

Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue and Settle Practices.

House Committee on Natural Resources

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Mr. Chairman, Members of the Committee, my name is Steve Ferrell. I am a Policy Advisor to Governor Mead in Wyoming. My primary responsibility is wildlife and endangered species issues. It is an honor to offer you my thoughts on the topic of today's hearing and answer your questions. I intend to focus on state led conservation opportunities relative to the Endangered Species Act (ESA), offer suggestions for improving implementation of the ESA, and report on a promising ongoing effort regarding the topic.

States should be considered full and equal partners in implementing the ESA. Listing decisions under the ESA typically result in transferring the management jurisdiction for a species between state and federal authority. Full state involvement should be expected since the states either were the managers prior to the listing decision or will become the managers after the delisting decision. States are unquestionably qualified to be effective partners in the implementation of the ESA. States have extensive experience and expertise in science based wildlife management principles and the application of public policy in managing wildlife as a public asset. States are significantly affected by the ESA including their ability to develop and maintain their economies and natural resources. States should be afforded every opportunity to provide input to laws, regulations and policies in implementing the ESA.

To highlight this expertise, let me briefly describe two success stories in Wyoming.

Wolves in Wyoming

I am proud to say that wolves in Wyoming have exceeded their recovery goals for 11 consecutive years.

Wolves were likely eradicated from the lower 48 states by 1930. In 1974 gray wolves in the lower 48 states were listed as endangered. For the 50 years preceding 1986 there had been no detection of wolf reproduction in the U.S. portion of the Rocky Mountains. In 1986 a den was discovered near the Canadian border in Glacier National Park. In 1987 the wolf recovery plan for the Northern Rocky Mountain Region established a recovery goal of 300 wolves and 30 breeding pairs to be equally allocated among the states of Wyoming, Idaho and Montana. In 1995 and 1996 a total of 31 wolves were reintroduced to Yellowstone National Park. Three years later Yellowstone supported 112 wolves and 6 packs. In 2001, just 6 years after reintroduction, the wolf population in the Northern Rocky Mountains exceeded recovery goals.

By the end of 2013 the wolf population in Wyoming will have exceeded the numerical, distributional, and temporal recovery goals for 12 consecutive years. By anyone's standards that should be a success story. Yet today Wyoming remains embroiled in litigation contesting the delisting of wolves. Since delisting in Wyoming nine months ago, three separate lawsuits have been filed by a total of 14 organizations. Litigation has been a constant occurrence since the first delisting rule in 2008. At that time the wolf population in the Northern Rockies exceeded the recovery goal for total numbers by more than 5 times and for breeding pairs by more than 3 times. Wolves have been delisted in Wyoming twice since 2008 and both delisting decisions have been challenged in court.

In 2011 Wyoming began the process of revising its statutes, rules and management plan addressing wolves. Among other features our revised regulatory mechanisms commit to enhanced population goals, add protections to facilitate natural dispersal of wolves, delete features from previous regulations to improve certainty in protecting wolves, and commit to successful genetic interchange between wolf populations. The latter feature is unique to Wyoming's plan. It includes extensive genetic monitoring and commits to further plan revisions if state management is a factor in not meeting genetic connectivity goals. Wyoming's plan was twice subjected to peer review with favorable results. Wolves were removed from the protections of the ESA in September 2012.

The Sage-grouse Task Force

Wyoming is a recognized leader in sage-grouse conservation. In 2008 then-Governor Freudenthal issued an executive order establishing the core area strategy for sage-grouse conservation in the state. The U.S. Fish and Wildlife Service (the Service) endorsed the executive order as a sound framework for a policy to conserve sage-grouse populations and achieve the goal to preclude listing sage-grouse. In 2011 Governor Mead issued an updated version of the executive order which has been similarly endorsed by the Service.

In December 2011 Governor Mead and then-Secretary Salazar co-hosted a meeting in Cheyenne among the Governors' representatives of the 11 sage-grouse states and the executives of four federal agencies (the Service, the Bureau of Land Management, the Forest Service and the Natural Resources Conservation Service) to discuss a coordinated effort that might ensure sage-grouse would not require the protections of the ESA by 2015. The Sage-Grouse Task Force is a product of that meeting. Co-chaired by the Governors of Wyoming and Colorado, and the Director of the Bureau of Land Management (BLM), the Task Force is charged with developing a near-term comprehensive management plan with a primary focus on policy. The Task Force has served as a support group for state planning efforts across the species range to improve regulatory mechanisms. It also serves as a coordination forum for BLM and Forest Service sage-grouse planning efforts, and the remarkable achievements of the Natural Resource Conservation Service's (NRCS) Sage Grouse Initiative. The Task Force has investigated opportunities for

improvement in federal fire policy, invasive species policy, and state and privately led conservation efforts. The group is presently developing a list of metrics that best quantify the conservation value of management efforts and a database to document those efforts.

The Task Force represents a new model that is heralded by many as a unique approach to the range-wide conservation of a candidate species. The combined effort of the 11 sage-grouse states and four federal agencies with jurisdiction for sage-grouse is impressive. When these efforts are leveraged back at home with the contributions of industries, NGOs, and landowners the combined effort is staggering.

Time will tell if the efforts will be successful. For state and private contributors, success will be measured by the attainment of the goal – a “not warranted” finding for sage-grouse in 2015. States and industry need certainty that this model has a chance at succeeding to invest so heavily in it. If this effort fails to achieve its goal and sage-grouse are listed in spite of the range-wide conservation taking place, I wonder if this model will be attempted again. The amount of time and resources invested by Wyoming and other states on species conservation is tremendous, but our incentive to do so is harmed by the uncertainty created by an outdated ESA, and repeated litigation that places arbitrary deadlines on listing decisions. One thing is certain, the federal government absolutely needs the states’ active involvement in species conservation, but we are travelling a path that will eventually back states into a corner, and leave the federal government to fend for itself for a program that is already overwhelming.

Improving implementation of the ESA through Legislation.

The states recognize that comprehensive reform of the ESA is not a likely outcome in the near future. However, that does not mean that implementation of the ESA cannot be improved in ways that benefit species and people. Some updates to the ESA itself, agency practices, and other related laws ought to be addressed.

One of the most urgent needs is to make ESA-related decisions less susceptible to litigation. Changes to the ESA and the Equal Access to Justice Act would cause significant improvement in ESA implementation. For example, litigation appears to be a business model for some organizations today. Changing these laws to reduce the financial incentive to litigate would make the implementation of the ESA more efficient, and more transparent. States and other interested stakeholders need and deserve a seat at the table when it comes to ESA management. Litigation moves these decisions out of the public realm, and into the very private confines of a courtroom.

In Wyoming, reduced incentives to litigate would have addressed the ineffectiveness of implementing the ESA for wolves, grizzly bears, and others. Despite the amazing recovery success story for these animals, litigation continues and allows no finality in managing these

species. These subjects are repeatedly litigated and filed simultaneously in multiple jurisdictions making them very costly to defend.

The most active litigants (states and non-government organizations) have the resources to litigate without the financial incentives caused by awarding attorney fees to the prevailing party. Legislation that requires wealthy litigants to pay their own way would help limit the onslaught of litigation to only the most substantive and deserving cases where real harm to species is shown, not ones where the litigants merely disagree with the decisions of the Service.

Another example for improving ESA implementation would be requiring ESA litigation to be filed initially in the federal court of appeals in the circuit that is home to the Service's Regional Office that has primacy for the species in question. This would speed up litigation by removing the federal district courts from the process, reduce "forum shopping" by plaintiffs, and allow the decision to be made in the home circuit.

Increased scrutiny of the process and outcomes of litigation and the suggested changes to these laws would have a positive effect on the implementation of the ESA.

Opportunities for Policy Revisions.

There are several policy revisions that could improve the implementation of the ESA. Some of these may benefit from changes in the statute. Some may require new statutory authority to enable new policies or make them more defensible in litigation. Most would not require changes in statutes.

Recovery goals. Federal policy should require the identification of recovery goals in final rulemaking. The recovery criteria should include a clear description of the required population size, population trend, or other relevant criteria describing recovery. States should play an active role in developing the recovery goals.

Delegation of authority. Federal policy should enhance the delegation of authority for the management of listed species to willing state partners. There are several examples where states have voluntarily accepted this role. Shared authority could also be enhanced through formal agreements, which spell out a larger role for states in coordinating ESA implementation.

Peer Reviews. The ESA requires that the Service base decisions on the best science. Yet wildlife is regarded by the states as a public trust asset. Accordingly, states manage species under their jurisdiction with broad public participation, considering socio-economic objectives as well as the scientific principles of wildlife management. As such, wildlife management under state jurisdiction includes science and public policy. The Service has as a matter of policy made extensive use of scientific peer reviews in developing management plans. The agency's response

to these reviews can create unrealistic consequences. The states should be equal partners in designing peer reviews, selecting reviewers, choosing the scope of the review, and formulating a response. Reviews should be broadened to include public policy issues as well as scientific merit. This would result in management decisions that balance public policy needs with species recovery needs.

Define Significant Portion of the Range (SPR). It is important to recognize that regulatory mechanisms are the product of states and counties and may vary across jurisdictional boundaries. Favorable listing decisions, experimental, nonessential population designations and 4d rules have provided significant incentives for a regulatory jurisdiction to implement conservation measures.

A common argument in ESA litigation is that the inadequacy of existing regulatory mechanisms requires a listing or relisting. Some court cases have held that differing degrees of protection cannot be based on jurisdictional boundaries. In response to these cases, in 2011 the Service withdrew its existing policy interpreting the term “significant portion of the range” and published a new draft policy. The new draft eliminates several important incentives for the conservation of listed species. Listing decisions must be determined based on the collective effect of regulatory mechanisms across a species’ range. This diminishes the certainty for reward if a regulatory authority invests in conservation.

The draft SPR policy requires a species to be listed as endangered range-wide if conditions warrant endangered status in a significant portion of the range. This is true even if evidence simultaneously supports a determination that the species is **only threatened** throughout its entire range. Consequently, the draft prevents the use of conservation tools commonly used to recover threatened species such as experimental nonessential (10j) designations and special (4d) rules which cannot be applied to the recovery of endangered species.

The final policy interpreting SPR needs to preserve the rewards that states and counties currently realize for investing in conservation. Further, the final policy should not assign endangered status to portions of the range where the population is threatened so that conservation tools that are only available for managing threatened populations are not lost. If these provisions are not restored the conservation of imperiled species may be diminished.

Climate Change and Foreseeable Future. Climate change is increasingly cited as a factor in deciding to list species under the ESA. Status reviews use models to predict the effect of climate change on a species’ status. It is reasonable to expect that the accuracy of these models diminish the farther into the future that they are applied. There are examples where species are proposed for listing only because of long-term predictions made by climate change models. In these examples the species is currently considered robust in number and distribution and there are no other current threats that affect the species’ status well into the future. Listing these species

takes them from state trust status and places them in federal jurisdiction. This begs the questions of how far into the future predictive models should be applied beyond the listing decision, and how much consideration should be given to current conditions in making those decisions now? Is it reasonable to remove a species from state trust status 5, 10, 50 or 100 years prior to their status showing the predicted effect of climate change? Federal policy needs to define “foreseeable future” and develop criteria that consider the uncertainty of climate change models at various times into the future.

Thank you for the opportunity to share my thoughts on this important subject.