"State and Local Efforts to Protect Species, Jobs, Property, and Multiple Use Amidst a New War on the West"

House Committee on Natural Resources

September 4, 2013

TESTIMONY OF ROB HENDRY

NATRONA COUNTY COMMISSIONER

Mr. Chairman, Representative Lummis and members of the Committee, I am Rob Hendry from Lysite, Wyoming. Thank you for the opportunity to present testimony on the critical issue of Endangered Species Act (ESA) reform. I am a Natrona County Commissioner. Together with my wife and two sons, we own and manage Clear Creek Cattle Company, our fourth-generation family ranch. I am the past president of the Wyoming Stock Growers Association and I currently serve on the Agriculture, State and Public Lands and Water Resources Committee of the Wyoming County Commissioners Association. WCCA represents the elected commissioners of Wyoming's twenty-three counties. WSGA has represented Wyoming's livestock industry since 1872. While the WCCA and the WSGA concur with these remarks, they are my own.

I wish to offer insight on two points: First, that the current implementation regime for the ESA creates too much uncertainty by way of its varied application, which creates headaches for the landowner while providing no sure foundation for the successful conservation of our nation's most vulnerable species; and second, while the ESA has been interpreted to ensure the preservation of species "whatever the costs," it does not necessarily mean that solutions cannot be obtained via a working collaboration between industry, environmental non-profit organizations, private landowners, the individual states, and the Fish & Wildlife Service (Service) to minimize those costs.

The State of Wyoming has over 50% of federal public land comingled with private lands. There are currently seventeen listed and candidate plant and animal species in Wyoming. As demonstrated by the attached maps (See Exhibit 1) for these species indicating the areas for which Section 7 consultation is required under the ESA, virtually every acre of our state is directly impacted by the ESA. These impacts include the economic impacts on Wyoming's key industries of energy, tourism, and agriculture; loss of revenues to state and local governments; and changes to the customs and culture of our citizens.

Although the ESA as adopted by Congress in 1973 explicitly precluded the consideration of economic criteria in species listing, Congress soon recognized the potentially devastating economic impacts and responded in 1978 with the provision under Section 4 that allows the Secretary to "take into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." While this was an important step, several challenges remain.

First, because the designation of critical habitat often occurs much later than the listing, significant economic impacts often occur prior to or absent the designation of critical habitat. Second, there is no well-developed nor widely-accepted toll for measuring the economic impacts to the private sector and to local governments. While the federal government's forthcoming rule regarding the simultaneous disposition of its economic analysis upon the designation of critical habitat is welcome, the absence of

factors in the proposed incremental analysis creates ambiguity where there is little room for it. Moreover, the absence of factors gives significant deference to the Secretary, which raises concerns that any economic analysis undertaken will be prejudiced by flavor of the day political machinations and not the kind of long-term strategic analysis required. Distinguished University of Wyoming Professor Jason Shogren noted this in a paper that he published on "Economics and the Endangered Species Act."

> "The best measure of economic loss is opportunity cost—the foregone opportunities due to restrictions on the use of property due to listings, designation of critical habitat, and recovery plans. Opportunity costs include the reduced economic profit from restricted or altered development projects including agriculture production, timber harvesting, minerals extraction, and recreation activities; wages lost by displaced workers who remain unemployed or who are re-employed at lower pay; lower consumer surplus due to higher process; and lower county property and severance tax revenue."

Professor Shogren focused on the lack of national data to measure the impact of the ESA on economic growth, as well as to measure direct private expenditures driven by the ESA.

I want to share with the Committee some of the financial impacts of the ESA on Wyoming agriculture. Too often an uninformed public assumes the economic impacts are limited to the costs of predation by large carnivore species including the grizzly bear and the currently delisted gray wolf. Reported losses of livestock in Wyoming to these two species in 2012 included approximately 1,000 head of cattle with a value of $742,000 and 1,500 head of sheep with a value of $273,000. While these numbers may seem relatively insignificant in relation to a $1 billion industry, it is important to recognize that these losses fall disproportionately on producers in those areas inhabited by these protected species. The impact of these species is even greater in other areas for which economic data is lacking. These include:

1. Direct impacts of grizzly bear and gray wolf activity on livestock weight gains;
2. Additional labor and equipment costs associated with livestock protection and predation deterrence;
3. Reductions and/or restrictions placed on public land grazing due to the presence of grizzly bears or gray wolves;
4. Compliance with food storage, carcass disposal and other regulatory burdens;
5. Difficulty of finding employees who are willing to tend livestock in grizzly bear occupied areas; and
6. Diminished value of grazing permits and private grazing lands in bear and wolf occupancy areas.

At the other end of the spectrum from the grizzly bear is the tiny but impactful Preble's Meadow Jumping Mouse found only in southeastern Wyoming and northern Colorado. This questionable subspecies, which has been delisted in Wyoming then relisted as a result of litigation, has burdened agriculture with:

1. Restricted ability to clean irrigation ditches;
2. Restrictions on changes in agricultural practices under the 4(d) rule;
3. Real time costs of continued participation in numerous public and industry meetings held to address mouse issues due to the fact that many of our agricultural producers do not have hired labor, and therefore time away from the farm/ranch directly impacts ranch work and profitability; and

4. Direct cost of ranchers who have employed biologists or environmental consultants to conduct studies to counter the evidence on habitat and mouse classification presented by the USFWS.

I merely offer the grizzly bear, gray wolf, and preble's jumping mouse as specific examples. Comparable costs to agricultural producers can be traced to many of the other listed animal species. For example, when aquatic species are listed, loss of, or restrictions upon, water rights can have a major impact on both the agricultural enterprise and on land values. Further, the listing of plant species often leads to reduced private land values and loss or reduction in public land grazing permits.

The response of federal land management agencies to the presence of listed or candidate species often goes far beyond the specific requirements of the ESA. Allow me to provide a very recent example. In 2012, the U. S. Forest Service initiated a Section 7 consultation with the Fish & Wildlife Service (Service) on livestock grazing on a complex of nine allotments on the Bridger-Teton National Forest. The outcome was a biological opinion that authorized the lethal removal of no more than three female grizzly bears over the next three grazing seasons. This summer the Wyoming Game and Fish, in consultation with the Service, removed two female bears that were habitual killers of cattle. Following removal of the second bear, the U.S. Forest Service advised the permittees that, if a third female grizzly was lethally removed, they would require that all livestock be removed from these allotments. While this threat has been withdrawn at this time, it is indicative of the pressure faced by Wyoming ranchers.

Let me now turn to one of the most challenging and costly impacts of the ESA to the ranching industry—incessant litigation. When I became President of the Wyoming Stock Growers Association in 1999, for example, one of my first actions was to establish a Litigation Fund. At that time, WSGA had served our industry for over 125 years without having to engage in litigation to protect our members' interests. Since 1999, however, WSGA has expended several hundred thousands of dollars in defending its members' private property rights and federal grazing permits from challenges by groups that believe environmentalism takes place in the courts, such as Centers for Biological Diversity and Western Watersheds Project, as opposed to groups who are interested in making meaningful impacts on the ground. Furthermore, these challenges are typically premised, in whole or in part, on purported threats to listed species.

The costs associated with litigation are not limited to the State and the associations I represent today alone. According to the Department of Justice, it spent more than $15 million on attorney fees for alleged violations of the ESA in just the past four years. Even more shocking is the following: In Fiscal Year 2011, the Service, spent over 75% of its $20.9 million listing and critical habitat budget responding to litigation alone. That leads me to question the underlying efficacy of the ESA in its current form. These precious resources should not be spent in the courts. This is money that could be spent on enhancing our land and wildlife habitat, instead of paying lawyers and clogging the court system.

Compounding the litigation issue is that the ESA lacks any certainty in its status review and the delisting processes. The result of these ambiguities is, again, litigation. The grizzly bear has been delisted and relisted due to litigation. The gray wolf was delisted, relisted, and is now threatened by litigation to relist again in Wyoming. The preble's jumping mouse was delisted, then relisted by way of litigation. The bottom line is that when the listing of an iconic species such as the Greater Sage Grouse is determined by the Service as not warranted, these groups just come back again through litigation until finally reaching their objective of securing a listing. A listing of the Greater Sage Grouse will cripple our state and local economies.

In the end, all of these potential economic pitfalls and encumbrances, in their aggregate, have a negative economic and cultural impact on Wyoming's counties. I can speak on behalf of all County Commissioners in Wyoming that no elected official wants to see the destruction of a species, especially

when practicable, workable alternatives are obtainable. Too often conservation and economic development are held to be mutually incompatible. Perhaps that is the flavor of the day in Washington, but in Wyoming we have proven time and again the effectiveness of collaboration to obtain real, workable solutions to the issue at hand. Whether it is Hydraulic Fracturing, Sage Grouse Core Area Development or Carbon Sequestration, Wyoming has continually demonstrated its willingness to take the lead and to work with myriad federal and state agencies, local government, as well as private parties to develop solutions that not only minimize detrimental impacts to our most vulnerable flora and fauna, but also encourage sustainable economic growth in Wyoming.

Essentially, the ESA can be compared to the ranch pickup that is forty years old. It still serves a very useful purpose, but badly needs a tune-up. I would like to offer a few thoughts as to where one might begin to reform the ESA in a meaningful manner

1. The first objective of the ESA should be to foster species management that avoids listing. There needs to be acknowledgment that this cannot be accomplished solely through federal regulation. It is best accomplished when landowners, industry, and state and local governments are motivated to proactively act to enhance a species and its habitat. I have found no better example of this than the leadership that Wyoming has exhibited in protecting and enhancing the sage grouse through its Core Area Development program;

2. It is often said that "The cost of filing a listing petition is no more than a 48 cent stamp." We believe that a listing petition should be required to include a reasonable amount of peer-reviewed science sufficient to support a claim that the subject of the petition is a distinct species or subspecies and a description of available scientific data on its current and historic range within North America. A listing petition should only be valid for a single species or subspecies and, in turn, a legal challenge to a 90-day or 12-month finding should be limited to that specific species or subspecies;

3. In reviewing and issuing a finding on a properly filed petition, the Service should be required by law to consult with state wildlife agencies operating within the current and historic range;

4. When the Service determines that a listing as threatened or endangered is warranted, the designation of critical habitat and the delineation of clear recovery criteria should be required to accompany the listing. The designation of critical habitat should include an analysis of the impact on other wildlife or plant species that may be affected;

5. A clear definition of "distinct population segment" should be established in legislation so that it is not subject to "redefinition" by subsequent solicitors as it has been in the past;

6. The role of the 4(d) rule should be expanded to assure that it will support reasonable "take" of species in the course of normal human economic activity;

7. When a species is listed with the establishment of clear recovery criteria, citizens should have the certainty of knowing that, when those criteria have been met, delisting will automatically occur; and

8. Finally, the opportunity for litigation that consumes limited the Service's human and financial resources while imposing huge, often immeasurable, costs on the private sector and the revenues of state and local governments must be stemmed.

In closing, let me again emphasize the real, often immeasurable social and economic impacts of the ESA on ranchers and local governments in a state such as Wyoming that is natural resource dependent for its economy and its culture. The energy industry, tourism industry and agricultural industry is the three legged stool that provides a robust and healthy economy. These industries provide good paying jobs for Wyoming citizens. They also help us pay our bills and put money in the bank for a "rainy day". As it is currently implemented, the ESA is too far reaching in its impacts on both the species it seeks to protect and the lives that it impacts to allow so many of these impacts to be left to the regulatory and judicial processes. After 40 years, the need for greater Congressional direction is abundantly clear and that should be that the conservation of species is necessarily best accomplished by those closest to the resource.

Thank you for the opportunity to appear before you today. I look forward to answering questions.

Rob Hendry
County Commissioner
Natrona County, Wyoming