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Testimony on H.R. 424 "Grey Wolf State Management Act of 2017;"
H.R. 717 "Listing Reform Act;"
H.R. 1274 "State, Tribal, and Local Species Transparency and Recovery Act;"
H.R. 2603 "Saving America's Endangered Species Act;" and
H.R. 3131 "Endangered Species Litigation Reasonableness Act."
Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, DC 20515
July 19, 2017

I. Introduction

Thank you for the opportunity to testify on these important issues. Holsinger Law, LLC is a small, Denver-based law firm that specializes in lands, wildlife and water law. I am testifying as the manager and founder of Holsinger Law, LLC. In that capacity, I can attest to the impacts the Endangered Species Act ("ESA" or "the Act") has had on many of our clients, such as individual landowners, agricultural interests, water providers and energy producers.

According to the U.S. Fish and Wildlife Service's ("FWS") Environmental Conservation Online System, approximately 1,564 U.S. species have been listed under the ESA since the Act's passage in 1973 (and not counting those species listed under its predecessors). Only 23 domestic species have been delisted due to recovery. In other words, we can celebrate the recovery of only 1% of all domestic listed species in the U.S. The regulatory burdens of the ESA have been severe while its successes have been sparse.

In the 44 years since the ESA was passed, it has become increasingly apparent that, implementation is plagued with problems. Various listing decisions have proven: a clear lack of coordination with state and local governments; a failure to designate recovery goals within set timeframes; the failure to economically incentivize private conservation; and a tendency to allow sue-and-settle litigation, among other issues.

The Act is long overdue for amendment. The last time the ESA was substantively updated (1988), the Soviet Union was a superpower and Def Leppard topped the pop charts. Former Idaho Senator Dirk Kempthorne tried, but ultimately failed, to amend and reauthorize the ESA in 1997. I was intimately involved in those efforts as well as the amendments to the ESA that passed the House in October of 2005.

A FWS document, "[A] History of the Endangered Species Act of 1973" nicely summarizes amendments to the Act over the years. The most significant amendments were made in 1978. They allowed federal agencies to undertake actions jeopardizing listed species as long as such action was exempted by a Cabinet-level committee; required concurrent designation

of critical habitat with a species listing; directed that plans for conservation of fish, wildlife, and plants be developed; expanded land acquisition authority; and defined distinct population segments as limited to vertebrates.

The 1982 amendments required listing determinations to be made based solely on biological and trade information; instituted 12-month finding requirements; permitted designation of experimental populations; prohibited removal and possession of endangered plants from federal land; introduced habitat conservation plans that allowed for incidental take.

The 1988 amendments introduced monitoring of recovered and candidate species; expanded protections for listed plants; required public notice and comment on recovery plans and required expenditure reports for Section 6 funding.

Minor amendments for the Department of Defense were made in 2004 and 2009, but did not substantially affect the provisions of the original Act. Funding was authorized through Fiscal Year 1992. Since then, Congress has appropriated funding to continue ESA implementation.

a. The ESA versus Species Conservation

ESA listings often restrict the ability to manage for species and could even result in more harm than good. Inevitably, a listing or potential listing becomes a threat to landowners because of the inherent economic consequences. *See* Amara Brook, Michaela Zint, Raymond De Young, *Landowners' Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation,* 17 Conservation Biology 1473, 1638 (Dec. 2003) (Where an extensive survey of landowners showed many managed their land so as to avoid the presence of a listed species). This has even been found to facilitate development of private lands.

The listed red-cockaded woodpecker provides a good example. A single colony can cost up to $200,000 in foregone timber costs according to the Cato Institute. *See* Jonathan H. Adler (https://object.cato.org/sites/cato.org/files/serials/files/regulation/2007/12/v30n4-6.pdf). Many landowners managed their forest lands to avoid nesting of the species:

> [Ben] Cone of North Carolina managed 7,200 acres of timberland with 70-80 year harvest rotations, small cuts, and controlled burns, which . . . created habitat for the red-cockaded woodpecker. When the endangered woodpecker took up residence on Cone's land, more than 1,500 acres were placed under the control of the U.S. Fish and Wildlife Service (see Stroup 1997). In response, Cone began a harvest rotation of 40 years on the rest of his land in order to eliminate the mature pines favored by the woodpecker and also remove any possibility that the federal government would take control of his remaining land.
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> Ben Cone's experience is not an isolated incident, as a study by economists Dean Lueck and Jeffrey Michael (1999) confirms. Using data from hundreds of forest plots in North Carolina, they found that the more red-cockaded woodpeckers in the vicinity, the more likely the landowners were to harvest younger trees. . . . (Lueck and Michael 1999, 36). The landowners' incentive for using this shorter rotation was to ensure the birds did not

move onto their property, possibly leading to land-use restrictions. Clearly, the ESA is creating perverse incentives.

Holly Fretwell, *Forests: Do we get what we pay for?* Property and Environment Research Center. (January 1999), https://www.perc.org/articles/do-we-get-what-we-pay.

A similar study found that "land designated as critical habitat [for the cactus ferruginous pygmy owl] was, on average, developed one year earlier than equivalent parcels." Jonathan H. Adler, *Anti-Conservation Incentives*, Cato Institute. (Winter 2008).

According to Bureau of Land Management ("BLM") and U.S. Forest Service officials, the ESA creates " . . . a complex maze of processes and procedures, which field biologists and managers must attempt to negotiate on a daily basis in order to implement on-the-ground projects." USFS and BLM, *Improving the Efficiency and Effectiveness of the Endangered Species Act*, (Dec. 15, 2003). In regards to the peregrine falcon, leading experts concluded, "despite having the authority for implementing the ESA, and a number of their biologists contributing importantly to the recovery program, as an agency the FWS had a limited role, and its law enforcement division, which was in charge of issuing permits as well as enforcing regulation, was **regularly an obstacle to recovery actions**." (Burnham and Cade 2003) (emphasis added).

Because the regulatory straightjacket of the ESA creates a disincentive to landowners, listing often stands in the way of good conservation work. Even the FWS has expressed that it "supports voluntary conservation as the most effective method to protect species and their habitats." *See* 70 Fed. Reg. 2245. Further, FWS acknowledges "that listing may affect local planning efforts, due to its effect on voluntary conservation efforts." *Id.* at 2246.

Based on these and many other similar examples of the ESA's perverse incentives, it is clear the ESA penalizes the very stewards of the majority of habitat for listed species (private landowners). Providing compensation and incentives for landowners is essential for productive conservation.

b. Listing through Litigation

Currently, federal agencies are subject to statutory time frames for reviewing listing petitions and making determinations. Rather than guiding and expediting the listing process, however, these time frames instead become the tool of litigious activist groups seeking to push their own agendas while recovering litigation costs. In fact, these groups often cause the issues they subsequently litigate.

Over the past several years, a small cadre of environmental groups has buried the FWS with listing petitions under the ESA. WildEarth Guardians ("WEG"), the Center for Biological Diversity ("CBD"), and their like have a long history of filing both numerous and onerous listing petitions. For example, in 2007 WEG submitted two petitions seeking to list 475 Southwestern species and 206 species in the Mountain-Prairie Region. A 2013 petition sought to list 81 marine species. CBD petitioned to list 404 species in a single 2010 petition.

These massive and numerous petitions serve only to increase FWS's workload—and by extension, the time needed to review and subsequently make determinations. FWS has already struggled to carry out Section 4 directives. Environmental activist groups see this ensuing delay—brought about in part because of the extensive petitions they themselves have submitted—as an opportunity to litigate. In a February 8, 2016 article, Robert Jackson and John Eick for the American Legislative Exchange Council reported that sue-and-settle agreements had quintupled during the Obama administration compared to previous administrations. CBD and WEG are repeat offenders to say the least. They filed 117 and 55 lawsuits respectively between 2009 to 2012. Collectively, these two groups (and their predecessors in interest) have filed roughly 1,500 lawsuits since 1990.

The perverse incentives to litigate under the ESA must be removed.

c. Failure to Involve State and Local Governments and to Incorporate State and Local Input

While Section 4(b)(1)(A) requires the Secretary to take into account efforts by a state or its political subdivision to protect species or its habitat, as well as predator control, ESA listing decisions are frequently made without full cooperation of state and local governmental entities. As a result, listing decisions often fail to take into account the best sources of information on the species.

For example, the FWS cited "[I]nadequate" local, state, and federal regulatory mechanisms in its November 20, 2014 listing decision on Gunnison sage grouse ("GUSG"). In doing so, the agency ignored: rising population numbers; a rangewide conservation plan; local working groups and conservation plans; Candidate Conservation Agreements and scores of conservation easements. The State of Colorado estimates nearly $50 million in conservation efforts have gone towards GUSG conservation. Colorado, joined by Gunnison County and others, challenged the GUSG listing in federal court.

FWS has also refused to cooperate with states and local governments on its Mexican wolf recovery efforts. The State of New Mexico challenged the agency in federal court based on its refusal to work with the Fish and Game Commission on a state permit to reintroduce wolves. The district court ruled for New Mexico, but unfortunately the Tenth Circuit Court of Appeals overturned the decision. In another disappointing Tenth Circuit decision, the Court recently held the Commerce Clause authorized regulation of a listed species (Utah prairie dog) in a single state. Legislative updates to the ESA are sorely needed.

d. Best Available Science

Pursuant to Section 4(b)(1)(A) of the ESA, "The Secretary shall make determinations … solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species…." A determination must be based on proven data—not conjecture. Yet the very

definition of best available science has come under scrutiny in several recent cases due to the increasing use of speculative long-term climate change modeling.

The listing decision on greater sage-grouse provides another example. There, a single report (the USGS Monograph) was cited nearly 300 times. Unfortunately, the Monograph is highly flawed and fails basic standards of quality, objectivity and integrity.

Amendments to the ESA must ensure the agencies truly utilize the best available science.

II. The Western States Support Updates to the ESA

The Western Governors' Association ("WGA") has been actively seeking ESA reform for several years, and, to that end, launched the Western Governors' Species Conservation and Endangered Species Act Initiative. In its Policy Resolution 2017-11, WGA identified seven changes needed to improve the ESA:

1. Setting clear recovery goals for listed species and working actively to delist recovered species;
2. Increasing the regulatory flexibility of the Service to review and make decisions on listing petitions or to change a species' listing status;
3. Utilizing the cooperative efforts of Federal agencies and state governments and private landowners;
4. Using the best available science in listing decisions;
5. Ensuring funding and incentives for conservation;
6. Determining a set definition for the term "foreseeable future" (in particular relative to climate change); and
7. Permitting state and local governments to be full partners in agency decisions, as these entities are the best repositories of current available information and science regarding the wildlife within their borders.

a. Legislation would Redress Significant Flaws with the Act

H.R. 2603 ("Saving America's Endangered Species Act" or "SAVES Act") – seeking to amend the ESA to provide that non-native species in the U.S. shall not be treated as endangered species or threatened species for purposes of the Act.

H.R. 424 ("Gray Wolf State Management Act of 2017") – directing Secretary to reissue final rules published in 2011 and 2012 which removed the Western Great Lakes region and Wyoming gray wolf populations from the List of Endangered and Threatened Wildlife. Note: Bill provides that "such reissuance shall not be subject to judicial review."

> 76 Fed. Reg. 81666 (2011) – "removing the [Western Great Lakes Distinct Population Segment] from the List of Endangered and Threatened Wildlife. We are taking this action because the best available scientific and commercial information indicates that the [Western Great Lakes Distinct Population Segment] does not meet the definitions of threatened or endangered under the Act."

77 Fed. Reg. 55530 (2012) – "The best scientific and commercial data available indicate that gray wolves (*Canis lupus*) in Wyoming are recovered…. [We are] remov[ing] the gray wolf in Wyoming from the Federal List of Endangered and Threatened Wildlife….and remov[ing] the Yellowstone Experimental Population Area established in 1994 to facilitate reintroductions") relating to gray wolves in Western Great Lakes region and in Wyoming.

H.R. 717 ("Listing Reform Act") – amending ESA to require review of the economic cost of adding a species to the list of endangered species or threatened species. Furthermore, the ESA shall be amended to strike the Section 4(b)(3)(A) clause requiring the Secretary to make a finding within 90 days. This Bill also amends the ESA to permit prioritization review of listing petitions, amends the requirement to make a determination within 12 months to "as expeditiously as possible."

H.R. 2109 ("Endangered Species Litigation Reasonableness Act") – conforming citizen suits brought under the ESA to conform with other existing law. Namely, this amends Section 11(g)(4) to award costs of litigation not to "any party," but rather to "any prevailing party in accordance with section 2412 of title 28, United States Code [Equal Access to Justice Act]."

H.R. 1274 ("State, Tribal, and Local Species Transparency and Recovery Act") – requiring that all data upon which endangered and threatened listing decisions are based be made available to those States which are affected by those determination. Namely, this amends Section 6(a) in that such transparency of information is to be included in a federal agency's cooperation with the States. Furthermore, "best scientific and commercial data available" shall include "all such data submitted by a State, tribal or county government."

III. Other Needed Updates

a. Stifling Conservation Work

A common thread in dealing with these issues is the need to mitigate impacts for regulatory compliance. But, incredibly, agencies like the BLM are requiring permitting and red-tape even for projects that improve or enhance habitat. National Environmental Policy Act ("NEPA") compliance, along with the ESA, is stifling conservation work.

For listed species, activities that require federal permits, licenses or authorizations require consultation with the FWS under Section 7 of the ESA. This can result in significant delays and costly project modifications. For example, surveys may be required for some listed species that are not present for significant months out of the year. And existing federal permits, licenses or authorizations could be subject to reinitiation of consultation upon new listings or information. Finally, some actions on public or private lands could be construed to "take" listed species or their habitat under Section 9 of the ESA. Violations of the ESA are subject to substantial civil and criminal penalties.

b. Recovery Goals

Moving goalposts have become a hallmark of recovery goals. An example of a problematic listing and recovery process is that of the Mexican gray wolf. While the recovery process for this subspecies has similarly been characterized by lack of cooperation with state agencies, it is marked by a failure to rely on best available science and failure to set population benchmarks by which recovery success could be measured. In fact, while the Mexican gray wolf has been listed under the ESA since 1976, only as of the issuance of the June 30, 2017 Draft Revised Recovery Plan has FWS set recovery benchmarks to aid in determining when the subspecies will be eligible for delisting.

IV. Holsinger Law, LLC Litigation

I have been involved in approximately one dozen federal cases over the past 13 years on behalf of agriculture, counties, oil and gas, trade associations and other clients. Many of these were actions to intervene in litigation filed by environmental groups. Others were Freedom of Information Act ("FOIA") cases where agencies refused to divulge information that should have already been public. Recently, Holsinger Law, LLC represented four Colorado counties in challenging Obama Administration land use plan amendments on greater sage-grouse. Among other things, the counties allege state and local plans and conservation efforts were ignored in favor of eleventh-hour mandates from Washington, D.C.

V. Conclusion

The ESA must be amended to require definite recovery goals and examine the true cost of regulation under this powerful statute. Listing determinations should be prioritized with adequate time to solicit information from states and local governments to truly utilize the best available science. The perverse incentives for litigation must be removed. At the same time, efforts to incentivize private conservation should be maximized. Finally, decisions should be based primarily at the state and local government levels.

Now is hardly the time for "business as usual" under the ESA. Listings are frequently proving more harmful than beneficial to the listed species. Scarce resources are being wasted on litigation driven by a handful of activist groups with little or no real conservation benefits. While some activist groups have posited that Congress aims to weaken the ESA and strip protections, such statements could not be more disingenuous. The ESA is not a perfect law, and this fact has been borne out through the low rate of species recovery, the numerous highly-contested listing decisions, and the high costs of ESA litigation. Both people and wildlife would benefit from improvements to the ESA, NEPA and other federal laws. Congress and the Administration should be working to reduce frivolous litigation, streamline permitting to promote on-the-ground conservation efforts, alleviate economic burdens and promote jobs. Thank you again for the opportunity to testify.

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Kent Holsinger is the founder and managing partner of Holsinger Law, LLC. Kent has been recognized for his work on ESA issues by the Wall Street Journal, the Washington Times and

CNN.com, among many others. He currently represents a broad array of clients in complex ESA, NEPA, water and land use issues.