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U.S. House of Representatives
Committee on Natural Resources
Subcommittee on Water, Wildlife and Fisheries
Washington, DC 20515
Via email: Lindsay.walton@mail.house.gov

Chairman Bentz and Members of the Subcommittee,

Thank you for the opportunity to testify on July 9, 2024 regarding the importance of federal protection for imperiled wildlife and the dangers posed by Rep. Westerman's discussion draft, the "ESA Amendments Act of 2024," which would eviscerate the Endangered Species Act and harm struggling species and their habitat.

I also appreciate Rep. Grijalva's written questions regarding the proposed Water Rights Protection Act, H.R. 7544. Defenders of Wildlife strongly opposes H.R. 7544, which would inhibit the ability of the federal government to protect public federal lands by ensuring that there is water available to support vibrant and healthy ecosystems and ensure recreational opportunities for all. In addition, the bill creates cumbersome roadblocks for federal agencies seeking to protect species and landscapes by making formal assertion of federal reserved water rights the sole means of requiring basic protections or mitigation measures for a wide variety of federal land management actions, including all permits and rights-of-way.

With respect to Rep. Grijalva's specific questions, on behalf of Defenders of Wildlife I submit the following responses:

a. **In your opinion, what is the role of the federal government in addressing environmental concerns and climate change?**

The federal government plays the primary role in addressing environmental concerns, and it must continue to do so. Indeed, without strong federal

government involvement, these broad collective challenges cannot be solved. To illustrate this, I will address in turn the importance of federal action on each of the "twin crises" of our age—(1) the rapid loss of species and (2) accelerating climate change.

First, the federal government and federal law are the last refuge of wildlife facing extinction. States generally manage species that are not at risk of going extinct, but if after decades of state management species continue to decline, it is vital that the federal Endangered Species Act serve as a backstop to prevent species from disappearing forever. The federal wildlife agencies are the experts who are responsible for our national commitment to preventing extinction. In addition, numerous federal agencies play a vital role in protecting wildlife on federal lands—including the National Park Service, Fish and Wildlife Service, Forest Service, Department of Defense, Bureau of Land Management, and more. These agencies' actions can ensure that federal lands provide a refuge for wildlife, providing them room to roam and creating opportunities for Americans to visit wild places and marvel at our collective natural heritage.

A National Biodiversity Strategy would be the most effective way to ensure a coordinated and comprehensive national response to the extinction crisis. Such a strategy would knit together all federal agencies' authority to create a blueprint for effectively tackling the challenge. The strategy would provide each agency an opportunity to plan for addressing drivers of biodiversity loss, securing and restoring ecosystem services, promoting social equity and justice, and reestablishing our nation as a global leader in biodiversity conservation. A National Biodiversity Strategy also would situate the protection of biodiversity alongside other important national goals and would provide an opportunity to better harmonize approaches across agencies and sectors.

Second, like biodiversity loss climate change is a broad and collective problem that cannot be solved by individuals or private businesses alone. The release of global warming gases does not respect state borders—instead, when we burn fossil fuels the effects are felt in the troposphere that surrounds our entire nation and world. This warms the entire planet. In addition, climate change is already shifting ecosystems and impacting every system on our

planet, including humans, wildlife, water and agriculture. For example, in North America, nearly half of species are already undergoing local extinctions, which are partially due to spatially variable changes in temperature and precipitation.[1] Given the scale of the problem, the most effective solutions are those that can be implemented broadly. In the United States, that means the federal government must be the leader in addressing this challenge by lowering emissions, supporting nature-based climate solutions, and implementing effective climate adaptation strategies for wildlife and people.

As we face the twin crises of extinction and climate change, we are all in this together. We should work as a nation, led by our national government, to face these collective challenges head-on.

b. Do you believe that the federal government should have the ability to manage water resources for the protection of resources on our public lands for the benefit of all Americans?

Yes. The federal government already has this ability and must retain it.

It is impossible for the federal government to administer federal lands that benefit all Americans without the ability to manage water resources. This is especially true in the arid West, where some lands do not support life unless water is available. For that reason, the Supreme Court has long recognized that lands reserved for the federal government include the underlying water rights needed to administer the land for its intended purpose.

Critically, this means that tribal reservation lands include the underlying water rights needed to make the land inhabitable and suitable for cultivation. In the foundational case of *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court recognized this basic but critical reality, holding that a claim to water is reserved alongside the reservation of tribal land. Otherwise, the full use of reservation land would be significantly impaired.

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[1] *See* Wiens 2016, https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.2001104; Román-Palacios and Wiens 2020, https://www.sciencedaily.com/releases/2020/02/200212150146.htm.

Other federal lands likewise must include sufficient underlying water rights to fulfill the intended federal purpose. For example, in *Cappaert v. United States*, 426 U.S. 128, 139 (1976), the Supreme Court held that a private water rights seeker could not pump water in a way that would harm Devil's Hole cavern, in Death Valley National Monument, and the desert pupfish, an imperiled species dwelling in the cavern. Federal reserved water rights have been affirmed by the courts repeatedly over the years. *E.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1079 (2019) ("When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.") (cleaned up).

In addition to the federal law that allows agencies to assert reserved water rights, a wide variety of federal land management statutes charge agencies with safeguarding ecosystems in a way that requires water. For example, the national forests under the jurisdiction of the Forest Service "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. In the arid west, none of these purposes can be fulfilled without water available—for example, recreationalists often wish to explore verdant forests, and wildlife depend on streams and other water sources for survival. The Federal Lands Management and Policy Act, which guides management of lands under Bureau of Land Management (BLM) jurisdiction, likewise contains a "multiple-use" mandate to manage for wildlife, recreation, and similar values, not just extractive uses. 43 U.S.C. § 1701. And the Organic Act for the National Park Service directs that agency to manage parks "to conserve the scenery, natural and historic objects, and wildlife in the [parks] and to provide for the enjoyment of the scenery, natural and historic objects, and wildlife in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). Virtually all of these values—beautiful landscapes, abundant wildlife, and long-term ecosystem health—depend on water.

Healthy federal lands are critical for imperiled wildlife and important to all Americans. Federal lands belong to all Americans—and visiting them is wildly popular. Iconic national parks like Yellowstone and Grand Canyon provide the

family vacation of a lifetime for millions each year.[2] And there are so many other federal lands to enjoy—not just national parks, but wilderness areas, national wildlife refuges, national seashores, national forests, and more. Making sure that agencies can provide water for these lands keeps them verdant and replete with wildlife for all to enjoy.

Federal water rights are also a critical part of ensuring that federal tribes continue to enjoy the right to keep tribal lands available for cultivation, development, or preservation according to the values of individual tribes. Federal reserved water rights protect this basic, obvious, and essential right.

c. **If state law was the only consideration in terms of allocating and regulating water rights, do you believe that fish and wildlife have the necessary protections to sustain populations and habitat?**

No. State law does not ensure that the fish and wildlife that inhabit federal lands have adequate water to meet their needs.

Most western states apply the doctrine of "prior appropriations" to allocate water rights; this doctrine is often summarized as "first in time, first in right." In other words, under the doctrine of prior appropriations, "a person acquires an enforceable water right to use water only upon actually diverting the water from its natural source and applying it to a beneficial use."[3]

However, as the *Cappaert* case illustrates, exclusive reliance on state water law can expose special places and wildlife to serious harm, since the prior appropriations system may not adequately account for instream flows needed to sustain ecosystems and wildlife. Even where available, instream flows are generally still subject to the "first in time" priority system. (This may

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[2] The Park Service tallies over 300 million visitors to all national parks last year. https://www.nps.gov/aboutus/visitation-numbers.htm

[3] Reid Peyton Chambers & John E. Echohawk, *Implementing Winters Doctrine Indian Reserved Water Rights: Producing Indian Water & Economic Development Without Injuring Non-Indian Water Users?* (1991) at p. 3, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1081&context=books_reports_studies&httpsredir=1&referer=.

not be true in all states, but is generally true of states in the west that organize water rights using prior appropriations.)

Cappaert involved an underground pool—a unique remnant of a prehistoric chain of lakes that was home to "a peculiar race of desert fish" found only in such settings and nowhere else in the world. 426 U.S. at 132. This "peculiar" fish is the desert pupfish, a federally listed endangered species. The pool that the fish called home was part of Death Valley National Monument. The owners of a nearby ranch applied for state permits to pump additional water for their operations in a manner that would have lowered the level of the underground pool and harmed the monument and the fish. The Nevada State Engineer, ruling on the water application, found "that there was no recorded federal water right with respect to Devil's Hole"—which would have allowed the pumping to go forward. It was only the protests of the National Park Service, ultimately upheld by the Supreme Court, that led to recognition of the Park Service's reserved water right protecting the pool and its wildlife.

This issue has recurred over past decades, including in Rocky Mountain National Park, Dinosaur National Monument, and Yellowstone National Park, where reserved water rights are essential to protecting in-stream flows that benefit wildlife.[4] To this day, reserved water rights continue to be asserted for the protection of a broad variety of parks and preserves. For example, earlier this year the U.S. Fish and Wildlife Service underscored that proposed mining near the Okefenokee National Wildlife Refuge—a vibrant wilderness in southeast Georgia—must take into account federal reserved water rights "to ensure the long-term health and viability of the Okefenokee wetland ecosystem."[5]

Stripping federal authority over water would place wildlife at serious risk. Federal lands provide large swaths of wildlife habitat. Increasingly, this "room to roam" is a special feature of federal land, as other lands are converted and

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[4] John R. Little, Jr. and Ralph O. Canaday, U.*S. Dept. of the Interior Office of the Solicitor, Reserved Water Rights and the National Park Service, the Present Status and Future Problems*, at pp. 66-68, https://npshistory.com/publications/water/reserved-water-rights.pdf.
[5] https://defenders.org/blog/2024/04/fish-and-wildlife-service-raises-shield-okefenokee-setting-stage-permanent-protections

developed. BLM, for example, "manages more fish, wildlife and plant habitat than any other federal or state agency in the country; more than 3,000 species of wildlife live on BLM-managed public lands."[6] It is essential to continue federal agencies' ability to manage water for the benefit of these species, not to mention to provide for recreation and fulfill their other responsibilities under applicable law (discussed in the response to the preceding question).

Moreover, many states do not place adequate restrictions, or any restrictions at all, on groundwater withdrawals. This is a serious problem for biodiversity and wildlife as well. The Edwards Aquifer in south-central Texas is one example. This massive underground water system supports an extraordinary array of species and ecosystems, including fish and salamanders that do not occur elsewhere.[7] As federal agencies have pointed out, a primary threat to these species is over-pumping of groundwater without adequate restrictions under state law, which has increased steadily over the years.[8] (For decades, this occurred with no restrictions at all, although major land subsidence and the threat of ecosystem collapse have led to some additional restrictions more recently.[9])

As an additional complication to exclusive reliance on state water law, states have not always supported tribal water rights. As one recent news article describes, decades ago "[s]tates successfully opposed most tribes' attempts to have their water rights recognized through the landmark case [of *Arizona v. California*], and tribes have spent the decades that followed fighting to get what's owed to them under a 1908 Supreme Court ruling [*Winters*] and long-standing treaties."[10] Tribes have had to depend on the U.S. Department of

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[6] https://www.blm.gov/programs/fish-and-wildlife.

[7] https://ecos.fws.gov/docs/recovery_plan/960214.pdf

[8] *Id.* at 16-18.

[9] *E.g.*, https://docs.gato.txst.edu/137507/Raiders%20of%20the%20Lost%20Aquifer.pdf, at pp. 269-270.

[10] Mark Olalde & Anna V. Smith, Pro Publica, *Western States Opposed Tribes' Access to the Colorado River 70 Years Ago. History Is Repeating Itself*, https://www.propublica.org/article/states-tribes-water-rights-history-repeating-itself.

Justice to defend their interests in water, making federal water management incredibly important.

d. How would H.R. 7544 limit federal agencies from ensuring the management of our nation's water resources contain reasonable safeguards to protect fish, wildlife, and recreational benefits?

H.R. 7544 threatens to erode the ability of federal agencies to safeguard fish, wildlife, and recreation on federal lands. In addition, broad and ambiguous provisions in the bill pose a far broader threat to federal authority, raising an unacceptable risk of kneecapping the federal land agencies charged with conserving America's lands and wildlife.

The bill provides that a broad swath of federal actions—including all permits or rights-of-way, as well as many other federal actions—must be "consistent with, and impose[] no greater restriction or regulatory requirement, than applicable State water law." This provision would harm federal land management in several harmful ways.

First, the provision could preclude federal agencies from asserting federal reserved water rights while considering permits to conduct activities on federal lands—even if the proposed activities would dry up beloved federal lands or leave wildlife without adequate water. It is true that the bill contains a savings clause providing that "Nothing in this Act limits or expands any existing or future reserved water rights of the Federal Government on land administered by the Secretary [of Interior or Agriculture]." However, the savings clause may not be adequate to ensure that federal reserved water rights are asserted in a uniform and effective manner. By setting state water law as the standard for all permitting, with an exception only for reserved water rights, the bill could lead to a need for a formal assertion of water rights for otherwise simple decisions on permits or land use approvals—which at the very least could be cumbersome, time-consuming, and expensive.

Second, outside the context of reserved water rights, the bill sets state water law as the ceiling for protective measures relating to water in federal land management decisions. This is an independent threat to federal management of species and ecosystems. For example, on BLM land that may lack the sort

of special federal "reservation" or designation that would lead to reserved water rights, the bill would preclude *any* project conditions that require more than state water law requires. Depending on the underlying state law, this could interfere with the agency's ability to protect the environment in considering projects on federal lands that belong to everyone.

To make this concrete, BLM is currently considering many applications to build solar power on federal land. As one BLM representative explained in prior testimony to this Committee, "[t]he potential effects of solar energy development on the desert's scarce water resources and aquatic habitats are []important issues" given "the region's chronic water scarcity and water allocation issues."[11] Because such projects can use significant water—including, in remote areas, groundwater resources that may already be overdrawn—BLM needs the ability to ensure that these projects do not have unacceptable impacts on the dry western landscape and species that depend on it.[12]

Third, the applicable provision is drafted so broadly that it threatens to have impacts even outside water issues in federal land use permitting. The bill makes "State water law" the ceiling—i.e., the only applicable restriction *of any kind*—for numerous federally issued approvals. The bill thus threatens to strip away not just the assertion of federal water rights but also the protections of a broad suite of other applicable federal law (such as the multiple-use mandates described above). Without recourse to these laws, federal agencies would not be able to protect landscapes, wildlife, and recreation as Congress has charged them with doing.

Worse still, the provision described above applies to an exceedingly broad suite of federal actions. It could be read to reduce federal authority to impose restrictions not only in federal permits, but in "any *rule, policy, directive, management plan*, or similar Federal action *relating to* the issuance, renewal, amendment, or extension of *any* permit, approval, license, lease, allotment, easement, right-of-way, or other *land use* or occupancy agreement." Under the proposed bill, *all* of these must impose "no greater restriction or regulatory requirement" than state water law. If interpreted broadly, this

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[11] https://www.doi.gov/ocl/hearings/111/SolarEnergyDevelopment_051109

[12] *E.g.*, https://www.nrel.gov/docs/fy15osti/61376.pdf.

provision would make state water law the ceiling for *any federal land use rule*—which, taken literally, would hamstring federal agencies attempting to engage in any land use activities, including general planning and policymaking. In other words, this bill threatens to broadside not only federal water rights, but virtually all federal land use authority.

The provision discussed above is not the only damaging portion of this bill. Section 3, item (2) is also highly problematic. That provision prevents federal agencies from "assert[ing] any connection between surface water and groundwater that is inconsistent with such a connection recognized by State water law." It is a physical and biological reality that surface water and groundwater are often connected.[13] Recognition of this reality is critical for federal agencies considering land uses that would deplete water for species and ecosystems on federal land. For example, concerns about depletion of groundwater caused by mining in the vicinity of Ash Meadows National Wildlife Refuge have led BLM to reject some applications for mining near the refuge.[14] Some states, in contrast, deny the connection between groundwater and surface water or severely limit it. It would be highly damaging to federal lands if agencies' ability to recognize this connection, and place conditions on pumping that would harm surface waters, were hamstrung by this bill.

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[13] *E.g.*, Sophocleous et al., *Interactions between groundwater and surface water: the state of the science*, Hydrogeology Journal, https://link.springer.com/article/10.1007/s10040-001-0170-8 ("Surface-water and groundwater ecosystems are viewed as linked components of a hydrologic continuum leading to related sustainability issues."); Brodie et al., (2007) *An overview of tools for assessing groundwater-surface water connectivity* ("Groundwater and surface water resources are hydraulically connected in many regions of Australia"); Fleckenstein et al., *Groundwater-surface water interactions: New methods and models to improve understanding of processes and dynamics*, Advances in Water Resources (2010) ("New regulations such as the EU Water Framework Directive (WFD) now call for a sustainable management of coupled ground- and surface water resources and linked ecosystems"), https://www.sciencedirect.com/science/article/abs/pii/S0309170810001739.
[14] https://insideclimatenews.org/news/31012024/nevada-supreme-court-groundwater-restrictions/

Plainly, wildlife that depend on federal lands would suffer if this bill were to be signed into law. In addition to the examples provided throughout this letter, bull trout and cutthroat trout, which depend on streams flowing through Forest Service lands in the mountain west, might be deprived of in-stream flows if the federal ability to protect those flows is diminished.[15] Federally endangered Appalachian hellbenders—the iconic giant salamanders of eastern hardwood forests—also depend on cool, clean streams on federal lands, such as New River Gorge National Park and Preserve—which must be safeguarded if the hellbender is to recover.[16]

In addition to harming these and other species and escalating our biodiversity crisis, by obstructing federal lands and resource management this bill threatens to make federal landscapes less verdant and less vibrant, harming recreational opportunities cherished by Americans.

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For the reasons set forth above, Defenders of Wildlife strongly opposes H.R. 7544.

If I can assist the Subcommittee or its Members in any other way, please do not hesitate to contact me.

Sincerely,

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[15] https://www.fs.usda.gov/detail/r2/landmanagement/?cid=stelprdb5390116
[16] https://www.nps.gov/neri/learn/nature/hellebenders.htm