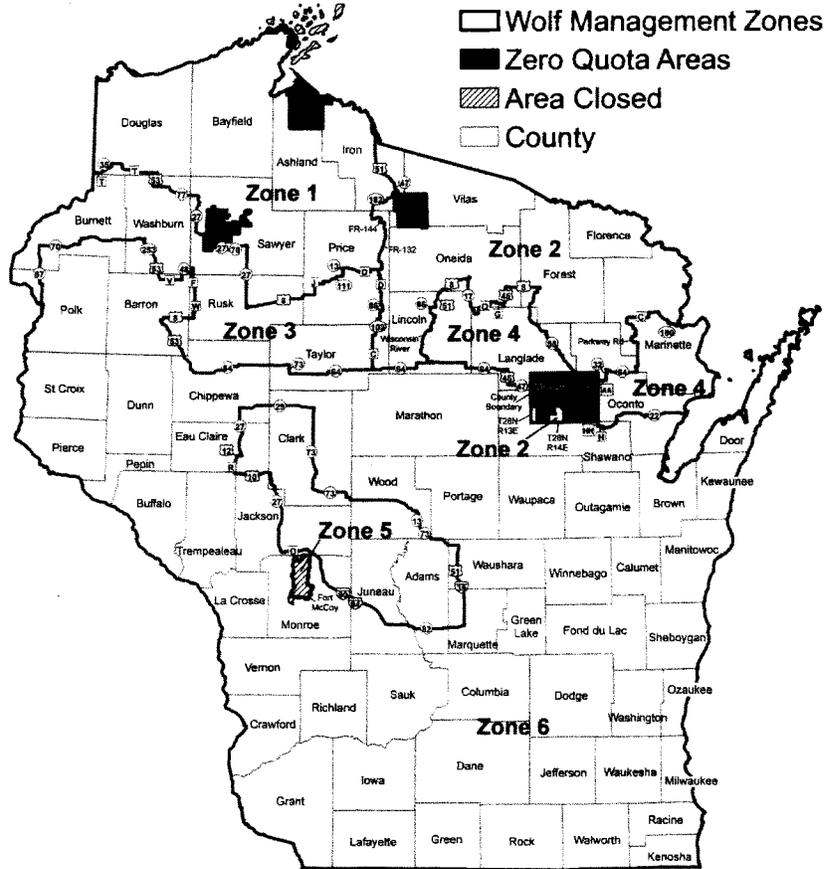


Figure 1: Wolf management zones

Table 1: Wolf permit applications

	Resident	Non-resident	Total
Harvest permit	9,195	139	9,334
Preference point	4,859	146	5,005
Total	14,054	285	14,339

Table 2: Wolf quota, harvest and closure date by management zone.

Zone	2014 off reservation winter count mid-point	Total quota	State-licensed quota	Harvest	Harvest Rate as % of winter count	Closure date
1	275	33	32	36	13.1	10/19/14
2	139	16	15	29	20.9	10/18/14
3	82	41	40	30	36.6	12/5/14
4	18	9	8	5	27.8	10/19/14
5	106	21	20	18	17.0	10/20/14
6	28	36	35	36	128.6	12/5/14
Total	648	156	150	154	23.8	12/5/14

Table 3: Method of harvest by management zone.

Unit	Gun	Bow	Foothold Trap	Gun - with the aid of Dogs <sup>a</sup>	Total
1	8		28		36
2	2		27		29
3	4		25	1	30
4	1		4		5
5	1	1	16		18
6	5	2	24	5	36
Total	21	3	124	6	154

<sup>a</sup> wolves harvested by gunshot with the aid of trailing hounds.

Table 4: Summary of law enforcement activity during the wolf season

	Oct.	Nov.	Dec.	Jan.	Feb.	Total
# of Wolf Hunting related complaints received:	5		1			6
# of Wolf Trapping related complaints received:	11	1				13
# of Wolf related Investigations conducted:	14	2	1			19
# of Hunting related citations issued:	1		1			2
# of Trapping related citations issued:	4					4
# of Verbal Warnings Issued:	8	1				9

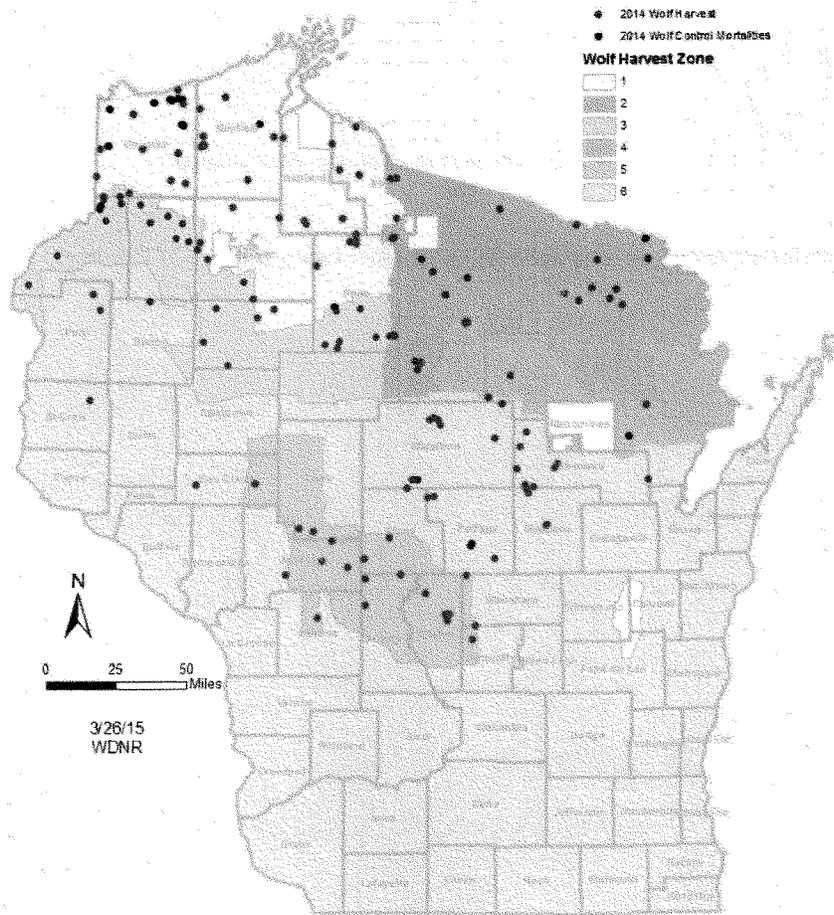


Figure 2: Location of 2014 wolf harvest and control mortalities.

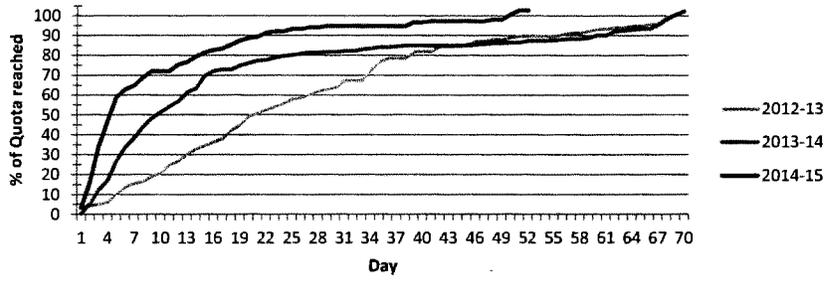


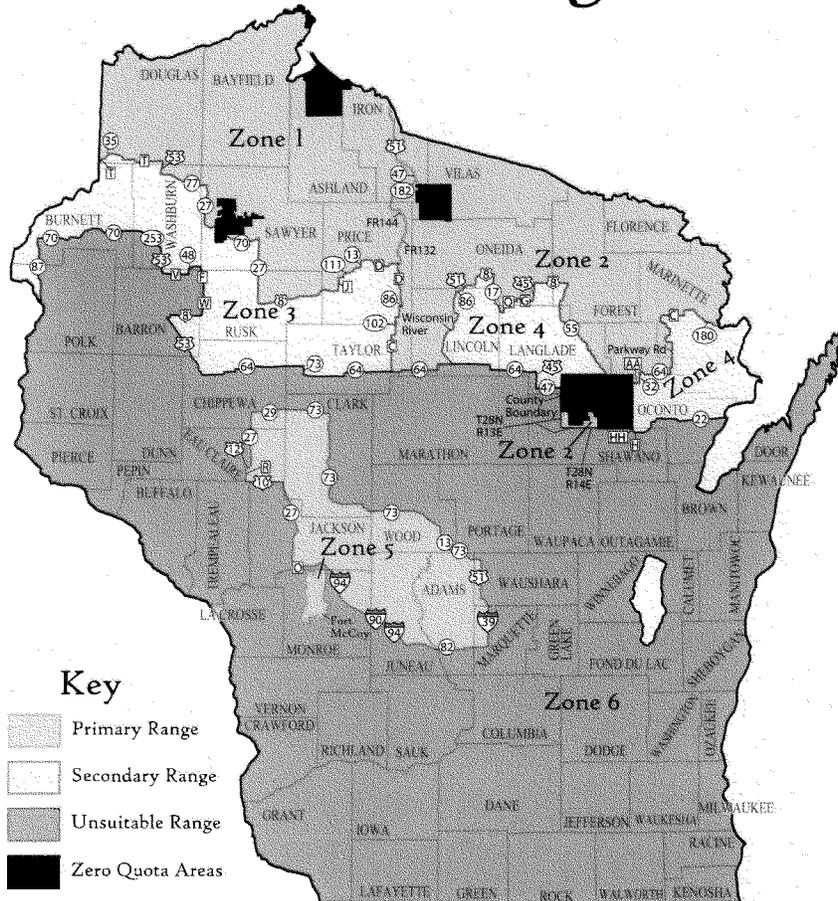
Figure 3: Comparative rate of harvest in Wisconsin's first 3 wolf seasons

**Wisconsin Annual Wolf Damage Payment Summary**

Cal Year	Cattle \$	Calves \$	Missing Calves \$	Cattle \$	Cattle Vet \$	Hounds \$	Hound Vet \$	Pat Dogs \$	Pet Vet \$	Deer \$	Sheep \$	Horse/Donkey \$	Llama \$	Pig \$	Goat \$	Chickens \$	Turkey \$	Total \$																	
85	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	200.00																
86	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00																
87	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00																
88	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	2,500.00																
89	400.00	1	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00																
90	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00																
91	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	490.00																
92	80.00	1	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	684.00																
93	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	2,500.00																
94	900.00	2	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	1,600.00																
95	1,500.00	6	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	6,125.00																
96	2,040.00	8	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	1,509.75																
97	3,800.00	9	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	11,918.82																
98	2,198.00	5	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	11,850.00																
99	13,471.62	28	5,724.00	12	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	9,346.16																
00	3,030.00	7	475.00	1	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	84,279.47																
01	2,308.96	4	12,684.08	21	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	18,630.00																
02	7,125.00	11	0.00	0	3,500.00	1	429.00	2	22,000.00	11	151.60	1	800.00	1	238.00	3	8,100.00	5	2,453.50	27	10,000.00	2	50.00	0	0.00	0	0.00	0	3,731.90	68	120.00	8	47,434.14		
03	6,950.00	12	1,450.00	2	2,400.00	2	0.00	0	12,550.00	7	332.21	1	0.00	0	1,549.68	3	1,200.00	1	1,425.00	11	2,250.00	1	50.00	0	0.00	0	0.00	0	0.00	0	25.00	4	0.00	0	18,630.00
04	32,093.33	49	32,148.82	53	7,250.00	5	0.00	0	24,500.00	11	1,868.18	3	1,900.00	3	2,858.47	3	5,300.00	6	2,025.00	15	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	54,497.10		
05	19,509.00	30	1,900.00	3	9,175.00	5	64.50	1	28,750.00	14	1,628.95	3	5,300.00	4	527.95	2	0.00	0	970.00	8	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	30,106.88		
06	34,897.33	41	7,450.00	6	9,450.00	5	129.00	1	51,000.00	21	4,081.30	6	4,000.00	3	1,128.93	4	0.00	0	1,400.00	6	6,500.00	2	93.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	72,355.40
07	18,745.00	25	6,990.00	9	1,000.00	1	0.00	0	26,500.00	11	908.95	2	5,735.00	3	1,128.93	4	0.00	0	1,400.00	6	6,500.00	2	93.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	114,798.52
08	22,684.46	26	28,950.00	21	18,000.00	13	0.00	0	52,500.00	22	100.50	1	2,200.00	2	2,567.52	5	3,500.00	1	150.00	1	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	68,907.88
09	27,442.43	37	2,550.00	4	0.00	0	46.00	1	47,500.00	19	4,666.64	6	4,450.00	4	2,814.28	5	0.00	0	390.00	2	1,500.00	3	50.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	134,752.48
10	28,338.50	38	28,900.00	25	27,325.00	18	0.00	0	44,651.00	19	1,779.65	4	8,730.00	6	8,146.36	11	55,000.00	6	1,225.00	6	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	91,328.55
11	36,207.00	46	20,994.00	25	22,231.00	15	414.82	2	37,000.00	15	3,240.25	4	1,250.00	2	401.20	2	20,000.00	2	8,850.00	43	2,000.00	1	500.00	1	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	202,843.21
12	13,990.00	17	190,702.00	257	718.00	1	0.00	0	7,500.00	3	108.18	1	1,000.00	1	0.00	0	150.00	1	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	139,174.31
13	22,958.00	33	95,519.20	115	6,200.00	8	0.00	0	14,000.00	8	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	151,333.36
14	20,332.00	26	52,362.00	62	14,348.00	15	136.75	2	56,000.00	23	0.00	0	5,300.00	3	79.61	1	2,675.00	6	200.00	2	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	151,333.36
<b>Total</b>	<b>321,398.83</b>	<b>480</b>	<b>488,906.90</b>	<b>618</b>	<b>121,598.00</b>	<b>89</b>	<b>1,229.82</b>	<b>10</b>	<b>497,651.00</b>	<b>221</b>	<b>20,034.06</b>	<b>40</b>	<b>41,915.00</b>	<b>36</b>	<b>22,023.71</b>	<b>51</b>	<b>164,675.00</b>	<b>60</b>	<b>21,047.50</b>	<b>141</b>	<b>27,000.00</b>	<b>12</b>	<b>4,900.00</b>	<b>2</b>	<b>600.00</b>	<b>1</b>	<b>3,025.00</b>	<b>14</b>	<b>4,328.90</b>	<b>164</b>	<b>1,196.00</b>	<b>148</b>	<b>1,739,927.72</b>		

# Indicates the number of that species compensation was provided on.  
 Note: Totals indicate the number of animals and compensation paid in a calendar year which may or may not be the same year the depredation occurred.

# Wolf Harvesting Zones



## Key

-  Primary Range
-  Secondary Range
-  Unsuitable Range
-  Zero Quota Areas

**Zero Quota Areas** - Wolf harvest is not allowed within the exterior boundaries of the Bad River, Lac Courte Oreilles, Lac du Flambeau, Menominee, and Red Cliff reservations nor within the designated Stockbridge-Munsee wolf zone except with DNR depredation permits.

Access to Fort McCoy is by special permit only.

**Testimony of Ryan Klussendorf  
W2072 State Highway 64  
Medford, WI 54451**

**Great Lakes Wolf Summit  
Cumberland, WI  
September 15, 2016**

Good Afternoon. My name is Ryan Klussendorf. I am a 4<sup>th</sup> generation dairy farmer from Medford, WI. I own and operate a 100 cow rotational grazing dairy farm with my wife, Cheri, and three sons Kale, Owen, and Max.

I am here to testify because, like so many other farms in Wisconsin, I have had a confirmed wolf depredation on my farm. I'm here to tell you about the gruesome attack that happened on my farm, and how my cow number 2042 was bit in the back leg and drug down from behind by a pack of wolves. It is hard to believe it happened six years ago, and yet this single attack still impacts every decision we make for our cattle and our farm management practices continually revolve around it.

After cow number 2042's tendons and ligaments in her back legs were severed, the pack started eating her soft tissue while she was alive, but she eventually succumbed to her lethal injuries. The blood bath in the field was large and it was hard to identify her. The tags from her ears were 100 feet from her blood-stained corpse. For all of you this is the beginning of my story... but for me it started months before.

Our nightmare began in the middle of June 2010. We moved a group of young spring calves out to pasture for the summer. The calves all born between February and April were put in a paddock close to the barn. These calves were moved to new pasture and fed grain twice a day. They were used to human contact and were very friendly.

On July 2<sup>nd</sup> we received a phone call at 3:55 AM from the Taylor County Sheriff's Department. They had a report of a large group of young cattle in the roadway about a quarter of a mile from our farm. We were up, dressed and outside in a

matter of minutes. We went out to the roadway and brought the agitated, sweat-covered calves from the roadway back to their pasture. Several more times on early July mornings we found these spring calves separated into groups out of their paddock but still on the farm.

In August we were awoken twice by passing motorist and notified that our calves were out in the roadway. On August 10<sup>th</sup> at 2:15 AM we received a phone call from the Taylor County Sheriff's Office that our calves were again in the roadway. We were able to herd the calves off the road but could feel a sense of fear in them. They seemed to be attracted to lights and were uncontrollable. We offered grain to the calves but as soon as we moved around to count them they would spook and run.

While I was tending to the calves, my wife Cheri was being issued a citation for animals at large. By this time, we believed – incorrectly - the calves were being chased by coyotes. As Cheri tried to explain this to the officer, she was told that we had inadequate fences, this was not the first time law enforcement was called out, and to contact the DNR for help with the wildlife.

This is the first time I really felt I was fighting a losing battle. Our cattle are our most valuable investment and sole income generators on the farm. Each time there are cows on the road there is a very real possibility one could get hit. I kept asking myself, "What if it caused an accident, maybe even the death of the cow? Or even worse, a person?" This is an extremely serious public safety hazard and a huge liability I take each and every night I put cows on pasture. The sole reason I was able to start farming at age 21 was my ability to keep my overhead cost low by grazing my cattle. That day I also realized exposing my cattle to normal grazing practices – under the threat of wolf predation - could also ruin my life.

I certainly couldn't blame these calves. If I was running for my life, I would also run through a fence and head for the first car or light I could find. Not only was I being tormented by a pack of wolves, but now I felt like I, and my wife, were being treated as a second-class, law-breaking citizen by my county sheriff's department.

We decided to fight the citation and go to trial. Having farmed all my life, I was confident I had adequate fences to contain our livestock, and we made changes

to the way we farmed, including keeping our calves closer to the buildings, but nothing we did helped. When we were approached by the District Attorney to pay the fine or go to trial we expressed our problem with wildlife to him but were told "there is nothing I can do for you, buy a gun."

To bring my story full circle, on the morning of November 7<sup>th</sup> we got up and headed to the barn to start chores. The first thing we noticed were cows in the barn yard waiting to be milked, but this was highly unusual as I normally have to go out to the pasture to get them. That morning, as I made my way out to pasture to bring the rest of the cows in, I found cow 2042. She might only be one cow to you, but she was my cow. She was a 3-year old cow, a good milker, and ready to calve the next spring. That day I didn't only lose a cow but every calf she could have had in the years to come, and all the milk she could have produced. Each day my cows produce milk we pour on cereal in the morning and fill our cups with at supper each night. It is my responsibility as their farmer to keep the cows happy, healthy, and safe and that day I failed them.

On November 11<sup>th</sup>, the charges of animals at large were dismissed, and we received an apology from the Sheriff's department. That was the worst summer of my life, and it still affects me every day. My stomach sinks if the phone rings after 9 pm. At night we have our window open no matter what time of year. I listen to each car go by and make sure they don't slow down. There are times that I spring out of bed at night thinking someone was knocking on the door only to figure out it is the ice maker in the kitchen dropping the ice. I am not an expert on wolves, but I am an expert on how one pack of wolves can torment you, threaten your livelihood and haunt you until you just want to give up.

Our cows are now within 200 feet of the buildings on our farm each night. Our calves are no longer out on pasture at all. The cost has been financially burdensome due to additional feed management and manure hauling, and emotionally burdensome with increased health and stress levels for us and our animals.

I am a husband, a father, and a farmer. Right now I cannot protect my cows and my family's livelihood without the risk of being prosecuted. Help Wisconsin farmers by removing the grey wolf from the endangered species list and get back

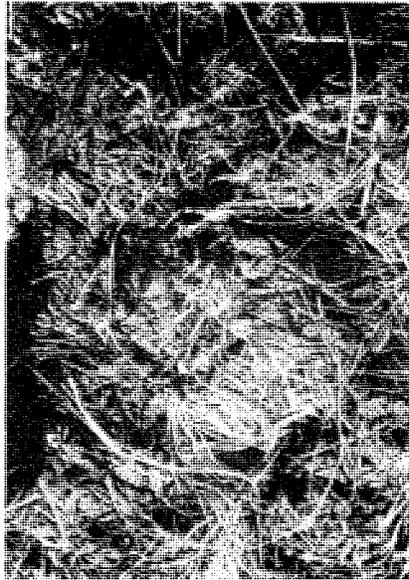
to a state-run management plan that accomplishes a population goal of 350 or less.

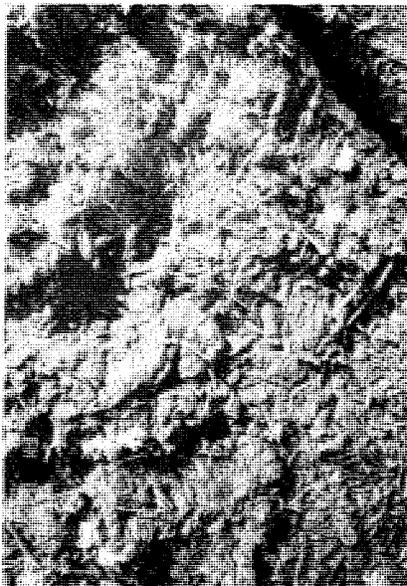
I don't think a federal judge, and most others who do not farm and care for livestock, can truly understand and appreciate the emotional and financial burden that wolf depredation can have on a farmer, their family, and their small business. Cow 2042 might only be one cow to you, but she was one of the reasons I get out of bed each morning, and still is the subject of my nightmare every night.

Thank you.

**Warning**

**Wolf Depredation Photos are graphic in nature**





*Halstern cow eaten alive by wolves Rust County*



TAYLOR CO. COW AND CALF EATEN BY WOLVES WHILE  
GIVING BIRTH



BURNETT CO. EXAMPLE OF LOSS OF EVIDENCE EATEN BY WILVES



CALF WAS SEEN WALKING IN PASTURE AT 5:00 AM - DISCOVERED REMAINS AT 4:00 PM



*Wolf Depredation Rusk County, WI Oct 2003*



ASHLAND CO. BEAR HOUND KILLED BY WOLVES



**Senate Environment and Public Works Committee**  
**Hearing entitled, “Oversight: Modernization of the Endangered Species Act”**  
**February 15, 2017**  
**Questions for the Record**  
**President James Holte**

**Ranking Member Carper:**

1. If you were in our shoes, what would you do to find consensus for proposed changes to the ESA?

**Answer:** Senator Carper, there are several opportunities for consensus on the issue of the ESA. The largest issue that must be identified is the need to work with landowners to really make the ESA function for all parties. Landowners must be consulted to discuss the areas of concern and challenges they have with the current ESA, what changes they recommend to help alleviate heavy burdens on them while balancing the need to preserve habitat and populations of endangered species.

These conversations need to occur with lawmakers truly LISTENING to these concerns by people whose livelihoods are dependent upon the land. This may mean that lawmakers must listen to citizens outside of their normal constituent base. Urban citizens often have a much different view of the realities that rural citizens face daily. This must be addressed when determining how to best modernize the Endangered Species Act to work for landowners and endangered species protection because the current system does not function properly.

2. Please identify three (3) areas where there is the greatest opportunity to find consensus for changes in the ESA.

**Answer:**

- Working lands conservation – There must be an incentive basis established for farmers to participate in order to providing habitat for endangered species. Often these agreements can be established but there must be proper incentives for the changes that will take place to the farmer/rancher’s operation. This can be accomplished by private partnerships with landowners as well as identification of opportunities for voluntary conservation practices that help preserve habitat. With 70 percent of listed species residing on private land, there must be a better incentive for farmers and ranchers to willingly participate.
- Identify guidelines for placing limitations and a minimum standard for listing new species. USFWS is required to address every inquiry or request they receive for new species listing, regardless of the evidence presented or validity of the claim. These are vital resources that could be focused toward more productive efforts. There should also be a refocus of the entire ESA to concentrate on species population recovery and the criteria for delisting. This has been woefully inadequate with the statistics of over 1,600 species that have been listed throughout the history of the ESA and less than 2% of those have been delisted in over 40 years. There must be a refocus on species population recovery.
- Transparency and State Wildlife Agency Involvement. Those that work closest to the land know it best. This is true for both farmers and those in the state wildlife agencies. These two groups are integrally involved in conservation and species awareness at the local level. Wisconsin has their own State Endangered Species List and I reference in my testimony that during the last revision, 15 species were delisted and only 9 were listed. That shows an understanding of what is happening at a local level and a positive engagement with wildlife, their habitat and their recovery.

Both farmers and wildlife agencies should be in integral part of the conversation and determination of what conservation plans and ESA decisions are made in their backyard. They should not be swooped down upon by broad sweeping mandates that may or may not function well for their individual situation. There are nuances in every situation that are known best by those that have their boots on the ground locally. The same objectives can be met with a little flexibility and creative ingenuity. Farmers have a lot to offer to this conversation and should be included from the very first step of the decision-making process.

**Senator Wicker:**

3. Like you, I come from a state with strong interests in the private property rights of farmers and other working lands. The biggest problems for landowners under ESA seem to be that having a listed species on your land is a legal liability and very costly. Is there a way to shield these property owners from litigation and create financial incentives to help recover species?

**Answer:** There is an opportunity to provide both financial incentives and shield property owners from legal liability while helping recover species. These issues are listed below:

- **Financial Incentives:** Working lands conservation – There must be an incentive basis established for farmers to participate in order to providing habitat for endangered species. Often these agreements can be established but there must be proper incentives for the changes that will take place to the farmer/rancher's operation. This can be accomplished by private partnerships with landowners as well as identification of opportunities for voluntary conservation practices that help preserve habitat. With 70 percent of listed species residing on private land, there must be a better incentive for farmers and ranchers to willingly participate.
- **Legal Liability:** We have started down a slippery slope as recent species listings have started to tread closer and closer to what private landowners can and cannot do with their property. This movement needs to be reined in and revised with more of a carrot v. stick approach. Revision of the habitat conservation listing agreement to include a reduction for litigation risk is essential. Farmers and ranchers assume all the risk with the agreements, therefore, these agreements should provide assurances to those that are taking the risks. In addition, these risks should include better pay and incentives to meet conservation requirements. Many of the practices necessary to protect habitat require a change in farming/ranching practices and that requires time, labor, reconfiguring farm management strategies, all things that have a monetary implication. If the federal government truly wants to protect and revive endangered species populations, there must be a fair, market-based, monetary compensation provision created and provided for those actions.

Senator BARRASSO. Thank you very much, Mr. Holte, for your compelling testimony. We appreciate you sharing your story.

Our next witness is Hon. Jamie Rappaport Clark, President and CEO of Defenders of Wildlife.

Thank you very much for joining us today. We look forward to your testimony.

**STATEMENT OF JAMIE RAPPAPORT CLARK,  
PRESIDENT AND CEO, DEFENDERS OF WILDLIFE**

Ms. RAPPAPORT CLARK. Thank you, Mr. Chairman, Ranking Member Carper, and other members of the Committee.

I am Jamie Rappaport Clark, President and CEO of Defenders of Wildlife, a national, nonprofit conservation organization dedicated to the protection of all native animals and plants and their natural communities.

From 1997 to 2001 I served as Director of the U.S. Fish and Wildlife Service under former President Bill Clinton. For 16 years prior to that I was a wildlife biologist for both the Department of Defense and the Department of the Interior.

Thank you for the opportunity to present the views of Defenders at today's oversight hearing on modernizing the Endangered Species Act.

For almost 45 years now the Endangered Species Act has protected our most imperiled species helping bring back the bald eagle, the American alligator, the Steller sea lion, the peregrine falcon, and many others from the brink of extinction.

It is a law that once enjoyed amazing bipartisan support. It passed the Senate in 1973 unanimously. It is a law that American people still support. A national poll conducted just last December found that 81 percent of voters believed that saving at risk wildlife from extinction is an important goal for the Federal Government.

It is a law that many other countries look to as a model for expressing their own commitment to future generations.

When President Nixon signed the Endangered Species Act into law, it represented the collective determination of the American public that we would not sit by and watch our species go extinct. It is a law that embodies a lofty vision of protection and preservation of species grounded in clear conservation principles.

Simply put, the Endangered Species Act works. It is important to remember that the Act is a tool of last resource to save species, the final measure when all others have failed to protect plants and animals on the brink of extinction.

It is an alarm bell that sends a warning signal about the state of our natural world, giving us an opportunity to find ways to save imperiled species and their habitat, plan for their recovery, and be responsible stewards of our environment.

Endangered species and the plants put in place to restore them are increasingly presented as barriers or annoyances to unfettered development or unchecked planned use activities. The Act has become a lightning rod for those who want less oversight and less protection from government.

That is not what the American people want for our wildlife, which brings us to today's oversight hearing. In my over 35 years of experience, talk of modernizing the Endangered Species Act has

amounted to one thing—a euphemism for undermining and weakening the statute.

In just the past 2 years in this Congress we have seen over 130 bills or riders proposed that all without exception would have weakened or undermined the Act and its purposes veering away from the American value of conservation and protection for future generations.

The Endangered Species Act is not broken. It does not need to be fixed. In fact it is enormously flexible. It has been improved by continuous administrative reforms that have made the law work better, both for the species it is designed to protect and for the landowners and other stakeholders affected by its provisions.

Federal agencies have made significant advances in implementing the Act from habitat conservation plans that integrate development and species conservation to candid conservation agreements with assurances that provide upstream solutions and regulatory certainty to landowners. That process is continuing.

Defenders is deeply engaged in thinking through new ways to make the Act work better and to make it more transparent for all stakeholders.

It is also important to remember that for many species recovery occurs not over years or months but over decades. We cannot rush nature toward recovery, but we can rush its destruction by weakening the single greatest tool we have to protect it.

The Act's strength is in its simple purpose, to prevent the extinction of threatened and endangered species and to promote their recovery. Local, State, tribal, and Federal agencies working with interested stakeholders continue to do some innovative, cutting edge work that guarantees the best chance for species survival.

The biggest problem the Endangered Species Act faces is not a need for modernization. It is a need for funding. Conflict surrounding the Act arises when government agencies lack the resources to fully implement the law.

Starving the Federal and State agencies that are committed to preventing species extinction and providing for the diversity of life across our country seriously undermines the goals of the law.

This debate should not be about the law. Rather, it should be about our commitment to its purposes and goals. Once a species is gone, it is gone forever. Let us not be the generation that bears the inglorious reputation of condemning our species to irrevocable extinction. We can and must do better for our children and grandchildren. They deserve it.

Thank you.

[The prepared statement of Ms. Rappaport Clark follows:]

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Testimony

of

**JAMIE RAPPAPORT CLARK  
PRESIDENT & CEO  
DEFENDERS OF WILDLIFE**

before the

**COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS**

**U.S. SENATE**

on

**Oversight: Modernization of the Endangered Species Act**

February 15, 2017



Good morning Chairman Barrasso, Ranking Member Carper and Members of the Committee:

My name is Jamie Rappaport Clark and I am the President and CEO of 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 speak about my experience conserving imperiled wildlife under the Endangered Species Act (ESA).

For 70 years, Defenders of Wildlife 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 1.2 million members and supporters.

Before coming to Defenders of Wildlife, I spent 20 years working in conservation as a wildlife biologist in the federal government, first at the Department of Defense and then at the Department of the Interior. From 1997 until 2001, I served as the Director of the U.S. Fish and Wildlife Service (FWS) under President Bill Clinton. In that role, I oversaw the implementation of the ESA and presided over the recovery and delisting of key endangered species including the bald eagle, the Aleutian Canada goose and the peregrine falcon. During my confirmation hearing before this committee almost 20 years ago, I pledged to increase the FWS's role in cooperative approaches to species conservation. I firmly believe that involving stakeholders and other federal and state agency expertise early on reaps long-term benefits for fish and wildlife resources and the economy. As detailed in my testimony, I remain convinced that such collaborative projects can be accomplished under the authority of the ESA in its current form.

The ESA is not broken and does not need to be fixed – or, in the vernacular of the hearing “modernized.” For more than 40 years, the ESA has been successful, bringing the bald eagle, the American alligator, the Stellar sea lion, the peregrine falcon and numerous other species back from the brink of extinction. Based on data from the FWS, the ESA has saved 99 percent of listed species from extinction. In its 44-year history, only 10 listed species have been officially declared extinct. Moreover, the ESA is in fact enormously flexible. Simply put, the ESA works. It has been improved by continuous administrative reforms that have made the ESA work better – both for the species it protects and for landowners and other stakeholders affected by its provisions. The Services have made enormous advances in implementing the ESA, from habitat conservation plans that integrate development and species conservation to candidate conservation agreements with assurances that provide regulatory certainty to landowners. And that process is continuing.

As this testimony emphasizes, the most important thing Congress can do to improve the ESA's effectiveness is to fully fund it. The current fiscal starvation must end. For the ESA to work as effectively as was intended, the agencies charged with overseeing and implementing it simply must have the necessary resources to achieve its visionary purposes and goals. Congress must provide adequate resources – not change the structure of this successful and popular law – to help realize the ESA's full potential.

### **A Visionary Law: The ESA's Values and Purpose Remain Strong Today**

So many of the conservation successes I've witnessed during my career can be attributed to the Endangered Species Act – a law that has withstood the test of time thanks to its solid grounding in shared conservation values. The preamble to the ESA recognizes that endangered and threatened species of wildlife and plants “are of esthetic, ecological, educational, historic, recreational, and scientific value to the Nation and its people.”<sup>1</sup> The intrinsic value placed on the presence of diverse and abundant plant and animal species on the landscape has long been hailed as a fundamental American principle. That value has been shared throughout centuries of U.S. conservation history by Native American tribes, western settlers, hunters and anglers, property owners, scientists, conservation professionals and the average American citizen. In addition to their intrinsic value, many threatened and endangered species provide tangible services and benefits to humans, playing valuable roles in providing us with clean water, food, medicines and more.

The sudden extirpation of the passenger pigeon at the turn of the 20th Century – a bird that had numbered in the billions just decades prior – underscores that without adequate safeguards, even the most common species can vanish forever in the blink of an eye. By the 1960s and 70s, the urgent need to address lethal threats to imperiled species catalyzed existing public support for wildlife conservation, culminating in the enactment of the ESA in 1973. When President Richard Nixon signed the ESA into law, he reflected on public conservation values, recognizing that “Americans are more concerned than ever with conserving our natural resources,” including “an irreplaceable part of our natural heritage – threatened wildlife.” The values enshrined in the ESA still reflect the American public's strong commitment to wildlife conservation.

Far from being a controversial law, the ESA was enacted nearly unanimously with strong bipartisan support. Robust public support for the ESA has remained strong throughout the years. A July 2015 poll conducted by Tulchin Research on behalf of Defenders of Wildlife and Earthjustice revealed that 90 percent of American voters support the ESA. This support extended across gender, age, and political lines, with the law being backed by overwhelming majorities of self-identified liberals (96 percent support), moderates (94 percent), and conservatives (82 percent).<sup>2</sup> A poll from December 2016 conducted by Hart Research on behalf of the Center for American Progress revealed that 81 percent of American voters agree that saving at-risk wildlife from going extinct is an important goal for the federal government.<sup>3</sup>

The ESA is also notable for its strong, yet simple purpose: to prevent the extinction of threatened and endangered species, conserve the ecosystems they depend on, and promote their recovery. This broad purpose has allowed the oversight agencies to adapt and improve upon the law over the years through administrative actions. The ESA was intended to be a strong, yet flexible statute that prioritizes the conservation and recovery of threatened and endangered species, while simultaneously permitting activities, where appropriate, in imperiled species' habitat. This permitting regime is enshrined in Sections 7 and 10 of the Act, and it has been implemented with tremendous flexibility.

<sup>1</sup> National Oceanic Atmospheric Administration, *Full Text of the ESA*, <http://www.nmfs.noaa.gov/pt/laws/esa/text.htm>.

<sup>2</sup> 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>.

<sup>3</sup> Hart Research, *CAP Energy/Environment/Climate Voters Survey*, Dec. 2016, <https://cdn.americanprogress.org/content/uploads/2017/01/18040011/FI-CAP-Energy-Enviro-Dec2016.pdf>.

Partly because of this flexibility, the ESA has accommodated many human activities. For example, a recent peer-reviewed study by ESA experts at Defenders of Wildlife revealed that between 2008 and 2015, the FWS conducted over 88,000 consultations under Section 7.<sup>4</sup> Out of those consultations, only two were deemed to "jeopardize" a species and neither project was stopped. Administrative adjustments to the ESA over the years have increased flexibility for developers and private landowners alike, while reaffirming its foundational goal of species conservation and recovery.

The drafters of the ESA also recognized that successful species conservation and recovery must rely on sound science, and thus required that all key decisions made under the ESA be based on the best available science. This requirement ensured there would be no political interference with identifying, protecting and recovering threatened and endangered species. The 2015 Tulchin poll showed that by a margin of nearly 4-to-1, a strong majority of voters said that decisions about which species should be protected under the ESA should be science-based and made by FWS biologists, rather than Congress.<sup>5</sup> With a March for Science scheduled on Earth Day this year, it's clear that public support for science-based research in policymaking is stronger than ever.

The strong, clear values underlying the ESA are as American as apple pie and its goals are just as sacrosanct as they were when the law was enacted in 1973. Just imagine – without the ESA, we would not have recovered our national symbol: the bald eagle. And countless other species important to the fabric of this nation would be lost forever. As stewards of our natural heritage, it is our duty to continue the critical work to fulfill the ESA's purpose and protect our natural wildlife heritage for generations to come.

#### **The ESA has Achieved Great Success**

The ESA's prescient vision is surpassed only by its on the ground successes. The statute has been incredibly successful in achieving one of its primary goals – preventing species extinction. In its 44-year history, only 10 listed species have been officially declared extinct. According to the FWS's data, that translates to a 99 percent success rate in preventing the extinction of threatened and endangered species protected by the ESA. Scientists have predicted that 227 species would have gone extinct by 2006 if not for the conservation measures of the ESA.<sup>6</sup>

The ESA has also made significant progress in achieving its goal of species recovery. Forty-seven species have been removed from the endangered species list due to recovery, including the iconic bald eagle, peregrine falcon, American alligator and brown pelican. Before the bald eagle became one of the first species to receive protections under a precursor to the ESA in 1967, biologists

<sup>4</sup> See Malcom, Jacob W.; Li, Ya-Wei, *Data contradict common perceptions about a controversial provision of the US Endangered Species Act*, Proceedings of the National Academy of Sciences, Dec. 29, 2015, available at: <http://www.pnas.org/content/112/52/15844>.

<sup>5</sup> See Tulchin, note 2.

<sup>6</sup> See Goble, Dale D.; Scott, J. Michael; Davis, Frank W., *The Endangered Species Act at Thirty: Volume 1*, Island Press, 2006, p. 31.

estimated that there were barely 400 breeding pairs left in the continental United States.<sup>7</sup> As of 2009, that estimate stands at over 15,000 breeding pairs, with an additional 15,000 pairs in Alaska.<sup>8</sup>

Species delistings increased significantly under President Barack Obama, a true testament that, with time and attention, many species can and do recover if protected by the ESA. During its eight-year tenure, the Obama administration removed a record-setting twenty-nine species from the endangered species list – more than all previous administrations combined. In 2015, the FWS found that the Delmarva fox squirrel and the Oregon chub had both recovered. In 2016, the Service delisted sixteen species, including the Columbia whitetail deer, nine humpback whale populations, a Texas plant and three subspecies of Island Fox located on California's Channel Islands. The ESA has also made significant strides in bringing endangered species back from the very brink of extinction, including the gray wolf, the wood bison, the California condor and the black-footed ferret.

Despite being a miraculous antidote to extinction, the ESA cannot make miracles happen overnight. For many species, recovery takes a long time, particularly those clearly on the brink of extinction when finally afforded the protections of the ESA. For certain species, gestation periods are particularly long and birth rates are low. For example, Florida manatees usually bear one calf every 13 months, and intervals between births range from two to five years.<sup>9</sup> Similarly, orcas typically bear just one calf at a time and the gestation period lasts for 15 to 18 months.<sup>10</sup> Grizzly bears are one of the slowest reproducing land mammals, with an extremely brief mating season and a 4-month delay of the implantation of eggs in the female's uterus. For other species, a pernicious and unforeseen threat such as white-nose syndrome plaguing numerous bat species may block an otherwise steady path to recovery.

On the other hand, there have been several instances where the protections of the ESA have allowed biologists to address some discrete threat to a species, allowing delisting to occur relatively quickly. For example, the FWS was able to delist the San Miguel, Santa Cruz and Santa Rosa Island foxes after only 12 years of ESA protection as a result of a focused island fox recovery program that included captive breeding and reintroduction of foxes, removal of resident golden eagles, re-establishment of bald eagles and removal of non-native ungulates.<sup>11</sup> This story provides a compelling example of how a coordinated, organized and highly focused strategy under the ESA can recover a highly endangered species.

The ESA is successful partly because it enables private conservation partners and non-profit organizations to also play a vital role in recovering species. These mission-based entities have bolstered the agencies' work to implement the ESA and recover threatened and endangered species. At Defenders of Wildlife, we have worked hard both in the field and in the policy realm to conserve species and their important habitat and improve the effectiveness of the ESA. For decades, we have

<sup>7</sup> U.S. Fish and Wildlife Service, *Bald Eagle Removed from Endangered Species List*, March 18, 2011, <https://www.fws.gov/pacific/ecoservices/BaldEagleDelisting.htm>.

<sup>8</sup> U.S. Fish and Wildlife Service, *Bald and Golden Eagles: Population demographics and estimated sustainable take in the United States, 2016 update*, April 26, 2016, <https://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-StatusReport.pdf>.

<sup>9</sup> National Wildlife Federation, *West Indian Manatee Fact Sheet*, <https://www.nwf.org/Wildlife/Wildlife-Library/Mammals/West-Indian-Manatee.aspx>.

<sup>10</sup> Defenders of Wildlife, *Orca Basic Facts*, <http://www.defenders.org/orca/basic-facts>.

<sup>11</sup> National Park Service, *Channel Islands*, <https://www.nps.gov/chis/learn/nature/island-fox.htm>.

been working with lawmakers, conservation professionals, local communities and private landowners to develop innovative and effective methods for minimizing conflicts with imperiled predators, including wolves and bears. Our coexistence program has helped ranchers across the West address the presence of predators on the landscape through nonlethal deterrents, better animal husbandry practices and other innovative tools, minimizing conflict and building social acceptance for these species. In the Southeast, we have worked closely with the state of Florida, other conservation groups and private landowners to pave the way for recovery of the Florida panther while minimizing conflicts and increasing social tolerance throughout the densely populated state. And we have just recently launched the Center for Conservation Innovation to pioneer innovative, pragmatic solutions to enhance the effectiveness of endangered species conservation in the United States. For example, we are leading the way to develop the first web-based ESA recovery plan, which can be updated readily and regularly to reflect the best available science on a species. By relying on the power of data analytics, technology, and interdisciplinary approaches, the Center for Conservation Innovation will help federal and state agencies, as well as other interested stakeholders, take advantage of science and technological advances to improve how they implement the ESA.

#### **The ESA Does Not Need to be “Modernized” through Legislation**

As detailed above, the ESA has proven highly successful. It does not need legislative changes to meet its goals. Over the years, administrations of both political parties have been committed to improving the way the ESA is implemented. There have been numerous successful efforts to truly improve the efficiency and effectiveness of the ESA through administrative actions. The ESA’s flexible nature lends itself to these actions, all while staying committed to the purposes and goals of the law itself.

While I was the Director of the FWS, I oversaw the issuance of several agency rulemakings that increased the ESA’s flexibility and provided more certainty to private landowners. For example, the No Surprises Assurance rule increased landowner participation in habitat conservation plans by several fold, while the policies on safe harbor agreements and candidate conservation agreements with assurance remain some of our most popular voluntary landowner conservation tools.

Under President Obama’s Administration, the FWS issued numerous administrative reforms to improve the ESA’s efficiency and conservation effectiveness. For example, the seven-year listing workplan enables the agency to prioritize listing reviews for over 300 candidate and petitioned species, while providing the public with greater clarity and predictability about the timing of listing determinations.<sup>12</sup> FWS also recently revised its listing petition rule, giving states a greater role in informing FWS’s 90-day petition findings.<sup>13</sup>

Republican administrations have also finalized important updates to ESA policies and regulations. For example, in 2008, the FWS finalized guidance on the “recovery crediting system” to encourage voluntary recovery actions. And the Reagan Administration issued guidance on how the agencies should prioritize recovery and listing decisions. For most species, conserving them is all about conserving their habitat. For years, every administration has worked with mitigation banks to ensure

<sup>12</sup> U.S. Fish and Wildlife Service, *The Service’s National Listing Workplan*, Last updated Sept. 7, 2016, [https://www.fws.gov/endangered/improving\\_ESA/listing\\_workplan.html](https://www.fws.gov/endangered/improving_ESA/listing_workplan.html).

<sup>13</sup> U.S. Fish and Wildlife Service, *Petition Regulations*, Last updated Dec. 8, 2016, [https://www.fws.gov/endangered/improving\\_ESA/petition-regulations.html](https://www.fws.gov/endangered/improving_ESA/petition-regulations.html).

that the habitat species need to recover is identified and protected. These private-public partnerships again demonstrate the ESA's flexibility to conserve species through creative, pragmatic policy improvements.

In contrast with these administrative improvements to the ESA, the mounting volume of ESA-related legislation proposed by Congress over the past decade has all sought to roll back and undermine ESA protections. In my experience working on ESA policy over the course of several decades, the professed desire to "modernize" the ESA has almost always been code to push forward an agenda to weaken or gut the nation's premier and most effective wildlife conservation law. That agenda – backed by special interests – ignores the public value of wildlife conservation and unequivocally violates the original purpose of the ESA. I'm concerned that legislators who talk about the need to modernize the ESA really seek to weaken its ability to conserve imperiled species. At least two members of the 115<sup>th</sup> Congress have expressed an outright desire to repeal the ESA.<sup>14</sup> As long as our country is still committed to species conservation and recovery, there is no need to amend the law through legislation. Instead, Congress should focus on fully funding the agencies so that they can implement the ESA more effectively and continue their important work to fulfill its goals.

Of the 130 legislative proposals introduced last Congress aimed at updating the ESA, not a single one would have improved species conservation.<sup>15</sup> Many would have stripped existing protections or blocked future protections for at-risk and listed species, accelerating those species' decline and likely condemning them to extinction. Remarkably, none of the delisting proposals initiated by Congress would assure funding to the states that would be left in charge of conserving these threatened and endangered species with limited resources and weaker protections under their state ESAs. The ESA is already starved for funding. Removing protections under the ESA and the federal support that accompanies those protections would most definitely send some of these species spiraling down the path of extinction.

Other legislative proposals would have interfered with the ESA's science-based listing process, including by redefining "best available science" to automatically include all data submitted by states, localities and tribes, regardless of the quality of the data. Another category of proposals would interfere with the ESA's science-based listing process by injecting economic considerations into listing determinations. While the agencies already consider economic considerations when they designate critical habitat, those considerations are strictly prohibited as part of the listing decision. Economic considerations must not factor into science-based determinations about whether a species needs protections under the ESA. Science informs us whether a species is threatened or endangered with extinction, not politics, economics or personal desire.

The ESA's citizen lawsuit provision has been another target of proposed legislative "fixes." The ESA's citizen lawsuit provision allows members of the public to hold federal agencies accountable to Congress's directives in the ESA through the federal court system. Judicial review is an essential part of the checks and balances within the federal government to ensure that laws enacted by Congress

<sup>14</sup> See LA Times Editorial Board, *GOP water bill in Congress should be rejected*, July 10, 2015, <http://www.latimes.com/opinion/editorials/la-ed-water-bills-20150710-story.html>; Zaffos, Joshua, *House Republicans want to 'repeal and replace' the ESA*, High Country News, Dec. 28, 2016, <http://www.hcn.org/articles/house-republicans-may-try-to-repeal-and-replace-the-endangered-species-act>.  
<sup>15</sup> See Defenders of Wildlife, *Summary of Legislative Attacks on the Endangered Species Act in the 114<sup>th</sup> Congress*, Dec. 21, 2016, <http://www.defenders.org/publications/Chart-of-ESA-Attacks-in-114th-Congress.pdf>.

are properly implemented. By including an explicit mechanism for reviewing agency decisions, the drafters of the ESA wisely intended the courts – nor Congress – to resolve disputes over the agencies' implementation of the law.

The existing structure of the ESA works well to meet its purpose – the conservation of at-risk wildlife and plant species. Any necessary reforms to improve its effectiveness and efficiency can and should be carried out by the wildlife agencies that implement the law. Congressional interference in science-based decisions about how to conserve species would only serve to undermine the nation's ability to conserve imperiled species, and is strongly opposed by the American public. By focusing on funding the ESA instead of weakening it, Congress could remain committed to the goals of the ESA and provide more certainty for the regulated community waiting for decisions on permits and plans.

#### **The ESA is Not Broken – it's Starved**

It is clear that more work could and should be done to provide protections for those species that need it, to expeditiously respond to requests for permits and impact decisions and to successfully recover listed species. What the ESA really needs is more funding so that the federal agencies and states can carry out important conservation programs and fully implement the ESA. Congress must help accomplish this goal by adequately funding the federal agencies that play a role in species conservation.

Federal spending on recovery actions under the ESA has long been severely insufficient. A 2002 study estimated that current funding is only 20 percent of what the authors estimate is required to carry out the work of endangered species recovery.<sup>16</sup> The agencies desperately need more funding to develop species recovery plans and implement species recovery actions. Over 400 U.S. listed species do not currently have recovery plans. This gap in recovery funding is unfortunately only widening, as congressional appropriations for recovery have not kept pace with the number of listed species, especially after adjusting for economic inflation.

Funding for the ESA permitting program has also failed to keep pace with the addition of newly-listed species. Because of inadequate funding, American businesses and landowners face delays in requests for ESA permits to carry out activities ranging from road construction to bridge repairs to housing developments and other land use activities. It is imperative for FWS to have the resources to properly evaluate these activities for their effects on species recovery, so that the ESA can accommodate conservation and human activities simultaneously.

In addition, to truly stop the decline of at-risk and listed species at its origin, adequate funding to conserve their habitat is essential. Congress must fully fund the Land and Water Conservation Fund and substantially increase funding for the Recovery and Habitat Conservation Plan Land Acquisition Programs for states under the Cooperative Endangered Species Fund as well as for other habitat conservation programs, including those under the Farm Bill which is up for reauthorization in 2018. The agencies also need adequate funding to evaluate whether declining species should be listed and

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<sup>16</sup> See Miller, Julie K.; Scott, Michael J.; Miller, Craig R.; Waits, Lisette P., *The Endangered Species Act: Dollars and Sense?*, BioScience, Feb. 1, 2002, <https://academic.oup.com/bioscience/article/52/2/163/341363/The-Endangered-Species-Act-Dollars-and-Sense>.

to take steps, in partnership with the states and other stakeholders, to conserve them while they await decisions.

If this committee is truly committed to conserving at-risk and listed wildlife and plant species, it should work with members of the Appropriations Committee to ensure that the ESA is fully funded – not draft legislation to “fix” or “modernize” a hugely important, wildly successful and popular law.

### **The Role of States in Conserving Threatened and Endangered Species**

States have a very powerful and important voice in determining the fate of species – both before and after species are listed. The ESA is the law of last resort in species conservation. It was enacted to ultimately prevent species from going extinct after they are deemed threatened or endangered using the best available science, and to recover those species. Until the ESA is deemed necessary, states have primary authority and responsibility for protecting and managing their native fish, wildlife, and plants and their habitats. Often, a listing comes only after the species has declined for decades and state management in accordance with state laws and regulations are deemed insufficient to avoid extinction.

Species often come under the protections of the ESA after years of chronic underinvestment in habitat conservation at the state level. The lack of state funding spent on conserving non-game species puts an increasing pressure on the ESA, causing the list of endangered species to increase rather than decrease. By then, some of the species have declined so much that recovery becomes far more difficult and expensive. States can help stave off species decline by increasing their own funding for species and habitat conservation. A commitment by states to fund upstream solutions could prevent species from being listed in the first place, saving money in the long run. Innovative upstream funding initiatives to conserve habitat and ultimately species are essential to minimize the need for the ESA to step in and provide necessary protections.

A prime example of how states have achieved successes in species conservation is through the State Wildlife Grants Program, which provides federal funding to a variety of conservation needs that are identified within a State’s Wildlife Action Plan.<sup>17</sup> Each State Wildlife Action Plan identifies “species of greatest conservation concern” and outlines steps needed to conserve those species before they become rare and costly to protect. However, more funding is still needed. States should recommit to increasing their spending on conserving the diversity of wildlife – not just the game species.

Recently, eleven western states played a critical role as partners in an unprecedented collaboration led by the federal government to conserve the imperiled greater sage-grouse. States partnered with the FWS, the Bureau of Land Management, private landowners and other stakeholders to reach an agreement to improve the management of over 60 million acres of the Sagebrush Sea – a little known, but vitally important landscape to hundreds of species, outdoor recreation, western communities and sustainable economic development. This historic, national strategy would not have been happened without the pressure of a potential ESA listing. And in the end, the FWS determined that because of this National Greater Sage-Grouse Planning Strategy, the agency did not have to list the bird at that time. Implementation of the Strategy will be critical to ensuring the greater sage-

<sup>17</sup> See Association of Fish and Wildlife Agencies, *State and Tribal Wildlife Grants Program: 10 Years of Success*, Sept. 2011, [http://www.fishwildlife.org/files/StateWildlifeGrants\\_10YearSuccess-Report.pdf](http://www.fishwildlife.org/files/StateWildlifeGrants_10YearSuccess-Report.pdf).

grouse is sustained. If commitment to the Strategy wanes or is undermined, it is virtually certain that the bird and possibly other species will need the protection of the ESA to survive.

When a species does come under the protections of the ESA, states continue to play a significant role as collaborative conservation partners. Federal agencies are required to use state expertise and solicit the information and participation of state agencies in all aspects of the recovery planning process, including implementing recovery plans. State agencies have the authority to carry out many of the actions identified in recovery plans and are in an excellent position to do so because of their close working relationships with local governments and landowners.<sup>18</sup> States can receive federal funding to implement recovery actions through grants under section 6 of the ESA. These grants support a variety of voluntary conservation projects for listed, recently delisted, and candidate species. In addition, data collected and maintained by state agencies is important to ensuring the best available science is used in all federal agency decision making, from listing to permit issuance, to recovery planning and implementation.

However, the ultimate responsibility under the ESA lies with the federal government, acting through FWS and the National Marine Fisheries Service (NMFS), to make science-based decisions about the status of imperiled species and actions necessary to ensure their continued existence and ultimate recovery. That responsibility must not be diminished or undermined, as some have suggested. The current federal role is critically necessary and has proven effective at taking up the arduous – and sometimes controversial – work to carry out the ESA’s mission of conserving threatened and endangered plant and wildlife species. Just as this country has committed to civil rights for citizens, it has also made a national commitment to conserve species under the ESA. Imperiled species deserve that support and should not depend on the sentiments or politics of particular states. The federal government is the appropriate authority to ensure that at-risk species are conserved according to the best available science under the ESA, rather than local economic and political considerations.

### Conclusion

The conservation values enshrined in the ESA remain strong today, with 90 percent of the American voting public supporting this visionary law that is respected by countries well beyond our borders. Given the ESA’s flexibility and its broad delegation of implementation authority to the federal agencies charged with its oversight and implementation, there is no need to update the ESA through legislation. Any true improvements to the law can be achieved through administrative actions. Congress should instead consider focusing on ways to fully fund the ESA so that the FWS, NMFS and other engaged federal agencies can implement it more effectively.

When Congress enacted the ESA over 40 years ago, it made a commitment to future generations to protect and restore at-risk species and their habitat. As this committee considers proposed changes to the Act, please ask yourselves whether you are upholding that commitment. Ask yourselves whether the proposed changes would actually help meet the ESA’s goals rather than undercut species protections.

Thank you for considering my testimony. I would be happy to answer any questions.

<sup>18</sup> See U.S. Fish and Wildlife Service, *Interagency Policy Regarding the Role of State Agencies in ESA Activities*, Last updated Feb. 22, 2016, <https://www.fws.gov/endangered/laws-policies/policy-state-agencies.html>.

**Senate Environment and Public Works Committee**  
**Hearing entitled, "Oversight: Modernization of the Endangered Species Act"**  
**February 15, 2017**  
**Answers to Questions for the Record**  
**Jamie Rappaport Clark, President and CEO, Defenders of Wildlife**

**Answers to Questions from Ranking Member Carper:**

1. If you were in our shoes, what would you do to find consensus for proposed changes to the ESA?

Answer:

As highlighted in my testimony before the committee, I do not believe the Endangered Species Act (ESA) is in need of statutory revision. The ESA is a flexible statute. Its structure has allowed the oversight agencies to adopt and improve upon the law over the years through administrative actions. To the extent that the Committee pursues changes to the statute anyway, it should only do so with strong bipartisan support and should focus on strengthening the ability of the ESA to protect species on the brink of extinction and provide for their recovery. Administrative initiatives that focus on those goals, while promoting collaborative partnerships, transparency, and open dialogue could be pursued. Without adequate funding to support implementation of the ESA, the law will continue to be challenged for reasons not related to the statute itself.

2. Please identify three (3) areas where there is the greatest opportunity to find consensus for changes to the ESA?

Answer:

As emphasized in my testimony, it is unequivocally clear that the ESA is starved for funding. Lack of funding is hindering efforts to provide deserving species needed protections, to expeditiously respond to requests for technical assistance and permits, to develop species recovery plans and to implement recovery actions. Over 400 listed species do not currently have recovery plans and 30 candidate species are currently awaiting ESA listing. Funding for the ESA permitting program is increasingly deficient and causing frustrating delays for businesses and landowners in carrying out various activities. Additional funding for key habitat conservation programs is sorely needed as well. These programs include the Land and Water Conservation Fund and the Recovery and Habitat Conservation Plan Land Acquisition Programs for states under the Cooperative Endangered Species Fund. And finally, the lack of state funding for conserving non-game species puts increasing increased pressure on the ESA by ultimately requiring federal protection for more species the states have not successfully conserved. Increased funding for the federal State Wildlife Grants Program would respond to this need and provide an upstream solution before the ESA is needed as a last resort conservation tool. Addressing the current funding deficiencies is without a doubt the area of legislative activity relating the endangered species conservation where consensus is more likely to be found.

In the current highly polarized and increasingly toxic political environment, however, there is not the opportunity to find truly bipartisan consensus on changes to the ESA that would improve species conservation. In fact, of the more than 130 legislative proposals introduced last Congress aimed at updating the ESA, not a single one would have improved species conservation. Many would have stripped existing protections or blocked future protections for at-risk and listed species, accelerating those species' declines and likely condemning them to extinction. And the same alarming pattern is well underway in the current Congress. Virtually all initiatives to date, both in the House and the Senate, have been pursued on a highly partisan basis and are aimed at undermining species protection and the ESA. The vast difference that now exists between the two parties about the wisdom and nature of ESA legislation demonstrates there is no political appetite to find consensus on changes to a landmark environmental law that has been so overwhelmingly successful in fulfilling its goal of preventing species extinctions and providing pathways to recovery for many more. While some lawmakers may have a genuine interest in finding common ground, the toxic atmosphere in Congress makes it impossible to see how legislation that actually improves the effectiveness of Endangered Species Act could in fact become law.

**Answers to Questions from Senator Wicker:**

3. I understand that the current 1-year statutory deadline for every listing decision creates a lawsuit problem. I know more funding could help the situation, but what are some ways to improve scheduling and budgeting for listing decisions?

Answer:

The U.S. Fish and Wildlife Service recently developed a seven-year listing workplan to improve scheduling and budget allocations for the listing program and to attempt to reduce litigation over listing deadlines.<sup>1</sup> The workplan is a reasonable solution to managing the listing workload because it prioritizes species for 12-month findings based on the immediacy of threats to species, existing voluntary conservation efforts, and other factors. The workplan covers over 350 pending species and critical habitat decisions. To date, a variety of stakeholders have supported the workplan. For example, the recommendations from a recent work session of the Western Governors' Associations indicate that "attendees widely agreed that the listing workplan presented a favorable approach" and should eventually be extended beyond the seven-year horizon.<sup>2</sup>

The workplan is also likely to significantly reduce the extent of litigation over missed listing deadlines. Several other wildlife organizations that have actively petitioned for listings had recently informed us that they support the workplan if FWS implements it properly. To the extent that some organizations continue to challenge missed listing deadlines, the workplan could provide a basis for the courts to give deference to FWS's proposed timeframe for issuing listing decisions. The workplan is thus very likely to substantially reduce piecemeal litigation over listing deadlines. Congress should support the workplan by allowing FWS the opportunity to implement it and by adequately funding that work.

<sup>1</sup> [https://www.fws.gov/endangered/improving\\_esa/listing\\_workplan.html](https://www.fws.gov/endangered/improving_esa/listing_workplan.html)

<sup>2</sup> Western Governors' Species Conservation and Endangered Species Act Initiative Work Session: Listing, Recovery and Delisting (Jan. 31, 2017), available at: [https://www.westgov.org/images/SUMMARY\\_Work\\_Session\\_Section\\_4.pdf](https://www.westgov.org/images/SUMMARY_Work_Session_Section_4.pdf)

That said, it's important to recognize that most, if not all, the candidate species awaiting decisions for ESA protection that are now part of the workplan are continuing to decline in status while they await decisions. More resources are essential to address their conservation needs so that ESA protection may not be necessary, and to more expeditiously recover those that require the safety net of the ESA.

Senator INHOFE [presiding]. Thank you, Ms. Rappaport Clark.

What you are witnessing right now is we are swapping the Chair back and forth between Senator Barrasso and me because we are in the middle of two votes right now. I have already voted on the first, and that is what he is doing now.

Before we hear from Dan Ashe, we know the next witness but we know him in a different life. Why don't you take just a moment and tell us a little bit about your incarnation before your presentation?

Mr. ASHE. Thank you, Senator Inhofe.

It is a joy to be back here once again. From 2011 to January 2017 I served as Director of the United States Fish and Wildlife Service. My confirmation was considered in a hearing by this Committee.

**STATEMENT OF DAN M. ASHE, PRESIDENT AND CEO,  
ASSOCIATION OF ZOOS AND AQUARIUMS**

Mr. ASHE. Today I sit here as President and Chief Executive Officer of the Association of Zoos and Aquariums, or as we affectionately call it, AZA. AZA represents 232 accredited aquariums, nature centers, science centers, and zoos that annually host more than 186 million visitors, generating more than \$17 billion in economic activity and employing over 175,000 Americans.

I believe we bring a somewhat unique perspective to this important discussion. We are a partner with our governments in species conservation, but we are also a directly and significantly regulated party.

As a partner, AZA members contributed over \$186 million to conservation in 2016 alone.

Senator INHOFE. Are you into your presentation? What are you doing now?

Mr. ASHE. I am making my presentation.

Senator INHOFE. Yes, go ahead. You are going to have to get out to Tulsa and see, where you least expect them, spectacular aquariums. We have them.

Mr. ASHE. I will be there.

Senator INHOFE. I will look for you.

Mr. ASHE. We support more than 1,000 field conservation and research projects here in the U.S. and in more than 100 other countries. From this practitioner perspective the law is working to save species. It is a catalyst for organizations like ours and our members to participate in conservation.

A good example is the partnership between AZA accredited zoos, the Federal and State governments, and other organizations to conserve the California condor. Without that effort, the California condor would be extinct today.

It began with a bold decision to remove all California condors from the wild back in the early 1980s. Like so many other efforts to recover endangered species, it has required continuous effort and extraordinary dedication. The Los Angeles Zoo, the San Diego Zoo, the Oregon Zoo, and many others have played integral roles in that effort.

AZA accredited aquariums and zoos have supported recovery of Florida manatees, spending over \$6 million in the last 5 years

alone. Tampa's Lowry Park Zoo, Sea World, the Mote Marine Laboratory and Aquarium have long partnered to rescue, rehabilitate, and release injured and ill Florida manatees and conduct crucial research that is answering questions about manatee biology, health, and behavior so that we can better understand the species and inform management decisions and the public.

Especially since Senator Barrasso is the new Chairman, I have to mention the effort to recover black-footed ferrets which were once believed extinct and were rediscovered near Matesee, Wyoming, in 1981.

Last July I had the privilege to join Wyoming rancher Christina Hogg and her family and many others in reintroducing 35 ferrets to this incredible landscape. Christina Hogg sent me this little cardholder which I keep in my office until today to remind me of the importance of partnership with private landowners and what we can do when we work together with private landowners.

We are proud of our history, zoos and aquariums, but we are far from done. Building on the success of existing conservation and species preservation efforts, AZA and its members are launching a new effort we call SAFE, Saving Animals From Extinction.

Through SAFE we are challenging ourselves to provide urgent leadership and create a collective movement that is strong enough to turn the tide against the massive wave of animal extinctions.

As regulated parties, our members, their 186 million visitors, and their communities depend upon an efficient and effective regulatory structure within the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

As any regulated party from time to time, we have frustrations, but overall the process is professional and predictable as evidenced by the vibrant economy surrounding AZA aquariums and zoos. It works.

Mr. Chairman, as you and Committee members consider the future of this great law, I would suggest careful consideration of context. Scientists estimate that the total number of mammals, birds, reptiles, amphibians, and fish has declined by more than 50 percent since 1970, leading many to conclude that we are living amidst the planet's sixth mass extinction event.

It is being driven by the ability of human beings to change the very physics underlying the earth's ecology, the molecular composition of the atmosphere, the moisture of soil, and the temperature and acidity of oceans.

Mr. Chairman, saving species from extinction is very challenging. It will become increasingly challenging in the future. The Endangered Species Act is the world's gold standard. It has helped us to achieve miracles.

It is not perfect, and we can make it better, but as this Congress considers its future, your goal should be to make it stronger, faster, and better for the 21st century because life literally depends upon it.

Thank you, Mr. Chairman, as always, for the opportunity to be here with you. I look forward to a dialogue with you.

[The prepared statement of Mr. Ashe follows:]

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Testimony

of

**DAN ASHE  
PRESIDENT & CEO  
ASSOCIATION OF ZOOS AND AQUARIUMS**

before the

**COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS**

**U.S. SENATE**

on

**Oversight: Modernization of the Endangered Species Act**

February 15, 2017

Thank you Chairman Barrasso and Ranking Member Carper for the opportunity to testify before the Committee today about the Endangered Species Act.

My name is Dan Ashe, and I am the President and CEO of the Association of Zoos and Aquariums (AZA). Founded in 1924, the AZA is a 501(c)3 non-profit organization dedicated to the advancement of zoos and aquariums in the areas of conservation, education, science, and recreation. AZA's 232 accredited aquariums, nature centers, science centers and zoos annually see more than 186 million visitors, collectively generate more than \$17 billion in annual economic activity, and support more than 175,000 jobs across the country. Over the last five years, AZA-accredited facilities supported more than 1,000 field conservation and research projects, contributing over \$186,000,000 in 2015 in more than 100 countries. In the last 10 years, accredited zoos and aquariums formally trained more than 400,000 teachers, supporting science curricula with effective teaching materials and hands-on opportunities.

At the heart of the AZA's mission is its accreditation process, which assures that only those zoos and aquariums that meet the highest standards can become members of the AZA. The rigorous, unbiased, and lengthy AZA accreditation process includes self-evaluation, on-site inspection, and peer review. The standards are continuously evolving and getting stronger as we learn more about the needs of the animals in our care. Accreditation is mandatory for all AZA aquariums and zoos. Once earned, it confers best-in-class status, an important message for local, state, and federal government and the visiting public.

AZA and its members bring a different perspective to this discussion. We are a partner and participant in species conservation. We work with the government to save species. And we are also a regulated party and depend on an effective and efficient regulatory structure within the U.S. Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration (NOAA).

As a partner in species conservation, we work in concert with Congress, the federal agencies, conservation organizations, state governments, the private sector, and the general public to conserve our wildlife heritage. In particular, AZA and its member facilities have long-standing partnerships with the USFWS, NOAA, and the U.S. Department of Agriculture (USDA). Our collaborative efforts have focused on:

- Engaging in endangered species recovery and reintroduction;
- Supporting multinational species conservation funds and state wildlife grants; and
- Collaborating on partnership opportunities involving wildlife refuges, migratory birds, freshwater and saltwater fisheries, national marine sanctuaries, illegal wildlife trade, amphibians, and invasive species.

The AZA and its members take the issue of wildlife conservation very seriously and wholeheartedly support the Endangered Species Act, which has prevented hundreds of listed species from going extinct. Simply put, the ESA, which is recognized globally as a model for species preservation, is working. It has prevented the extinction of 99% of the species it protects

since its inception in 1973. However, we know that the challenges facing our planet in the 21st century are as complex as they are urgent. Scientists estimate that the total number of mammals, birds, reptiles, amphibians, and fish has declined by more than 50% since 1970, and many believe that we are living amidst the planet's sixth mass extinction. Climate change threatens to accelerate this crisis. Without critical intervention today, we are facing the very real possibility of losing some of our planet's most magnificent creatures such as cheetahs, elephants, gorillas, sea turtles, and sharks.

AZA-accredited zoos and aquariums have a unique responsibility to help others understand this crisis. It is our obligation - to these animals and to all life on earth - to take bold action now to protect our planet's biodiversity.

One achievement that has gone unnoticed by most people is that zoos and aquariums have played a significant role in bringing over 25 species back from the brink of extinction.

The California condor, officially labeled as extinct in the wild in 1987, has been bred in human care and is being reintroduced in the wild by a coalition of groups including San Diego Zoo Global, The Peregrine Fund, the Los Angeles Zoo, the Oregon Zoo, and the Ventana Wildlife Society. In 1982, with only twenty-two condors left in the wild, San Diego Zoo Global began the first breeding program for California condors. The program also involved the USFWS, California Department of Fish and Game, the National Audubon Society, and the Los Angeles Zoo. Within twenty years the population of California condors grew to almost 200. The zoological breeding programs now release 20 to 40 condors annually, and according to USFWS officials, the California condor population has reached a total of 435 birds, 268 of which are living in the wild in California, Arizona, Utah, and Baja California, Mexico.

Another success story is the black-footed ferret. Just last year, thirty-five years after the species was rediscovered after having been believed to be extinct, a historic reintroduction took place, marking another positive step toward recovery for the black-footed ferret, one of North America's most endangered mammals.

On July 26, 2016, the Wyoming Game and Fish Department, in partnership with the USFWS and the owners of two ranches, released 35 black-footed ferrets to honor the special anniversary. The release occurred near Meeteetse, Wyoming on the Lazy BV, Pitchfork, and Hogg Ranches, where the species was first rediscovered, and was also supported in part by the AZA and four of its accredited facilities: the Phoenix Zoo, Louisville Zoo, Cheyenne Mountain Zoo, and Santa Barbara Zoo. The zoological facilities contributed funds to support the necessary dusting of the prairie dog colonies with the insecticide deltamethrin (Delta Dust) to address the presence of sylvatic plague, a flea-borne disease that has decimated the prairie dog population.

Beginning in 1986, the Wyoming Game and Fish Department and USFWS founded a successful breeding program for black-footed ferrets. Breeding under managed care continues today, and the ferrets have been released throughout western North America. Black-footed ferrets currently reside at five AZA-accredited facilities: the Cheyenne Mountain Zoo, Louisville Zoo, Phoenix Zoo, Smithsonian National Zoological Park, and Toronto Zoo. Additionally, between 2011 and 2015, 22 AZA-accredited facilities contributed approximately \$5.8 million to 32 field

conservation projects benefitting black-footed ferrets. These projects primarily focus on reintroduction, monitoring of reintroduced ferrets, and ecological studies focused on strengthening long-term sustainability of the population, such as those investigating the species' relationship with its prey, the black-tailed prairie dog.

The national Black-footed Ferret Recovery Implementation Team has released ferrets at 24 sites across North America. Current ferret numbers in the wild are encouraging, but more reintroduction sites are needed to fully recover the species so that it no longer requires federal protection.

Building on the success of existing conservation and species preservation efforts, AZA and its members launched SAFE: Saving Animals From Extinction® to provide urgent leadership and action to prevent mass animal extinctions. The actions we take to protect endangered species today will determine the kind of world we live in for many generations to come.

AZA-accredited zoos and aquariums all share a deep commitment to the animals we care for and to conserving wildlife throughout the world. Now, through SAFE, we are challenging ourselves to create a collective movement strong enough to turn the tide against a massive wave of animal extinctions.

I would like to briefly mention one SAFE signature species, the vaquita porpoise. It is the most critically endangered cetacean in the world and can only be found in the northwestern corner of the Gulf of California in Mexico. This porpoise population is in rapid decline, with recent reports pegging the total population to 30 animals left. This is a direct result of the animals being caught accidentally in fishing gillnets which are used by drug cartels to catch totoaba, an endangered fish. Totoaba bladders, which command thousands of dollars in China, are trafficked through the United States to the market there.

What is important to note is that there is no zoo or aquarium in the world where you can see a vaquita porpoise. This amazing animal will likely only be known by our children and grandchildren in photographs. AZA members stepped up and have contributed hundreds of thousands of dollars to projects specifically designed to help save the vaquita. This is an opportunity to help save a species. That is why AZA and its members are collaborating with U.S. and Mexican government agencies, including NOAA and the Mammal Marine Commission, NGOs in Mexico, and local communities in the Upper Gulf to do everything we can to keep the vaquita from going extinct.

AZA-accredited zoos and aquariums also are uniquely positioned to educate the public and inspire them to take conservation actions both locally and globally. With our reach to more than 186 million visitors annually, our members have taken the lead on many critical issues affecting endangered species including one which Congress, the federal agencies, and many states have worked to advance: combating wildlife trafficking.

In 2013 the AZA and many of our members joined The Wildlife Conservation Society as a partner in the 96 Elephants Campaign – an effort focused on securing a U.S. moratorium on illegal ivory; bolstering protection of African elephants; and educating the public about the link

between ivory consumption and the elephant poaching crisis. Through the 96 Elephants campaign, millions of zoo and aquarium visitors took action to stop the demand for ivory here in the United States and around the world.

Last year the federal government finalized a rule to close the loopholes in the existing regulations that inadvertently enabled illegal ivory to be sold in the U.S. for decades. The rule established a near-complete ban on commercial ivory sales. Congress also passed and President Obama signed into law the "END Wildlife Trafficking Act," which will help wildlife law enforcement personnel by providing them with additional tools and resources they need to apprehend, prosecute, and convict wildlife criminals. Meanwhile, AZA members have worked with their state partners to pass wildlife trafficking legislation in New York, New Jersey, California, Washington, Hawaii, and Oregon.

AZA-accredited zoos and aquariums are connecting people with these iconic species and engaging them in conservation issues that these animals face in their natural ranges. However, none of us can save these species alone. This effort requires partnerships among NGOs, Congress, federal agencies, state governments, foreign governments, private sector stakeholders, and the public. AZA and its members view the USFWS, NOAA, and the USDA as exceptional partners in these efforts, and we are striving to be even better partners to them.

The public display of ESA-listed species is not an easy endeavor. Since most of our threatened and endangered animals are born in our aquariums and zoos, the frequent, timely and humane transport of these animals is critical to our conservation breeding and conservation education efforts. There are specific regulatory and permitting requirements that must be met in order to import, export, and in some cases, move animals across state lines. In the past few years, AZA zoos and aquariums have experienced increasing delays in getting these permits approved by the relevant federal agencies. These delays are not the result of neglect or disinterest on the part of the federal authorities but more so are due to the lack of human resources required to process the voluminous number of ESA permits...most of which do not originate from the AZA community. We are currently looking at alternatives to streamlining the permit process for ESA-listed species for AZA institutions while maintaining the intent and integrity of the ESA permit process. We look forward to working with this Committee and the relevant federal agencies to improve this critical process.

Although we have made significant progress in saving endangered species, this work is far from done. Species protection and conservation requires long-term commitment by all of us. It is through the ongoing work related to species recovery plans that we will conserve these species for future generations. The AZA and its members fully support the Endangered Species Act, and we look forward to working with Congress to assure that the agencies responsible for carrying out the mandates of the Act receive the necessary funding, human resource capacity, and regulatory flexibility to succeed.

Thank you for the opportunity to testify on this important matter, and I would be happy to answer any questions that you may have.



8403 Colesville Road, Suite 710  
Silver Spring, MD 20910-3314  
301-562-0777 tel 301-562-0888 fax  
www.aza.org

March 16, 2017

The Honorable John Barrasso  
Chairman  
Committee on Environment and  
Public Works  
410 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Tom Carper  
Ranking Member  
Committee on Environment and  
Public Works  
456 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper,

Thank you for the opportunity to testify before the Environment and Public Works Committee about the Endangered Species Act (ESA). Species conservation and preventing extinction are critically important issues for the zoos, aquariums, science centers, and nature centers that are accredited by the Association of Zoos and Aquariums (AZA). At your request, I am providing answers to your follow-up questions below.

Chairman Barrasso:

- 1. The Endangered Species Act is premised on a strong federal-state partnership. States have primary authority over wildlife species within their borders, while the federal government is responsible for species conservation under the ESA. Many states have expressed concerns that they are not being treated as full partners with the federal government in ESA decision-making. As a former Director of the U.S. Fish and Wildlife Service, do you believe that the statutory intent of the ESA is being realized with respect to federal-state cooperation? In your opinion, is state data and expertise adequately included in ESA listing and delisting decisions, critical habitat designations, and recovery planning?*

In general, yes. Inherent in implementing a statute like the ESA is a constant sense of urgency. Due in part to the statutory deadlines, and resulting litigation and court orders; but mainly due to the press of business and the catastrophic consequence of failure -- extinction. States are not monolithic; some participate extensively, and others rarely, based on choice, priority and capacity. Sometimes, states are limited in their ability to participate in ESA decisions because they lack regulatory authority (e.g., some state wildlife agencies lack authority over insects). Sometimes, states are reluctant or unable to share data collected from private landowners. Sometimes, states simply do not want to get involved in a

controversial issue or are prohibited from involvement by their Governor or Commission. However, mostly, states are engaged partners in providing data and information to federal agencies to help inform the decision-making process. When it comes to the listing process and recovery teams, states are critical partners to the federal agencies. Overall, in my opinion, capacity is the single greatest limitation to greater state involvement in ESA implementation.

The best example of recent collaborative federal-state effort was the process to consider listing of the greater sage grouse. The USFWS relied extensively on state data. All eleven range states had full opportunity to participate. The Department of the Interior worked with the Western Governors' Association to establish a federal-state Sage Grouse Task Force, chaired by the WGA. There was full and complete discussion and sharing of information from start-to-finish. This was recognized, when the U.S. Fish and Wildlife Service decision was announced, and both Republican and Democratic Governors praised the process as well as the decision. Nevada Governor Sandoval said, "This is good government."

**Ranking Member Carper:**

*2. If you were in our shoes, what would you do to find consensus for proposed changes to the ESA?*

My recommendation would be to forge an agreement upfront at the top level about the process for crafting this legislation. This agreement would require everyone to agree to work by consensus and only include legislative language that changes the ESA by consensus. Without this firm agreement, I doubt there would be adequate trust to move forward.

*3. Please identify three (3) areas where there is the greatest opportunity to find consensus for changes in the ESA.*

First, states and federal agencies need greater capacity to support listing functions, participate in recovery activities, and coordinate conservation plans. Everybody wants more "cooperation" but that requires people, science, and resources to support it. Second, greater focus on cooperative recovery efforts would increase the effectiveness of the ESA. These changes could promote and incentivize cooperation between federal agencies, between federal and state partners, and between public and private stakeholders. The single most significant "innovation" in the past decade has been the partnership between USDA's Natural Resource Conservation Service, and the USFWS. NRCS has brought the incentives of financial and technical support to landowners (and trust and credibility with landowners), and USFWS has brought regulatory predictability. This partnership was the cornerstone of success on species like greater sage grouse, arctic grayling, New England cottontail, and others. Finally, the USFWS should develop five-year plans for listing decisions so that the process becomes more predictable. Opponents would have an opportunity to challenge the integrity of a plan schedule rather bring deadline lawsuits, species-by-species. This would streamline the process and reduce time and resources spent by all concerned parties in the courts.

Thank you for the opportunity to provide additional feedback to the committee. The AZA and its members fully support the Endangered Species Act, and we look forward to working with you to assure that the agencies responsible for carrying out the mandates of the Act receive the necessary funding, human resource capacity, and regulatory flexibility to succeed.

Sincerely,

A handwritten signature in black ink that reads "Dan Ashe". The signature is written in a cursive style with a large, sweeping initial "D".

Dan Ashe  
President and CEO

Senator INHOFE. It is nice to have you back. I would say when you made the statement that when you work on a partnership basis, as you personally came out on two occasions to western Oklahoma and discovered that the landowners want the pristine environment the same as you might from another perspective.

It is easy to sit in Washington and talk about how everything is working well, but when you are out in the States is where you really have problems.

I am going to start the questions since I am the only one here. I am not going to be encumbered by any short timeline.

Why don't you ask your questions first?

Senator BARRASSO [presiding]. Thank you, Senator Inhofe, for holding down the fort as people are back and forth with the votes. There are two votes so some of the members are waiting for that second vote to start. As a result, they will be back.

I would like to start with Governor Freudenthal, if I may.

In 1973 the Congress was controlled by the Democrats, but with a Republican President they enacted the Endangered Species Act as we discussed earlier. Cliff Hansen, former Governor of Wyoming and then Senator for Wyoming, supported it.

The last significant amendments took place in 1988, almost 30 years ago. Since that time a lot has changed. Do you agree with the stakeholders who argue that the time really has come to modernize the Endangered Species Act? Would you give us your thoughts on that?

Mr. FREUDENTHAL. Senator, the world has changed. This Act has just too much sand in the gears to get where it needs to go. Some of these things need congressional adjustment so that we actually get where we want to go as Dan Ashe indicates in a more efficient, more logical kind of fashion and employ the resources that are there.

There is a history, as you know. There have been a couple of times when they have tried to redo the ESA, and it got lost in two sides wanting the whole loaf. I think the opportunity now is to arrive at some compromises that address the portions that could function better.

There is no suggestion that it not be continued, at least not in the Senate so far, but if we think it is going to function in the way we wanted it we are going to have to change it. The proof of that is when everybody talks about how much is not being done. We forget maybe we could do more if we did it right, faster, and better, and frankly if we employed the resources of the State.

Senator BARRASSO. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

Let me say from our experience, I had the opportunity to chair this Committee for a number of years. We have had problems, and some have been pretty serious. I categorize them in three groups.

One is that the States during this process seemed to be ignored. The second thing is the delisting just never happens. We talk about it, and it never comes about. Third, the stakeholders and the landowners are pretty much ignored.

I will start with you, Governor. In Oklahoma, we set in motion—and you will remember this, Dan Ashe, because you were there at

the time—a 5-State partnership with New Mexico, Colorado, Kansas, and Texas.

We got together and spent a lot of time on this. We sat down and decided what we were going to do with the problems facing the lesser prairie-chicken by bringing all the States together, the agencies together, industries, conservation groups, and private landowners.

Despite this the Fish and Wildlife listed the species as threatened. That listing was so wrong that the courts reversed it. Yet Fish and Wildlife continued moving forward.

As a former Governor of a State, isn't this a little frustrating when you go to this much work? That is not an easy thing to do, to get five States all in one room for a long period of time.

Mr. FREUDENTHAL. Senator, I am familiar a bit with the lesser prairie-chicken. Obviously it is complicated. From my experience I would say they ought to be required at the outset if they are going to list to tell you what is required to get it delisted so that does not continue to move.

Second, they need to recognize that if they want to do this on a scale that does something for the species, multi-State cooperation is difficult, and it is expensive to put together. At some point they have to become a partner with the States.

The problem with the Act is it has the cooperation component, but it has this role where they are also judge and jury. At some point those two roles have to be reconciled. If you are going to be partners in putting together a recovery effort, yet you have to be guarded.

As I say, they would always come and talk to us about the wolf, the bear, and that and say, we really cannot say anything because that would be pre-decisional. We have to somehow reconcile the fact that cooperation means people actually can sit down and work together.

The problem I have with it is that they are judge and jury and at the same time they want to be a cooperator. We have to reconcile those two roles, because what happens now is cooperation with the States is clearly secondary because the decisionmaking role is so subject to judicial review.

Senator INHOFE. Excellent.

Mr. Myers, getting back to the delisting dilemma that we sometimes face, in 1989 Fish and Wildlife listed the American burrowing beetle. This was the hardest thing for me to explain back home, not just to road builders and farmers, about why they cannot do something because there is a bug down there because it had disappeared from its former range. That was the reason for doing it in the first place.

It seems the information relied on for the listing was based on anecdotal historical evidence and poorly performed surveys, yet nearly 30 years later the beetle is a thriving and stable species, but we are still not delisting.

Mr. MYERS, how could that system be improved?

Mr. MYERS. I guess I would mention a couple of things. One is I do not know the specifics of the case, but I would first mention that many States, in fact, have very good data on species. I think

it is important to assure integration of State data into any decisions.

Relative to the delisting, I think, as Governor Freudenthal pointed out, specific triggers are very important. I think integration of those triggers up front in the listing process is also key, but once those triggers obtained, whether they are habitat or population objectives, that should key and bring forward the delisting process.

Of course often the courts end up becoming a very big problem in moving along those decisions.

Senator INHOFE. What I hear from both of you is that maybe a system should be set up that when a listing goes into place, state at that point the conditions and the timeline of delisting, and then expand that even further and go into others that are already listed because there are many on that list right now.

The last question I have, Mr. Chairman, would be for Mr. Holte. Our Oklahoma farmers and ranchers are just now learning about a petition to list the monarch butterfly under the Endangered Species Act.

They were not aware that there was a problem. They did not know anything about it until they woke up and found that was going on. The monarchs need milkweed to breed, yet milkweed is poisonous to cattle. It is clear that a listing will directly affect our agricultural community, yet they were left in the dark.

We are talking about modernizing now. Changes are going to be made.

What are your thoughts about that, Mr. Holte?

Mr. HOLTE. I would respond that I think the communication to farmers and others might be enhanced by a better line of communication with general farm organizations, commodity groups, and State Departments of Natural Resources.

I would admit that when I, my neighbors or colleagues arise in the morning, the first thing we think about is not the Endangered Species Act. It is producing our livelihood in production of food and fiber.

Opportunity to share that information and concerns before they are actually listed and then the opportunity to work with States with incentive-based programs could maybe solve the situation before we get to a listing situation. Those processes could be very helpful, I believe.

Senator INHOFE. Thank you very much.

Senator BARRASSO. Thank you, Senator Inhofe. I appreciate it.

Governor Freudenthal, I wanted to talk about Wyoming and the time you were Governor. The wolf population really has exceeded recovery goals I think since about 2002. The Yellowstone population of the grizzly bears has exceeded recovery goals for a decade. They both remain listed.

In the case of the grizzly bear, it is not because of scientific judgment of Fish and Wildlife, but because of litigation. Can we talk about that in terms of is the Endangered Species Act working when species have exceeded the recovery goals for a decade and continue to be listed?

Mr. FREUDENTHAL. Mr. Chairman, the numbers are correct. Everyone agrees it is a robust population. The bear is hung up, I think, in part, over concern from the Fish and Wildlife Service that

they want to engage in post-delisting management. Under the statute that is not contemplated.

The problem I see is that the language that is in the statute was intentionally broad. As lawyers we are very good at taking broad language and creating new law, particularly law that works to whatever client we have.

I think if we could end up with a clarifying in the statute as to when those targets are hit, and they need to be established at the time of listing, and then if they are going to deviate from those targets later, which is what they tended to do.

If you look at the history of both those species, the area over which there were management prescriptions imposed grew significantly over the decades involved. Each of those was really unreviewable. At some point we had to say this is what is needed. The courts have to be bound by that. The only way they will be is if the language of the statute is modified.

The rules and regulations vary over Administrations, and then the administrative judgments vary. Nobody argues that the wolf population is not robust. I would argue that if we did it right, and thought again about distinct population segment, and thought about that as part of the State management, they would not have needed the rider to allow Montana and Idaho to proceed. In Wyoming we were still in dispute with the Fish and Wildlife Service.

There has to be reconciliation between the nobility of the goals and the implementation. The perfect examples are the wolf and the grizzly bear.

I sympathize with Mr. Holte because I was the prosecutor in some of those cases, not in your district, and people are defending their livelihood. I think we have not understood that if we can structure it right, they would be equally interested in defending the wolves.

It is not that people are against having the wolf present. Some are; as you know, some of our friends are. Most people say, look, I can live with this, but I have to know what the rules are, and I have to have some assurance that in the context of those rules whatever judgment I execute will be respected both in terms of prosecution and in terms of recovery.

Senator BARRASSO. So we need to improve the certainty?

Mr. FREUDENTHAL. Absolutely.

Senator BARRASSO. Mr. Ashe, last summer, the Western Governors' Association unanimously passed a policy resolution to modernize the Endangered Species Act. There was an article in E&E last June. In your comments you remarked about the Western Governors' Association saying, "I think the resolution is a great place to begin a dialogue. If we can continue that dialogue, and if we can keep it bipartisan and then start to take the resolution and build that into more specific principles and legislative language, then I think it represents the best opportunity that we have had in a long time to think about reauthorization of the Endangered Species Act."

Do you still agree that the Endangered Species Act needs to be modernized and that the Western Governors' Association bipartisan policy resolution represents a decent place to start the discussion?

Mr. ASHE. I do agree that the WGA resolution represents a good step forward. The statement you made earlier about a bipartisan effort on this Committee, I think obviously is what is going to happen or needs to happen if we are going to have an effective debate about the future of the Endangered Species Act.

Hats off to Governors Mead and Bullock and the leadership of the WGA, and the U.S. Fish and Wildlife Service under my leadership supported that effort. We supported it financially, and we supported it by providing our expertise.

I would encourage bipartisan communication and discussion about the future of this law. It cannot be premised, I do not think, Senator, on a notion that the law is broken. I believe that the law is working well. I will mirror Senator Carper's remark saying can it be better, can it work better? Of course it can. I do not think a debate, the starting point of debate should be that the law is broken.

Senator BARRASSO. Ms. Rappaport Clark, you said in your testimony, "The ESA is not broken." You went on to say, "It does not need to be fixed."

In 2013 you authored an article in BioScience titled, "The Endangered Species Act at 40, Opportunities for Improvement." In the article you argued for modernization of the Endangered Species Act. You highlighted five areas for reform. You concluded that these ideas were "just the tip of the iceberg." The vast majority of Americans, I think, agree with you.

There was actually a poll conducted by Morning Consult in 2015 that said 63 percent of registered voters favor updating and modernizing the Endangered Species Act. Only 10 percent oppose modernization.

While we may not agree precisely on what changes need to be made to the Endangered Species Act, it does sound like we do agree that some changes are needed. Are you willing to work with the Committee on ESA modernization?

Ms. RAPPAPORT CLARK. Thank you, Senator Barrasso, for that question.

There are a couple of things.

I would echo what I am hearing on this panel that certainly the Endangered Species Act could work better, absolutely. Before I get too far into my response, yes, I am happy to work with this Committee, for sure, as I have for years.

Again, the Endangered Species Act—as we stay focused on the purposes and the goals and the objectives, what we end up debating are the implementation mechanics. I think you have heard a lot of that conversation today.

I believe I have seen it happen through both Democratic and Republican Administrations. A lot of the challenges we are hearing conversation about I believe can be fixed administratively. There is a lot more rigor that can go into the Endangered Species Act.

I remain concerned about these times given the 100-plus amendments that occurred in the last Congress which seemed disconnected from the purposes and goals. I believe the American public enjoys and supports this law. As long as we are working to strengthen its ability to achieve its goals and vision, absolutely, it can work better.

A huge issue though which I think undercuts a lot of the frustration you are hearing is this law is starving. I have watched it happen since my time as director through Dan's time as director, the chipping away of the funding fabric and the ability of the Federal and State agencies to save species at risk of extinction is very dire.

To the degree this committee can work with the appropriators to adequately fund, I think you will see a lot of this frustration begin to erode.

Senator BARRASSO. Thank you.

Senator BOOZMAN.

Senator BOOZMAN. Thank you, Mr. Chairman. We appreciate you and Senator Carper for holding such an important hearing. It really is important to the people of Arkansas.

Thank all of you for being here. We do appreciate your testimony.

This is not a question, Ms. Clark, but I think the reason we are seeing so much backlash in the sense of people introducing legislation in an effort to kind of push things back the other way is I think we have had instances where things have, sometimes rightfully, sometimes wrongfully, appeared pretty heavy handed in the sense of using the power of the Endangered Species Act.

Arkansas is a natural State. It is so important for so many different reasons, including \$1.55 billion to the State, 25,000 jobs annually in the case of sports people. However, I and many others, as we have heard today, have grown concerned that the Endangered Species Act at times has been implemented in a manner that hurts Arkansas families, farms, businesses, and communities with disputable benefits at times to wildlife.

Director Myers, critical habitat designation has caused unease and even fear with private landowners concerned for the use of their property if it is within the circle. Under section 7 of the ESA private landowners are required to consult with the Fish and Wildlife Service when their property use requires a Federal permit or funding. Do we really need critical habitat designation to apply to private landowners?

Mr. MYERS. Thank you, Senator, for the question.

As you stated, section 7 consultation is triggered when a Federal action agency is permitting or funding a project on private land where a listed or threatened species is present. That consultation will result in whether or not that permit or funding is allocated for that particular land management activity.

In my view critical habitat designation has no further effect on those situations, but it can cause unnecessary anxiety as you have pointed out. I would just further my view that designation of that habitat could be eliminated on private lands.

Senator BOOZMAN. Tell me how it affects agriculture.

Mr. MYERS. With agricultural practices it is a similar situation. If they are receiving, say, farm bill allocations, and there is critical habitat that overlays, there are those conditions under which if those species are present, as they go through their planning process with FSA or NRCS, they could be precluded from receiving some of those funds.

Senator BOOZMAN. Often there is little data available for a petitioned species other than required under section 4 listing criteria.

However, when developing a recovery plan much more refined data on life needs and habitat requirements is realized.

Does it make sense that the need for critical habitat designation occurs with the recovery plan development and not at the listing?

Mr. MYERS. Senator, absolutely. I think there are many examples that show that as you go into that recovery plan process there are much more comprehensive amounts of data and much more information through stakeholders and partners.

Of the simple examples I have encountered, the Atlantic sturgeon is a simple example of there was critical habitat designated that included reaches of rivers that were above dams where that species of fish never would be occurring.

Had those designations come subsequent to or during the recovery planning process I think it would have been refined and been more targeted.

Senator BOOZMAN. Director Ashe, it is good to see you. There is lots of talk about the frivolous lawsuits that come about. It does seem there is perhaps an economic incentive for lawyers to do that in the sense that their attorney fees are paid regardless of if they win the case or not. Can you explain why this has become the norm?

Mr. ASHE. Attorney fees are paid only if they win their case. They are not paid whether they win the case or not. As I have testified before, when somebody takes on the Federal Government that is a big chore.

We get sued by States, energy industry, and NGOs. When they win the law provides their attorney fees and costs should be paid, but it is only when they win. I would say that is not a substantial burden for the Federal Government because No. 1 they do not win that often, and two, it is not a big expense for us.

Senator BOOZMAN. In regard to that, how much time and effort is spent by the agency in man hours and the hassle factor where you could have that ability to do other things directly in line with your mission? I would say certainly all lawsuits are not frivolous and this and that, but there is enough smoke here that there actually is some fire.

Mr. ASHE. Whether and how to compensate people for successful challenge against the Federal Government is a legitimate thing for the Congress to consider. It is kind of outside my area of expertise, but it is kind of a fundamental question of justice. To what extent do you want, does the Congress want to provide recompense to people who challenge their Federal Government and win?

Senator BOOZMAN. Right, but it does take a lot of resources from the agency.

Mr. ASHE. It takes resources, but again, as others have mentioned here, Senator, the biggest challenge for the U.S. Fish and Wildlife Service in implementing the law is not the challenge that we face in the courts. It is the lack of capacity for us to do the work that the law requires.

When we talk about recovery and recovering species we proved in the last Administration I think that where you make a dedicated investment and dedicated effort we can recover species and get them off the list. We delisted due to recovery more species than all previous Administrations combined.

Where you dedicate the resources, where you build capacity, where we build partnership with our State colleagues we can achieve success. I think we have shown that.

If I could take 1 minute I would tell you a number of suggestions have been made here today to make recovery standards binding at the time of listing to move critical habitat designation up to recovery planning.

If you push everything up to the point at which you list the species, you are going to create a huge backlog. If we push everything up to the point at which we make a listing determination, it is going to make the work impossible to do listing, to do critical habitat, to do recovery planning, and to make that all binding at the time that you list the species is an incredible burden.

I would urge the Committee to think about that carefully.

Senator BOOZMAN. Thank you very much.

Thank you, Mr. Chairman.

Senator INHOFE [presiding]. Thank you, Senator Boozman.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Governor Freudenthal, it is good to see you once again. I could not agree more with your comments regarding the Western Governors' Association. That is an organization that is bipartisan in nature, but it is made up of leaders in the western part of the United States from many different points of view, but they come together and work through issues that are important to them.

With the amount of Federal lands with which they have to work and the different ecosystems they are all involved with, they really do a marvelous job of trying to come together and find consensus.

You talked about moving the goalpost and changing the course when someone has a new theory with regard to how we respond to these listings and so forth. Is this the result of a lack of perhaps up to date science at the agency, and if so, how should the scientific process be improved to make sure that we are using the most accurate science and have clear goals for species conservation?

Mr. FREUDENTHAL. As you know, as former Governors we believe in the Western Governors' largely bipartisan operation, and it always has been.

I think what happens is, as I mentioned in my testimony, we develop missions that people want to insert into the ESA. In the case of sage grouse the science sort of took a back seat to the Administration's desire to impose landscape scale planning, which is a legitimate policy but should actually be manifested not through an ESA listing where you piggyback it onto the sage grouse.

What happens is people develop new ideas. I am not a scientist but I will say the new ideas seem to conveniently align with the policy of the given Administration. In the recent rules, they stuck in the word "credible." That was essentially a reflection of the status quo. We need to strengthen the kind of science that can be brought to bear on these decisions.

I am nervous about peer review. I have a son who is a scientist. It is a lot like lawyers judging each other. We are pretty kind to each other, but I think the legislation has to have some yardstick that says the science has to have either been—you have to talk to

the scientists, something that formulates whether it is required it be peer reviewed.

For instance, in the attempt to change the listing they wanted the proponent to offer kind of both sides of the argument. That got struck before they finalized it. At some point you have to say science is a lot like a lot of other things. Some of it is statistical, and some of it is opinion. You have to differentiate opinion from what I would call statistical or more supportable facts.

I am not quite sure how you word it, but one of the things that has to come out of this is better definition so that Director Ashe's successors and others—as well as the States—begin to get a sense of certainty and what the target is.

The problem is that the ESA will work if we stop putting bells and whistles on it to accomplish other purposes. Suddenly it becomes how do we get the western States to behave? How do we save 11 State sage grouse or sagebrush ecosystems? You end up saying that is not what the ESA is for. The ESA is supposed to be species specific and not necessarily become a fulcrum by which you lift up certain policy preferences.

I think the key is to get back to the notion of what is the science related to that species and how is that science validated? I, obviously, disagree with Dan. I think more of it can be done up front so that we would know what the objective was on sage grouse, know the objective on bears, know the objective on the wolf so you could actually focus the limited resources we have.

Senator ROUNDS. This may have been covered since we are all popping in and out. If it is, I will move on.

I am curious both with Governor Freudenthal and also Director Myers. In 2015 we held an Oversight Subcommittee hearing on the practice of sue and settle. Particularly in this hearing we heard testimony discussing the impact of the 2011 legal settlement between the Fish and Wildlife Service and the Center for Biological Diversity and Wild Earth Guardians that required the agency to issue a final listing decision on more than 250 species.

Can you explain what impact the practice of sue and settle has on the ability of States and local units of government with whom you should be working to work constructively together toward species conservation? I would like your thoughts on it.

Director Ashe, would you like to begin?

Mr. ASHE. As I testified before, the notion of sue and settle, No. 1, I think is illegal. It would be illegal for the U.S. Fish and Wildlife Service to encourage someone to sue us and then settle. That is not what happened.

What happened is the law contains very strict deadlines. We found ourselves I think in 18 Federal district courts arguing deadline lawsuits. We threw a lasso around that and pulled the plaintiffs to the table and forced them to settle. It was not a cozy agreement. It was actually a forced settlement.

That allowed us to then put together a timeline that would allow us to meet the requirements under the law and get the courts to then hold to that timeline.

I would say from the standpoint of our State and local partners it was very successful because we were able to push the big con-

controversial things to the back, like sage grouse, which gave us 3 years to work with our State colleagues and sit down.

We formed a Sage Grouse Task Force with 11 range States. It gave us the space to make a good decision. The same happened with Arctic grayling. It gave us the space to work with the State of Montana and ranchers in the Big Hole Valley of Montana and avoid the need to list the Arctic grayling.

I think it worked to the advantage of our partners for us to have a logical, predictable, sensible schedule that everyone could see.

Senator ROUNDS. I apologize to the Chair but would you mind if the Governor would respond to that as well? Thank you.

Mr. FREUDENTHAL. An old lawyer mentor of mine told me that a bad settlement is better than a good lawsuit. That is only true if you are in the room when it is being settled and when it is being approved.

This is sort of we are going to settle it and then we will issue and you can comment on it, particularly on something that is broad and affects an immense number of people and their rights.

I do not assert collusion. It is kind of fun as a rotary speech matter, but I do not do that as a matter of lawyer ethics. It is one that has a convenient outcome. People settle when the outcome works for both of them. It is the people on the outside, the States, private property owners, interest groups who are confronted with a de facto end game that is finished.

I would also take exception on the question of we need to define win when it comes to the attorneys' fees. They do not have to win the whole case; they have to win one point, and that opens it up.

You do not want to discourage settlement, but you have to formulate the settlement in the context of the people who are broadly affected by it because these are public policy questions. These are not just two private litigants engaged. At some level you have to let others participate.

Director Ashe asserts that this was better for us. For those of us on the receiving end it may not have felt that way, but we would love to have been in the room when they were talking about what the terms of the settlement were to have some standing.

Remember, even intervenors do not necessarily have standing to participate in the settlement depending on the posture of the litigation. I would argue that sue and settle—I do not want to discourage people from settling, but I do think that settlement has to be subject to a higher level of scrutiny when it involves significant rights of non-parties across the board in a public policy context.

Senator ROUNDS. Thank you.

Thank you for your patience, Mr. Chairman.

Senator BARRASSO [presiding]. Thank you, Senator Rounds.

Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman.

Mr. Holte, thank you for being here today. I appreciate your sharing of experiences about the real challenges and the costly consequences that ag producers face due to ESA policies. I am a cattle rancher. I can empathize with the producer and the family you mentioned.

In your testimony you cited the general need to modernize the ESA from a listing and delisting perspective. We have tremendous assets in agriculture. Chief among them are our producers.

Can you discuss the tools available to landowners that promote species recovery, and are these programs voluntary or incentive-based?

Mr. HOLTE. I probably do not have real personal experience with the tools to assist in that. Much the frustration which I think was somewhat apparent in my testimony, most of the frustration was with an animal that has reached recovery status or well exceeded recovery status and yet through legal means delisting does not occur or is not maintained.

To be frank with you, I do not know if I can answer your question real well.

Senator FISCHER. I think it is clear that better engagement is necessary, and we have to have that engagement with landowners in order to address the deficiencies many of us feel are within the ESA.

As we look to modernize that Act, in your view are there any mechanisms dealing with consultation that you think might be helpful so that we can enhance a discussion with local landowners and bring them to the table?

Mr. HOLTE. As I mentioned earlier, you may not have been able to be here, but the first thing farmers think of when they get up in the morning is not the Endangered Species Act. It is very much about the livelihood they are producing and the people they are feeding.

We have a great network in agriculture of general farm organizations, commodity organizations, and we work closely with our State Departments of Agriculture and Natural Resources.

It is an obvious conduit to get to farmers. Many States—including Wisconsin, for sure—have a great ag press organization, a great network of agricultural press people, both in radio and print which are somewhat untapped at times, I think, in the area you mentioned.

Those would be some suggestions I would throw out.

Senator FISCHER. Thank you, sir.

Governor, I do not know if you know but Nebraska has 23 natural resource districts. That is a system that is very unique to my State. Each of these NRDs is located within an individual watershed which allows the local people to develop programs to best serve the local natural resource management needs of that area.

In your testimony you discussed mitigation as an important mechanism to preserve species. An NRD within the Missouri River Watershed has worked on the levee system that protects drinking water for two-thirds of Nebraskans as well as safeguard Offutt Air Force Base where STRATCOM and the 55th are located.

However, under ESA rules this NRD would be required to purchase land for mitigation for future development. Certainly it is equally important so that we protect species and deliver this necessary levee project to the area.

In your experience, Governor, what are the different tools currently available to mitigate the impact of projects on species?

Mr. FREUDENTHAL. Mitigation was actually developed, as you know, in the Army Corps of Engineers 404 bank context. There is a pretty good set of U.S. Fish and Wildlife Service rules that relate to banking.

However, now we have mitigation options, in lieu fee where you pay into a fund or project-sponsored activities. You also have something called exchanges which have not really evolved to a definition.

I think on mitigation, I would think about structuring the mitigation so that it responds to the nature of the impact. In some cases, something like the sage grouse, that is a much longer time-frame than it is for some other species which are able to respond more quickly to habitat changes.

The problem with the sage grouse is they fall in love with one parcel of ground, and they are dependent on certain levels of sagebrush. They are not necessarily the smartest species the Lord ever created, so they need a different formulation. In that context, you want it to be responsive to the impact.

I think the issue for the people doing what your folks are doing is that we are looking for some degree of permanence to make sure the impact is offset over the life of it. I do not know that has to be a permanent easement. For some species, it does but it has to be more than some of the stuff that is going on, repeatedly doing 5- and 10-year leases. That is meaningless in terms of species.

My thought is the Committee needs to integrate some kind of discipline corresponding mitigation to the kind of impact, its nature and extent, as opposed to having that kind of float out there so your folks would have a set of rules.

You need rules and consistency on mitigation just like you do on everything else where everybody has their own idea. Mitigation is not like art, is not in the eye of the beholder. It either works, or it does not.

I think some yardsticks could be put in so your folks would know what they need to do and how it would be responsive to the impact they are trying to offset.

As long as I am on that subject, one of the worse things they are doing now is going from a no net loss provision, which was present clear back to the 1980s. I think it is a 1981 set of rules. Now we have gone to net gain with no definition.

Neither the ESA nor NEPA or any of the land management statutes contemplate using the authorization by the Federal Government as a vehicle to impose an additional tax on the activity of net gain. I get no net loss. That makes sense. It is a Federal resource; you want to protect it.

To say that in addition to everything else you are going to do we are going to slap this other tax on as a matter of policy. That is important in the context of mitigation because it sets the bar as to what the impact is you are trying to offset. I get it, no net loss. I do not understand net gain.

Other than that, I am entirely neutral.

Senator FISCHER. Got that. Thank you, sir.

Senator INHOFE. Mr. Chairman, before you go on, may I have about 30 seconds to clarify something that was said?

First of all, I would say to my friend, Dan Ashe, I have heard him talk about it before, that you have had more delistings than anyone has.

Since its inception total listings have been 1,652. The total number of delistings during that time has been 47, 47 out of 1,600. Ten of those 47 were because they became extinct, so it is really 37 out of 1,600. You were responsible for 16 delistings, 1 out of 100.

Senator BARRASSO. Senator Carper.

Senator CARPER. Thank you.

Again I apologize to our witnesses for not being able to join you for most of this hearing. I appreciate very much what is going on.

I am going to telegraph a pitch here. I think pitchers and catchers report for spring training this week. I am going to telegraph a pitch. The pitch that I telegraphed is what are a couple of areas where you think there is broad consensus, if we are to make any changes at all? What might they include?

When you have a controversial hearing, I think this, from what I am told, is constructive. There is a lot of controversy and not a whole lot of agreement. Help us find a few nuggets of agreement here today. Why don't we start with that?

Dan, do you want to go first? Mr. Ashe, where do you think there is agreement among the witnesses?

Mr. ASHE. I think the first broad consensus needs to be that the benchmarks—

Senator CARPER. Be very brief.

Mr. ASHE. The first point is I think we need to start with the consensus that we are trying to strengthen the law and our ability to save endangered species.

Second, I think we can come agreement about enhanced capacity for States and Federal agencies to do their job and looking for ways to build and strengthen capacity, both in the field capacity and the science needed to support these decisions so they have a underlayment and firmament in science.

Senator CARPER. Good.

Jamie Clark, can you give us two, just very briefly. You can agree or disagree, that is OK. Repetition is good.

Ms. RAPPAPORT CLARK. Not that I often agree with Dan but absolutely funding—with funding for the Federal and State oversight agencies, I believe that we could make great strides in addressing imperiled species challenges across our country as well as our habitat.

Second, if I have two, an underlying consensus issue is to increase the transparency with which the Endangered Species Act is implemented. I think that will cross over all the elements of the law.

Senator CARPER. All right, thank you.

Mr. Holte.

Mr. HOLTE. I think it might be more obvious, and we have not said it; we support the Endangered Species Act and the thought behind it. It is the right thought and the right direction to go. That is the first one.

Second, probably for myself, it is the experience of having a species that has very definitely recovered, but we cannot get it

delisted. It is the frustration of either too much broadness in the Act or allowing the legal system to cause us headaches.

Senator CARPER. Thank you.

Mr. Myers.

Mr. MYERS. I would reflect what Dan said about building capacity. It is very important. I would also say as Governor Freudenthal said, there is sand in the gears. We need to use our existing capacities as effectively and efficiently as possible into addition to building that capacity.

As Mr. Holte has mentioned I think the delisting delays and those choke points are very important and is probably common ground.

Senator CARPER. Thanks.

Governor.

Mr. FREUDENTHAL. Senator, I advocate more funding, but I am careful of the biblical admonition about new wine and old wineskins. We need to do more than that.

I do not know that there is agreement on this panel. I think the reason there is not agreement is it gets to be very nuanced, the interrelationship between significant portions of the range and DPS gets to—that is pretty tricky.

There are probably things we could agree on, but everybody is so tentative about this because this has been tried twice before and it failed. I would argue that there is agreement about a discussion of problems, but we are a long way about agreement as to how the corrections in the different areas would occur because it is a complicated interrelationship that has evolved over the period of time, particularly with some of the case law. Everybody sees an advantage for them in that.

At some stage you guys are going to have to convene something that everybody puts down their spears and says, OK, is there something that we can move on. I would say that we really have not crossed the threshold you established in your initial comments.

Senator CARPER. Thank you.

Christophe Tulou, Senior Aide and former Secretary of the Delaware Department of Natural Resources and Environmental Control, is sitting right behind me. He was talking to a member of our EPW Committee on the minority side. He was talking to me about something called the sixth mass extinction.

Apparently a number of scientists, maybe most, concluded that we are now living in the midst of what is termed a “sixth mass extinction,” one caused by human alteration of the planet.

I would like a quick yes or no answer. Do you all agree that we are now experiencing a sixth mass extinction of species, just yes or no?

Governor, do you want to start?

Mr. FREUDENTHAL. The truth is I am not qualified to answer. I am not familiar.

Senator CARPER. Thank you.

Mr. Myers.

Mr. MYERS. I would echo the same answer. I am not qualified to answer that.

Senator CARPER. Thank you.

Mr. HOLTE. Three in a row.

Senator CARPER. Ms. Rappaport Clark.

Ms. RAPPAPORT CLARK. Yes.

Senator CARPER. You said yes?

Ms. RAPPAPORT CLARK. Yes.

Mr. ASHE. Yes.

Senator CARPER. All right. Thank you.

I have a question, if I could, for Mr. Myers, Mr. Holte, and the Governor.

Mr. Chairman, let me know when I need to slow down.

I am wondering how it is that the population of a species declines so much that it has to be protected under the Endangered Species Act in the first place. I want to ask a couple questions about that, if I might.

First, are States well aware generally years in advance of species in their jurisdiction that are declining? That is one question. The second question is, should we expect the States, who as I listened to your testimony, feel left out, unengaged, and willing to take on more responsibilities under this Act? Shouldn't we expect our States to do a better job of managing species so they do not end up in so much trouble?

Mr. Myers, do you want to go first, and then we will ask the two fellows on either side of you?

Mr. MYERS. I would point out that for over a decade now State wildlife action plans have been guiding the work of State agencies. With development of State wildlife grants and these alternative funding sources, we have built capacity, significant capacity.

I mentioned in my testimony and in greater detail in my written testimony, using the a southeast example, that we have created the Southeast At Risk Species Program where we are triaging across State boundaries and looking across those territorial jurisdictions range-wide at species.

We are applying financial and human resources much more wisely and effectively than we have in the past to optimize those results. These are species that are not listed at this point in time, so I would say the States have made tremendous strides in building capacity but also in using their existing capacities more wisely.

Senator CARPER. Thank you.

Mr. HOLTE. I would say in Wisconsin we have a State law that recognizes endangered species. We have our own list. That is periodically reviewed as far as the species listed and those delisted.

In the last review I think we added six or seven species and we delisted 15. To me that says that our State is appropriately interested, active, and capable of managing the situation.

One other point I would make is in the area I am most familiar with, the gray wolf. There was a 3-year period of time in which wolves were delisted in Wisconsin before court action was taken and listed them again.

During that 3-year period of time, our Department of Natural Resources held three hunting seasons in which several hundred wolves were taken, but the total population only decreased 9 percent, well in excess yet of our goal.

I think there is a lot of capacity and appropriate expertise at the State level to deal with these issues in conjunction with the Federal Government.

Senator CARPER. Governor.

Mr. FREUDENTHAL. I have three observations. One really has to with the history of game and fish agencies. They were initially created for management of species that people were interested in for either hunting or fishing or other things.

It is really only within the last 10 or 15 years, largely driven by Federal grants, that the State agencies have shifted their focus. That accounts, I think, for part of the problem in that species habitat and species conditions deteriorate over time. Fifteen years is a pretty short period in terms of the States focusing on it.

Second, I don't want to get into the issue about whether climate change is manmade. I will leave that to you. However, climate is changing. You see that, and those are things that State agencies try to account for it, but they account for it in the same gradual nature that it occurs.

I think the question you raised is the correct one. I would argue that really the history of game and fish agencies does not, until recently, in a relative sense, focus on the question of species maintenance or species enhancement. It has by and large been hunting, fishing, the hook and bullet crowd.

I love them but now our agencies have a much broader mission. One of the things I learned when I was Governor was how much money we spent in game and fish that was beyond the traditional mission that those game and fish agencies had.

That is, I don't know, maybe a 15- or 20-year history. That is a relatively short time in the life of a species.

Senator CARPER. I have one last point, if I could. You mentioned trying to figure out how much you are spending in these agencies. One of the things I mentioned in my testimony is what does the preservation of our species or protection of our natural resources, whether animals, birds, or fish, mean for us economically in our State?

We have a lot of people who come to our State to hunt for ducks, we have a lot who come to our State who want to fish our inland bays and also the Atlantic Ocean which is right off our coast. We actually tabulated how much we realized in economic development. There is a real positive there. We have to keep that one in mind.

I am going to ask a question for the record. I will mention the question here. It is hard to get anything done around here, as you know, even on a good day for things that are not controversial.

When you have something that is controversial, we do not have a lot of good days yet this year. It is especially challenging. I think the Chairman and I have a good personal relationship and have a real interest in collaborating and finding areas where we can collaborate.

We talk about the 80-20 rule is our colleague from Wyoming, Mike Enzi, whom you know well, Governor. Mike Enzi has the 80-20 rule. He says 80 percent, the things we agree on, why don't we focus on that. The 20 percent of things we don't agree on, why don't we just not focus on that and come back another day.

I don't know that this is the 80 percent or the 20 percent, but I think we need to spend some time focusing on it and finding out.

I will just close with this. I would ask, if you were in our shoes, what are some of the things you would do to try to find consensus

to grow and develop consensus going forward? Give us your counsel.

The second thing just for the record, the Chairman has heard me say this before, and my colleagues have as well, I was born in West Virginia not too far from where Senator Capito grew up. My dad and grandfather took me fishing at a very young age, probably 3 or 4, and hunting, a little bit older than that. I have memories still of the New River, fishing in the New River and other bodies of water.

I remember my dad and my grandfather just being outraged at seeing trash in the water, along the shore, or on the docks and literally taking the time to clean it up.

I got to be a Boy Scout later on in life. My wife and I had two boys became Eagle Scouts, and we were very much involved in what they do. The idea is I think we have a moral obligation to leave this planet better than the way we found it.

There are ways to do that. There are ways to do that we do not impede our economic growth and economic opportunity. We have to be smart enough to figure out how can we be true to the advice my dad used to give me and my sister on our responsibility of stewardship to his planet.

The other thing my dad used to say to my sister and me—my dad was a Chief Petty Officer in the Navy for like 30 years. He was tough as nails. He used to say a couple things over and over. One of the things he would say over and over to my sister and me was just use some common sense. He did not say it so nicely. He said it a lot.

Out of that I take the notion that we should use some common sense in what we do here and our responsibilities.

He also used to say had chores to do around our house, our garden and the yard and so forth. He was always saying if the job is worth doing, it is worth doing well. If the job is worth doing, it is worth doing it well. He said it a lot.

Out of that, I took the idea that everything I do, I can do better. I think the same is true of all of us. I think the same is probably true of most programs that we develop in our States and for our country.

Our challenge here is a way to do this better. My hope is by working together, by communicating, compromising, and collaborating, we will find the path forward is true to both our stewardship responsibilities and our responsibility to make sure we have jobs for people in this country.

Thank you.

Senator BARRASSO. Thank you, Senator Carper. Thank you for your thoughtful comments.

Senator Ernst.

Senator ERNST. Thank you very much.

Thanks to our panel. I think there are a lot of other hearings going on this morning, but I appreciate the fact that you are here today to share some thoughts.

I would like to redirect to State and local control or collaboration in some of these projects. I know the Chair mentioned the monarch butterfly. This is a great example of where Iowa has really stepped up to the plate. We have what is the Iowa Monarch Conservation

Consortium. It is a great example of how collaborative local-based approaches should be made prior to listings.

The Consortium involves the Iowa State University, the Farm Bureau, the Iowa Department of Natural Resources, the Iowa Department of Agriculture and Land Stewardship, The Nature Conservancy, and many others. They are using science-based approaches in efforts to establish the best ways to increase habitat that will benefit the monarch butterfly.

We are really glad that they have come together in this manner to head off a problem that we do see. We would much rather see that rather than heavy handed government approaches. I think this is a great way of how we leave the environment better than we found it.

Ms. RAPPAPORT CLARK, I would like to direct this question to you. Do you support a greater role for States in the implementation of the ESA?

Ms. RAPPAPORT CLARK. Absolutely, Senator. The States are very important collaborators and partners in all wide range of species conservation given their knowledge base, given their relationship with local landowners, and given their relationship with local entities.

I believe that the Endangered Species Act over the years has demonstrated—your monarch example is a very good one—that there is enough flexibility in the law to expand those partnerships, and there is enough flexibility in the law to celebrate and ensure more rigor in those partnerships.

The Federal Government cannot do this alone. The Federal Government steps in when everything else has failed. It is a last resort. The Endangered Species Act is not a law that leads conservation; it is a law that is there to prevent the extinction.

To the degree we move upstream and States, tribes, other local stakeholders are engaged and resourced to be able to take care of our natural resources, that is a win-win all around.

Senator ERNST. That is wonderful. What are the best ways we can be communicating out there when there is a species that is approaching endangered status? How is that communicated to the States and local government so they can proactively embrace this rather than having the Federal Government come in and instruct them how to do so?

Ms. RAPPAPORT CLARK. There are a number of ways. Certainly I think you have heard some of my colleagues on the panel talk about their own State endangered species list. To a large degree the States have a tremendous capacity of knowing what is certainly endangered or imperiled within their own borders.

However, oftentimes some of these species extend beyond State borders. The Federal Government, the Fish and Wildlife Service and NOAA Fisheries, maintain a list of candidate species which I call the yellow blinking light, what are those species trending toward endangerment and that should provide incentive for everyone interested and capable to come together to prevent the need to list so there is that upstream solution and the upstream capacity to engage early on.

Senator ERNST. Mr. Ashe.

Mr. ASHE. Thank you, Senator.

I think yes to greater State engagement and involvement. I think we have been realizing that over the last decade or so. I think key to that is a predictable schedule. We talked earlier about the multi-district litigation settlement.

What the U.S. Fish and Wildlife Service is involved in now is a process of planning the next schedule, looking at their listing obligations, sitting down with our State partners and NGO partners and looking forward and setting up a schedule, a predictable schedule for doing the work of the Endangered Species Act.

The monarch butterfly is a great example of that where we said we have a petition, we are considering the need to list the Endangered Species Act; let us engage all of our partners now and start working on conservation.

We are working with the Natural Resource Conservation Service to put in place assurances so that agricultural producers will know if they do good work for the monarch butterfly, it will not be a disadvantage to them.

The Natural Resource Conservation Service has been a tremendous partner in providing those kinds of assurances to producers.

Senator ERNST. OK.

I am going to ask one more question for the entire panel. It focuses on do you believe that we cannot only support economic growth, but we can also balance that with the way we protect different species? How do we strike that balance?

I am going to pose that to you, but I am going to give you a quick example of something we have seen in Iowa. Then I will ask you to respond to that first question.

On January 11, 2017, the Fish and Wildlife Service listed the rusty patched bumblebee on the Endangered and Threatened Species List under the Endangered Species Act. The rule was set to go into effect on February 10 but was delayed under the current Administration until March 21. As of yesterday, the way I understand it, the NRDC has filed a suit on this delay.

In Iowa, several counties in the central Iowa area would be included in this listing as historical areas where the bee used to exist. There has not been a sighting of this bee in Iowa since 2000 according to the Fish and Wildlife Service. That is concerning to me. This listing will tie the hands of farmers while really doing nothing to increase the habitat for the bee.

Can you speak to the economic balance that we have to have between actually promoting economic development and protecting habitat?

Yes, sir.

Mr. FREUDENTHAL. Thank you for the question, Senator.

I would make two observations. One, it is entirely possible, but it will not occur unless we end up with the circumstance where we give meaning to partnership. The truth is the States are limited partners in an instance where the Federal Government is the general partner making the decisions. The States contribute resources to try to implement them.

I think until there is some degree of sharing of authority you are not going to have a sharing of information or have that information become decision relevant. Regarding the monarch, it is interesting

to me it stands out because we focus on these examples of cooperation because there are so few.

In fact, we need to figure a way that it is not the exception but is the rule. I think the only way you do that is redefine this as a general partnership and not a limited partnership, because from the State's point of view we are the limited partner. They make a decision; we get to figure out how to implement and pour in resources to try to get it there.

I think those kind of structural changes need to be effected so that when something like this is going to happen, somebody can say, just a minute. The significant portion of the range does not include, or this is a habitat designation. What does that mean?

A more practical example in Wyoming is you can have a nest for a raptor that has not been occupied in 7 or 10 years, and people have to adjust their activities around it when in fact—don't get me started.

Let me say the point you raise is the correct one. The issue is the resolution of it. That is why everyone is so nervous because somehow we are going to upset this balance when in fact the lack of balance is what keeps us from making this Act function the way it should where everybody is paddling the canoe in the same direction.

The only way you get there is if everyone is actually a partner and there is not a general partner who makes the decisions and calls the shots and their limited partners get to contribute resources.

Senator ERNST. Collaboration, yes. Thank you.

Mr. HOLTE. Senator, I would respond. I am optimistic. I think these things can happen. The one factor I think we sometimes overlook is discussion around our organization occasionally called "farmer common sense." I am pretty sure it is very similar to Senator Carper's father's common sense. It might be difficult to legislate.

What gives me optimism is the obvious bipartisanship this Committee has and the attitude they have toward these issues. If you can maintain that working together attitude, I am confident that State relationships as well as the actions of this Committee will be successful.

Senator ERNST. Thank you.

Yes, Ma'am.

Ms. RAPPAPORT CLARK. Senator, I firmly believe that economic security and environmental security are flip sides of the same coin. They do go hand in hand.

While I do not know the specifics of the bumblebee you mentioned, I do know a number of these species and bat species that are facing serious declines in this group called "pollinators" are essential to the food crops of this country.

They are sounding the alarm that something is going wrong. If we lose the pollinators, that whole segment of the food chain—we are going to be really threatening the agriculture fabric of this country.

I would say one last issue for many threatened and endangered species is they provide tangible benefits to all of us as humans,

whether they play valuable roles in clean water, food, medicines and things we do not even know yet. They are sounding the alarm.

Protecting that whole fabric of species' existence is really important to the economic platform of who we are as a country.

Senator ERNST. Going back to the bumblebee example, if it has not been cited in Iowa for 17 years, there is no reason there could not be habitat somewhere but that should be done in a collaborative effort with local authorities and those individual farmers.

Sir, did you have one closing comment, and then I will relinquish my time?

Mr. MYERS. Yes. I would add you absolutely can find that balance. Just a simple example that comes to mind is forestry practices in the southeast as it relates to prescribed fire.

Using prescribed fire protects their investment and their forests but also provides great habitat and also recovery potential for both T&E species as well as species that are tending toward listing.

Senator ERNST. Thank you very much, Mr. Chair.

Senator BARRASSO. Thank you very much, Senator Ernst.

Thanks to Senator Carper for coming back. I appreciate all of you being here today.

If there are no more questions, members may submit follow up questions for the record. The hearing record will be open for the next 2 weeks.

At this time, I would like to ask unanimous consent to enter into the record the 2013 article published by Ms. Rappaport Clark in BioScience, the 2015 Morning Consult poll, the 2016 E&E article, seven documents submitted by the Western Governors' Association, plus a statement by Senator Johnson.

Senator CARPER. I object.

Senator BARRASSO. Hearing no objection.

Senator CARPER. I do not object.

[The referenced information follows:]

## The Endangered Species Act at 40: Opportunities for Improvements

JAMIE RAPPAPORT CLARK

**T**he Endangered Species Act (ESA), signed into law by President Nixon 40 years ago this month, has provided protection for imperiled species, preventing hundreds of extinctions and putting many more species on a path to recovery. Compared with other wildlife laws around the world, the ESA is unique because it prohibits activities that would lead to species extinction on both government and private property. Those powers are coupled with a wide range of creative tools that proactively conserve and recover wildlife. But like most laws, times change, new opportunities arise, and there are always ways to make our national endangered species programs even better.

Congress last reauthorized the ESA 25 years ago. Despite numerous attempts over the years to either strengthen or undermine the law, Congress has never had enough votes to pass one of those bills. There is little reason to believe that reauthorization is any more likely today.

When I served as director of the US Fish and Wildlife Service (USFWS) in the Clinton administration, however, we launched a blizzard of reforms to make endangered species policy more effective, none of which involved Congress. We instead relied on bold administrative changes to policies and regulations that would make the law work better. Similar opportunities exist today. Here are five of the most important ones.

### Meaningful habitat protection

Habitat loss remains the primary threat to most listed species. It is unfortunate that one of the central tools for protecting habitat—critical habitat designation—has never been used to its potential. One problem is that when

the USFWS and the National Marine Fisheries Service (hereafter, the *services*) normally first designate critical habitat for a species, they do not always identify all areas needed for recovery—particularly, unoccupied areas. This is often because the targeted species does not have an updated recovery plan. To fix this problem, the services should evaluate whether the boundaries of critical habitat should be revised whenever they finalize a recovery plan. In some cases, this would result in designating additional critical habitat later to achieve recovery goals. In other cases, the services might identify areas of occupied habitat as not essential to recovery.

But merely designating critical habitat does not equate to protecting it. The services must rigorously enforce the ESA prohibition on “destroying or adversely modifying” critical habitat. Owens (2012) concluded that the services rarely relied on this prohibition to protect habitat for the 4000 projects that he reviewed. This is a missed opportunity, because “no destruction or adverse modification” should be a more objective standard to measure than that provided for threats to species (i.e., “no likelihood of jeopardy”; NRC 1995). The services are currently proposing to revise their definitions of *critical habitat* and *adverse modification* for the first time in over 20 years. This is an opportunity to further species recovery through stronger, more biology-based protections for critical habitat.

### When not to list a candidate species

For decades, the services have lacked the resources to immediately list all species that warrant protection. During this period of regulatory limbo, the

species is considered a *candidate* for listing. The term *candidate* is a misnomer; we should call them *deferred threatened* and *endangered* species. The truth is that candidate species are just as deserving of protection as any listed species, because, biologically, they have already met the test for listing.

Recently, the services have faced tremendous political pressure to not list many candidate species. Unfortunately, the services lack a clear standard for when they will decline to list a candidate species, and this creates the risk that political pressure will make decisions for them. The standard should be this: If the services decline to list a candidate species, they must ensure that the threats that supported its candidacy in the first place are adequately curtailed and that population targets have been met. For many candidates, however, their status has deteriorated to such an extent that last-minute conservation efforts often cannot meet population targets and threat-reduction goals. Therefore, they should be listed. The development of such a standard would help the services set expectations before political pressure starts to rise.

### Distinguishing between threatened and endangered species

The International Union for Conservation of Nature, NatureServe, the state of Florida, and countries around the world use structured and transparent definitions to categorize different levels of extinction risk. The ESA uses the terms *threatened* and *endangered*; for decades, the services have been urged to define these terms by quantifying the level of risk that corresponds to *threatened* and *endangered*

status (NRC 1995). However, the services still use a “best professional judgment” model, in which listing decisions are based primarily on a qualitative framework that lacks transparency and consistency.

Creating a meaningful distinction between these two categories is not a paper exercise. The ESA allows the services to create special rules (under section 4[d]) for *threatened* species in which regulatory protections are tailored to the needs of the species, in contrast to the blanket protections provided to *endangered* ones. The use of such a rule would actually create an incentive to list species earlier, when they first require some but possibly not all ESA protections and when more conservation options still exist. In addition, the opportunity to more precisely target regulation to benefit *threatened* species is an enormous incentive for states or others to take conservation action that would move an *endangered* species to *threatened* status. The services should develop better definitions for these terms, down-list *endangered* to *threatened* species when appropriate, and make a commitment to consider section 4(d) rules for each *threatened* species.

#### Monitoring and accountability

Basic information on the status of many listed species is lacking. The USFWS does not monitor the performance of many habitat conservation plans and other conservation agreements. In addition, thousands of avoidance measures and conservation actions are negotiated through consultation between federal agencies, but the agencies do not systematically

track whether and how those commitments and actions are carried out. The typical response is that little funding exists to carry out the necessary monitoring. One solution to this problem is for the USFWS to finalize the development of a formal tracking system. The second is for the USFWS to create a better system to track the data that its staff and state agencies already collect but rarely share with those who could benefit from it. Monitoring does not have to be expensive, and it should be part of every project, not a separate line item that is easily excised from a budget.

#### Prioritizing recovery

Funding has never been adequate to recover all listed species whose *threatened* or *endangered* status may have been decades or centuries in the making. Given this constraint, the services should seek to maximize the amount of biodiversity conserved under the ESA. To do this, they need a structured process to prioritize limited resources in ways that would achieve that goal. The ESA asks for the agencies to use a priority system to implement recovery plans. Although such systems were developed in 1975 and again in 1982, they are not used today to allocate recovery funding. Instead, funding is based largely on opportunities to leverage other funding and other nonbiological factors like the number of employees in an office.

When New Zealand recently adopted a funding prioritization process, they found that they could recover 100 more species for the same amount of funding (Joseph et al. 2009). Similar systems

are used or are under development in Australia. If the services were to develop similar guidelines and restructure their budget allocation processes to implement them, more recovery plans could be implemented with better results for wildlife. In some ways, this is the hardest administrative reform of the five identified here, because it shakes up long-standing practices and power among the regional bureaucracies within the agencies, but it could have the most transformative results.

#### Conclusions

At the 40th anniversary of the ESA, we should be looking forward to the solutions that we already have on the table that will make the ESA more successful in the coming decade. These ideas are the tip of the iceberg; many more administrative improvements to ESA policy would make implementation of the law more effective at conserving biological diversity and more efficient in doing so, for wildlife and for the people affected by the law.

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Jamie Rappaport Clark (jclark@defenders.org) is the president and chief executive officer of Defenders of Wildlife, in Washington, DC.

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Morning Consult  
National Tracking Poll #150706  
July 31 - August 3, 2015

Crosstabulation Results

**Methodology:**

This poll was conducted from July 31 - August 3, 2015, among a national sample of 2069 registered voters. The interviews were conducted online and the data were weighted to approximate a target sample of registered voters based on age, race/ethnicity, gender, educational attainment, region, annual household income, home ownership status and marital status. Results from the full survey have a margin of error of plus or minus 2 percentage points.



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**Table FB4NET:** Given what you know about the Endangered Species Act, do you favor or oppose updating and modernizing the Endangered Species Act?

Demographic	Total favor	Total oppose	Don't Know / No Opinion	Total N
Registered Voters	63% (1307)	10% (209)	27% (553)	2069
Gender: Male	66% (632)	14% (133)	21% (200)	965
Gender: Female	61% (675)	7% (77)	32% (353)	1104
Age: 18-29	59% (195)	12% (40)	29% (96)	332
Age: 30-44	67% (345)	8% (42)	25% (128)	515
Age: 45-54	63% (250)	12% (46)	26% (102)	398
Age: 55-64	60% (228)	10% (37)	31% (118)	383
Age: 65+	65% (289)	10% (45)	24% (108)	442
PID: Dem (no lean)	70% (490)	7% (47)	23% (163)	700
PID: Ind (no lean)	59% (441)	10% (76)	30% (226)	743
PID: Rep (no lean)	60% (375)	14% (87)	26% (163)	626
PID/Gender: Dem Men	73% (225)	8% (26)	19% (59)	310
PID/Gender: Dem Women	68% (265)	5% (21)	27% (104)	390
PID/Gender: Ind Men	64% (202)	15% (46)	21% (67)	315
PID/Gender: Ind Women	56% (240)	7% (29)	37% (160)	429
PID/Gender: Rep Men	60% (205)	18% (61)	22% (74)	340
PID/Gender: Rep Women	60% (170)	9% (27)	31% (89)	286
Tea Party: Supporter	65% (391)	16% (99)	19% (116)	606
Tea Party: Not Supporter	63% (906)	7% (108)	30% (434)	1448
Ideo: Liberal (1-3)	73% (413)	7% (38)	20% (116)	566
Ideo: Moderate (4)	68% (376)	8% (46)	24% (134)	556
Ideo: Conservative (5-7)	59% (437)	15% (113)	26% (194)	744
Educ: < College	62% (844)	10% (134)	28% (382)	1360
Educ: Bachelors degree	68% (310)	9% (40)	24% (109)	460
Educ: Post-grad	61% (153)	14% (35)	25% (62)	250
Income: Under 50k	61% (547)	11% (95)	28% (255)	897
Income: 50k-100k	64% (437)	9% (62)	27% (181)	680
Income: 100k+	66% (323)	11% (52)	24% (117)	491
Ethnicity: White	65% (1094)	10% (164)	25% (426)	1685

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Table FB4NET: Given what you know about the Endangered Species Act, do you favor or oppose updating and modernizing the Endangered Species Act?

Demographic	Total favor	Total oppose	Don't Know / No Opinion	Total N
Registered Voters	63% (1307)	10% (209)	27% (553)	2069
Ethnicity: Hispanic	56% (103)	15% (28)	29% (53)	184
Ethnicity: Afr. Am.	49% (131)	11% (30)	39% (105)	266
Ethnicity: Other	69% (81)	13% (15)	18% (22)	118
Relig: Protestant	66% (369)	11% (64)	23% (129)	562
Relig: Roman Catholic	63% (276)	11% (48)	26% (114)	437
Relig: Ath./Agn./None	62% (344)	8% (42)	30% (167)	553
Relig: Something Else	61% (195)	11% (35)	27% (87)	317
Relig: Jewish	63% (33)	11% (6)	26% (14)	53
Relig: Evangelical	63% (328)	13% (67)	25% (129)	524
Relig: Non-Evang. Catholics	65% (432)	10% (66)	25% (166)	664
Relig: All Christian	64% (761)	11% (132)	25% (296)	1188
Relig: All Non-Christian	62% (539)	9% (77)	29% (254)	870
Community: Urban	67% (315)	11% (50)	22% (102)	468
Community: Suburban	63% (650)	10% (106)	27% (280)	1036
Community: Rural	60% (337)	9% (53)	30% (170)	560
Employ: Private Sector	68% (454)	10% (66)	22% (148)	668
Employ: Government	71% (107)	10% (15)	19% (29)	151
Employ: Self-Employed	68% (104)	13% (20)	19% (30)	154
Employ: Homemaker	55% (129)	12% (27)	34% (80)	236
Employ: Student	59% (40)	23% (15)	19% (13)	68
Employ: Retired	65% (314)	8% (41)	26% (126)	481
Employ: Unemployed	45% (75)	8% (13)	47% (78)	166
Employ: Other	56% (79)	9% (12)	35% (49)	140
Job Type: White-collar	65% (580)	12% (110)	23% (200)	890
Job Type: Blue-collar	68% (533)	10% (79)	22% (173)	785
Job Type: Don't Know	49% (189)	5% (20)	46% (179)	389
Military HH: Yes	69% (293)	10% (41)	22% (93)	426
Military HH: No	62% (1010)	10% (169)	28% (460)	1639
RD/WT: Right Direction	70% (483)	7% (51)	22% (154)	688
RD/WT: Wrong Track	60% (824)	11% (158)	29% (399)	1381

Continued on next page

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Table FB4NET: Given what you know about the Endangered Species Act, do you favor or oppose updating and modernizing the Endangered Species Act?

Demographic	Total favor		Total oppose		Don't Know / No Opinion		Total N
Registered Voters	63%	(1307)	10%	(209)	27%	(553)	2069
Obama Job: Approve	71%	(591)	8%	(64)	21%	(174)	829
Obama Job: Disapprove	60%	(687)	12%	(140)	28%	(320)	1147
#1 Issue: Economy	64%	(511)	9%	(73)	27%	(212)	796
#1 Issue: Security	62%	(233)	15%	(57)	23%	(88)	379
#1 Issue: Health Care	63%	(171)	7%	(19)	30%	(83)	274
#1 Issue: Medicare / Social Security	64%	(160)	6%	(16)	29%	(73)	249
#1 Issue: Women's Issues	62%	(50)	17%	(14)	21%	(17)	82
#1 Issue: Education	59%	(72)	11%	(14)	30%	(36)	122
#1 Issue: Energy	75%	(53)	10%	(7)	15%	(10)	70
#1 Issue: Other	57%	(57)	10%	(10)	33%	(32)	98
2014 Vote: Democrat	74%	(555)	6%	(47)	20%	(148)	750
2014 Vote: Republican	60%	(440)	14%	(104)	26%	(192)	736
2014 Vote: Other	53%	(78)	14%	(21)	32%	(47)	146
2014 Vote: Didn't Vote	53%	(228)	9%	(38)	38%	(162)	428
2012 Vote: Barack Obama	72%	(622)	6%	(52)	22%	(191)	865
2012 Vote: Mitt Romney	60%	(453)	14%	(108)	26%	(196)	756
2012 Vote: Other	53%	(66)	15%	(18)	32%	(40)	124
2012 Vote: Didn't Vote	51%	(161)	10%	(32)	39%	(125)	318
4-Region: Northeast	66%	(251)	7%	(26)	27%	(100)	377
4-Region: Midwest	61%	(297)	13%	(62)	27%	(130)	488
4-Region: South	60%	(461)	10%	(77)	30%	(231)	769
4-Region: West	69%	(299)	10%	(44)	21%	(92)	434

Note: Row proportions may total to larger than one-hundred percent due to rounding.

Table FB4: Given what you know about the Endangered Species Act, do you favor or oppose updating and modernizing the Endangered Species Act?

Demographic	Strongly favor	Somewhat favor	Somewhat oppose	Strongly oppose	Don't Know / No Opinion	Total N
Registered Voters	26% (544)	37% (763)	7% (148)	3% (61)	27% (553)	2069
Gender: Male	25% (240)	41% (392)	10% (93)	4% (40)	21% (200)	965
Gender: Female	28% (304)	34% (371)	5% (56)	2% (21)	32% (353)	1104
Age: 18-29	28% (94)	31% (101)	9% (31)	3% (9)	29% (96)	332
Age: 30-44	33% (170)	34% (175)	7% (35)	1% (7)	25% (128)	515
Age: 45-54	24% (96)	39% (153)	7% (28)	5% (19)	26% (102)	398
Age: 55-64	24% (91)	36% (137)	6% (23)	4% (14)	31% (118)	383
Age: 65+	21% (92)	45% (197)	7% (32)	3% (12)	24% (108)	442
PID: Dem (no lean)	32% (221)	38% (269)	5% (32)	2% (14)	23% (163)	700
PID: Ind (no lean)	25% (184)	35% (257)	7% (49)	4% (27)	30% (226)	743
PID: Rep (no lean)	22% (138)	38% (237)	11% (67)	3% (20)	26% (163)	626
PID/Gender: Dem Men	27% (84)	45% (141)	6% (17)	3% (8)	19% (59)	310
PID/Gender: Dem Women	35% (137)	33% (128)	4% (15)	2% (6)	27% (104)	390
PID/Gender: Ind Men	25% (79)	39% (123)	10% (30)	5% (16)	21% (67)	315
PID/Gender: Ind Women	25% (105)	31% (134)	4% (19)	3% (11)	37% (160)	429
PID/Gender: Rep Men	23% (77)	38% (128)	13% (45)	5% (16)	22% (74)	340
PID/Gender: Rep Women	22% (62)	38% (109)	8% (23)	1% (4)	31% (89)	286
Tea Party: Supporter	30% (181)	35% (210)	11% (67)	5% (32)	19% (116)	606
Tea Party: Not Supporter	25% (360)	38% (546)	6% (81)	2% (27)	30% (434)	1448
Ideo: Liberal (1-3)	39% (222)	34% (191)	5% (27)	2% (11)	20% (116)	566
Ideo: Moderate (4)	26% (145)	42% (231)	7% (39)	1% (7)	24% (134)	556
Ideo: Conservative (5-7)	20% (146)	39% (291)	10% (75)	5% (37)	26% (194)	744
Educ: < College	27% (363)	35% (480)	7% (94)	3% (41)	28% (382)	1360
Educ: Bachelors degree	27% (123)	41% (187)	7% (32)	2% (8)	24% (109)	460
Educ: Post-grad	23% (57)	38% (96)	9% (23)	5% (12)	25% (62)	250
Income: Under 50k	28% (250)	33% (297)	7% (65)	3% (31)	28% (255)	897
Income: 50k-100k	25% (168)	40% (269)	7% (46)	2% (16)	27% (181)	680
Income: 100k+	26% (125)	40% (197)	8% (38)	3% (14)	24% (117)	491
Ethnicity: White	26% (443)	39% (651)	6% (109)	3% (55)	25% (426)	1685
Ethnicity: Hispanic	28% (51)	28% (52)	12% (22)	4% (7)	29% (53)	184

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**Table FB4: Given what you know about the Endangered Species Act, do you favor or oppose updating and modernizing the Endangered Species Act?**

Demographic	Strongly favor		Somewhat favor		Somewhat oppose		Strongly oppose		Don't Know / No Opinion		Total N
Registered Voters	26%	(544)	37%	(763)	7%	(148)	3%	(61)	27%	(553)	2069
Ethnicity: Afr. Am.	23%	(62)	26%	(69)	11%	(29)	1%	(2)	39%	(105)	266
Ethnicity: Other	32%	(38)	36%	(43)	9%	(11)	4%	(4)	18%	(22)	118
Relig: Protestant	23%	(131)	42%	(238)	8%	(45)	3%	(19)	23%	(129)	562
Relig: Roman Catholic	23%	(100)	40%	(175)	6%	(28)	5%	(20)	26%	(114)	437
Relig: Ath./Agn./None	30%	(166)	32%	(178)	6%	(35)	1%	(8)	30%	(167)	553
Relig: Something Else	30%	(95)	32%	(100)	10%	(31)	1%	(4)	27%	(87)	317
Relig: Jewish	32%	(17)	31%	(16)	9%	(5)	2%	(1)	26%	(14)	53
Relig: Evangelical	25%	(129)	38%	(199)	8%	(42)	5%	(25)	25%	(129)	524
Relig: Non-Evang. Catholics	23%	(153)	42%	(280)	6%	(41)	4%	(25)	25%	(166)	664
Relig: All Christian	24%	(282)	40%	(479)	7%	(83)	4%	(50)	25%	(296)	1188
Relig: All Non-Christian	30%	(261)	32%	(278)	8%	(66)	1%	(11)	29%	(254)	870
Community: Urban	34%	(158)	34%	(158)	8%	(38)	3%	(12)	22%	(102)	468
Community: Suburban	24%	(250)	39%	(400)	8%	(79)	3%	(27)	27%	(280)	1036
Community: Rural	24%	(135)	36%	(202)	6%	(31)	4%	(22)	30%	(170)	560
Employ: Private Sector	31%	(206)	37%	(249)	6%	(39)	4%	(27)	22%	(148)	668
Employ: Government	24%	(37)	47%	(70)	8%	(13)	2%	(3)	19%	(29)	151
Employ: Self-Employed	32%	(49)	36%	(55)	11%	(17)	2%	(3)	19%	(30)	154
Employ: Homemaker	25%	(60)	29%	(69)	7%	(17)	4%	(10)	34%	(80)	236
Employ: Student	29%	(20)	29%	(20)	23%	(15)	—	(0)	19%	(13)	68
Employ: Retired	21%	(101)	44%	(213)	6%	(29)	2%	(12)	26%	(126)	481
Employ: Unemployed	22%	(36)	23%	(39)	7%	(12)	—	(1)	47%	(78)	166
Employ: Other	24%	(34)	32%	(45)	4%	(6)	4%	(6)	35%	(49)	140
Job Type: White-collar	25%	(225)	40%	(355)	8%	(75)	4%	(35)	23%	(200)	890
Job Type: Blue-collar	30%	(237)	38%	(297)	8%	(62)	2%	(17)	22%	(173)	785
Job Type: Don't Know	21%	(81)	28%	(108)	3%	(11)	2%	(9)	46%	(179)	389
Military HH: Yes	28%	(119)	41%	(174)	8%	(34)	2%	(7)	22%	(93)	426
Military HH: No	26%	(424)	36%	(586)	7%	(115)	3%	(54)	28%	(460)	1639
RD/WT: Right Direction	32%	(221)	38%	(261)	6%	(41)	2%	(11)	22%	(154)	688
RD/WT: Wrong Track	23%	(323)	36%	(502)	8%	(108)	4%	(50)	29%	(399)	1381
Obama Job: Approve	33%	(274)	38%	(317)	7%	(55)	1%	(9)	21%	(174)	829
Obama Job: Disapprove	22%	(257)	38%	(430)	8%	(89)	4%	(51)	28%	(320)	1147

Continued on next page

**Table FB4:** Given what you know about the Endangered Species Act, do you favor or oppose updating and modernizing the Endangered Species Act?

Demographic	Strongly favor		Somewhat favor		Somewhat oppose		Strongly oppose		Don't Know / No Opinion		Total N
Registered Voters	26%	(544)	37%	(763)	7%	(148)	3%	(61)	27%	(553)	2069
#1 Issue: Economy	24%	(193)	40%	(317)	6%	(48)	3%	(24)	27%	(212)	796
#1 Issue: Security	27%	(101)	35%	(132)	12%	(45)	3%	(12)	23%	(88)	379
#1 Issue: Health Care	26%	(72)	36%	(99)	4%	(12)	3%	(7)	30%	(83)	274
#1 Issue: Medicare / Social Security	25%	(63)	39%	(97)	4%	(11)	2%	(5)	29%	(73)	249
#1 Issue: Women's Issues	36%	(30)	25%	(21)	17%	(14)	—	(0)	21%	(17)	82
#1 Issue: Education	25%	(30)	34%	(42)	7%	(9)	4%	(5)	30%	(36)	122
#1 Issue: Energy	39%	(27)	37%	(26)	6%	(4)	4%	(3)	15%	(10)	70
#1 Issue: Other	28%	(27)	30%	(29)	5%	(5)	5%	(5)	33%	(32)	98
2014 Vote: Democrat	34%	(255)	40%	(300)	5%	(37)	1%	(10)	20%	(148)	750
2014 Vote: Republican	20%	(151)	39%	(289)	9%	(69)	5%	(35)	26%	(192)	736
2014 Vote: Other	28%	(40)	26%	(38)	7%	(10)	8%	(11)	32%	(47)	146
2014 Vote: Didn't Vote	22%	(94)	31%	(134)	8%	(33)	1%	(5)	38%	(162)	428
2012 Vote: Barack Obama	33%	(282)	39%	(340)	5%	(41)	1%	(11)	22%	(191)	865
2012 Vote: Mitt Romney	22%	(167)	38%	(286)	10%	(75)	4%	(33)	26%	(196)	756
2012 Vote: Other	20%	(25)	33%	(41)	7%	(9)	8%	(9)	32%	(40)	124
2012 Vote: Didn't Vote	22%	(70)	29%	(91)	8%	(24)	2%	(8)	39%	(125)	318
4-Region: Northeast	30%	(114)	36%	(137)	4%	(15)	3%	(12)	27%	(100)	377
4-Region: Midwest	25%	(121)	36%	(176)	9%	(43)	4%	(19)	27%	(130)	488
4-Region: South	24%	(185)	36%	(276)	7%	(57)	3%	(20)	30%	(231)	769
4-Region: West	29%	(124)	40%	(175)	8%	(33)	2%	(10)	21%	(92)	434

Note: Row proportions may total to larger than one-hundred percent due to rounding.

## ENDANGERED SPECIES

# Western governors propose sweeping ESA overhaul

Phil Taylor, E&E News reporter

Published: Tuesday, June 14, 2016

JACKSON, Wyo. -- The Endangered Species Act should be amended to provide clearer goals for recovering imperiled species and make states "full partners" in listing, critical habitat and recovery decisions, according to a policy resolution unveiled yesterday by the Western Governors' Association.

The policy blueprint, passed unanimously at WGA's summer meeting here, also proposes that federal wildlife agencies be given greater flexibility to prioritize which listing petitions they respond to first, among several other proposals.

The eight-page [resolution](#) is the culmination of a yearlong, bipartisan effort at WGA to get conservation groups, industry and elected officials to take a "hard look" at how to update the 1973 law. The initiative led by WGA's chairman, Wyoming Gov. Matt Mead (R), included four workshops in Cody, Wyo.; Boise, Idaho; Denver; and Honolulu that drew thousands of participants.

Mead plans to bring the resolution to the National Governors Association, where he chairs the Natural Resources Committee, and seek support from industry, environmental groups, state game and fish agencies, and the Fish and Wildlife Service for a legislative package that could be sent to Congress for approval, he said.

"I refuse to accept that something [as] important as the Endangered Species Act can't be improved upon," Mead said yesterday during a WGA panel on ESA. "I am not going to go forward today in a timid fashion."

A key provision in the resolution asks Congress to set clearer goals in ESA for what constitutes recovery of a species.

"Western Governors believe that the best way to accomplish this goal is to require the Services to publish clear and quantifiable recovery goals, in consultation with the individual affected state(s), for threatened or endangered species at the time of the listing decision," the resolution states.

The issue resonates for Mead, whose Cowboy State has worked for years to recover the gray wolf. The Fish and Wildlife Service has delisted the predator in Wyoming on multiple occasions, most recently in 2012, only to have the decisions reversed by federal judges ([see related story](#)).

Mead said that sends a bad signal to landowners and industry partners who can assist FWS in keeping species from the brink of extinction.

"If you want people to support conservation, if you want them to do conservation work as well, you also have to have the appropriate finish line, [to show] that the job can be done," Mead said. When litigation keeps wolves endangered despite findings by FWS and state scientists that they are recovered, "the Endangered Species Act loses credibility."

FWS Director Dan Ashe called the resolution an important first step toward updating ESA, which was last reauthorized in 1988.

"I think the resolution is a great place to begin a dialogue," he said. "If we can continue that dialogue and if we can keep it bipartisan, and then start to take the resolution and build that into more specific principles and legislative language, then I think it represents the best opportunity we've had in a long time to think about reauthorization of the Endangered Species Act."

But Ashe was skeptical whether the current Congress is up to the task.

"I think in our current political climate, constructive legislative improvement of the law, I think, will continue to be difficult to envision," he said. "But I think hope springs eternal that conditions will change, and ... I think the WGA effort puts us in a better position to work constructively in a legislative process when the opportunity arises."

In the meantime, he said, FWS will continue to pursue administration reforms to make ESA more efficient and flexible for landowners and industry.

Brett Hartl, endangered species policy director with the Center for Biological Diversity, warned the WGA resolution "would gut the Endangered Species Act" by vesting too much power in states.

"There should be no mistake that if we turn over the keys to the states on the implementation of the Endangered Species Act, the states would immediately turn around and give those keys to the oil and gas industry and other special interests," he said. "And that only spells trouble for wildlife already at the brink of extinction."

The initiative lists seven goals for reauthorizing ESA:

- Requiring clear recovery goals for listed species.
- Increasing FWS flexibility to prioritize listing petitions for species in most need of attention.
- Enhancing the role of state governments in recovering species.
- Ensuring the use of sound science in ESA decisions.

- Providing economic incentives for landowners to participate in conservation efforts.
- Providing a clearer definition of "foreseeable future," a term in ESA that determines whether species are "threatened."
- Making states "full partners" in listing, critical habitat and recovery decisions.

The resolution also calls for discouraging ESA litigation, increasing grants to help states recover species and giving states greater say in the passage of special rules for threatened species.

It also recommends "delaying judicial review of a rule delisting a species until the conclusion of the federally identified post-delisting monitoring period to allow state management of recovered species an opportunity to succeed."

WGA Executive Director James Ogsbury said finding solutions on ESA requires navigating a political minefield. Legislative compromise in Congress has been elusive.

"Perhaps, I suggested to [Mead], we could take on something a little easier -- like peace in the Middle East," Ogsbury said. However, "what has ensued is a remarkably adult and evenhanded dialogue about the ESA and species conservation."

Email: [ptaylor@eenews.net](mailto:ptaylor@eenews.net)

**Testimony of James D. Ogsbury  
Executive Director, Western Governors' Association**

**Before the  
United States Senate  
Committee on Environment and Public Works**

**Oversight: Modernization of the Endangered Species Act  
February 15, 2017**

Chairman Barrasso, Ranking Member Carper, and members of the Committee, Western Governors appreciate the opportunity to provide written testimony on the issue of species conservation and the Endangered Species Act (ESA). These remarks are presented by the Western Governors' Association (WGA), an independent, non-partisan organization representing the Governors of 19 western states and three U.S.-flag islands.

**Background**

Western Governors applaud the principles and intent of the ESA. Since its enactment in 1973, the ESA has helped prevent the extinction and assisted the recovery of threatened and endangered species, while providing ancillary benefits to other species. We believe that there is much to learn from both the successes and the failures of the Act.

Western states are particularly and uniquely affected by the ESA, and they contain the vast majority of ESA critical habitat designations made by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services). The economic benefits derived from tourism and recreation supported by healthy species and ecosystems redound largely to states. At the same time, species listings and the associated prohibitions can negatively affect western states' ability to promote economic development, accommodate population growth, and maintain and expand infrastructure. The economic costs of ESA compliance can fall disproportionately on western states and local communities.

The ESA is premised on a strong state-federal- partnership. Section 6(a) of the ESA states that, "in carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States." Western Governors submit that such cooperation should involve full and authentic partnership between the states and Services with respect to species listing, critical habitat designations, establishment of recovery goals and delisting decisions.

Through decades of work by staff and contractors, states have developed extensive science, expertise and knowledge of species within their borders. In many cases, state wildlife agencies often possess the best available science on species and retain primary management authority over most fish and wildlife within their borders.

Experts, observers and wildlife managers acknowledge that, in the 44 years since the passage of the ESA, changes to the Act are warranted. Regardless, proposed amendments to the Act are frequently opposed on the basis that any change represents a first step toward dismantling the ESA. Through the Species Conservation and ESA Initiative (Initiative), Western Governors have taken a significant step towards changing that narrative and will continue to advance common-sense reforms in the years to come.

As former Chairman of WGA, Wyoming Governor Matt Mead launched the Initiative in June 2015. This multi-faceted effort has included numerous public workshops, focused work sessions, webinars and survey instruments to collect the best ideas, recommendations and thoughts of a wide variety of stakeholders. Principal goals of this effort are to create a mechanism for states to share best practices in species management, promote the role of states in species conservation and explore options for improving the efficacy of the ESA. The Initiative has also focused on how to avoid the need to list species in the first place, through establishment of institutional frameworks that encourage collaborative voluntary conservation.

#### **Western Governors' Association Policy**

WGA's successful effort to manage an inclusive and bipartisan dialogue in the first year of the Initiative culminated in the adoption of WGA Policy Resolution 2016-08: *Species Conservation and the Endangered Species Act*. We hope the principles that Western Governors have embraced on a bipartisan basis will help to inform your own deliberations on possible changes to the ESA.

In this resolution, Western Governors suggest seven broad goals as a basis for any bipartisan reform effort. We would stress that these goals must be achieved in a manner that maintains the Act's integrity and original intent to protect listed species. Implementation of these goals will improve the efficacy of the ESA by making it more workable and understandable.

As directed by the resolution, the Initiative is continuing with a series of in-depth work sessions and webinars. Work sessions are primarily constructed to refine the Governors' policy recommendations and address challenges identified in the first year of the Initiative. We would like to highlight the Western Governors' Species Conservation and ESA Initiative Year Two Work Plan as further evidence of Governors' ongoing commitment to implementing their ESA-related recommendations.

WGA would also like to highlight the efforts Western Governors have made to promote positive administrative changes to the ESA regulatory process. Western Governors have provided comments on several recent rulemakings, and I am pleased to submit such comments as concern:

- Revisions to the Regulations for Petitions
- Endangered Species Act Compensatory Mitigation Policy
- FWS Methodology for Prioritizing Status Reviews
- Proposed Changes to Critical Habitat Designation (encompassing two rules and one policy)

Western Governors recognize the value of the Services' engagement in the Initiative. Governors are hopeful that this positive engagement will help ensure that state considerations are reflected in federal agency rulemaking and policies. Governors also recognize the limitations of regulatory reform. Regulations are not statutes and do not provide the certainty and consistency that statutory changes would produce.

#### **Conclusion**

Western Governors appreciate this opportunity to discuss species conservation, the role of states in this endeavor, and the impact the ESA has on state conservation efforts. Having worked diligently for many years on species conservation on a bipartisan basis, most recently through the Initiative, Western Governors recognize that much can be accomplished by collaborating with the Services to enact administrative changes to the Act. Further, we assert that the ESA should be reauthorized through bipartisan legislation that maintains the intent of the ESA to conserve and recover imperiled species. Western Governors hope that their contributions will help improve the Act's operation and its outcomes for imperiled species. Thank you.



**Western Governors' Association  
Policy Resolution 2016-08**

*Species Conservation and the Endangered Species Act*

**A. BACKGROUND**

1. Western Governors applaud the principles and intent of the Endangered Species Act (ESA). Since its enactment in 1973, the ESA has helped prevent the extinction and assisted the recovery of some threatened and endangered species, while providing ancillary benefits to other species.
2. Through broad trustee, statutory and police powers, States have primary management authority over all fish and wildlife within their borders. States also exercise sovereign authority over the administration of water rights within their borders.
3. Western states are proactively engaged in species conservation, including development of state and/or multi-state conservation plans to manage species at the local level as an alternative to federal ESA regulation.
4. Through decades of work by staff and contractors, States have developed extensive science, expertise, and knowledge of species within their borders.
5. Western states are particularly and uniquely affected by the ESA. States are the primary recipients of economic benefits associated with healthy species and ecosystems. Tourism and recreation in wildlife-dependent communities help sustain rural economies and promote healthier communities throughout the West. At the same time, species listings and the associated prohibitions and consultations can impact western states' abilities to promote economic development, accommodate population growth, and maintain and expand infrastructure such as roads, water projects, and transmission lines. In these circumstances, the economic costs of ESA compliance can fall disproportionately on western states and local communities.
6. Given the impact ESA listing decisions have on vital state interests, states should be provided the opportunity to be full partners in administering and implementing the ESA. Federal agencies should work with states in a meaningful and productive manner on all ESA matters potentially impacting the states, as required by Section 6(a) of the

ESA: "In carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States."

7. The ESA is premised on a strong federal-state partnership. But the Act and its implementation should seek to provide expanded and meaningful consultation opportunities for states to comment, participate, or perform before the federal government takes action under the ESA. Such participation is largely optional under the current scheme and has been provided inconsistently. The role of states also has been limited by rigid internal federal processes, interagency jurisdictional disputes, and interpretations of the provisions of the Federal Advisory Committee Act (FACA). This scenario has prevented the sharing of scientific information and the consideration of state determined, science-based information.
8. Western Governors recognize that species and habitat protection can be enhanced through working with the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS) (referred to collectively as "the Services"), the Department of the Interior (DOI), and appropriate changes in the Act. However, determining the shape of those changes has proven controversial and Congress has been unable to reauthorize the ESA since its spending authority expired in 1992. Key areas that need to be addressed in the ESA in addition to reauthorization include:
  - a) Defining a clear methodology and practice for de-listing recovered species;
  - b) Delaying judicial review of a rule delisting a species until the conclusion of the federally identified post-delisting monitoring period to allow state management of recovered species an opportunity to succeed so long as there is a federally reviewed and endorsed conservation plan in place;
  - c) Improving regulatory flexibility for federal agencies to prioritize petitions received to list or change the listing status of a species under the ESA;
  - d) Establishing a comprehensive system of incentives to encourage state and local governments to develop water, land-use and development plans that meet the objectives of the ESA as well as local needs, both before and after a species is petitioned for listing under the ESA;
  - e) Providing adequate tools and incentives that encourage private landowners to engage in species and habitat conservation activities both before and after a species is petitioned for listing under the ESA;
  - f) Addressing ways to dis-incentivize litigation that strains federal resources and impedes the Services' ability to direct resources to truly imperiled species;

- g) Increasing grants authorized under ESA Section 6 – and other federal funding for the recovery of listed species – for: 1) state and local implementation of the Act; and 2) federal efforts to prevent additional listings in active partnership with the states;
  - h) Improving the functionality of ESA Section 6 to increase partnerships and cooperation between states and the federal government in addressing ESA issues;
  - i) Alleviating the pressure on states to expend scarce funds to address, mitigate and recover endangered and threatened species, at the expense of non-listed species within the state’s jurisdiction;
  - j) Providing greater distinction between the management of threatened versus endangered species in ESA to allow for greater management flexibility, including increased state authority for species listed as threatened; and
  - k) Providing more extensive state engagement in development and implementation of Section 4(d) special rules or other mechanisms under the ESA that promote species conservation while addressing situations that merit flexibility or creative approaches.
9. Climate change is increasingly being used as a determinant factor in the assessment of the need to list a species under the Act; however, the ESA may not be equipped to address this potential global threat to species and habitat. Nevertheless, the meaning of “foreseeable future” with the use of climate modeling is still undefined for effective management decisions related to implementation of the ESA. Predictions from climate models grow increasingly uncertain over time. Additionally, the Services currently have no criteria to weigh the model uncertainty related to projected scientific information, such as climate change, in their scientific review.
10. States are concerned about the use of the precautionary principle in the Services’ recent listing regulations and recovery planning processes, both proposed and adopted. This principle, coupled with over-reliance on predictive models that have not been validated with independent observational data, can have the effect of removing species from state jurisdiction and extending critical habitat into areas requiring extensive ground-truthing. In some instances, such listed species are at a healthy population level and are expected to remain healthy for decades into the future. Listings based on climate change modeling makes it difficult for the federal government and the states to identify a recovery timeline or plan for management of the listed species.
11. States are capable of managing species, including those that might be impacted by future conditions. States should be viewed as full partners in all ESA decisions, but

particularly when reviewing and considering the challenges that could be faced by species in the future. States bring a wealth of observational knowledge and information about the current status of a species and its habitat that must be factored into any ESA analysis or decision beyond just responding to data calls. The full depth of state capabilities should be incorporated in any listing decision or critical habitat designation based on the precautionary principle and best professional judgment. Federal consultation with states in analyses and final decision making will result in more durable and implementable solutions, better conservation outcomes, and allow for strained federal budgets and resources to be allocated to protecting and conserving species at serious risk of extinction.

12. The Services have administratively expanded the definition of “(unoccupied) critical habitat” beyond the “specific areas... essential to the conservation of the species” (ESA, Section 3(5)(A)(ii)) to include areas not currently capable of supporting the species but determined to have the potential of becoming habitat in the future. Because the designation of “critical habitat” can limit activities on state, county, municipal, and private lands, this overly broad reading can add unnecessary and uncompensated regulatory burdens and costs. Some recent critical habitat designations (and proposed designations) have been overly expansive, including nearly all or all of the geographical area of a broadly distributed species including peripheral habitat. This runs counter to statutory guidance and adds unnecessary regulatory burdens. For broadly distributed species, critical habitat should not include the entire or nearly all of the geographic area which can be occupied by a threatened or endangered species.
13. The ESA requires that the Services use the “best available” biological information in making determinations about individual species’ status for the purposes of the ESA. Biological information should be collected as thoroughly as possible in the timeframe provided by the Act, and should include scientific information and biological opinions from affected states.

**B. GOVERNORS’ POLICY STATEMENT**

1. Western Governors support all reasonable management efforts to conserve species and preclude the need to list a species under the ESA.
2. Western Governors believe that state and multi-state conservation plans, upon review, consultation, and endorsement by the Services, should give rise to a regulatory presumption by federal agencies that an ESA listing is not warranted so long as resources and mechanisms are in place to implement such plan and listing factors affecting the viability of the species are addressed in the plan. To that end:

- States need clear, concrete guidance from the Services about the requirements of state and multi-state conservation plans in meeting minimum conservation goals and objectives that would lead to stable or increasing populations, eliminate perceived threats to the species, and eliminate the need for listing.
  - The Services should acknowledge that variability in state approaches for conservation of species is acceptable, particularly for species with a wide geographic range, as long as conservation goals and objectives are met.
3. Governors support legislative initiatives, court rulings, petitions or regulatory measures which allow local, state, federal and private conservation efforts adequate time to be implemented and demonstrate their efficacy.
  4. Western Governors recognize that much can be accomplished by working with DOI and the Services, and they believe that the ESA can only be reauthorized through legislation developed in a fashion that results in broad bipartisan support and maintains the intent of the ESA to protect and recover imperiled species.
  5. Western Governors call on Congress to amend and reauthorize the Endangered Species Act of 1973 based upon seven broad goals. These goals should be achieved while maintaining the Act's integrity and original intent to protect and recover listed species to a point where the protections of the Act are no longer necessary. Implementation of these goals will improve the effectiveness of the Act by making it more workable and understandable. The seven goals are:
    - **Require clear recovery goals for listed species, and actively pursue delisting of recovered species.** Western Governors believe that recovery, and ultimately delisting of species covered by the ESA, should be the highest priority of the Act. Every effort should be made to complete a recovery plan within one year of a species being listed, when doing so will not compromise the integrity of the plan. For climate change listings a two to three year process may be reasonable. Federal funding for ESA activities should be prioritized to achieve species recovery. Western Governors believe that the best way to accomplish this goal is to require the Services to publish clear and quantifiable recovery goals, in consultation with the individual affected state(s), for threatened or endangered species at the time of the listing decision. This will provide objective recovery criteria that both state and federal agencies may work toward in the recovery process. Recovery plans should also provide guidance, in the case of species listed as endangered, regarding the criteria for a down-listing from endangered to threatened. In cases where quantification of recovery goals is not initially feasible, the services should be required to publish a plan, including a timeline, describing the steps the federal agencies will take in identifying measurable goals. Recovery goals should be reviewed and changed using an adaptive framework. Further, the Western

Governors believe the required objective recovery criteria should include a clear articulation of the required population, population trends, or other relevant criteria, including amelioration of threats identified in the listing process.

- **Increase the regulatory flexibility of the Services to review and make decisions on petitions to list or change the listing status of a species under the ESA.** The current statutory time frames provided for making listing determinations are not sufficient to allow for adequate data collection and analysis. Consequently, instead of prioritizing listing decisions based upon resource availability and for the species needing the most immediate attention, the agencies are often forced to prioritize listing determinations through legal action. This can result in making determinations based on insufficient data for a species. Further, it can jeopardize opportunities to partner with states, landowners and other stakeholders for preemptive species conservation efforts that could eliminate any need to list the species.
- **Enhance the role of state governments in recovering species.** The Endangered Species Act can effectively be implemented only through a full partnership between the states, federal government, local governments and private landowners. One way to accomplish this partnership is to authorize the delegation of authority for the development of conservation plans on a voluntary basis to states that choose to accept such delegation, and agree with the appropriate Secretary to perform them in accordance with specified standards. Authority should also be given to the appropriate Secretary to provide grants for the additional administrative costs to the state. States will benefit by a right of refusal to be partners in recovery planning and species management. Additionally, states should also be offered tools such as incidental take authority, as authorized by the ESA.
- **Ensure the use of sound science in ESA decisions.** Given the broad implications that may arise when ESA actions are taken, significant decisions must be made using objective, peer-reviewed scientific literature and scientific observations. A review of the scientific and management provisions contained within listing, recovery and delisting decisions by acknowledged independent experts is important to ensure the public that decisions are well-reasoned and scientifically based. State agencies often have the best available science, expertise and other scientific and institutional resources such as mapping capabilities, biological inventories, biological management goals, state wildlife action plans and other important data. This wealth of resources is highly valuable; the federal government should recognize, consult, and employ these vast resources in developing endangered species listing, recovery and delisting decisions. Scientific and management review committees, as well as the scope and extent of the appropriate scientific and management review, should be agreed upon by the Services and the affected states. Federal agencies may delegate

their responsibility to name these review committees, and determine the scope of review to states in order to enhance state ownership of the committee's decision.

- **Incentives and funding for conservation are essential.** Western Governors believe that providing economic incentives for landowners to participate in conservation efforts is likely to achieve more efficient and cost-effective results, and may lead to more rapid conservation, and even obviate the need to list a species in the first instance. In addition, funding for ESA related activities should be enhanced to address the growing list of threatened and endangered species. Funding needs to escalate rapidly as state and federal agencies increasingly assume ESA management activities and embrace ecosystem and multi-species management strategies. The Cooperative Endangered Species Conservation Fund authorized under Section 6 should be funded and managed as a block grant, with state discretion on spending priorities. A broad range of programs, from the Farm Bill to the Water Resources Development Act, should be reviewed for opportunities to assist communities and landowners in their efforts to conserve species in a manner that respects water and property rights. Funding needs to be made available for proactive and incentive-based efforts to prevent listings, and for recovery plans and de-listing activities.
- **Foreseeable future must be defined.** The ESA does not contain a clear definition of "foreseeable future," a term of art in the Act. As a result, there is considerable variation in the Services' interpretation of this factor in listing, recovery planning, and delisting decisions. This lack of clarity is becoming a critical point for divergent and unfocused decisions as the scientific effects of climate change are being incorporated into these decisions. The meaning of "foreseeable future" with the use of climate modeling needs to be defined for listing decisions where climate change is critical to the decision. The re-authorization of the Act needs to provide further definitions for this term including an exception if there is a determination made that conservation objectives can be met or maintained for 5 years under state management authority, at which time another status review should occur. The Solicitor's 2009 M-Opinion that has been the basis for the Services' interpretation of the term provides only vague guidance, explaining that Congress intended "foreseeable future" to "describe the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of a species." M-37021, Jan. 16, 2009.
- **States should be full partners in listing, critical habitat designations, recovery planning, and delisting decisions, particularly when modeling is used in analysis.** When federal agencies intend to rely on the precautionary principle or best professional judgment, particularly when coupled with the use of long-term modeling and forecasting, in place of current observational science and measurable impacts, the states should be a full partner in the analyses, model development and consulted with prior to final decisions. Furthermore, the Services need to establish

consistent criteria to assess modeling uncertainty related to projected scientific information, such as climate change, in their scientific review. In these circumstances, federal agencies should partner with states to develop and utilize mutually acceptable predictive techniques and consensus-based metrics that maintain state primacy in the management of the species and are strongly grounded in observational science and measurable outcomes.

6. Western Governors encourage the federal government to consider sound science, particularly from state agencies, and to include such science in its species status assessments and listing decisions.

**C. GOVERNORS' MANAGEMENT DIRECTIVE**

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual action/work plans that shall include specific targets, actions, and timelines necessary for furthering the policy positions and goals contained in this resolution. The Governors direct Governors' staff and the WGA Staff Advisory Council to participate with WGA staff in the development of the action/work plans. Those action/work plans shall be presented to, and approved by, Western Governors prior to implementation. The first work/action plan shall be presented to the Western Governors not later than three months after adoption of this resolution. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual action/work plans.

*Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult [www.westgov.org/policies](http://www.westgov.org/policies) for the most current copy of a resolution and a list of all current WGA policy resolutions.*

## Western Governors' Species Conservation and ESA Initiative Work Plan

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### Background

As Chairman of the Western Governors' Association, Wyoming Governor Matt Mead launched the Species Conservation and Endangered Species Act Initiative (Initiative) in June 2015. Efforts of the Initiative have included four workshops, five webinars and a series of questionnaires in the pursuit of: creating a mechanism for states to share best practices in species management; promoting the role of states in species conservation; and exploring options for improving the efficacy of the Endangered Species Act (ESA).

Workshops and webinars were designed to foster an inclusive and bipartisan dialogue on how to improve the efficacy of the ESA, and how to incentivize species conservation efforts to avoid the need to list a species in the first place. Thousands of stakeholders representing diverse interests provided input to WGA under one or more of the following six themes:

- Incentivizing Voluntary Proactive Conservation;
- The Role of State and Local Governments in Species Conservation and ESA Implementation;
- Landscape Level Conservation and Ecosystem Management;
- Investing in Science and Measurable Outcomes;
- Listing, Recovery and Delisting Process of the ESA; and
- Law and Policy Recommendations.

WGA's efforts to conduct an inclusive and bipartisan dialogue in the first year of the Initiative culminated in the adoption of WGA Policy Resolution 2016-08, *Species Conservation and the Endangered Species Act*. It requires WGA to develop a work plan to further the policy positions and goals contained in the resolution. Elements of the proposed work plan are detailed below.

#### **Element 1: Identify Predicate Issues for Future Success**

Extensive research and documentation of state competencies in funding, research and species management will be foundational to policy recommendations for regulatory and/or statutory improvements to the ESA.

WGA staff will work with appropriate groups (e.g. AFWA/WAFWA) to document state conservation funding for non-game species, success stories and best practices.

WGA will also work with the Staff Advisory Council (SAC) to develop a document detailing year-one successes for delivery to the incoming Administration and Members of Congress. The transition document will focus on the Governors' policy statements in the resolution and how those statements were informed by a broad bipartisan discussion.

**Element 2: Stakeholder Engagement – Work Sessions, Webinars and Questionnaires**

Facilitating discussion and building trust among an array of diverse groups through a series of facilitated workshop sessions was fundamental to the success of the first year of the Initiative. Keeping these groups engaged will be pivotal to promoting and further refining recommendations for species conservation efforts and ESA improvement. WGA proposes to accomplish this through hosting a series of intimate work sessions, webinars and survey instruments on the key themes stated above and in the resolution.

Work sessions will help WGA refine key themes and develop an understanding of the hurdles that may impede implementation of policy recommendations. Stakeholders will provide recommendations for improvements to the ESA that can be accomplished through regulatory or statutory means. Work sessions will serve as a mechanism for WGA to discuss real-world obstacles and implications to advancing the Governors' policy recommendations.

Work sessions will differ from year one workshops in that they will:

- Be limited in size to 40-50 individuals per work session;
- Not include media;
- Not feature roundtable or panel discussions; and
- Focus on exhaustively exploring a narrow band of issues previously identified by Governors and stakeholders.

Work sessions will not necessarily be held in a diversity of locations across the West. WGA will determine work session locations that are economically prudent and convenient for both participants and staff.

Participants in work sessions will be predicated on an initial round of extensive outreach by WGA staff. A year two questionnaire will be developed to expand upon findings and recommendations from year one, then sent to those who have indicated interest and been engaged in the Species Conservation and ESA Initiative. WGA staff will also reach out to key partners in each sector from year one, and field recommendations on additional groups to receive the year two questionnaire.

Maintaining a balance between sectors and interests will be imperative to the success of work sessions. Invitation lists will also strive to balance the continued engagement of groups from year one with the goal of expanding the reach of the Initiative and cultivating interest from groups that have not yet provided input.

Work session findings will be recorded for gubernatorial consideration. Key questions identified during work sessions will inform the evolution of the year two questionnaire that will be distributed to interested individuals to encourage a wide range of stakeholder input on specific policy issues.

Given the limited size of work sessions, WGA proposes to utilize webinars to broadcast progress and findings to a broader audience. Webinars can be used to highlight case studies in proactive species conservation or serve as “virtual town halls” for groups to provide feedback on the development of policy issues. Panelists will be drawn from a diversity of interests and sectors.

**Element 3: Policy Recommendations for Species Conservation and ESA Implementation**

Policy proposals emerging from this process can be discussed and further refined at work session meetings. This process will position WGA to facilitate constructive engagement between the Services, states and interested stakeholders with the ultimate goal of improving the efficacy of species conservation efforts and the ESA through regulatory and administrative action.

In advancing mutually identified policy priorities, it is likely that certain proposals will be unable to be enacted through regulatory means. Any possible statutory recommendations that emerge will need to be vetted through the regular review process for Governors’ approval.

**Element 4: Communications**

WGA will maintain and expand upon the existing website for the Initiative through continued publication of case studies and best practices in species management. This will include the *Species Spotlight* feature, case studies that illustrate success stories developed in collaboration with key partners. The case studies will be expanded beyond their current scope to include species outside of the West in an effort to begin engaging groups east of the Mississippi River.



**WESTERN  
GOVERNORS'  
ASSOCIATION**

Matthew H. Mead  
Governor of Wyoming  
Chairman

Steve Bullock  
Governor of Montana  
Vice Chair

James D. Ogsbury  
Executive Director

Headquarters

1600 Broadway  
Suite 1700  
Denver, CO 80202

303-623-9378  
Fax 303-534-7309

Washington, D.C.

400 N. Capitol Street, N.W.  
Suite 376  
Washington, D.C. 20001

202-624-5402  
Fax 202-624-7707

www.westgov.org

June 30, 2016

Dan Ashe, Director  
U.S. Fish and Wildlife Service  
U.S. Department of the Interior  
1849 C Street, N.W., Room 3331  
Washington, D.C. 20240

Eileen Sobeck, Assistant Administrator  
NOAA Fisheries  
U.S. Department of Commerce  
1315 East West Hwy., SSMC3, Rm. 14636  
Silver Spring, MD 20910

Re: Docket FWS-HQ-ES-2015-0016

Dear Director Ashe and Assistant Administrator Sobeck:

Western Governors respectfully submit these comments on *Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions* ([81 FR 23448](#), April 21, 2016). We appreciate that the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (referred to collectively as "the Services") have initiated a rulemaking to clarify the petition submission process, but are concerned with the withdrawal of several important provisions contained in the initial version of the proposed rule released on May 21, 2015 ([80 FR 29286](#)). Western Governors recommend the Services reinsert portions of the initial proposed rule that invites greater engagement with states when implementing the Endangered Species Act (ESA or the Act).

States should be full partners with the Services in listing, recovery and delisting decisions. This includes using state fish and wildlife data and analyses as principal sources in ESA decisions. WGA Policy Resolutions [2016-08](#), (*Species Conservation and the Endangered Species Act*); [2014-11](#), (*Species of Concern and Candidate Species*), [2014-14](#), (*State Wildlife Science, Data and Analysis*) and [2014-09](#), (*Respecting State Authority and Expertise*) memorialize relevant WGA positions in that regard.

**WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS**

In [comments](#) dated September 18, 2015, Western Governors expressed support for the proposal requiring petitioners to: provide a copy of the petition to affected state(s); attempt to collect any existing state data regarding the petitioned species; and include data collected from the state(s) in the petition to the Services. The Governors further expressed support for an extension of the timeline for state review from 30 days to at least 60 days.

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The Services' revision of §424.14(b)(9) (81 FR 23450) significantly departs from the initial proposal and fails to promote the utilization of state information and expertise to the benefit of species within their borders. The proposed revision now only requires the petitioner notify affected states of their intention to file a petition at least 30 days prior to submitting it to the Services.

Notice of filing without providing information contained in the petition will not improve the efficacy of the ESA. States will not know the basis of the petition, nor have an opportunity to evaluate the scientific information it is based on for completeness. Consequently, states will need to direct resources to provide all available species data – some of which may already be contained within the petition – to the Services. The Services will benefit from substantive engagement with states at the time of a petition given that all fish and wildlife and their habitat (except to the extent limited by the Marine Mammal Protection Act) are under state management authority at that time.

The April 21, 2016 revision makes the consideration of state data optional. The revision asserts that following a petition notification to a state, the Services then have "*the option*, in formulating an initial finding, *to use their discretion* to consider any information provided by the States" (emphasis added). This approach is inconsistent with the mandate in Section 6 that the Services cooperate with the states to the maximum extent practicable in implementing the ESA.

Western Governors are committed to working with the Services to improve the efficiency and effectiveness of the petition process, but calling for state data early in the process and then making its consideration discretionary offers no meaningful change to the process.

We recommend the Services reinsert language from the initial proposal that:

- Requires state data and information be directly appended to petitions prior to the consideration of the petition by the Services.
- Makes the consideration of state data and information by the Services in an initial 90-day finding mandatory and includes state agencies in preparing 12-month findings.
- Requires petitioners to provide copies of their petitions to state agencies prior to submitting them to the Services.

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Allowing states the ability to include relevant information and data into the petition process will improve efficiency by allowing the Services to identify and reject unsubstantiated or incomplete petitions early in the process. This would benefit the Services, states and the listed species in need of attention and resources.

**CONCLUSION**

Western Governors appreciate the Services' work to refine the petition process and promote utilization of state data and expertise. We also appreciate the ongoing partnership of the Services in the Western Governors' Species Conservation and ESA Initiative (Initiative). The petition process is one of the areas that received particular focus by stakeholders engaged in the Initiative. We would refer you to the Initiative's [Special Report](#) and [Appendix](#) for more information.

Thank you for your attention to these comments and we look forward to continuing to work with the Services on this and other common sense improvements that will make the ESA function better for species and people.

Sincerely,

  
Matthew H. Mead  
Governor of Wyoming  
Chairman, WGA

  
Steve Bullock  
Governor of Montana  
Vice Chair, WGA

cc: Gary Frazer, Assistant Director for Endangered Species, U. S. Fish and Wildlife Service  
cc: Donna Wieting, Director, Office of Protected Resources, NOAA Fisheries



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Steve Bullock  
Governor of Montana  
Chair

Dennis Daugaard  
Governor of South Dakota  
Vice Chair

James D. Ogsbury  
Executive Director

Headquarters

1600 Broadway  
Suite 1700  
Denver, CO 80202

303-623-9378  
Fax 303-534-7309

Washington, D.C.

400 N. Capitol Street, N.W.  
Suite 376  
Washington, D.C. 20001

202-624-5402  
Fax 202-624-7707

[www.westgov.org](http://www.westgov.org)

October 17, 2016

Dan Ashe, Director  
U.S. Fish and Wildlife Service  
c/o Division of Policy, Performance, and Management Programs  
MS: BPHC; 5275 Leesburg Pike  
Falls Church, VA 22041-3803

Docket No.: FWS-HQ-ES-2015-0165

Dear Director Ashe:

The Western Governors' Association (WGA) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (Service) draft *Endangered Species Act Compensatory Mitigation Policy* ([81 FR 61031](#), September 2, 2016).

**STATEMENT OF INTEREST**

Under the U.S. Constitution, states have trust authority over natural resources and wildlife. Consequently, Governors bear management responsibility for all fish and wildlife within their states' borders. Further, state agencies possess a wealth of knowledge and scientific expertise on the status and distribution of endangered, threatened and at-risk species. Moreover, because of their close working relationships with local governments and landowners, they are in a unique position to assist the Service in implementing the ESA.

For these reasons, Western Governors, in a letter dated January 21, 2014, requested that Department of the Interior (DOI) mitigation requirements that may affect state and private land be:

- Developed in coordination with Governors in whose states where DOI lands are situated; and
- Clearly defined and implemented so proper and reasonable mitigation can be incorporated in project planning.

**COORDINATION WITH STATES**

Section 4.8 of the proposed policy calls for collaboration with affected stakeholders and governments in the development of landscape-scale conservation programs designed to achieve a net gain, or at a minimum, no net loss in conservation for listed and at-risk species. The policy defines at-risk species as candidate species and other unlisted species that are declining and at

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risk of becoming candidates for listing under the ESA. Under this definition, states retain primary management authority for candidate and at-risk species within their borders.

Western states are proactively engaged in species conservation. Among other things, they develop state and multi-state conservation plans to manage species at the local level. For this reason, we urge the Service to expand and clarify guidance to agency staff on state agencies' lead role in coordinating compensatory mitigation efforts for at-risk species as defined in the proposed policy.

#### **LANDSCAPE-SCALE PLANNING**

Pursuant to President Obama's November 3, 2015, memorandum, *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (Presidential Memorandum), the Service's proposed policy calls for a landscape-scale approach to development and conservation planning, including mitigation.

Western Governors recognize that landscape-scale approaches to compensatory mitigation – if designed and implemented appropriately – may promote better project planning and help to achieve species conservation goals and species recovery under the ESA. Accordingly, the Governors support the Service's efforts to encourage the use of market-based compensatory mitigation programs such as conservation banks and habitat exchanges.

Whether a landscape-scale approach to species management can fulfill this promise will depend, to a significant degree, on how the concept is delineated and implemented by the Service. As the WGA Species Conservation and ESA Initiative identified, the term "landscape-scale" is multi-faceted and can have different meanings to different stakeholders. Questions persist regarding how landscape-scale conservation efforts are defined in terms of scale, scope, funding and scientific consistency. We refer you to the Initiative's [Special Report](#) and [Appendix](#) for more context in that regard.

#### **NET CONSERVATION GAIN / NO NET LOSS**

A primary focus of the proposed policy is a goal of "net conservation gain" to guide compensatory mitigation efforts, or, at a minimum, a goal of no net loss in conservation. Western Governors are concerned by the lack of definition provided for the "net conservation gain" goal. For example, the proposed policy does not delineate how the Service will determine that "net conservation gain" has occurred, or is likely to occur.

Western Governors request that the final rule include a definition of "net conservation gain" and the basis on which the Service will assess mitigation plans for net conservation gain

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outcomes. Western Governors also request that the Service identify the factors to be taken into account in assessing the net conservation gain of specific mitigation efforts.

Clearly defining "net conservation gain" will benefit projects that must comply with proposed policy, although the Service recognizes their limited authority to require mitigation under the ESA. It will also benefit Service representatives responsible for implementation of the proposed policy. Substantive consultation with Governors and state representatives regarding the definition will ensure appropriate parameters for compensatory mitigation under the ESA.

#### CONCLUSION

Western Governors request that the Service engage in substantive and ongoing consultation with Governors and state regulators to create clarity around landscape-scale compensatory mitigation in the West and the definition of "net conservation gain." Such an approach would comport with the Governors' view of what a real and substantive consultative process should entail.<sup>1</sup>

Sincerely,

  
Steve Bullock  
Governor of Montana  
Chair, WGA

  
Dennis Daugaard  
Governor of South Dakota  
Vice Chair, WGA

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<sup>1</sup> WGA Policy Resolution 2014-09, *Respecting State Authority and Expertise*: "Western Governors support early, meaningful and substantial state involvement in the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budget proposals, budget processes and strategic planning."



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1600 Broadway  
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303-623-9378  
Fax 303-534-7309

Washington, D.C.

400 N. Capitol Street, N.W.  
Suite 376  
Washington, D.C. 20001

202-624-5402  
Fax 202-624-7707

[www.westgov.org](http://www.westgov.org)

February 16, 2016

Mr. Douglas Krofta  
United States Fish and Wildlife Service  
Division of Conservation and Classification  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Re: Docket FWS-HQ-ES-2015-0169

Dear Mr. Krofta:

The Western Governors' Association (WGA) appreciates the opportunity to provide comments on the United States Fish and Wildlife Service's (FWS) proposed methodology for prioritizing status reviews and accompanying 12-month findings on petitions for listing species under the Endangered Species Act (ESA) [81 FR 2229, January 15, 2016].

**STATEMENT OF INTEREST:**

WGA represents the Governors of 19 western states and 3 U.S.-flag islands. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the western United States.

States have primacy over fish, wildlife and water within their borders. They have developed a tremendous body of science and expertise on these resources. States conduct research and on-the-ground analysis of species' status. States adopt policies and take steps to prevent species from becoming imperiled. Western Governors support voluntary proactive conservation measures and, in many cases, actively implement conservation measures in concert with local governments and private parties to aid the recovery of at-risk-species.

Governors recognize the important role of FWS in administering the petition process under the Endangered Species Act. Governors appreciate the recent efforts by FWS and the National Marine Fisheries Service (NMFS) to initiate a rulemaking to clarify the petition submission process and enhance the role of states in the process. The proposed rule notes that states have substantial expertise, and information relevant to species conservation and that states are generally responsible for species management unless the species is federally listed. Accordingly, the FWS should utilize state data and expertise in conducting status reviews and 12-month findings on petitions for listing species under the ESA.

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ESA Section 6 requires the Services to cooperate with states to the maximum extent practicable in implementing the Act. States should be full partners in listing, recovery and delisting decisions. Additionally, Governors encourage federal agencies to use sound science in ESA decisions with state fish and wildlife data and analyses as principal sources in species status assessments and listing decisions. WGA Policy Resolutions ~~13-08~~: Endangered Species Act, ~~14-11~~: Species of Concern and Candidate Species, ~~14-14~~: State Wildlife Science, Data and Analysis, and ~~14-09~~: Respecting State Authority and Expertise memorialize WGA positions.

#### **WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS:**

The FWS proposes five categories to better identify and prioritize pending status reviews and accompanying 12-month findings on petitions for listing species under the ESA.

##### **Available State Data**

In situations where the FWS does not have adequate data to support assigning an action the correct priority, the FWS proposes to consult with state fish and wildlife agencies. These agencies have management responsibility for petitioned species or relevant scientific data. Western Governors urge the use of state data in status reviews and accompanying 12-month findings. This state data should, however, be a principal source and not limited to instances where the FWS is lacking complete data.

##### **Highest Priority – Critically Imperiled**

The FWS states that the highest priority will be given to species experiencing severe threat levels across a majority of their ranges, resulting in severe population-level impacts. Western Governors encourage the FWS to add certainty to definitions by clarifying currently ambiguous terms. These include: “severe threat levels,” “severe population-level impacts,” and “majority of its range.”

##### **Conservation Opportunities in Development or Underway**

The FWS states that a species receiving the fourth highest priority must have conservation efforts organized, underway, and likely to address the threats to the species. Western Governors applaud the recognition of voluntary proactive conservation in the status review process, but urge the FWS to move this to the fifth highest priority to allow full consideration of voluntary conservation measures. Voluntary conservation programs must be provided adequate time to fully develop and subsequently implement conservation measures on-the-ground to be successful.

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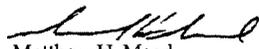
**Limited Data Currently Available**

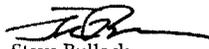
The draft methodology states, "Species for which we know almost nothing about its threats or status will be given fifth highest priority." Western Governors urge the FWS to strike priority bin five from its Draft Methodology. The FWS should not be conducting 12-month findings or status reviews for species with almost no data. The ESA requires the FWS to conduct a 12-month status review if "substantial" information shows that a listing "may be warranted." If the FWS knows "almost nothing" about the threats to or status of a species, the petition would not reach the "substantial" information bar necessary to initiate a 12-month finding. Therefore, priority bin five is unnecessary.

**CONCLUSION:**

Western Governors support the FWS work to refine the ESA status review process. They appreciate the ongoing partnership of the FWS in the Western Governors' Species Conservation and Endangered Species Act Initiative. Western Governors look forward to the continuing to work with FWS to identify common sense improvements to make the ESA function better for species.

Sincerely,

  
Matthew H. Mead  
Governor of Wyoming  
Chairman, WGA

  
Steve Bullock  
Governor of Montana  
Vice Chair, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior  
Dan Ashe, Director, U.S. Fish and Wildlife Service  
Gary Frazer, Assistant Director for Endangered Species, U.S. Fish and Wildlife Service



**WESTERN  
GOVERNORS'  
ASSOCIATION**

Brian Sandoval  
Governor of Nevada  
Chairman

John A. Kitzhaber, M.D.  
Governor of Oregon  
Vice Chairman

James D. Ogsbury  
Executive Director

Headquarters:  
1600 Broadway  
Suite 1700  
Denver, CO 80202  
303-623-9378  
Fax 303-534-7309

Washington, D.C. Office:  
400 N. Capitol Street, N.W.  
Suite 376  
Washington, D.C. 20001  
202-624-5402  
Fax 202-624-7707  
www.westgov.org

October 9, 2014

Mr. Douglas Krofta  
U.S. Fish and Wildlife Service  
Division of Conservation and Classification  
4401 N Fairfax Drive, Suite 420  
Arlington, VA 22203

Dear Mr. Krofta:

Western Governors respectfully submit to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") the following comments on the Notice of Proposed Rulemaking (NPR) for *Implementing Changes to the Regulations for Designating Critical Habitat* [[79 FR 36284, June 26, 2014](#) and [79 FR 27066, May 12, 2014](#)]. Thank you for extending the public comment period to provide states a reasonable period of time in which to respond to the proposed draft.

Our comments below focus on:

- The need to ensure the use of sound science in critical habitat designations, drawing in particular from state science and coordination with state agencies to do proper modeling of scientific trends and economic impacts of potential designations.
- Stressing that critical habitat is, by definition, the areas **essential** for conservation of a species and therefore should not be unduly expanded beyond that scope.

Western Governors request that this proposed rule be reworked in cooperation with Western states and utilizing our state data to reach a more legally-defensible result and foster partnership.

**Stated Purpose of the Proposed Rule:**

In the Endangered Species Act (ESA) Section 3(5)(A), critical habitat is defined as:

- (i) the **specific areas** within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) **essential** to the conservation of the species and (II) which

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may require special management considerations or protection; and (ii) **specific areas** outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are **essential** for the conservation of the species [emphasis added].

This definition emphasizes that critical habitat includes specific geographic areas, containing particular physical or biological attributes, that are occupied by the species at the time of listing or unoccupied areas determined by the Secretary to be essential for species conservation.

ESA Section 4 says that:

The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

In the NOPR, the Services state that “the purpose of critical habitat is to identify the areas that are *or will be* [emphasis added] essential to the species’ recovery.” Designating areas that “will be” essential to species recovery requires a determination by the Secretary using the best scientific data available.

The proposed rule notes that “unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species...In other words, the Services may identify areas that *do not yet* [emphasis added] have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain the features as areas essential to the conservation of the species.” The proposed rule notes that “best available scientific data” will be used to evaluate whether an unoccupied area could develop the needed features and is essential for the conservation of a species. At a minimum, the Service should provide a thorough, data-based explanation of the basis for the determination that areas outside the range occupied at the time of listing are or will be essential habitat.

**Western Governors’ Analysis and Recommendations:**

➤ **Best Available Scientific Data**

The Governors find it imperative that sound science form the basis for critical habitat determinations, with an emphasis on state science, data and analyses. This includes using best available economic science data considered in designating critical habitat.

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The importance of using sound science in ESA decisions, particularly from the states, is cited in the Western Governors' Association (WGA) Policy Resolution 13-08 Endangered Species Act. In addition, WGA Policy Resolution 2014-14 State Wildlife Science, Data and Analysis urges federal agencies to work directly with states to obtain and use state fish and wildlife data and analyses as principal sources to inform land planning decisions. Congress, in its FY 2014 Committee on Appropriations report on the Department of the Interior's budget, supported the Governors' position by directing Interior to use state fish and wildlife data and analyses as principal sources to inform land use, land planning and related natural resource decisions.

The proposed rule states, "The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing."

Use of state expertise and experience on the ground should extend to situations where the Services seek to use forward-looking modeling to forecast areas that "will be" species habitat in the future. As noted in the WGA Policy Resolution 13-08 Endangered Species Act, states should be full partners to federal agencies in developing and utilizing mutually acceptable predictive techniques.

➤ **Focus on Essential Habitat**

The Services recommend deleting a provision in Section 50 CFR 424.12(e) which provides that the Secretary can designate areas outside the geographical area presently occupied by a species only when "a designation limited to its present range would be inadequate to ensure the conservation of the species." While it may be the case that designating unoccupied habitat as critical habitat is beneficial to species recovery, under the ESA critical habitat, by definition, should include only those areas "essential" to conservation of the species.

Designation of critical habitat has real repercussions, particularly for landowners who may not be able to stay in business when land uses are restricted. As the Governors note in WGA Policy Resolution 2014-11 Species of Concern and Candidate Species, the negative economic impacts of federal ESA decisions fall solely on states, local communities, businesses, jobs and private property owners.

In this proposed rule, the Services propose that the scale of critical habitat designations be "at a scale determined by the Secretary to be appropriate" and give the Secretary the discretion to determine the scale used. Here once again we emphasize the need for using sound science, relying on state expertise. Although the proposed rule mentions information the Secretary may consider such as life history, the scale of available data,

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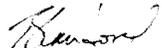
and biological and geophysical boundaries, it does not state that this information must be drawn from the best available science.

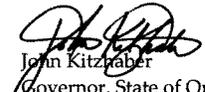
States have invaluable expertise that the Services should draw upon; coordinating with the states is an important part of appropriately designating critical habitat. The Services also need to document their rationale as decisions are made throughout the designation process.

Building on the sound science concept, when critical habitat is designated it should be tied to a definable objective in a recovery plan. This will help ensure that the habitat designated is only the land most essential to recovering a species.

As emphasized in WGA Policy Resolution 13-08, broad designation of critical habitat federalizes state, county, municipal, and private lands, adding unnecessary and uncompensated burdens and costs. Since ESA Section 4 calls for the Secretary to consider economic impacts when designating critical habitat, we underscore that designation of critical habitat is a costly enterprise and should be utilized only to cover the areas essential to conservation of a listed species, not the entire species' range. Western Governors look forward to working collaboratively to rework this proposed rule such that it meets our mutual interests and objectives.

Sincerely,

  
Brian Sandoval  
Governor, State of Nevada  
Chairman, WGA

  
John Kitzhaber  
Governor, State of Oregon  
Vice Chairman, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior  
Honorable Penny Pritzker, Secretary, U.S. Department of Commerce  
Dan Ashe, Director, U.S. Fish and Wildlife Service  
Eileen Sobeck, Assistant Administrator for Fisheries, National Marine Fisheries Service

[The prepared statement of Senator Johnson follows:]

STATEMENT OF HON. RON JOHNSON,  
U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman Barrasso, Ranking Member Carper, and members of the Committee, thank you for holding this oversight hearing regarding the Endangered Species Act. As an avid outdoorsman, I place a high value on preserving the environment for future generations. Preservation is a goal of the Endangered Species Act that we can all agree on, but the Federal Government must carry out its conservation efforts in a sensible and balanced manner.

Since late 2014 former Congressman Reid Ribble, Congressman Sean Duffy, and I have been consistently and actively engaged with Wisconsinites regarding a species that now roams over much of Wisconsin—the gray wolf. This species was listed as endangered in 1974, when populations were at a record low. Wildlife experts enacted a wolf recovery plan that has far exceeded its Wisconsin goal of 350 wolves. According to the Wisconsin Department of Natural Resources, Wisconsin had at least 866 wolves in the 2015–2016 winter.

Due to the gray wolf's recovery, U.S. Fish and Wildlife Service officials first attempted in 2006 to delist the gray wolf as an endangered species. Wisconsin, Wyoming, and other States were ready and willing to institute detailed management plans. In 2011 and 2012 Fish and Wildlife delisted the gray wolf as endangered in the Great Lakes and Wyoming. Unfortunately, a lawsuit and subsequent judicial ruling in late 2014 reversed the Federal experts on the delisting.

I am glad the Committee invited Jim Holte from the Wisconsin Farm Bureau to provide insights on the Endangered Species Act's unintended, negative consequences. I strongly agree with what I have heard directly from Mr. Holte and other stakeholders including farmers, ranchers, loggers, and sportsmen—that all future gray wolf listing decisions should be made by experts in the field, not judges in courtrooms.

In order to correct the misguided judicial action, I first introduced legislation 2 years ago with Chairman Barrasso requiring the Department of the Interior to re-issue the respective 2011 and 2012 delisting decisions for Great Lakes and Wyoming gray wolves. Unfortunately, Congress did not take action on our bill last session. I was pleased to reintroduce the Johnson-Barrasso legislation, S. 164, this year with the welcome addition of bipartisan support.

I am hopeful this Committee and Congress will pass S. 164 soon and note our bill takes a sensible approach that allows States to manage gray wolf populations while not modifying the Endangered Species Act. The bill also does not prevent Fish and Wildlife Service experts from ever returning the wolf to the endangered list if it determines the population is in need of Federal protection. This legislation provides us an example of how States and the Federal Government can work together toward reasonable, common sense solutions for ecosystem preservation.

Senator BARRASSO. I want to thank all of the witnesses for their time and testimony today.

This hearing is adjourned.

[Whereupon, at 12:04 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION  
1050 Thomas Jefferson Street, NW, 6th Floor  
Washington, DC 20007  
tel: 202 333 7481 fax 202 338 2416  
www.nesarc.org

## **NATIONAL ENDANGERED SPECIES ACT REFORM COALITION**

### **STATEMENT FOR THE RECORD SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS**

#### ***"OVERSIGHT: MODERNIZING THE ENDANGERED SPECIES ACT"* FEBRUARY 15, 2017**

#### **INTRODUCTION**

The National Endangered Species Act Reform Coalition (NESARC) commends Chairman John Barrasso and the Senate Environment and Public Works Committee for convening today's oversight hearing to address the need to modernize the Endangered Species Act (ESA). The hearing is an important first step early in the 115<sup>th</sup> Congress to inform lawmakers on significant problems with the law, while offering opportunities to advance improvements to benefit imperiled species across the nation.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

The Endangered Species Act was signed into law in 1973, and has not been reauthorized since 1988. For nearly 25 years, the law has remained unchanged and continues to be enforced, despite the lack of Congressional authorization. Since its enactment over 43 years ago, just two percent of species that have been listed as endangered or threatened have been successfully recovered.

#### **RECOMMENDATIONS FOR LEGISLATIVE IMPROVEMENTS TO THE ESA**

NESARC and its members recognize the need for, and support legislative improvements to, the ESA in the following areas:

NATIONAL ENDANGERED SPECIES ACT REFORM COALITION  
STATEMENT FOR THE RECORD  
HEARING: "OVERSIGHT: MODERNIZATION OF THE ENDANGERED SPECIES ACT"  
FEBRUARY 15, 2017

- ❖ **Encourage Voluntary Conservation Efforts:** Voluntary conservation efforts have been at the heart of most species' recovery. However, with the exception of habitat conservation plans under Section 10(a), the ESA contains no statutory provisions specifically devoted to voluntary conservation. Voluntary conservation efforts should be promoted and encouraged by creating new avenues for States, local governments, and private property owners to proactively participate in species recovery efforts (e.g., creating a habitat reserve program, tax incentives, loan or grant programs and other funding initiatives). In addition, existing programs like Safe Harbor Agreements, Candidate Conservation Agreements with Assurances, and ESA Mitigation Banks should be codified. Finally, participants in voluntary conservation programs need assurances that they will be shielded from potential take liability for their activities and that additional conservation measures will not be imposed in the future.
  
- ❖ **Increase State and Local Involvement:** State and local governments have unique authorities and expertise on the management, protection and conservation of species and habitat within their jurisdiction. However, this expertise has been largely marginalized in the implementation of listing and critical habitat decisions by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services). Further, the framework for interaction with States under Section 6 of the ESA is flawed and must be re-worked. Many species have been recovered primarily through voluntary conservation actions as well as management programs led by State and local governments, often without support or direction under the ESA. On the ground expertise and abilities must be leveraged by providing more flexibility so that States and local governments have a stronger role in providing their advice and expertise in the listing and critical habitat designation process. Further, the ESA must be updated to recognize and better integrate State and local governmental programs that protect and enhance species.
  
- ❖ **Ensure an Open and Sound Decision-Making Process:** The ESA must be open to new ideas and data. The decision-making process for listings, critical habitat designations and other decisions under the ESA must allow for full public participation, better data collection and transparency, and robust independent scientific review. The ESA also needs to reflect that States, tribes, local governments, and private parties often have current and accurate data that can be better incorporated into listing, critical habitat, and recovery decisions.
  
- ❖ **Improve the Critical Habitat Designation Process:** The critical habitat designation process should be improved by: adopting modern data gathering and analysis tools that increase the accuracy and quality of science considered; properly accounting for existing habitat protection

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measures (including voluntary conservation efforts) that render designations redundant; and minimizing adverse economic impacts from overbroad habitat designations. The ESA also must be clarified to ensure that critical habitat designations only include areas where essential physical or biological features for the species are found to occur and their designation as critical habitat is essential for the conservation of the species. Moreover, for unoccupied habitat, the Secretary of the Interior (Secretary) must affirmatively determine that such area is habitable and that the designation of occupied areas, alone, is insufficient for conservation of the species. Finally, the scale of any critical habitat designation must be consistently applied and be at a level of specificity that ensures that homes, businesses and other areas that do not support the species or its preferred habitat are not broadly swept into a critical habitat designation.

- ❖ **Improve Consultation Procedures:** The ESA Section 7 consultation process has proven to be unwieldy, with statutory deadlines routinely missed by the Services or avoided by procedural maneuvers. Key elements of the consultation process are so vaguely drafted that they have been the subject of a never-ending stream of litigation, including the scope of impacts to be evaluated, definitions for "jeopardy" and "adverse modification," and the establishment of environmental baselines for evaluation of potential impacts. Further, the consultation process has proven to be too complex for simple permits and inadequate for application to complex regulatory actions, such as the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The process for consultation on the effects of federal actions on listed species and critical habitat must be thoroughly reshaped in a manner that avoids consultations for agency actions with only beneficial incremental effects, limits consultations to the footprint of the action proposed, requires consultations to be consistent with proposed agency actions, takes the current environment as the baseline, facilitates the Services' timely and consistent performance of their consultation obligations, and provides greater certainty and reasonableness regarding the end-result.
- ❖ **Establish Delisting Criteria:** The ESA requires that, as part of recovery plans, the Services identify "objective, measurable criteria" for delisting species. However, many species do not have recovery plans and, consequentially, no criteria for delisting. Establishing meaningful and enforceable delisting criteria will provide a goal for everyone to work toward, streamline the downlisting and delisting process, and ensure that species can be removed from the list when recovery is achieved.
- ❖ **Strengthen Habitat Conservation Planning Procedures and Codify "No Surprises":** The HCP process has the potential to be a success story, but too often private property owners are stymied by the delays and costs of getting HCP approval. HCP approval should be streamlined,

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including removing the unnecessary and redundant application of NEPA to a federal action that already has been thoroughly and exhaustively examined by the Services in its HCP review and approval process. Further, landowners involved in conservation efforts need to be certain that a "deal is a deal." The "No Surprises" policy must be codified under the ESA and cover all commitments by private parties to voluntary protection and enhancement of species and habitat.

- ❖ **Clarify the Scope and Application of Section 4(d) Rules:** Section 4(d) rules are valuable tools that allow the Services to determine how the ESA take prohibition will apply to threatened species. Section 4(d) should be expanded to also apply to endangered species, and its use should be required for all listed species on a species-specific basis. In addition, the scope of a 4(d) rule needs to be limited to defining what constitutes a prohibited take, preventing the use of the rule as a mechanism to impose management restrictions on the use and enjoyment of land.
- ❖ **Implement Petition Litigation Reforms:** The ESA's deadlines for acting on petitions to list species and designate critical habitat are so inflexible and unrealistic that the Services routinely fail to meet their statutory deadlines and foster a sue-and-settle environment that further usurps an orderly management of species decision making. The Services have no ability to prioritize actions for imperiled species, lack the resources to act in a timely manner, and are forced to act without full and thorough consideration of scientific data. These petition deadlines are enforced through litigation and settlements, without public involvement, which further perpetuates the underlying problem. The Services need additional flexibility to allow for the proper prioritization of ESA petitions and for full consideration of the petitioned action as expeditiously as possible.

CONCLUSION

On behalf of the agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, water and irrigation districts, and other businesses and individuals throughout the United States represented by NESARC, the Coalition looks forward to working with Chairman Barrasso, as well as all interested lawmakers on both sides of the aisle, to identify and implement long overdue changes to the law.



NATIONAL ENDANGERED SPECIES ACT  
 REFORM COALITION  
 1050 Thomas Jefferson Street, NW, 6th Floor  
 Washington, DC 20007  
 tel. 202.333.7481 fax 202.338.2416  
 www.nesarc.org

## NESARC Membership Roster

**American Agri-Women**  
*Manhattan, KS*

**American Farm Bureau Federation**  
*Washington, DC*

**American Forest and Paper Association**  
*Washington, DC*

**American Petroleum Institute**  
*Washington, DC*

**American Public Power Association**  
*Washington, DC*

**Association of California Water Agencies**  
*Sacramento, California*

**Basin Electric Power Cooperative**  
*Bismark, North Dakota*

**Central Electric Cooperative**  
*Mitchell, South Dakota*

**Central Platte Natural Resources District**  
*Grand Island, Nebraska*

**Charles Mix Electric Association**  
*Lake Andes, South Dakota*

**Coalition of Counties for Stable  
 Economic Growth**  
*Glenwood, New Mexico*

**Codington-Clark Electric Cooperative, Inc.**  
*Watertown, South Dakota*

**Colorado River Energy Distributors Association**  
*Phoenix, Arizona*

**Colorado River Water Conservation District**  
*Glenwood Springs, Colorado*

**Colorado Rural Electric Association**  
*Denver, Colorado*

**County of Eddy**  
*Carlsbad, New Mexico*

**County of Sierra**  
*Truth or Consequences, New Mexico*

**CropLife America**  
*Washington, DC*

**Dixie Escalante Rural Electric Association**  
*Beryl, Utah*

**Dugan Production Corporation**  
*Farmington, New Mexico*

**Eastern Municipal Water District**  
*Perris, California*

**Edison Electric Institute**  
*Washington, DC*

**Frank Raspo & Sons**  
*Vernalis, California.*

**Empire Electric Association, Inc.**  
*Cortez, Colorado*

**Garrison Diversion Conservancy District**  
*Carrington, North Dakota*

**Guadalupe Blanco River Authority**  
*Seguin, Texas*

**High Plains Power, Inc.**  
*Riverton, Wyoming*

<b>Idaho Mining Association</b> <i>Boise, Idaho</i>	<b>Renville-Sibley Cooperative Power Association</b> <i>Danube, Minnesota</i>
<b>NAIOP</b> <i>Herndon, Virginia</i>	<b>San Luis Water District</b> <i>Los Banos, California</i>
<b>National Alliance of Forest Owners</b> <i>Washington, DC</i>	<b>Southwestern Power Resources Association</b> <i>Tulsa, Oklahoma</i>
<b>National Association of Counties</b> <i>Washington, DC</i>	<b>Sulphur Springs Valley Electric Cooperative</b> <i>Willcox, Arizona</i>
<b>National Association of Conservation Districts</b> <i>Washington, DC</i>	<b>Teel Irrigation District</b> <i>Echo, Oregon</i>
<b>National Association of Home Builders</b> <i>Washington, DC</i>	<b>Washington State Potato Commission</b> <i>Moses Lake, Washington</i>
<b>National Association of State Departments of Agriculture</b> <i>Arlington, Virginia</i>	<b>Washington State Water Resources Association</b> <i>Yakima, Washington</i>
<b>National Cattleman's Beef Association</b> <i>Washington, DC</i>	<b>Wells Rural Electric Company</b> <i>Wells, Nevada</i>
<b>National Rural Electric Cooperative Association</b> <i>Washington, DC</i>	<b>West Side Irrigation District</b> <i>Tracy, California</i>
<b>National Water Resources Association</b> <i>Arlington, Virginia</i>	<b>Western Business Roundtable</b> <i>Lakewood, Colorado</i>
<b>Nebraska Farm Bureau Federation</b> <i>Lincoln, Nebraska</i>	<b>Western Energy Alliance</b> <i>Denver, Colorado</i>
<b>Northern Electric Cooperative, Inc.</b> <i>Both, South Dakota</i>	<b>Wheat Belt Public Power District</b> <i>Sidney, Nebraska</i>
<b>Northwest Horticultural Council</b> <i>Yakima, Washington</i>	<b>Whetstone Valley Electric Cooperative, Inc.</b> <i>Milbank, South Dakota</i>
<b>Northwest Public Power Association</b> <i>Vancouver, Washington</i>	<b>Wilder Irrigation District</b> <i>Caldwell, Idaho</i>
<b>Public Lands Council</b> <i>Washington, DC</i>	<b>Wyrulec Company</b> <i>Lingle, Wyoming</i>
	<b>Y-W Electric Association, Inc.</b> <i>Akron, Colorado</i>

*Trink*

**Statement  
On Behalf of the  
American Road and Transportation Builders  
Association**

**Submitted to the  
United States Senate  
Committee on Environment & Public Works**

**Hearing on Oversight: Modernization of the Endangered Species  
Act**

**February 15, 2017**

Chairman Barrasso and Ranking Member Carper thank you for holding this hearing on Oversight: Modernization of the Endangered Species Act (ESA). ARTBA, now in its 115<sup>th</sup> year of service, provides federal representation for more than 6,000 members from all sectors of the U.S. transportation construction industry. ARTBA's membership includes private firms and organizations, as well as public agencies that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

Because of the nature of their businesses, ARTBA members undertake a variety of activities that are subject to ESA regulations. ARTBA's public sector members adopt, approve, or fund transportation plans, programs, or projects which are all subject to multiple federal regulatory requirements. ARTBA's private sector members plan, design, construct and provide supplies for federal-aid transportation improvement projects.

The ESA is a valuable tool in helping to deliver transportation projects in a manner that is most beneficial to both the environment and the communities served by those projects. In its current state, however, the ESA has achieved less than a one percent rate of success for species recovery. At the same time, it has resulted in multi-year delays for transportation construction projects. Delayed transportation improvements contribute to greater congestion on existing roads which leads to detrimental public health and safety effects, including reduced air quality and increased motor vehicle accidents.

ARTBA urges the committee to pursue ESA reform with the intent to allowing the ESA to be used where it is truly needed, rather than as a tool to delay and stop transportation projects. To that end, ARTBA offers the following general ESA reforms for the committee's consideration:

- Remove the ESA's critical habitat provisions and replace it with a less expansive habitat preservation system that focuses on preserving essential species habitat without imposing unnecessary and excessive restrictions on development.
- Establish a standard to define the "best available" scientific data in decisions concerning endangered or threatened species. This standard should provide for independent peer review of all ESA determinations.
- Reform the species listing process to discourage listing of species not actually threatened. Specifically, species should not be able to be listed based on potential threats, only actual impacts. Also, the de-listing process should be streamlined to allow for easier removal of species once they are no longer threatened.
- Curb unnecessary ESA litigation by disallowing litigation based on possible development occurring as the result of a proposed transportation project. Only disputes involving the effects of the potential project itself should be considered.

One specific area which ARTBA would direct the committee's attention to is the determination of critical habitat under the ESA. Proper determination of critical habitat is a very important issue for state and local governments, as well as businesses located in areas impacted by ESA activity. A determination of critical habitat can literally remove hundreds of miles from the possibility of any type of development. Currently, regulatory agencies can even make this designation based on the "historical" presence of a species, years in the past. In the transportation arena, the critical habitat designation is especially relevant as states promulgate transportation plans years, if not decades, in advance. If a regulatory agency summarily declares an area "off limits" through an overly broad critical habitat designation, then it can unnecessarily jeopardize carefully designed plans for economic development. At a minimum, all economic analysis necessary for a critical habitat determination should be based on the best data available and incorporate an area's planned transportation improvements.

Recently, the need for reform of the critical habitat process was spotlighted by regulatory proceedings involving the long-eared bat. In the case of the long-eared bat, the United States Fish & Wildlife Service (FWS) determined the habitat to be:

"The range of the northern long-eared bat includes much of the eastern and north central United States, and all Canadian provinces from the Atlantic Ocean west to the southern Yukon Territory and eastern British Columbia. Within the United States, this area includes the following 37 States and the District of Columbia: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio,

Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.<sup>1</sup>”

Thus, the area potentially impacted by the “critical habitat” of the northern-long eared bat could have potentially been a majority of the land in the continental United States.

Further, the main concern leading to FWS leading to the ESA being applied to the long-eared bat was a condition known as “white nose syndrome.” While this disease has caused a significant impact on the long-eared bat’s population, it has not been linked to any specific type of human activity. Thus, by listing the long-eared bat under ESA, FWS took the risk of hindering development for a vast portion of the country without any direct benefit for the species the critical habitat was meant to protect.

While FWS ultimately decided that it was “not prudent” to place severe development restrictions on long-eared bat habitat, the episode demonstrates the need for ESA reform to prevent broad-based unintended consequences that can arise under the current system. ARTBA looks forward to working with the committee in a manner to constructively update the ESA in a manner which effectively balances species protection with responsible transportation development.

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<sup>1</sup> United States Fish and Wildlife Service, *Northern Long-Eared Bat*, available at: <http://www.fws.gov/midwest/endangered/mammals/nlba/nlbaFactSheet.html>, last updated January 22, 2015.

