



**Testimony of Ya-Wei Li
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**Before the Committee on Natural Resources
U.S. House of Representatives**

Legislative hearing on H.R. 1314, H.R. 1927, H.R. 4256, H.R. 4284, H.R. 4319, H.R. 4866

September 9, 2014

“When the last individual of a race of living things breathes no more, another heaven and another earth must pass before such a one can be again.” William Beebe (1906)

Mister Chairman and Members of the Committee:

Thank you for the invitation to testify today. I am Ya-Wei Li, the Director of Endangered Species Conservation at Defenders of Wildlife, an organization dedicated to protecting and restoring imperiled animals and plants in their natural communities. The Endangered Species Act (ESA) is central to that mission.

This hearing comes at an ironic time. It was one hundred years ago last Monday that a lone bird named Martha, the last passenger pigeon, died at the Cincinnati Zoo. It was a tragic end for what was once the most common bird in North America, numbering in the billions. American homesteaders reported seeing flocks so large they eclipsed the sun for hours, and so numerous they took three days to pass.

But in less than 50 years, unchecked expansion brought the bird from billions to none. It was America’s first famous extinction, and humans were responsible. We decimated the birds faster than they could reproduce. We lacked the knowledge to properly balance our needs with those of the passenger pigeon, to ensure economic growth while protecting our natural heritage.

But we learned from that hard and shameful lesson. We learned how we affect the natural world and to correct course if needed. Today, we can often diagnose species in decline before they pass the point of no return. We also have tools to head off extinction, tools that came too late for the passenger pigeon but not for the bald eagle, American alligator, peregrine falcon, and hundreds of other species that thrive today—tools like the Endangered Species Act.

The ESA, like the Clean Air Act and Clean Water Act, was not passed as part of some radical anti-development, anti-corporate agenda. It was passed by wide bipartisan majorities in Congress and signed into law by a Republican president as an expression of the quintessential American value that we protect what is ours. It was a statement that America's wildlife and natural heritage have value and should be protected for future generations, sentiments that are still echoed strongly in public opinion surveys today.

The six bills before us reject those values and do nothing to conserve imperiled species. They abolish protections for endangered wildlife and seriously obstruct recovery efforts. They sunset the protections of the ESA, as if the extinction crisis were over,¹ as if no more imperiled species needed further protection,² and as if we had learned nothing from the passenger pigeon. In reality, we need every tool under the ESA and every dollar we can muster to prevent more extinctions and recover more species. We need to promptly list species that warrant protection, safeguard their habitats, fund recovery efforts at meaningful levels, encourage landowners to voluntarily conserve species, and set strong recovery goals so that no species needs to revisit the ESA emergency room after it has been delisted. Regrettably, none of the bills embraces these common-sense strategies. And none aligns with the myriad of recommendations for improving ESA implementation from the National Academy of Sciences and the U.S. Government Accountability Office—even though Congress entrusts these entities with providing independent, nonpartisan advice. Instead, the bills reflect the recommendations from a report finalized in February by a partisan and self-appointed “ESA Working Group.” The recommendations threaten to radically alter the ESA for the worse, undercutting decades of conservation progress by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (Services) and their many partners. The bills do not reflect serious efforts to advance the ESA's goals of preventing extinctions and recovering species. Below are a few examples of the many problems with the bills.

H.R. 4256

This bill is poorly written, rife with ambiguity, and biologically indefensible. At one level, it seems to require the Services and state wildlife agencies to count every individual of a species before listing, downlisting, or delisting it. This mandate would be impossible to meet for many listed and candidate species because they are often extremely difficult to find and costly to count. Fish and aquatic invertebrate species would be particularly challenging because many are microscopic in their larval stage. Another major hurdle is that federal and state agencies generally need landowner consent to access private property, where many listed species live. Because of these obstacles, new listings, downlistings, and delistings would come to a halt. Extinctions would become ordinary, while recoveries extraordinary.

¹ Rodolfo Dirzo et al., *Defaunation in the Anthropocene*, 345 *Science* 401 (2014) (“We live amid a global wave of anthropogenically driven biodiversity loss: species and population extirpations and, critically, declines in local species abundance.”).

² David S. Wilcove & Lawrence L. Master, *How Many Endangered Species are There in the United States?*, 3 *Frontiers in Ecology & the Environment* 414 (2005) (“We review the best available data on the status of plants, animals, and fungi in the US and conclude that the actual number of known species threatened with extinction is at least ten times greater than the number protected under the Endangered Species Act (ESA).”).

The bill also seems to require the Services to count all individuals of a species in determining whether it has met recovery criteria. Individuals on unprotected lands must be counted, even in areas destined to be bulldozed in the future. This requirement would be disastrous for species like the Utah prairie dog, with less than four percent of individuals on protected lands and much of the remaining populations in areas facing growing pressure from agricultural and urban development. By prematurely delisting the prairie dog and many other species, the bill will reverse decades of recovery progress and leave the species at high risk of extinction.

H.R. 4866

H.R. 4866 contradicts nearly everything that science tells us about the lesser prairie chicken. As early as 1998, the Fish & Wildlife Service found that the bird met the ESA's definition of a threatened species. But without federal protections, the species continued to lose habitat and decline. The situation became so dire in 2008 that the agency escalated the bird's priority for ESA listing to 2 out of 12, a number reserved only for species facing threats that are both "imminent" and of a "high magnitude." The bird's population crashed again in 2012, this time by 50 percent. A few months ago, the Fish & Wildlife Service finally listed the bird as threatened.

Despite the overwhelming evidence that the lesser prairie chicken has slipped closer to extinction, H.R. 4866 reverses the agency's recent listing decision and suspends ESA protections for the species until 2020 or later. The bill gambles the bird's fate on the recently adopted Range-Wide Plan for the Lesser Prairie Chicken, which is unenforceable, unproven, and unable to stop the hemorrhaging. The plan does not require developers to avoid the most important habitats for the species or limit the amount of total habitat disturbed. It even allows permanent impacts from oil and gas development to be offset by short term mitigation measures, based on the theory that "unlike other grouse species, [lesser prairie chicken] appear to be adaptable to changing habitat conditions (i.e. structure, grass species composition etc.), which can be created in a relatively short time period (within 2-8 years)."³ The only citation for this "moving conservation concept" is a paper about a proposed mitigation system for the saiga antelope in Uzbekistan. To base a recovery strategy on the absurd notion that a prairie chicken is like a Uzbekistan antelope defies logic, but this is the flimsy biological foundation of H.R. 4866.

H.R. 1927

The ESA is often a scapegoat for an array of environmental problems, and H.R. 1927 is a classic example of that blame-shifting. California is in its third year of a historic drought that has diminished water supplies to farmers and cities across California, including in the San Joaquin Valley. Drought, not regulations, is the primary cause of those woes. The Director of the California Department of Water Resources has stated that "the great majority of water shortage this year is purely a basis of drought. It's not regulation."⁴ Even the State Water Contractors, an association of agencies that purchase water from the California State Water Project, recently acknowledged that ESA protections "have minimally affected water deliveries over the past six

³ Van Pelt et al., The Lesser Prairie-Chicken Range-wide Conservation Plan (Oct. 2013), pg. 93.

⁴ Alex Breitler, "It's not regulation," Environmental blog, Apr. 1, 2014, available at: <http://blogs.esanjoaquin.com/san-joaquin-river-delta/2014/04/01/its-not-regulation/>

months....”⁵ Unless the bill can summon rainfall, it will do nothing for farmers and more damage to California’s native fisheries, which support thousands of jobs in the state.

The “ESA Working Group” recently recommended legislation to “empower states” on ESA decisions. Ironically, H.R. 1927 does the exact opposite. It would preempt existing state and federal laws that regulate water diversions at the Bay-Delta estuary. The State of California, for example, could not protect its state-listed endangered species that inhabit the estuary. This year, water districts and conservation groups worked together to support a \$7.5 billion water bond recently approved by the state legislature, a measure to fund safe drinking water projects, new ground and surface water storage, watershed restoration, water conservation, and other real solutions to the water crisis. H.R. 1927 is a divisive measure that jeopardizes passage of the water bond at the upcoming November election. Similar House legislation such as H.R. 3964, which overrides environmental protections in current California state law, was opposed by the state’s governor, both senators, a majority of the state’s house of delegation, and dozens of citizen groups. The bill is foisting upon California what it clearly does not want. There is no “empowerment” here.

H.R. 1314

This bill undermines the efficient resolution of ESA listing and critical habitat disputes, delaying protections for species and wasting federal government resources. Any state or county could veto a proposed settlement to list a resident species or designate its critical habitat. There is no requirement to intervene in the lawsuit, consult with the litigants, or justify the veto. A county, at its whim, could derail a proposed settlement even if all plaintiffs and defendants agree to it. Because of this likelihood that a proposed settlement could fail for reasons beyond the control of the litigants, their incentive to settle is vastly diminished. Listing disputes that typically would have been resolved at the outset will now continue for months, if not years, draining government resources and delaying protections for imperiled plants and animals.

H.R. 4284

This bill creates a cynical detour around the protections of the ESA, sending species down a dead end road. It would allow the Services to decide whether to list a species based on vague and undefined State Protective Actions, instead of the ESA’s definitions of threatened and endangered. The Services could approve State Protective Actions as a substitute for listing, even if those actions are not enough to adequately conserve a species. For example, the Fish & Wildlife Service could conclude that a species no longer requires listing based on the unenforceable promise of landowners to restore the species’ habitat. The restoration need not have even occurred or proven effective for the species. The bill creates the illusion, but not the reality, of conservation.

The bill also sets the stage for returning primary management responsibility of listed species to states. Unfortunately, most states lack the resources and legal authority to adequately protect listed species. In general, their laws do not regulate habitat destruction that directly harms an

⁵ Doc. # 166, Motion for Leave to File a Reply in Support of Appellees Kern County Water Agency, Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California’s Petition for Rehearing En Banc, Case No. 11-15871, *San Luis & Delta Mendota Water Authority et al. v. Salazar*, Ninth Circuit Court of Appeals, June 23, 2014, at pp. 1-2.

endangered species and do not protect plants, which make up 56 percent of all U.S. listed species. Another shortfall is state spending on imperiled species, which is generally only a small fraction of what federal agencies spend. Further, Fish & Wildlife Service data from 2012 show that 13 states spent less than \$100,000 on endangered species conservation. Kansas, for example, reported spending only \$32,000. If states want to resume primary management responsibility for imperiled species, they should enact stronger laws and commit more resources to protect those species before they decline to the point of becoming threatened or endangered.

H.R. 4319

As with many of the bills being considered, H.R. 4319 overrides the Services' scientific judgment about how best to conserve listed species. It would require the Services to exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of inclusion—even if the exclusion would jeopardize the species' recovery. In no way does the bill help prevent extinctions or recover species. In fact, it contradicts the recommendations of the National Academy of Sciences:

Because habitat plays such an important biological role in endangered species survival, some core amount of essential habitat should be designated for protection at the time of listing a species as endangered as an emergency, stop-gap measure. As discussed below, it should be identified without reference to economic impact.⁶

The bill is nothing more than a concession to those who seek to develop or destroy endangered species habitat without having to consider how their actions affect the species.

The bill would also cripple the Services' conservation programs with the requirement to consider the economic effects of every critical habitat designation on land and property values, water and other public services, employment, and government revenue. The Services would need to increase their staff considerably to meet this obligation. Instead of spending their limited resource to recover species, the Services would use it complete analysis that does nothing for recovery. The tragic result is that critical habitat designations would slow to a crawl, especially because the Services already lack the resources to complete all listing and critical habitat decisions within the statutory deadlines.

What have we learned since 1914?

We could have saved the passenger pigeon with the Endangered Species Act and our current understanding of conservation biology. Yet the six bills rob us of these tools, as if we learned nothing from Martha's death. They override the scientific judgment of Services biologists on listings, critical habitat, consultations, and recovery planning. They prevent citizens from helping to enforce violations of the ESA. They even deny the lesser prairie chicken the protections for which it has waited 16 years. Perhaps most importantly, they eviscerate America's belief that our wildlife have value, that we must balance economic growth with the need to protect our natural heritage, and that we must never accept another tragedy like the one on September 1, 1914.

⁶ NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 7 (1995).