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Testimony for the Hearing Record of Dan Keppen, P.E.
On behalf of
Family Farm Alliance

Submitted to the United States House of Representatives
Committee on Natural Resources
Subcommittee on Water, Oceans and Wildlife

Legislative Hearing
September 24, 2019

Dear Chairman Huffman and Ranking Member McClintock:

On behalf of the Family Farm Alliance (Alliance), thank you for the opportunity to present testimony on the "Protect America's Wildlife and Fish in Need of Conservation Act of 2019" (H.R. 4348), a bill which would terminate certain rules issued by the Secretary of the Interior and Secretary of Commerce related to endangered and threatened species. While we do not focus on them here, we appreciate the Committee's focus on several other bills at today's hearing which address a variety of topics important to our membership. Some of these issues include wetlands conservation projects, fish conservation, wildlife refuges, and control of nutria.

About the Family Farm Alliance

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts, and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. We are committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental, and national security reasons – many of which are often overlooked in the context of other national policy decisions.

The federal government's significant presence in the West presents unique challenges for Alliance members. This is particularly true with respect to the reach of the federal Endangered Species Act (ESA). Implementation of the ESA impacts the management of land and water throughout the West. For example, federal water supplies that were originally developed by the Bureau of Reclamation (Reclamation) primarily to support new irrigation projects have, in recent years, been

targeted and redirected to other uses. The result is that these once-certain water supplies – one of the few certainties in Western irrigated agriculture – have now been added to the long list of existing "uncertainties." Farmers, ranchers, and rural communities from California's Central Valley, to the Columbia River Basin (IDAHO/WASHINGTON), to the Klamath Basin (CALIFORNIA/OREGON), to the Deschutes River (OREGON) have been impacted by these decisions.

Given the nature of water storage and delivery, our members are often directly impacted by the implementation of the ESA and other federal laws. A constant frustration our members experience is the lack of accountability for success or failure for the implementation of these federal laws. There is no empirical measure of the success or failure of mitigation measures (including reasonable and prudent alternatives) or the adjustment of those measures as a result. The ESA has at times been interpreted to empower federal agencies to take action intended to protect listed species without consideration of the societal costs of such action, even when it is not clear that the action taken will actually yield conservation benefits for the particular species. Thus, the Alliance supports the Trump Administration's recent efforts to reform the ESA and its implementing regulations to provide clearer direction to the agencies in applying and enforcing the law.

The Services' Proposed Regulations

The Interior Department's U.S. Fish and Wildlife Service (USFWS) and the Commerce Department's National Marine Fisheries Service (NMFS) - referred to here as "the Services" – in August jointly announced three final rules which revise regulations governing sections 4 and 7 of the ESA. The three rules were published in the Federal Register, and will take effect next month.

The strongest negative reaction to the Administration's announcement appeared to relate to the ESA's economic impacts. The new regulation allows the disclosure of negative economic impacts of listing decisions, without changing the rules that dictate whether and how these impacts are considered in the regulatory process. It is unclear why this is controversial. While listing decisions must be made based "solely on the basis of the best scientific and commercial data available," the ESA itself does not prohibit the presentation of information on economic and other impacts to the public, or decision makers, like Members of Congress. We believe this is a positive change.

Efforts to modernize implementation of this 1973 federal law is not going to subject noble creatures such as grizzly bears, sea otters and beluga whales to the activities of developers, agribusinesses and industrial corporations. Instead, the Services are simply updating implementation of the ESA to make it clearer and more consistent and to better work to address the conservation challenges of the 21st century. These rule changes are being finalized following a transparent public process, resulting in regulations that are clear and will be effective in advancing the goal of recovery for species.

Much of the media coverage has led with headlines touting how the Trump Administration is "weakening" the ESA, quoting long-time critics of efforts to modernize the Act. Some of the same

organizations critical of the new rules and supporting H.R. 4348 have an established track record for their consistent efforts to thwart the efforts of developers, farmers, ranchers and government agencies. They have done this through petitions to list more species to the ESA, create new ESA critical habitat for other plants and animals, and engage in a seemingly endless string of litigation aimed primarily at the agencies who regulate resource producers.

To be clear, not all l organizations should be lumped into the same category as the much smaller number of activist groups that rely on litigation to achieve their objectives. The Alliance has a proven track record of working with a growing number of constructive conservation organizations who want to collaborate and find mutually beneficial ways to improve the environment, protect Western irrigated agriculture, and keep farmers and ranchers in business. For example, we worked closely with a number of conservation groups as the Western Governors Association developed ESA principals and recommendations. Our coalition, which has been active for many years, is known as the Western Agriculture and Conservation Coalition (WACC). Our conservation partners in the WACC include representatives from EDF, Trout Unlimited, and The Nature Conservancy. The WACC is becoming increasingly effective on the narrow list of topics its members engage in, including the new farm bill, which includes several important provisions – many of them driven by the WACC – that will assist Western agricultural irrigators.

The WACC provides a core that can help policy makers and our collective members remember that the foundation for some true, collaborative solutions that are driven from the constructive "center". The WACC shared perspective on species conservation is rooted in our experience with practical, on-the-ground solutions that work well for ranchers, farmers, and other landowners, as well as for fish, wildlife and plants. Indeed, maintaining a mosaic of working farms and ranches along with lands managed for conservation purposes, represents the best opportunity for conserving the ecosystems upon which species depend so that species do not decline to the point where a listing under the ESA is warranted, and so that currently listed species can recover.

Unless the agricultural industry and conservation come together, the public policies and resource management strategies necessary to maintain a viable and sustainable rural West will be impossible to achieve. There will always be isolated instances of successful partnerships. But, these discrete examples of success will not suffice. The threats to a viable and sustainable rural West are numerous, complex, and variegated. A broad and authoritative voice like that of the WACC is needed to effectively address these threats with collaborative solutions.

The Alliance's Views on the Regulations

The Family Farm Alliance was one of a multitude of interests – including members of Congress, state, local and tribal governments and the public – that provided comments and input considered in the finalization of these regulations. Our 2018 comment letter provided detailed recommendations for the Services to help form the basis for solutions to meet the challenges our farmers and ranchers face. The letter was developed by a team of resources, law, and policy

experts familiar with Western water resource management and how this important function is impacted by implementation of federal laws and regulations.

Examples are presented below explaining why we are encouraged by the new rule changes.

Changes to Implementation of ESA Section 4

The USFWS proposes to revise the regulations that extend most of the prohibitions for activities involving endangered species to threatened species. The regulations will require the USFWS, pursuant to section 4(d) of the ESA, to determine whether protective regulations are appropriate for species that the USFWS determines to be threatened. The Alliance supports this provision for several reasons:

1. The plain language of the Act provides that section 9 take prohibitions only apply to threatened species if determined appropriate, based on a case-by-case review. The USFWS's current "blanket" rule – applying take prohibitions to all threatened species unless decided otherwise – is the inverse of the structure or logic of the ESA itself. The defect would be cured by this amendment. While a command-and-control regulatory approach may be necessary for species on the brink of extinction, such an approach should be employed sparingly, consistent with congressional intent and sound public policy.

2. The new rule will also eliminate an inconsistency between the regulations of USFWS and NMFS. Currently, NMFS's approach affords more flexibility – for species, agencies, and the regulated community – by allowing a case-by-case determination. There is only one ESA, and there is no reason that it should apply differently to one species as compared to another based merely on the agency with jurisdiction.

3. The new rule will help avoid unnecessarily harsh consequences and exposure to liability for the regulated community. Under the current rule, the listing of a species as threatened results in situations where producers and water users who have done nothing wrong can become subject to liability overnight (literally). Although USFWS does currently retain the ability to adopt case-specific rules that afford conditional liability protection, it is often impossible to do so in the time frame required for making a listing decision. Also, to the extent the USFWS determines that the take prohibition should apply to a threatened species, a well-designed, case-specific 4(d) rule providing conditional take protection will be a more efficient use of agency resources.

Overall, these changes will provide much needed clarifications, a more scientifically based determination, and a policy consistent with the ESA.

Changes to Implementation of ESA Section 7

The new rule would amend portions of regulations that implement section 7 of the ESA. We

believe these changes improve and clarify the interagency consultation processes and make them more efficient and consistent.

For example, the rule will add the phrase "as a whole" to the definition of "destruction or adverse modification" and removing unnecessary and confusing language. We support this proposal. As the Services explain, it is improper to assert that a species may already be "in a status of being 'in jeopardy,' 'in peril,' or 'jeopardized' by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for 'jeopardize the continued existence of' or 'destruction or adverse modification.'" Such a position is inconsistent with the plain language of the ESA, which requires a federal agency to insure that "any ***action*** authorized, funded, or carried out by such agency … is not likely to ***jeopardize*** the continued existence of" a listed species (emphasis added).

Congress knew full well that consultation would only occur with respect to species already listed as threatened or endangered and, therefore, already at some risk vis-à-vis their historical status. The notion that any incremental harm to such species attributable to a proposed federal action would jeopardize the species is anathema to the language and structure of the Act. Congress was clear that only a proposed action likely to jeopardize the continued existence of a species (i.e. that will lead to its extinction) should result in a jeopardy determination. In the same vein, an adverse modification determination should be reserved for those rare circumstances where harm to critical habitat is so extensive that it is likely to lead to the species' extinction.

Similarly, the Services rule includes applying "as a whole" in determining whether unoccupied habitat is "essential to the conservation of the species." This evaluation must now be based on the totality of the circumstances. This is only commonsense.

We hope these examples -which are just a sampling of why we are supportive of the Services' regulations - provides you with a better sense of how Western water managers view what impact the rules will actually have.

Conclusion

We all know of the difficulty in amending the ESA, a law which turns 50 in four years. However, there is considerable discretion in *how* the ESA is implemented. Given the significant scientific uncertainty with many listed species and the ecosystems in which they reside and the failure of the ESA regulators to look at the host of stressors affecting them to this point, the agencies needed to step back and rethink the consequences of their actions. Even though the ESA does not require the human consequences of their decisions to be considered, it does not prohibit such consideration. Understanding the impacts on people that come with ESA decisions is simply good public policy.

We understand and respect that there are many views on the ESA and its implementation. We also recognize there are divergent views on the need – or not – for change.

As outlined above, we believe modest changes to implementation of the Act are needed. The Services are taking a measured approach to assessing and making measured and reasonable regulatory changes to the implementation of the ESA , an approach we support.

Western irrigated agriculture is a strategic and irreplaceable national resource important to both our food security and our economy. It must be appreciated and protected by the federal government in the 21st Century. The regulations promulgated by the agencies are an important step in that direction.

Unfortunately, H.R. 4348 would undo a thoughtful effort that actually improves and modernizes implementation of the ESA, which will lead to improved recovery of all species as it was intended to protect.

Thank you for the opportunity to provide this testimony. We look forward to continuing to work with the Subcommittee on the many other water, conservation, and natural resources issues identified by the other bills discussed today in particular and broader relevant issues under the full committee's jurisdiction.

If you have any questions, please do not hesitate to contact me at 541-892-6244.

Sincerely,

Dan Keppen
Executive Director