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Testimony
Before the Subcommittee on Water, Wildlife and Fisheries
Committee on Natural Resources
United States House of Representatives

Legislative Hearing on H.R. 520
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Chairman Bentz and members of the Subcommittee, my name is Thomas Birmingham, and I am resident of Sacramento, California. In December 2022, I retired as the general manager of the Westlands Water District, a position I held for more than twenty-two years. At various times, I also served as general counsel for the District. Prior to my employment with Westlands I was in private law practice, with an emphasis on water law. I am honored to have been invited to testify at today's legislative hearing on H.R. 520, a bill that would amend the Endangered Species Act of 1973 to provide that artificially propagated individuals of a species of fish or wildlife shall be treated under that Act as equivalent to naturally propagated individuals.

I hope everyone would agree, the Endangered Species Act was enacted for laudable purposes including to protect and conserve endangered and threatened species and the ecosystems upon which they depend. Conflict over the Act primarily revolves around how the Act is implemented and how its implementation affects human activities, including water resources management, agricultural production, forestry management, energy development, and commercial and recreational fishing. These conflicts include how agencies responsible for implementing the Act treat artificially propagated animals.

Congress has already expressed its policy choice that artificial propagation of a species is a legitimate means by which an endangered or threatened species can be conserved. Indeed, section 3(3) of the Act defines the terms "conserve", "conserving", and "conservation" to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided in the Act are no longer necessary, including "propagation." 16 U.S.C. § 1532(3).

Experience has demonstrated that without artificial propagation, some species likely would have gone extinct. The most notable example is the California condor, which was listed in 1967 as endangered under the Endangered Species Preservation Act of 1966, the predecessor to the Endangered Species Act of 1973. According to the U.S. Fish and Wildlife Service ("FWS"), by 1982, only 22 condors survived in the wild, and in an effort to avoid extinction of the species, FWS began to capture the remaining wild condors. Five years later, all remaining wild condors were in captivity and a captive breeding program to save the species was undertaken. FWS reports that today, the total wild free-flying California condor population is more than 300 birds. https://fws.gov/program/california-condor-recovery.

Another species for which captive breeding, or artificial propagation, was a critical tool to avoid extinction is the Central Valley winter-run Chinook salmon. According to the FWS, drought in 2014 and 2015 killed nearly the entire in-river winter-run juvenile salmon population, which prompted FWS, along with the National Marine Fishery Service ("NMFS"), to reinitiate a captive broodstock program at the Livingston Stone National Fish Hatchery, part of the Coleman National Fish Hatchery Complex. In 2018 and 2019, that program released 220,000 and 185,000 juvenile winter-run Chinook salmon, respectively. https://www.fws.gov/story/2021-08/reclaiming-lost-population. With respect to this program, Maria Rea, then Assistant Regional Administrator for NOAA Fisheries' California Central Valley Office, stated "[t]hese fish continue to impress us with their resilience and their ability to survive if given the opportunity," and "[w]e

were fortunate to have the hatchery to help us save this species. . . ."
https://www.fisheries.noaa.gov/feature-story/endangered-winter-run-chinook-salmon-increase-millions-offspring-headed-sea.

I am confident that all the members of the Subcommittee are aware that most decisions made under the Act are made without regard to economic or other policy considerations. As the general manager of a public water agency in the San Joaquin Valley that is dependent on a federal reclamation project for its water supply, I witnessed the socioeconomic impacts of water supply reductions resulting from futile attempts over decades to protect from extinction the Delta smelt. It now appears that the only hope to conserve this species is artificial propagation, which is now being undertaken by the FWS, in cooperation with the California Department of Fish and Wildlife.

But how artificially propagated fish are treated under the Endangered Species Act varies from species to species. For instances, spring-run Chinook salmon from the Feather River Hatchery Spring-run Chinook Program are treated as part of the Central Valley spring-run Evolutionary Significant Unit ("ESU"), but fish from numerous hatcheries are excluded from Lower Columbia River Chinook salmon ESU. 50 CFR § 223.102. The determination of whether to treat hatchery fish the same under that Act as naturally propagated fish is based on numerous policy considerations set forth in a rule published by NMFS entitled "Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead." 70 Fed. Reg. 37204.

This Policy on the Consideration of Hatchery-Origin Fish was developed after the Court's decision in *Alsea Valley Alliance v. Evans*, 161 F. Supp.2d 1154 (D. Or. 2001), appeal dismissed, which set aside NMFS's 1998 listing of Oregon Coast coho salmon because it impermissibly excluded hatchery fish from the ESU listing. Prior to the Court's decision in *Alsea Valley Alliance*, NMFS recognized that artificial propagation could be used as a conservation tool and had the potential to help speed recovery of natural populations, but NMFS did not explicitly consider the contribution of hatchery fish to the overall viability of an ESU, or whether the presence of hatchery fish within the ESU might have the potential for reducing the risk of extinction of the ESU or the likelihood that the ESU would become endangered in the foreseeable future. 70 Fed. Reg. 37205.

The Policy on the Consideration of Hatchery-Origin Fish was intended to provide policy guidance to NMFS personnel for considering how hatchery-origin fish would be treated under the Endangered Species Act. And despite including artificially propagated fish within an ESU listing, conservation and recovery efforts are often almost exclusively focused on naturally propagated individuals.

The enactment of H.R. 520 would represent a congressional determination that such policy choices should be made by Congress, rather than an administrative agency. Moreover, this policy choice has the potential to facilitate the conservation and recovery of listed species, while providing balance to avoid often draconian impacts resulting from implementation of the Endangered Species Act. I would welcome any questions from members of the Subcommittee.