

Testimony of David J. Willms  
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Before the  
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Committee on Natural Resources

Legislative Hearing on Five Bills  
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Mister Chairman and Members of the Committee on Natural Resources:

Thank you for the invitation to testify today. I have worked on endangered species issues for my entire career, first as a Senior Assistant Attorney General for the State of Wyoming, and then in private practice. Today, I am a natural resources policy advisor for Wyoming Governor Matthew H. Mead, and teach a graduate course on the Endangered Species Act at the University of Wyoming. I appreciate the opportunity to share Governor Mead's, and Wyoming's perspective on the Endangered Species Act.

The civic duty and moral responsibility to conserve our nation's wildlife and the ecosystems upon which they rely transcends politics. Congress said as much when it nearly unanimously passed the Endangered Species Act (ESA) in 1973. Yet for the past several decades, divisive partisan rhetoric has politicized wildlife management. In the meantime, both wildlife and people suffer. To move forward, we must acknowledge that the ESA both succeeds and fails. We must celebrate its successes, but recognize, and seek to remedy its failures in a way that allows the ESA to better serve wildlife and people.

This mindset led Governor Mead to launch the *Species Conservation and Endangered Species Act Initiative (Initiative)* when he became the chair of the Western Governors' Association (WGA) in the summer of 2015. Using a transparent, inclusive, and bipartisan process, Governor Mead brought a diverse group of thought leaders together from around the country to discuss ways to improve the ESA, and species conservation more generally. Over two years, the Initiative hosted nine facilitated work sessions, six webinars, multiple surveys and questionnaires that produced two reports outlining opportunities to strengthen the ESA. This work led to a resolution that Governors unanimously adopted in June of 2016. The National Governor's Association adopted a similar resolution in early 2017. Then last month, Western Governors adopted a new series of recommendations that describe specific statutory, regulatory, and funding recommendations to further strengthen the ESA, and enhance species conservation.

Governor Mead hopes this Committee finds these bipartisan recommendations helpful as you consider updating the ESA. You will find that several of the challenges Western Governors identified with the ESA's current implementation are consistent with the challenges underlying many of the bills you are considering today. For illustration, I would like to explain from Wyoming's perspective, how the WGA recommendations address common criticisms of the

ESA including, (1) funding shortfalls, (2) reducing procedural litigation, and (3) a more robust recovery planning process.

### Funding

Groups routinely argue that inadequate funding serves as an impediment to successful ESA implementation. Some of these arguments have merit. Western Governors recommended additional funding in certain areas including: (1) to address the current backlog of recovered species awaiting downlisting or delisting; and (2) to enhance incentive based conservation efforts for listed and non-listed species. Governor Mead supports these recommendations, as well as recommendations that deliver more direct funding to states for species conservation. Other funding may also be appropriate; however, those funding discussions are, in some cases, premature.

Before making large appropriations for ESA implementation, it makes sense to identify and rectify procedural inefficiencies within the ESA that unnecessarily strain existing US Fish and Wildlife Service (FWS) resources.<sup>1</sup> After correcting these inefficiencies, the FWS and Congress will better understand where they can redistribute existing funding, and where additional funding may be appropriate.

### Procedural Litigation

For example, the current structure of section 4 of the ESA invites uncontrolled procedural and legal gambits intentionally designed to cripple the FWS's ability to implement the ESA. This in turn erodes support from many of the stakeholders necessary for species conservation. Section 4 establishes the protocols for listing and delisting species. Under this section, a person may submit a petition to the FWS requesting ESA protection for a species as either threatened or endangered. Within 90-days, the FWS must determine whether the petition contains enough information to warrant a more detailed analysis. If it does, then the FWS must make a final determination about the species within 12 months. These deadlines are the source of the greatest acrimony in ESA implementation. However, they are not sacrosanct.

When Congress adopted the ESA in 1973, it did not direct the FWS to act on petitions it received in a specific timeframe. In 1978, Congress amended the ESA, and gave the FWS two years to make a final determination on whether or not to list a species. Under the 1978 amendment, if the FWS failed to act within two years, it was required to withdraw the rule making until it received new information about the species.

In 1982, after complaints that the FWS intentionally delayed listing decisions, Congress again amended the ESA adding the current requirement that the FWS make an initial 90-day finding, and that it act on a substantial 90-day finding within 12-months of the date it receives a petition. Congress did not establish these deadlines using any scientific rationale. Instead, Congress

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<sup>1</sup> The Secretaries of the Interior and Commerce have authorities under the ESA, which manifest through the US Fish and Wildlife Service (FWS) and National Marine Fisheries Service. For purposes of my testimony, I refer to the FWS because Wyoming interacts with them exclusively.

imposed a politically concocted, arbitrary deadline to spur the administration into taking timely action on potential species listings.

However, Congress did not anticipate the strategic onslaught of species petitions and related litigation that would strain the agency decades later. Prior to 2003, the FWS never received more than 25 species listing petitions in a single year. Since then, species petitions have skyrocketed. In 2007, the Services received petitions to list 695 species, and another 432 in 2010—nearly all of which originated from two non-governmental organizations. These two groups attempt to overwhelm the FWS with so many species petitions that the FWS is unable to respond within the statutory timeframes. Then, these two groups litigate, in hopes that the FWS will acquiesce to their demands. We should not allow two groups to dictate the policy of an entire agency because we are afraid to acknowledge and address the problem.

After 35 years, let us admit that the politically motivated deadlines in section 4 have outlived their usefulness. In addition to the problems discussed above, the compressed deadlines discourage innovative and voluntary conservation, and may limit FWS access to valuable scientific data that could otherwise inform a listing determination.

Through their June 2017, recommendations, Western Governors identified two possible ways to address these issues. Wyoming supports both. Congress could amend section 4 to give the FWS greater flexibility to prioritize petitions it receives, but with an understanding that it must still make a decision by a specific date. Alternatively, Congress could amend section 4 to give the FWS discretion to defer listing determinations up to five years if the species meets certain conditions. For example, the FWS could defer a listing decision to allow state-led conservation efforts an opportunity to succeed, or to allow the completion of ongoing scientific studies related to the petitioned species.

In addition to alleviating the agency workload, these pragmatic changes have other benefits. They would allow the FWS to ensure that the most imperiled species receive immediate attention, thus reducing the likelihood of extinction. They would encourage more creative and collaborative conservation efforts like those undertaken for greater sage grouse and lesser prairie chicken. They would ensure that listing decisions are based on the best available science. Finally, they would significantly reduce litigation, allowing agency personnel to spend more time developing and implementing strategies for recovering listed species.

### Recovery Planning

The ESA envisions recovering a species to the point that its protections are no longer necessary. Yet, our current system makes removing protections for recovered species difficult. This must change. Currently, 493 species, or roughly 30% of all listed species have no recovery plan. This means species like Canada lynx, which the FWS listed as threatened more than 17 years ago, sit in purgatory with no discernible path to recovery. On the other extreme, species like grizzly bears and gray wolves exceeded recovery plan objectives for a generation before returning to state management.

Grizzly bears first met their ESA prescribed recovery objectives in 2003—an event that would presumably trigger delisting. Yet, the FWS took four more years before publishing a delisting rule in 2007. Ultimately, the rule failed to survive judicial review on a procedural technicality. Grizzly bears continued to increase in population and expand their range, yet it took until June of this year before the FWS issued a new delisting rule addressing the 9<sup>th</sup> Circuit’s lone concern. Instead of celebrating grizzly bear recovery as an ESA success story, hosts of organizations have already issued notices of intent to sue the FWS over its delisting rule. They allege procedural deficiencies in the rule as well as hypothetical, unsubstantiated, prospective harm.

Fundamentally, these groups do not want to see grizzly bears delisted because they do not trust states to manage wildlife within their borders. However, they fail to recognize two important facts. First, states played a significant role in recovering grizzly bears. Since the early 1980s, Wyoming has spent more than \$42 million on grizzly bear recovery—including contributing to research that makes this population of grizzly bears perhaps the most studied mammalian population on the planet. Wyoming also funds public education and landowner incentive programs that engender support for grizzly bears on a multiple-use landscape. Second, the FWS has never relisted a species that it successfully delisted due to recovery. This fact underscores the seriousness with which the states accept their responsibility to develop and implement management plans that ensure a recovered species into the foreseeable future.

For these reasons, Governor Mead encourages Congress to consider the WGA recommendation that would encourage willing states to lead recovery teams and develop recovery plans for listed species. Those recovery plans should contain discrete, achievable goals that when met satisfy all of the delisting criteria under section 4 of the ESA. When the species meets the recovery goals established in the recovery plan, the FWS should immediately initiate a status review of the species for purposes of considering delisting or down-listing of the species. Finally, once the FWS delists a species, states should manage the species. To allow states an opportunity to succeed, Congress should consider delaying judicial review of a delisting rule until the completion of the post-delisting monitoring period established through the delisting rule pursuant to statute.

## Wolves

I briefly want to address this Committee’s efforts to ensure wolves in Wyoming remain under state management. Earlier this year, after a protracted legal battle, the Federal Circuit Court in Washington D.C. issued a mandate that reinstated a 2012, FWS rule delisting gray wolves in Wyoming. Today, Wyoming is managing wolves pursuant to a federally approved wolf management plan that ensures a recovered wolf population in Wyoming for the foreseeable future. The provision of the bill protecting the FWS wolf delisting rule from further judicial review provides the states with needed predictability while still ensuring a recovered wolf population.

Regardless of the mechanism, any measure that ensures state management predictability into the future provides the most pragmatic and reasonable solution for both the gray wolf population and Wyoming citizens. The ESA preserves the responsibility for the FWS to re-list Wyoming’s gray

wolf population if it becomes threatened or endangered in the future. The current draft of this bill does not affect this ESA requirement.

### Conclusion

Governor Mead supports the Endangered Species Act, as evidenced by his leadership of the *Species Conservation and Endangered Species Act Initiative* through the Western Governors' Association. The ESA is a valuable tool for ensuring that our suite of wildlife remains for the enjoyment of future generations. The ESA is responsible for igniting some of the most remarkable species recoveries ever documented, and continues to facilitate the recovery of other imperiled species. However, it is far from perfect. It can, and should work better, both for wildlife and for people. The recommendations put forward by Western Governors through Governor Mead's Initiative are both reasonable and achievable solutions that warrant serious consideration.

Thank you again for this opportunity to share Wyoming's perspective on ways to strengthen the ESA and enhance species conservation. I welcome any questions you may have.



## WGA Species Conservation and the Endangered Species Act Initiative Year Two Recommendations

### Preamble

The Western Governors' Association (WGA), under the leadership of then-Chairman Wyoming Governor Matt Mead, launched the Western Governors' Species Conservation and Endangered Species Act Initiative (Initiative) in 2015. Since the Initiative's inception, WGA has hosted numerous workshops, webinars, and work sessions to create a forum for a diverse coalition of stakeholders to share best practices in species management, promote the role of states in species conservation, and explore options to improve the efficacy of the Endangered Species Act (ESA).

While the Initiative has closely examined the ESA, the effort goes well beyond consideration of the Act alone. Governors also are seeking to encourage voluntary conservation – through early identification of sensitive species and establishment of institutional frameworks that incentivize collaborative voluntary conservation – thus avoiding the need to list species in the first place.

The first year of the Initiative (2015-2016) resulted in approval of WGA Resolution [2016-08: Species Conservation and the Endangered Species Act](#) – an expansive resolution encapsulating Governors' principles informed by the Initiative. The Resolution instructs WGA staff to develop a multi-year workplan to further Governors' policy principals on Species Conservation and the ESA. What followed in the first year of workplan implementation (2016-2017) was a continuation of the transparent, inclusive, and stakeholder driven process to refine and examine avenues for implementation of Governors' policy statements expressed in the Resolution.

A suite of recommendations addressing proactive and incentive based voluntary conservation species and ESA implementation emerged from year two work sessions. Work session participants were not expected to reach full consensus on recommendations forwarded by the Governors. However, comity among work session participants gave rise to significant progress toward conceptual agreement and helped inform the Governors' deliberations on the recommendations contained in this document.

As interest within Congress and the Administration in examining the ESA builds, Western Governors' submit these bipartisan statutory, regulatory and funding-related recommendations consistent with implementation of the principles forwarded in WGA Resolution 2016-08, *Species Conservation and the Endangered Species Act*.

Importantly, with respect to statutory recommendations, Western Governors' acknowledge any Congressional effort to amend the ESA will be complicated and spark diverse opinions. WGA's ESA initiative enjoyed diverse stakeholder input and broad consensus; these resulting

recommendations represent bipartisanship at this stage. Each governor reserves judgment on whether to support Congressional action, based upon unknown future legislative language.

## Statutory

1. A) Amend Section 4 of the Endangered Species Act to create flexibility for the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, "Services") to create a prioritization schedule for petitions received. The Services must assign a petitioned species a listing priority within 12 months of a positive 90-day finding. Species in immediate risk of extinction will receive highest priority, while species with ongoing conservation efforts or species for which listing would provide limited conservation benefit within the foreseeable future will be placed in a lower priority category.  
  
B) Amend Section 4 of the Endangered Species Act to create a statutory exception for the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, "Services") to defer 12 month findings for a species under the ESA when: 1) a conservation plan is either being developed or implemented to meet the conservation needs of the species. In the case of species that range across multiple states, this refers to a plan in each state or a range-wide plan. The Services may renew the deferral every five years so long as they have worked with states to complete a determination that the conservation plan continues to meet the conservation needs of the species; 2) a delay will allow time to complete data collection or complete studies relating to the petitioned species; 3) species for which listing would provide limited conservation benefit within the foreseeable future.
2. Require the Secretary to make a determination on whether or not to designate critical habitat for a species. The Secretary shall designate critical habitat if he or she determines such a designation is necessary to recover the species. If the Secretary determines that such designation is not critical to recovery of the species, the Secretary may decline to designate critical habitat for a species. If the Secretary designates critical habitat, it must link such designation to recovery objectives and plans. For many species, recovery planning cannot occur until years after a listing, leaving a lot of time for critical habitat to be compromised in the meantime. When necessary, critical habitat should continue to be designated at the time of listing, and re-evaluated as part of the recovery planning process. The Secretary will retain current authority to permit exclusions from critical habitat designations for discrete purposes.
3. Upon listing, the Services will convene a recovery team within 12 months. States will have the option to lead and develop that team. The Recovery Team shall create a recovery plan, and lead its implementation. The recovery plan shall include criteria, that when met, would require the Recovery Team to recommend delisting or downlisting to

the Services. Whenever necessary, the recovery plan should be updated to include the best available science and strategies to address all recognized threats to recovering the species. Upon receipt of the recommendation to delist or downlist a species from the Recovery Team, the Service shall initiate a status review of the species for purposes of considering delisting or downlisting. Once the Services issue a delisting rule, they shall develop a post-delisting monitoring plan in a timely fashion, and judicial review of the delisting rule will be delayed until the completion of the post-delisting monitoring review period so long as a federally endorsed conservation plan is in place.

## **Regulatory/Administrative**

1. Examine the possibility of providing assurances on public land to minimize the disincentive to enrolling in Candidate Conservation Agreements with Assurances (CCAAs) for permitted public land users with operations spanning both federal and private land. Assurances provided may not come in the form of incidental take permit associated with CCAAs, but rather a suite of assurances such as increased AUMs or extended grazing lease renewal periods for operators providing conservation actions on public lands, providing the assurances would not compromise the intent of the CCAA to recover the species to the point that ESA listing is not necessary.
2. When a landowner implements conservation measures as a part of a federally endorsed conservation agreement, The Services may exclude private land covered under the agreement from any critical habitat designation. This authority currently exists under the ESA, but needs further clarification and guidance.
3. When making listing determinations, the Secretary must take into account conservation efforts to protect species, including efforts by states, federal agencies, and private landowners.
4. The Services should work with states to develop templates for voluntary conservation programs and conservation tools that are intended to incentivize voluntary conservation for a variety of species and habitats. These templates would provide a more streamlined process of implementing voluntary conservation programs for candidate and listed species.
5. Encourage the Service to develop Species Status Assessments to help inform a listing determination. If listing is deemed warranted, use this same assessment to inform development of a recovery plan blueprint so stakeholders are able to implement effective recovery actions prior to the release of a formal species recovery plan.
6. Given the Services' new policy of using Species Status Assessments (SSAs) as a routine part of listing and recovery decisions made under the ESA, recommend the Services promulgate regulations to ensure the SSAs serve their intended function of collecting



and analyzing foundational science on a species and updating that information promptly when new data or analysis becomes available. Give state wildlife agencies a leadership role on SSA teams commensurate with their position as the repository of the bulk of the data and expertise on many species. Most critically, provide an adequate internal appeals process for challenging the conclusions of an SSA, either to Ecological Services leadership or to the Regional Director, to ensure that a misguided determination does not become embedded in multiple future decisions about a species.

7. Develop a national policy for the implementation of 4(d) rules that details best practices and incentivizes strong local input.
8. Clarify or emphasize existing authority under the ESA for states to exercise concurrent jurisdiction with the Services to implement the ESA, including management of threatened species and issuance of Section 10 take permits, if states demonstrate a desire and capacity to do so.
9. If states decline to develop and lead a recovery team, as described in Statutory Recommendation #3, the Services shall still seek sufficient participation from states to assemble recovery teams. States maintain strong wildlife management expertise, relationships with their regulated communities, and are able to better identify those individuals and entities that can best contribute to the recovery planning process.
10. Establish an informative “playbook” to inform citizens on how to engage throughout various steps of the ESA process.
11. In the case of species which are listed as threatened or endangered where listing provides limited conservation benefit within the foreseeable future, concurrent with the listing, Services should issue a 4(d) rule that emphasizes regulatory flexibility. Services should also consider delaying critical habitat designations, as well as modify the way in which they conducts consultations.

## Funding

1. Pair economic incentives with critical habitat and priority conservation designations on private land and public land permitted users to alleviate the burden of critical habitat designations on private land while rewarding stewardship of quality habitat. Incorporate a scoring system – similar to, but not duplicative of, farm bill incentive scoring system – developed by stakeholders and including states, for private land conservation priority to assign varying economic incentives.
2. The Services’ budget should include specific line items directing funding to assist stakeholders interested in seeking assurance agreements and other voluntary conservation efforts.

3. The Services currently allocate very little of their recovery budget to delisting or downlisting recovered species, which causes species to remain listed as threatened or endangered longer than the ESA intends. Congress should allocate money to the Services through a specific line-item in their budgets to enable the Services to timely delist or downlist species.
  
4. Congress should allocate additional funding to the Services' to implement the ESA. Western Governors believe that adoption of these recommendations will improve the efficacy of the ESA, but recognize that the Services and states require adequate funding to ensure successful implementation of the Act. Governors will work with Congress to identify priorities for funding that will facilitate voluntary species conservation efforts and improve the efficacy of the ESA.