

**WRITTEN STATEMENT
TESTIMONY OF**

ROBERT L. FISCHMAN

**BEFORE THE HOUSE COMMITTEE ON
NATURAL RESOURCES**

HEARING ON

**PROPOSED AMENDMENTS TO
THE ENDANGERED SPECIES ACT**

SEPTEMBER 9, 2014

My name is Robert L. Fischman. I am a Professor of Law at the Indiana University Maurer School of Law. I am also a member scholar of the Center for Progressive Reform. Thank you for inviting me to testify. I am testifying today on my own behalf; the views I express should not be attributed to any organization with which I am affiliated. A copy of my *curriculum vitae* is attached to this testimony as Appendix A. I also include a brief biographical paragraph in Appendix B. I have written about and taught the Endangered Species Act (ESA) for over two decades. My publications are listed in the *vitae*.

The statement that follows reflects my view that piecemeal fixes for particular species or projects will not improve the performance of federal agencies in meeting the objectives of the ESA. There are just too many individual issues and site-specific reforms, such as the carve-outs for certain water projects in H.R. 1927 and H.R. 4866's reversal of the lesser prairie chicken listing, which tend to skew priorities with temporary strategies. Piecemeal legislation and micro-management of agencies risk undermining this Congress' longstanding emphasis on science-based decisionmaking.

Instead, I propose more systematic reforms to make the aspirations of Congress in the ESA a reality. The ESA today is an indispensable tool of federal biodiversity conservation, but it can work better.

I. THE ENDANGERED SPECIES ACT SHOULD BE A LAST RESORT FOR CONSERVATION, NOT THE PRINCIPAL TOOL.

Though Congress intended the ESA to conserve “the ecosystems upon which” imperiled species depend,¹ the act almost exclusively focuses on preventing species from going extinct. By the time species are listed for protection under the ESA, populations are already so depleted that there remains little flexibility for further declines. The famous

¹ 16 U.S.C. § 1531(b).

inflexibility of the Act, to “halt and reverse the trend toward species extinction, whatever the cost,”² is borne of the emergency situation facing a species when it declines to the very brink of extinction. Isolated fragments of habitat, low genetic diversity, and precious few populations raise the costs of conservation and heighten the consequences of failure.

The most effective step Congress could take to improve the track record of the ESA and reduce conflicts about its application is to enact comprehensive biodiversity protection legislation. Most declining species in the United States are *not* on the brink of extinction. A conservation program for sustaining these species could succeed with much greater flexibility than the ESA. The ESA often demands modification of commercial activities because we do not take reasonable measures until species are at a relatively high risk of extinction. If we had a set of programs to slow unsustainable practices before biodiversity reached the point of potential collapse, then we would avoid many of the train wrecks that have tarnished the image of the ESA. It is a program of last resort, and we ought to rely less on the ESA and more on preventive biodiversity health initiatives to address ecological integrity.

For instance, it can be difficult to promote both economic development and species protection when very little habitat remains. The larger the area, the more feasible trade-offs become. Early planning, before every last scrap of habitat is needed for a species to cling to existence, enables more flexibility and can distribute the costs of species protection more evenly. Some candidate conservation agreements include this kind of flexible approach, but they tend to be developed when it is too late to realize their potential

² *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

because species populations are too small. We need legislative incentives to engage in such planning before a species is on the verge of listing.³

Preventive ecological health to avoid ESA listing also requires information. Without information about the location, vigor, trends, and needs of species, we have little hope of avoiding endangerment. Most species' range-wide status is not tracked by any agency, state or federal. Scientists are currently at work on a promising national conservation-support network.⁴ This is one model Congress could endorse, as it would establish the scientific data needed to support preventative ecological health.

II. THE ENDANGERED SPECIES ACT NEEDS MORE FUNDING FOR EFFECTIVE IMPLEMENTATION.

The ESA has never received adequate funding to fulfill its objectives, and recent budgets have intensified the problem. Much of the litigation that entangles the U.S. Fish and Wildlife Service (FWS) seeks to enforce clear statutory deadlines in cases where there is not much dispute over the meaning of the law. The listing agencies are simply unable to comply with the demands of the ESA because they do not possess the resources to keep pace with a flow of species declines that promises only to get worse. Limiting judicial review would not help the agencies meet their congressional mandates. The real solution is to give the agencies funding to carry out species listing, critical habitat designation, recovery planning, interagency coordination, and enforcement.

Funding implementation of the ESA *now* will be much cheaper than continuing on the current course of inadequate responses to the extinction crises. Unless we can *prevent*

³ Robert Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 Environmental L. 451 (2004).

⁴ Vicky J. Meretsky et al., *A State-Based National Network for Effective Wildlife Conservation*, BioScience 62:970-976 (2012).

further listings through conservation and address imperiled species needs for recovery *early*, we will experience more massive, expensive train wrecks like the disputes over the Columbia and San Joaquin Rivers. The states understand this and have made great strides in planning for preventive conservation. Congress should encourage states with more grants, as noted below. This is a classic case where an ounce of prevention is worth a pound of cure.

Habitat acquisition combats the leading cause of species imperilment, habitat loss,⁵ and has been a key element of federal efforts to prevent extinctions since the time of Congress' very first endangered species legislation in 1966.⁶ Unfortunately, the centerpiece for funding this tool, the Land and Water Conservation Fund, has been under-appropriated for many years. The account now accumulates about \$900 million annually, but appropriations from it have declined to under \$300 million annually. Of the total revenues accumulated in the fund for conservation purposes, Congress has spent less than half.⁷ Much of this money goes to states and enlists the power of cooperative federalism to promote species conservation. Congress should view such spending as an investment, because it reduces future recovery costs and burdens on businesses.

Federal funding can be used to conserve habitat with methods other than land acquisition. Another long-employed conservation tool is the appropriation of subsidies to encourage and compensate landowners for better management to protect species. Indeed many landowners expect compensation for foregone profits resulting from habitat

⁵ David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, *BioScience* 48:607-615 (1998).

⁶ Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926, 926-27.

⁷ Carol Hardy Vincent, *Land and Water Conservation Fund: Overview, Funding History, and Issues* (7-5700 RL33531) (2010).

protection. The farm bill programs provide some of this aid but are typically limited to agricultural land and are not sharply focused on biodiversity. Funding of incentive programs for habitat protection and enhancement could yield tremendous conservation dividends without enlarging the federal estate of public lands.

The ESA section 6 cooperative agreements to states and tribes could be significantly extended with infusions of funding. This would give greater control of priorities to states, which often feel pushed around by the priorities of federal agencies. In addition, all states have produced comprehensive wildlife action plans to protect biodiversity. Avoiding new ESA listings is a foundational purpose of each of these state plans, which Congress encouraged through a grant program contingent on federal approval of the plans. Instead of supporting H.R. 4256's singular mandate that federal agencies include states' counts of species in listing determinations, Congress should support the states' own wildlife action plans, which provide states with flexibility in setting priorities to avoid listings through programs of the states' own choosing. Federal grants to assist states in carrying out their plans amount to less than \$1 million/state/year and are decreasing over time. Funding the plans would require investments of \$ 9-26 million/state/year, a relatively small amount of money to head off much more expensive ESA challenges, where recovery costs are estimated to be many *billions* of dollars.⁸

While this committee does not directly control purse strings, it certainly can avoid making the situation worse. Requirements such as H.R. 4319's additional economic analyses and H.R. 4284's process involving "state protective actions" are problematic.

⁸ Vicky J. Meretsky et al., *A State-Based National Network for Effective Wildlife Conservation*, *BioScience* 62:970-976 (2012); Office of the Inspector General, U.S. Department of the Interior, Rep. No. 90-98, Audit Report: The Endangered Species Program 11 (1990).

Imposing new obligations on federal agencies to engage in more analyses will exacerbate problems, as foreseeable appropriations are likely to be inadequate to carry out the necessary research. New obligations will also increase law suits and implementation by consent decree.

III. CITIZEN SUITS PLAY AN IMPORTANT ROLE IN HOLDING AGENCIES ACCOUNTABLE TO THE REQUIREMENTS OF CONGRESS.

One understandable reaction to the frustration of litigation against the listing agencies, especially over violations of statutory deadlines, is to outlaw the lawsuits or make them difficult to file. However, that would remove an important control over agency overreach. Citizen suits play an essential role ESA implementation by keeping agencies focused on the commands of Congress and less distracted by the political demands of interest groups. As illustrated below, developers and other business groups actively employ the opportunity to hold the FWS to its legal mandates. Attorney's fees are generally available only to parties prevailing on the merits of law suits. That is a good incentive for citizens to bring to courts only meritorious claims of agency wrong-doing.

Courts defer to agency determinations under the "arbitrary and capricious" standard applicable to almost all ESA citizen suits. Therefore, plaintiffs can succeed on the merits only when the agency utterly fails to comply with the law. An agency decision must be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to [the constitution] . . . ; in excess of statutory jurisdiction, authority, or limitations . . . ; [or] without observance of procedure required by law . . ." in order for a court order a remand.⁹ In other words, a mere disagreement or difference of opinion is not enough to overturn an agency action or trigger attorney's fees. In a commonly cited

⁹ 5 U.S.C. § 706.

formulation, the Supreme Court stated that an agency action may be overturned under this standard if it:

has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁰

Establishing road-blocks to judicial review gives agencies license to consider factors unintended by Congress or to ignore considerations that Congress required to be part of a determination. For instance, the San Luis and Delta-Mendota Water Authority proved that the federal listing of the Sacramento splittail as a threatened species was arbitrary and capricious. The court agreed with the water provider that the FWS failed to rely on the best scientific data available, to relate the data to the listing, and to provide a written justification to the state agency opposing the listing.¹¹ The citizen suit forced the agency to follow Congress' criteria in making a listing decision for the fish, which the FWS removed from the list of species protected under the ESA.¹²

Settlements through consent decrees allow the federal government to avoid unnecessary litigation expenses when the outcome is clear that an agency will lose. By mandating that each affected state and county approve a consent decree prior to judicial approval, H.R. 1314 adopts a "tragedy of the anticommons"¹³ approach that will stifle the

¹⁰ Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

¹¹ San Luis & Delta-Mendota Water Auth. v. Badgley, 136 F. Supp. 2d 1136 (E.D. Cal. 2000).

¹² Notice of Remanded Determination of Status for the Sacramento splittail (1Pogonichthys macrolepidotus), 68 Fed. Reg. 55,140-01 (Sept. 22, 2003).

¹³ Michael Heller, *The Tragedy of the Anticommons*, 111 Harvard L. Rev. 621 (1998).

number ESA-related consent decrees by giving too many parties veto power to hold out for better outcomes. Such strategies that make settlement more difficult will increase litigation costs at a time when federal budgets are austere and will detract from the ability of agencies to effectively implement the ESA.

IV. CONCLUSION

The ESA works to prevent extinctions and employs sound science.¹⁴ But that is not enough to ensure national conservation goals or minimize the costs of species protection. To accomplish those objectives, we desperately need legislation to create programs that would promote the ecological health of the nation. The ESA is akin to a crowded hospital emergency room with a long wait. The most effective way of reforming the ESA is to provide treatments for species before their status is so dire. Programs like the state comprehensive wildlife action plans that head off more listings are a bargain compared to the emergency treatment under the ESA. Conservation success will require comprehensive legislative reform, more appropriations for the agencies charged with implementing the ESA, and vigilant citizens policing compliance with the act.

¹⁴ National Research Council, *Science and the Endangered Species Act* (1995); Mark W. Schwartz, *The Performance of the Endangered Species Act*, *Annual Review of Ecology, Evolution, and Systematics* 39:279-299 (2008).

**TESTIMONY OF
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APPENDIX A
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ACADEMIC & RESEARCH POSITIONS

Indiana University Maurer School of Law, Bloomington, Indiana (since 1992)
Professor (since 1999); Associate Professor (1992-1999) — teaching: Environmental Law,
Administrative Law, Public Natural Resources Law, Water Law, Wildlife Law,
Biodiversity Conservation Policy, and Advanced Seminar in Environmental Law.
Harry T. Ice Faculty Fellow (2010-14, 2007-08); Academic Fellow, Institute for Advanced Study
(2007); Poynter Center for the Study of Ethics and American Institutions Faculty Fellow
(2005-06); Ira C. Batman Faculty Fellow (2005-06); Louis F. Niezer Faculty Fellow
(2002-04).

Professor of Public and Environmental Affairs (adjunct) (since 2007).
Indiana University Teaching Excellence Recognition Award (1999).

Yale Law School, New Haven, Connecticut (2001)
Senior Research Scholar — sabbatical research

Lewis & Clark Northwestern School of Law, Portland, Oregon (Summer 2001)
Visiting Professor — taught: Environmental Law

Vermont Law School, South Royalton, Vermont (Fall 2000)
Visiting Professor — taught: Federal Natural Resources Law, Water Resources

University of Wyoming College of Law, Laramie, Wyoming (1991 - 1992)
Visiting Assistant Professor — taught: Water Pollution and Hazardous Waste, Indian Law,
Economics in Environmental Law.

Environmental Law Institute, Washington, D.C. (1988 - 1991)
Director, Natural Resources Program (1989 - 1991); Acting Director, Inter-American
Environmental Program (1990 - 1991); Staff Attorney (1988 - 1991).

EDUCATION

University of Michigan School of Law (J.D., 1987), Order of the Coif
Contributing Editor, Michigan Law Review. Note, *The BFOQ Defense in ADEA Suits: The Scope of "Duties of the Job"*, 85 MICH. L. REV. 330 (1986).
Belfield-Bates Fellow.

University of Michigan School of Natural Resources (M.S., 1987)
Master's Project: Protecting Biological Diversity in the North Woods.
Joseph L. Sax Award for outstanding scholarship and professional promise (first recipient).

Princeton University (A.B., 1984), *Summa Cum Laude* Geological and Geophysical Sciences
Sigma Xi Award for senior thesis: A Study of a Peralkaline Ash-Flow Sequence, *Gran Canaria*.

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Squillace).

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* *Learning from Conservation Planning for the U.S. National Wildlife Refuges*, CONSERVATION BIOLOGY (in press 2014) (with Vicky Meretsky). DOI: 10.1111/cobi.12292.

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REFEREE AND REVIEWER

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BioScience
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Island Press
John Simon Guggenheim Memorial Foundation
Journal of Fish and Wildlife Management
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Lexis/Nexis
Northwestern School of Law, Lewis & Clark College
Southern Illinois University at Carbondale School of Law
Stetson University College of Law
U.S. Environmental Protection Agency, Science to Achieve Results
University of Colorado Press
University of Colorado School of Law
University of Florida Levin College of Law
Vermont Law School
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MEMBERSHIPS

Board of Directors, Conservation Law Center, Inc. (2005 - present). Treasurer (2005-2012).
Member Scholar, Center for Progressive Reform (2008-present).
District of Columbia Bar (1990 - present).
State Bar of California (1988 - present) (inactive status since 1993).
Board of Governors, Univ. of Michigan Sch. of Natural Resources & Environment (1994-1997).
Sigma Xi (1984 - present).

**TESTIMONY OF
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Robert Fischman, Indiana University Maurer School of Law, is a professor at both the law school and the school of public and environmental affairs at Indiana University—Bloomington. Before joining the Indiana faculty in 1992, he taught at the University of Wyoming College of Law and served as Natural Resources Program Director and Staff Attorney at the Environmental Law Institute in Washington, D.C. He has taught in the environmental law programs at both Vermont Law School and Lewis and Clark School of Law. Professor Fischman has also been a senior research scholar at Yale Law School. His scholarship focuses on public land management, wildlife conservation, federalism, environmental impact analysis, adaptive management, and global climate change. Fischman’s books include *The National Wildlife Refuges: Coordinating a Conservation System through Law* and *Federal Public Land & Resources Law*. Professor Fischman received his J.D. and M.S. from the University of Michigan in 1987 and his A.B. from Princeton in 1984. He is a member scholar of the Center for Progressive Reform. Many of his recent journal articles are available for free viewing at: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=440223