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BEFORE THE COMMITTEE ON NATURAL RESOURCES
OVERSIGHT HEARING ON “THE ENDANGERED SPECIES ACT:
HOW LITIGATION IS COSTING JOBS AND IMPEDING TRUE RECOVERY EFFORTS”
DECEMBER 6, 2011

My name is Karen Budd Falen. I am a fifth generation rancher in Wyoming and an attorney specializing in protecting private property rights and rural counties and communities. I offer this testimony to provide legal and factual information and to voice my concern over the current interpretation and implementation of the Endangered Species Act (“ESA”) and the role federal court litigation has taken in driving decisions under the ESA.

Contrary to some belief, the implementation of the ESA has real impacts on real landowners, ranchers, farmers, businesses, employers and others who are a vital part of America’s present and future. Rather than saving species and conserving their habitats, the ESA is used as a sword to tear down the American economy, drive up food, energy and housing costs and wear down and take out rural communities and counties. The purpose of the ESA was NOT just to put domestic and foreign species on an ever-growing list and tie up land and land use with habitat designations, but to recover species and remove them from the list. According to a November 29, 2011 U.S. Fish and Wildlife Service (“FWS”) report, there are currently 1065 American and 590 foreign species on the ESA list, 250 candidate species, 440 critical habitat designations and 1200 recovery plans. See <http://ecos.fws.gov/tess.public/SpeciesReport>. On the delisting side, the same website shows that a total of 51 species have been removed from the list, 18 of the 51 species because of a listing error, 10 because the species were determined to be extinct and 23 because the ESA worked and the species was recovered. See http://ecos.fws.gov/tess_public/DelistingReport. In other words, since 1979, the ESA has worked as intended in 2 percent of the cases.

While I do not advocate the complete repeal of the ESA, and neither do the landowners, families and communities I represent, this Act is a threat to private property use, working ranch families and resource and job providers. Consider just one example. Charlie Lyons owns the Percy Ranch located in Mountain Home, Idaho. Eighty percent of the ranch consists of federally managed and state owned lands. Ted Hoffman is also from Mountain Home, Idaho, and owns a ranch named the Broken Circle Cattle Company. In 2001, an environmental group, the Western Watersheds Project (“WWP”) sued the FWS to list the Slickspot peppergrass which grows, or has the potential to grow, on these ranches. The 2001 WWP litigation only involved whether the FWS had to make a decision regarding whether to list the grass species under the ESA, not whether the grass was scientifically threatened or endangered. In this litigation, the Court determined that the FWS had violated the mandatory time deadline for making a listing decision and remanded the matter to the

FWS who ultimately decided against listing the Slickspot peppergrass. However, because the Court determined that the FWS had to make a decision regarding listing of the species, the FWS agreed to pay the WWP \$26,663 in “reimbursement” for attorneys fees and costs. See Committee for Idaho’s High Desert v. Badgley, 01-cv-1641 (D.Or. 2001).

After this first round of litigation, a number of local ranchers including Lyons and Hoffman came together with the State of Idaho and created a Candidate Conservation Agreement (“CCA”) which was approved by the FWS under the ESA. This was a pro-active Agreement that required certain on-the-ground measures be taken to improve the species. Also, through this Agreement, a great deal of research was dedicated to the status of the Slickspot peppergrass. In a report in 2009, the Slickspot peppergrass had the highest recorded population numbers since they started counting plants.

Following the decision of the FWS to not list the Slickspot peppergrass and despite the CCA, the WWP sued the FWS again in 2004 seeking a court order to list the species. The affected ranchers, including Lyons and Hoffman, intervened. However, WWP was successful in their attempt to force the FWS to list the Slickspot peppergrass. The total amount of money the ranchers spent on participating in the litigation was approximately \$30,000. WWP was awarded \$86,500 in attorneys fees, plus another \$15,000 to enforce the judgment, for a total award of \$101,500. See Western Watersheds Project v. Foss, 04-cv-168, (D.Id. 2004).

In 2007, the FWS withdrew the 2004 listing decision based upon the fact that the Slickspot peppergrass was already well protected by the implementation of the CCA. However, the WWP disagreed and sued the FWS over the Slickspot peppergrass again. WWP won and received an award in attorneys fees of \$110,000. See Western Watersheds Project v. Kempthorne, 07-cv-161, (D.Id. 2009). The FWS has now prepared its draft designation of critical habitat for the plant. The comment period closes on December 12, 2011. Thus far, the total attorneys fees paid related to the ESA listing of the Slickspot peppergrass is \$238,163.00.

According to these ranchers, WWP’s objective in litigating over the Slickspot peppergrass is to run ranchers off the land in the spring. According to Mr. Lyons, if the WWP is successful in their efforts, it would mean a death sentence to the Slickspot peppergrass and ruination of our ranches. These ranchers would have to sell their cattle and in some cases that money would not cover the mortgage on the ranch. The plant would ultimately burn. These ranches are located in one of the highest frequency fire areas in the country. The FWS admits that fire plays a major role in the survival of the Slickspot peppergrass. Ranchers play a major role in putting out the fires because they are on the land almost every day and can call and tell the federal and state agencies when a fire starts. Once there is no economic value and reason for the ranchers to be on the land, the fire suppression efforts will be greatly diminished. Additionally, if these ranchers have to limit their grazing and sell their livestock, they will be left with no

choice but to subdivide their private land. Housing subdivisions do not make good plant and animal species habitat.

Additionally according to the Natural Resources Conservation Service, “[n]o large ungulates, either domestic or wild use the [Slickspot peppergrass] plant (USDI, 2009). This species has no known agricultural, economic or other human uses at this time.” St. John, L. and D.G. Ogle. Plant Guide for Slickspot peppergrass (*Lepidium papilliferum*). USDA Natural Resources Conservation Service, Plant Materials Center, Aberdeen, Id. The CCA, which the landowners signed to protect the plant is useless and the faith and hard work that the landowners put into management for the plant is down the drain. No one can show that this plant is any better protected by an ESA paper designation than it was by true on-the-ground management. Under this scenario, the ranchers have lost, the plant has lost and the public has lost.

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted.” See Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). The goal of the Act is “to provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction.” Wyoming Farm Bureau Federation v. Babbitt, 199 F.3d 1224, 1231 (10th Cir. 2000), citing S. Rep. No. 93-307, at 1 (1973) and 16 U.S.C. § 1531(b). Under the ESA, a threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range, see 16 U.S.C. § 1532 (20), and an endangered species means any species which is in danger of extinction throughout all or a significant portion of its range other than insects that constitute a pest whose protection would present an overwhelming and overriding risk to man. 16 U.S.C. § 1532(6).

Anyone can petition the FWS or the National Oceanic and Atmospheric Administration - Fisheries Division (“NOAA”) to have a species listed as threatened or endangered. 16 U.S.C. § 1533. Listing decisions are to be based on the “best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). However, there is no requirement that the federal government actually count the species populations prior to listing. Additionally, although species that present an “overriding risk to man” are not to be listed, there are no economic considerations included as part of the listing of a threatened or endangered species.

Once a species is listed as threatened or endangered, prohibitions against “take” apply. 16 U.S.C. § 1540. “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(19). “Harm” within the definition of “take” means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing breeding, sheltering or feeding. 50 C.F.R. § 17.3. Harass in the definition of “take” means intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. 50 C.F.R. § 17.3. “Take” may

include critical habitat modification, if such modification results in the death of a listed species. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995). If convicted of “take,” a person can be liable for civil penalties of \$10,000 per day and possible prison time. 16 U.S.C. § 1540(a), (b).

Once a species is listed as threatened or endangered, the FWS or NOAA must “to the maximum extent prudent and determinable,” concurrently with making a listing determination, designate any habitat of such species to be critical habitat. Id. at § 1533(a)(3). By definition, critical habitat (“CH”) are “specific areas” see 16 U.S.C. § 1532(5)(A) and must be “defined by specific limits using reference points and lines found on standard topographic maps of the area.” 50 C.F.R. § 424.12(c); see also § 424.16 (CH must be delineated on a map). For “specific areas within the geographical area occupied by the [listed] species,” the FWS may designate CH, provided such habitat includes 1) “physical or biological features;” 2) which are “essential to the conservation of the species;” and 3) “which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(b).

CH must also be designated on the basis of the best scientific data available, 16 U.S.C. § 1533(b)(2), after the FWS considers all economic and other impacts of proposed CH designation. New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001) (specifically rejecting the “baseline” approach to economic analyses). CH may not be designated when information sufficient to perform the required analysis of the impacts of the designation is lacking. 50 C.F.R. § 424.12(a)(2). The FWS may exclude any area from CH if it determines that the benefits of such exclusion outweigh the benefits, unless it determines that the failure to designate such area as CH will result in extinction of the species concerned. 16 U.S.C. § 1533(b)(2).

Once a species is listed, for actions with a federal nexus, ESA section 7 consultation applies. Section 7 of the ESA provides that “[e]ach Federal agency [must] in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical” 16 U.S.C. § 1536(a)(2). The first step in the consultation process is to name the listed species and identify CH which may be found in the area affected by the proposed action. 50 C.F.R. § 402.12(c-d). If the FWS or NOAA determines that no species or CH exists, the consultation is complete, otherwise, the FWS must approve the species or habitat list. Id. Once the list is approved, the action agency must prepare a Biological Assessment or Biological Evaluation (“BA”). Id. The contents of the BA are at the discretion of the agency, but must evaluate the potential effects of the action on the listed species and critical habitat and determine whether there are likely to be adverse affects by the proposed action. Id. at § 402.12(a, f). In doing so, the action agency must use the best available scientific evidence. 50 C.F.R. § 402.14(d); 16 U.S.C. §1536(a)(2). Once complete, the action agency submits the BA to the FWS or NOAA. The FWS or NOAA uses the BA to determine

whether “formal” consultation is necessary. 50 C.F.R. § 402.12(k). The action agency may also request formal consultation at the same time it submits the BA to the FWS. Id. at § 402.12(j-k). During formal consultation, the FWS will use the information included in the BA to review and evaluate the potential affects of the proposed action on the listed species or CH, and to report these findings in its biological opinion (“BO”). 50 C.F.R. § 402.14(g-f). Unless extended, the FWS or NOAA must conclude formal consultation within 90 days, and must issue the BO within 45 days. Id. at § 402.14(e); 16 U.S.C. § 1536(b)(1)(A).

If the BO concludes that the proposed action will jeopardize any listed species or adversely modify critical habitat, the FWS’ BO will take the form of a “jeopardy opinion” and must include any reasonable and prudent alternatives which would avoid this consequence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If the BO contains a jeopardy opinion with no reasonable and prudent alternatives, the action agency cannot lawfully proceed with the proposed action. 16 U.S.C. § 1536(a)(2). If the BO does not include a jeopardy opinion, or if jeopardy can be avoided by reasonable and prudent measures, then the BO must also include an incidental take statement (“ITS”). 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(I). The ITS describes the amount or extent of potential “take” of listed species which will occur from the proposed action, the reasonable and prudent measures which will help avoid this result, and the terms and conditions which the action agency must follow to be in compliance with the ESA. Id.; see Bennett v. Spear, 520 U.S. 154, 170 (1997).

Once a species is listed, ESA section 10 also applies on private land, even if there is no federal nexus. In order to avoid the penalties for “take” of a species, and still allow the use and development of private land, the ESA also authorizes the FWS to issue ITSs to private land owners upon the fulfillment of certain conditions, specifically the development and implementation of habitat conservation plans (“HCPs”). 16 U.S.C. § 1539. A HCP has to include (a) a description of the proposed action, (b) the impact to the species that will result from the proposed action, (c) the steps that the applicant will take to minimize any negative consequences to the listed species by the proposed action, (d) any alternatives the applicant considered to the proposed action and why those alternatives were rejected, and (e) any other measures that the FWS may deem necessary for the conservation plan. 16 U.S.C. § 1539(a)(2)(A). Once a HCP is presented, the FWS must make certain findings before it can issue an ITS. Those findings include (a) that the taking of the species is incidental to the proposed action, (b) that the proposed action implements a lawful activity, (c) that the applicant, to the maximum extent possible, will minimize and mitigate any negative impacts to the listed species, (d) that the HCP is adequately funded, (e) that the taking will not appreciably reduce the survival and recovery of the species, and (f) any other measures deemed necessary will be carried out. 16 U.S.C. § 1539(a)(2)(B). As a practical matter, mitigation means that the applicant will either fund programs supporting the listed species or will provide or set aside land.

Although the legal ESA requirements sound fairly benign, that is not how the ESA is being used and interpreted by either the Courts or the federal agencies and why oversight by the Congress is needed. Consider the following examples:

A. Multi-District Litigation Settlement Agreement

On July 12, 2011, the Justice Department and the FWS announced “an historic agreement” which will require the American taxpayers to pay approximately \$206,098,920 to just process the paperwork deciding whether to include 1053 species under various categories under the ESA. See In Re Endangered Species Act Section 4 Deadline Litigation, 10-mc-377 (D.D.C. 2010). These two settlement agreements are the culmination of what is known as the ESA multi-district litigation. This case was formed in 2010 by combining 13 federal court cases filed by either the WildEarth Guardians (“WEG”) or the Center for Biological Diversity (“CBD”) regarding 113 species. On May 10, 2011, the FWS announced its settlement agreement with the WEG with the promise that the agreement would help the FWS “prioritize its workload.” That settlement agreement was opposed by the CBD who wanted other species added to the list. The Justice Department obliged the requests of the CBD and on July 12, 2011 filed the second settlement agreement. These agreements require the FWS to make 1201 decisions on proposed listing, listing and critical habitat designations for 1053 species. See Exhibits 1, 2.

Since part of this Oversight Hearing is to discuss the costs of litigation related to the ESA, this settlement agreement provides a good case study. According to a November 10, 2010 FWS *Federal Register* Notice, the median cost for the federal government to prepare and publish an ESA 90-day finding is \$39,276; for a 12-month finding, \$100,690; for a proposed listing rule with a critical habitat designation, \$345,000; and for a final species listing rule with a critical habitat designation, the median cost is \$305,000. See 75 Fed. Reg. 69,222, 69,230 (Nov. 10, 2010). The Multi-district ESA settlement agreements discuss which ESA actions have to be taken for which species, so by simply multiplying the number of species with the median cost per individual action, the cost to the American taxpayers for implementation of this settlement agreement is \$206,098,920. Those costs do not include any costs related to completing recovery plans, habitat conservation agreements, incidental take statements, section 7 consultation requirements or any on-the-ground measures for protection of currently listed or proposed newly listed species. This \$200,000,000 cost is simply to complete paperwork related to species that the CBD and WEG believe should be considered by the FWS for ESA inclusion.

This \$206,098,920 figure also does not include the amount of money that the Justice Department has agreed it will pay in attorneys fee reimbursement to the CBD and WEG. The Justice Department and the environmental plaintiffs have petitioned the court for additional time to discuss settlement of the attorneys fees claim. The Court has granted the parties request and according to the court docket sheet, the CBD/WEG are to file their attorneys fee petition or a settlement agreement by December 8, 2011. With regard to payment of attorneys fees, the Justice Department has already

agreed that the CBD and WEG are “prevailing parties;” so the only remaining question is how much money will be paid to these groups.

There is also a question of how the number of species in the settlement agreement grew exponentially from the number of species in the original litigation. According to the combined complaints before the multi-district panel, the FWS was in alleged violation of the ESA by failing to timely respond to the CBD and WEG petitions for 113 species. However, the settlement agreements expanded the number of species to 1053. It is not clear how the environmental plaintiffs convinced the Justice Department to expand the workload of the FWS envisioned by the original Complaints. Relatedly as stated above, there are currently 1069 species on the list since the passage of the Act in 1979 (a period of 30 years) and these settlement agreements require consideration for 1053 more species in just four years. If the FWS and NOAA cannot complete all required recovery actions for the species already on the list, how can the agencies continue that work if the list is approximately double in size?

Additionally, although the FWS has claimed that these settlement agreements will help it prioritize its workload, although the settlement agreement limits the number of additional ESA listing petitions that can be filed by the CBD and WWP, those are the only two groups impacted by the agreements. Thus, other environmental groups such as National Wildlife Federation, Western Watersheds Project, Sierra Club, the Humane Society of the U.S. or other groups can continue to file listing petitions to which the FWS and NOAA have 90 days to respond. If the federal government violates this timeline with relation to a listing petition filed by any other group, more ESA litigation will occur. Species will be added to the list, but no equal action is taken to get species off the list. I do not believe that simply adding species to the list and tying up land for habitat is the goal of the ESA.

B. Changes in Interpretation of Areas Designated as Critical Habitat

Additionally, the FWS appears to have expanded its determination of the area to be included in critical habitat designations. Under prior determinations, CH was interpreted as the area specifically occupied by the species. The ESA defines critical habitat as including “the specific areas within the geographical area occupied by the species, at the time it is listed . . . and . . . specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. 1532(5)(a)(I), (ii). The key issue for the FWS therefore is what areas are “occupied” by the species. Under past interpretations, the term “occupied” included only those areas that were actually inhabited by the species. Now, however, that definition seems to be expanding to also include areas that are used only intermittently by the listed species. The courts, such as the Ninth Circuit Court of Appeals, have held that they will defer to the FWS determination that CH can include areas used only intermittently by a species. See *e.g. Arizona Cattle Growers Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010). Recent CH designations have shown that the FWS expansion of the term “occupied” are more commonplace. See *e.g. 75 Fed.Reg. 76086* (Dec. 7, 2010) (polar

bear CH designation); 76 Fed.Reg. 32026 (June 2, 2011) (Hawaiian monk seal CH designation); 75 Fed.Reg. 77962 (Dec. 14 2010) (Santa ana sucker CH designation).

C. Foreign Species Listings

Although the United States has no jurisdiction over land use in foreign countries, the ESA allows species in foreign nations to be listed as threatened or endangered. In fact, as of November 28, 2011, there were 590 foreign species listed on the United States threatened or endangered species list. <http://ecos.fws.gov/tess.public>. Foreign countries who have species on the American list include but are not limited to China, Mongolia, Kyrgyzstan, Pakistan, Afghanistan, India, Palau, Canada and Mexico.

With regard to the reasons for listing, recent FWS releases include concerns about private land use in these foreign countries and climate change. For example, a December 28, 2010 FWS foreign species press release states:

All seven species face immediate and significant threats primarily from the threatened destruction and modification of their habitats from conversion of agricultural fields (e.g., soybeans, sugarcane, and corn), plantations (e.g., eucalyptus, pine, coffee, cocoa, rubber, and bananas), livestock pastures, centers of human habitation, and industrial developments (e.g., charcoal production, steel plants, and hydropower reservoirs).

Although there is limited information on the specific nature of potential impacts from climate change to the species included in this final rule, we [FWS] are concerned about projected climate change, particularly the effect of rising temperatures in combination with the potential loss of genetic diversity, and population isolation; and cumulative effects including El Niño events. Furthermore, we have determined that the inadequacy of existing regulatory mechanisms is a contributory risk factor that endangers each of these species' continued existence.

See Exhibit 3.

Additionally, once a foreign species is listed on the U.S. threatened or endangered species list, the ESA gives the American government the authority to buy "land or water or interests therein" in foreign countries. 16 U.S.C. § 1537.

D. Payment of Attorney Fees with No Transparency or Accountability

The final issue I would raise with the Committee is the accountability and transparency of the amount of attorneys fees paid out of the U.S. Treasury for ESA (and other cases). The waiver of sovereign immunity of the federal government allowing litigation against the FWS and NOAA for alleged violations of the failure to list species or designate critical habitat is authorized under section 9 of the ESA. 16 U.S.C. § 1540(g). Because the ESA contains its own "citizen suit" provision, any awarded

attorneys fees come from the Judgment Fund. The Judgment Fund is a permanent indefinite Congressional authorization. 31 U.S.C. § 1304. ESA awards paid by the Judgment Fund allows “reimbursement” of attorneys to the “prevailing party.” 16 U.S.C. § 1540(g)(4).

Although environmental groups claim that they recover attorneys fees only when they have proven that the government was not following the law, that does not seem to be the case. Based upon data collected from the PACER National Case Locator federal court data base, in 21 percent of the cases filed by 14 environmental groups, attorneys fees were paid in cases where there was no federal court decision, let alone a decision that the plaintiff was a prevailing party. See e.g. Center for Biological Diversity v. Norton, Docket No. 05-341 (D. Az. 2005). This data search was only conducted in 19 states and the District of Columbia, so I believe it is only the tip of the iceberg. With specific consideration of the ESA, if the federal government fails to respond to a petition to list a species within the 90 day time period mandated by the ESA, an environmental group can sue and almost always get attorneys fees paid. See e.g. WildEarth Guardians v. Kempthorne, Docket No. 08-443 (D.D.C. 2008). In these cases, the court is not ruling that the species is in fact threatened or endangered, but only that a deadline was missed by the FWS.

Additionally concerning is that in 10.5% of the same cases reviewed through the PACER data base, the court docket sheets revealed that attorneys fees were paid, but no amount was given. See Exhibit 5. The expenditure of public funds for attorneys fees should be available to the public.

Finally, while not directly related to ESA cases, there are attorneys fees “settlements” that are not well explained. Consider the case of WildEarth Guardians v. U.S. Forest Service, Docket No. 07-1043-JB (N.M. 2010). In that case, litigated in the U.S. District Court for the District of New Mexico, the WildEarth Guardians lost on all counts and claims before the federal district judge. The WildEarth Guardians appealed the case to the Tenth Circuit Court of Appeals, and even though there was NO ruling by a court on the merits overturning the federal district judge’s written decision, the WildEarth Guardians and the Forest Service jointly petitioned the federal district court to allow the Justice Department to voluntarily settle the case, including a payment of attorneys fees. The WildEarth Guardians lost their case; the Justice Department settled and paid attorneys fees.

In conclusion, while neither I nor the people I represent want to repeal the entire Act, this testimony illustrates that there are significant flaws in the Act and loopholes that should be closed. The use of the Act now appears to be more to produce paper, than implement on-the-ground species and habitat improvement. American landowners can be important and vital partners in protecting species and the habitats in which they live and the American taxpayer money should be spent on habitat improvement rather than attorneys fees and litigation.

Thank you.