TESTIMONY OF DAN ASHE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE, REGARDING "TRANSPARENCY AND SOUND SCIENCE GONE EXTINCT?: THE IMPACTS OF THE OBAMA ADMINISTRATION'S CLOSED-DOOR SETTLEMENTS ON ENDANGERED SPECIES AND PEOPLE"

AUGUST 1, 2013

Good morning Chairman Hastings, Ranking Member DeFazio and Members of the Committee. I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service) at the Department of the Interior (Interior).

Mr. Chairman, I appreciate the opportunity to discuss the Service's administration of the Endangered Species Act (ESA), especially our experience with litigation and settlement agreements.

In the forty years since it was passed, the ESA has prevented the extinction of hundreds of species and promoted the recovery of many others, including gray wolves in the Northern Rocky Mountains and the Western Great Lakes, Aleutian Canada geese, and the Tennessee coneflower. This great conservation work has helped to achieve Congress's call to preserve the nation's natural resource heritage, and it has happened alongside robust and sustained economic development.

But, as witnesses at your last ESA hearing testified, increasing numbers of species are facing the threat of extinction. The petition process, deadlines, and citizen suit provisions of the ESA provide appropriate opportunity for parties to challenge the pace and priorities of the Service in administering our listing duties. This contributes to a seemingly unlimited workload with limited resources sometimes resulting in missed statutory deadlines for which we are often sued. Settlement agreements are often in the public's best interest because we have no effective legal defense to most deadline cases, and because settlement agreements facilitate issue resolution as a more expeditious and less costly alternative to litigation.

When we settle a deadline case, we agree on a schedule for taking an action that is already required by the ESA. We do not give away our discretion to decide the substantive outcome of those actions, and the notice and comment and other public participation provisions of the ESA and the Administrative Procedure Act still apply.

ESA Litigation History

As I testified in December 2011, the Service is an equal opportunity litigation target, challenged frequently by industry, environmental organizations, states, tribes, and individual citizens. ESA-related litigation, particularly regarding our responsibilities for reviewing petitions to list, making listing determinations, and designating critical habitat, is not a recent occurrence; such litigation has been a fact of life for the Service for nearly

twenty-five years. Most of that litigation has challenged the pace and priorities of the Service in addressing a backlog of listing actions.

The Service has faced a listing backlog from virtually the beginning of our implementation of the ESA. The 1973 Act directed the Smithsonian Institution to identify species of plants that might warrant listing, and their subsequent Report identified more than 3,000 at-risk plants. In the late 1970s and early 1980s, the Service spent considerable time and resources working through that initial backlog.

Amendments to the ESA enacted in 1978 required the Service to also designate critical habitat concurrent with listing. The slow pace of listing determinations at the beginning of the Reagan Administration led the Congress to amend the ESA again, and in the 1982 amendments to establish strict deadlines for making petition findings and shorten the time allowed between proposed and final rules from two years to one. And tight deadlines are appropriate, because for species facing the threat of extinction, time is the most critical ingredient in success.

By the early 1990s, the Service had determined that hundreds of species warranted consideration of listing and the protections of the ESA. Taking that action on these "candidates" for listing was precluded due to limitations on available Service resources and the need to act on higher priority ESA actions.

Based on the number of species on the candidate list, and a perception that the Service was not making progress on listing these species, in 1993 the Fund for Animals sued the Service for its failure to make expeditious progress in carrying out its listing duties. The Service settled this litigation at the end of the George H.W. Bush Administration, agreeing to make listing determinations for the 401 species then on the candidate list by September 30, 1996. While the Service concluded that the listing of some of these candidate species was not warranted, listing was warranted for many others. As a result, the Service listed more species from 1991 to 1995 than in the previous 17 years since the ESA's inception.

At that time, in an effort to align work effort and limited resources with the highest conservation priorities, the Service concluded that it was not prudent to designate critical habitat for many of those newly listed species. That led to more litigation challenging the failure to designate critical habitat, and the courts ultimately made it clear that our discretion not to designate critical habitat was very limited.

By late 2000, the Service was subject to so many court orders to designate critical habitat that it was unable to carry out any other listing activity. In order to restore some balance to the Service's listing activities, early in the George W. Bush Administration the Service and environmental plaintiffs entered into another comprehensive settlement agreement, called the "Mini-Global Settlement." The Service agreed to act on a list of petition findings, proposed rules, and emergency listing decisions. In return, the plaintiffs agreed to work with the Government to obtain modifications to court orders and settlement agreements in three cases to extend deadlines for critical habitat designations and dismiss

a fourth case.

By the late 2000s, the Service was facing a new wave of deadline litigation – this time focused on petition deadlines.

Between 1994 and 2006, the Service received, on average, 17 petitions covering 20 species per year. In contrast, between 2007 and 2010, the Service was petitioned to list over 1,000 species – more species than the Service has listed during the previous 30 years of administering the ESA. Three "mega-petitions" overwhelmed the listing capacity of the Service and led to missed deadlines for petition findings for many species. During 2009 and 2010, the Service faced more than 20 lawsuits in numerous district courts challenging missed deadlines for more than 100 species. The Department of Justice asked the Judicial Panel on Multidistrict Litigation to transfer 20 petition deadline cases from seven district courts and assign them to the U.S. District Court for the District of Columbia. After the Panel agreed to do so, the District Court consolidated all of the cases, and referred the consolidated case to the court's mediation process, and that mediation ultimately led to the 2011 Multidistrict Litigation (MDL) settlement agreements.

Settlement Agreement Benefits of the Multidistrict Litigation

The MDL settlements have accomplished our objectives of making our listing activities more certain and predictable, and allowing the Service to focus more of our limited resources on actions that provide the most conservation benefit to the species that are most in need of help. The MDL settlement committed the Service to make the listing determinations required by the ESA for 251 species on a workable and publicly available schedule. The settlements did not commit the Service to add these species to the list; rather, they committed the Service to make a determination by a date certain as to whether listing was still warranted and, if so, to publish a proposed rule to initiate the rulemaking process of adding a species to the list.

The MDL settlement agreement has served to reduce deadline litigation. Through the agreement, the plaintiffs have agreed to substantially limit or eliminate their deadline litigation. Again, this allows the Service to use our objective, biologically-based priority system to establish our work priorities, rather than have our priorities overridden by litigation seeking to advance plaintiffs' priorities.

Between 2008 and 2010, the Service was also engaged in litigation for missed deadlines on petition findings for approximately 895 species. Since the MDL agreements were approved and the Service made its workplan public, the Service has seen an almost 96 percent reduction in species subject to lawsuits filed for missed deadlines on petition findings.

To that end, last year a federal judge cited the MDL settlements as the sole basis for finding that the Service is making expeditious progress in upholding an FY 2015 date for a listing determination for greater sage-grouse. Rather than force the Service to make a

listing decision on a far more aggressive schedule sought by the plaintiff, this ruling in support of the MDL settlements is providing time for the Service and our partners to develop and implement conservation measures that work best for the species and local communities.

The MDL provides predictability for stakeholders and local communities. Prior to the settlement agreements, stakeholders were in limbo while species were on the candidate list, unsure when the Service might pursue a listing determination on a candidate species. The settlements have allowed the Service to establish and make available to the public a multi-year schedule for listing determinations on our candidate species. Stakeholders know in advance, in some cases years in advance, when we will be reviewing these candidates to determine whether a listing proposal is still warranted.

The MDL settlements have also served to encourage proactive conservation efforts by landowners, industry groups, local communities, and government agencies. For example, planning and implementation of conservation efforts is happening right now for the greater sage-grouse, a candidate species for which the Service has committed to make a listing determination by September 30, 2015. Sometimes proactive conservation efforts can make an ESA listing no longer necessary, as was the case with the dunes sagebrush lizard in Texas and New Mexico. With more certainty and predictability about when the Service will make listing decisions, Candidate Conservation Agreements with Assurances (CCAAs) can also be developed and permitted to provide regulatory assurances to participating landowners in the event that listing is still warranted. Conservation efforts developed by stakeholders may also be rolled into Habitat Conservation Plans that provide predictability and ESA compliance for landowners, industry groups, or local communities. A clear example of the compatibility of working landscapes and species conservation can be found in the Sentinel Landscapes partnership, a federal, local and private collaboration designed to preserve agricultural lands, assistant military readiness and restore and protect wildlife habitat. Through this initiative, the U.S. Department of Agriculture (USDA), Interior and the Department of Defense (DoD) will work together in overlapping priority areas near military installations to help farmers and ranchers make improvements to the land that benefit their operation, enhance wildlife habitat, and enable DoD's training missions to continue.

Improving Implementation of the ESA

The title of today's hearing insinuates that settlement agreements have somehow reduced the transparency and scientific integrity of the listing decisions the Service makes under the ESA. We strongly reject that notion. Any deadline settlement we enter into commits us only to undertake a process already required by the ESA by a date certain. We do not commit to a substantive outcome of any decision or give away any of our authority, responsibility, or discretion in making a decision. Our listing decisions are based upon the best available scientific information, and proposals to add a species to the list or to designate critical habitat are subject to independent scientific peer review and public notice and comment.

The ESA is a tool by which we conserve our nation's biological diversity. Like any tool, it can be improved, and we are working hard to make those improvements to increase transparency, predictability and certainty. And like any tradesman, we are occasionally imperfect in our use of this tool. However, we are committed to continually improving the ESA's implementation in close collaboration with our partners, and I believe we have an exceptional history of doing just that. In addition to the multi-year workplan for the Listing Program, the Service and the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) are working to improve implementation of the ESA by considering appropriate changes to our practices, guidance, policies, and regulations to enhance conservation of listed species. Our priority is to make implementation of the ESA simpler, less contentious, and more effective by ensuring that key operational aspects of the ESA are current, transparent, and results oriented.

To improve the efficiency and effectiveness of the ESA in conserving endangered and threatened species, the Service and NOAA are moving toward improving the implementation of the ESA to reduce burdens, redundancy, and conflict, and at the same time promote predictability, certainty, and innovation. This effort has been guided by the following objectives, which conform with the principles espoused in President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review" and the Service's vision for the Endangered and Threatened Species Program:

- Improving the effectiveness of the ESA to conserve imperiled species;
- Making administrative procedures as efficient as possible;
- Improving the clarity and consistency of our regulations through, among other things, the use of plain language and by providing more precise definitions of many of our key terms;
- Encouraging more effective conservation partnerships with other Federal agencies, the States, Tribes, conservation organizations, and private landowners;
- Encouraging innovation and cooperation in the implementation of the ESA; and
- Reducing the frequency and intensity of conflicts when possible.

The Service and NOAA Fisheries seek to be open and transparent in our efforts to improve ESA implementation through ESA regulatory reform and meet the goals of promoting public participation, promoting innovation, increasing flexibility where possible, ensuring scientific integrity, and continuing our analysis of existing rules as set forth in Executive Order 13563.

Conclusion

In closing, Mr. Chairman, America's fish, wildlife, and plant resources belong to us all, and ensuring the health of imperiled species is a shared responsibility. We are working to actively engage conservation partners and the public in the search for improved and innovative ways to conserve and recover imperiled species. I would like to emphasize the importance the Service places upon having a science-driven, transparent decision-making process in which the affected public can meaningfully participate.

The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.