TRANSPARENCY AND SOUND SCIENCE GONE EXTINCT?: THE IMPACTS OF THE OBAMA ADMINISTRATION'S CLOSED-DOOR SETTLEMENTS ON ENDANGERED SPECIES AND PEOPLE

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
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OVERSIGHT HEARING ON "TRANSPARENCY AND SOUND SCIENCE GONE EXTINCT?: THE IMPACTS OF THE OBAMA ADMINISTRATION'S CLOSED-DOOR SETTLEMENTS ON ENDANGERED SPECIES AND PEOPLE"

Thursday, August 1, 2013
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to notice, at 10:03 a.m., in room 1324, Longworth House Office Building, Hon. Doc Hastings [Chairman of the Committee] presiding.

Present: Representatives Hastings, Gohmert, Bishop, Lamborn, McClintock, Lummis, Tipton, Gosar, Southerland, Mullin, Stewart, LaMalfa, DeFazio, Costa, and Shea-Porter.

The CHAIRMAN. The Committee will come to order, and the Chairman notes the presence of a quorum. In fact, we far exceeded our quorum; thank you for being here.

The Committee on Natural Resources is meeting today to hear testimony on an oversight hearing on: "Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People."

Under Committee Rule 4(f), opening statements are limited to the Chairman and the Ranking Member of the Committee. However, I ask unanimous consent that any Member that wishes to have an opening statement have it to the Committee prior to close of business today.

[No response.]

The CHAIRMAN. And without objection, so ordered. I will now recognize myself for my opening statement.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

The CHAIRMAN. Today the Committee continues oversight of the Endangered Species Act, with a specific focus on the lack of transparency of data and science used in literally hundreds of sweeping listing and habitat designation decisions that affect both the species and people.

This Administration publicly touts that it is "the most transparent in history." However, its ESA-related actions, through executive orders, court settlements with litigious groups, and rules to list species, instead force regulatory actions that shut out of the process Congress, it shuts out of the process States, local communities, and private landowners, and even science, scientists who may dispute the often sketchy and unverifiable data used in these decisions.

Yesterday I learned that the Interior Office of Inspector General has issued a notice raising allegations of serious scientific misconduct by Fish and Wildlife Service officials and that the Department's senior leadership failed to address these issues for over a year. Now, I have requested—the Committee has requested and will expect a response to these allegations as quickly as possible.

Last month the Fish and Wildlife Service Director told Western Governors that the mega-settlements have helped decrease the amount of "deadline" lawsuits by environmental groups. That was told to Western Governors. However, public documents reveal the same groups involved in the mega-settlements have filed or threatened to file more than 125 new ESA-related lawsuits against the Service just in the past 2 years. These self-imposed deadlines are creating legal dilemmas for the Service on decisions on whether and when to list more than 750 new species that would designate millions of acres of habitat over the next 4 years.

Within the past 2 months, the Service has already been forced to seek permission from litigious groups and the court to extend settlement deadlines to allow for more public input and consideration of new data and science that are required by law. Several Western States are legitimately concerned about the lack of transparency of the Greater Sage-Grouse, but their—the technical documents supporting that were developed by the Service and BLM. States were promised prompt approval of State-developed conservation plan, but the Service's deadlines and questionable science could force a listing and block activities on a million of acres of mining and grazing lands.

Recent Freedom of Information Act documents received by the State of Idaho suggest serious interference by multiple Interior officials in the development of the National Technical Team Report. Now, our committee has requested those documents, and it has been nearly 5 months since we have requested those documents. We have yet to receive those documents that were acquired by FOIA—by the State of Idaho. The Service has failed to provide those emails, but I certainly expect that we will get those, now that this has been made public. And that is why I mention that.

Last year, the Service finalized a highly questionable rule to designate nearly 10 million acres of habitat in Washington, Oregon, and California for the Northern Spotted Owl. Despite this, the number of owls continue to decline, due primarily to the Barred Owl. And what has been the response? What I heard in the news is they are going to go after the Barred Owl. Does this make sense?

Another recent example of the Service's transparency failings is occurring in the Congressional District that I represent in Central Washington with the White Bluffs Bladderpod, a plant that is slated to be listed under the settlement work plan this year. The Service failed to consult the local county or affected landowners on why it considers critical 419 acres of habitat it proposes to designate on private property.

Yet a recent university research that was funded, by the way, by affected landowners confirms that the plant's DNA is indistinguishable from bladderpod plants in other areas, and it may mean the plant doesn't require listing at all. Now, the question is, why didn't the Service do due diligence to that point?

So, I look forward to hearing from the witnesses today about how to improve transparency of the ESA that affects species and people.

[The prepared statement of Mr. Hastings follows:]

Statement of The Honorable Doc Hastings, Chairman, Committee on Natural Resources

Today the Committee continues oversight of the Endangered Species Act, with a specific focus on the lack of transparency of data and science used in literally hundreds of sweeping listing and habitat designation decisions that affect both species and people.

The Obama Administration publicly touts that it is "the most transparent in history." However, it's ESA-related actions—through executive orders, court settlements with litigious groups, and rules to list species—instead force regulatory actions that shut out Congress, states, local communities, private landowners—even scientists who may dispute the often sketchy or unverifiable data used for these decisions.

Yesterday, I learned the Interior Office of Inspector General has issued a notice raising allegations of serious scientific misconduct by Fish and Wildlife Service officials and that the Department's senior leadership failed to address these issues for over a year. I have requested and will expect a transparent response to these allegations as quickly as possible.

Last month, the Fish and Wildlife Service Director told Western governors that the mega-settlements have helped decrease the amount of "deadline" lawsuits by environmental groups. However, public documents reveal the same groups involved in the mega-settlements have filed or threatened more than 125 *new* ESA-related lawsuits against the Service over just the past two years.

Two weeks ago, I asked Secretary of the Interior Sally Jewell if the Administration favored meeting court deadlines over ensuring best science. Clearly, these self-imposed deadlines are creating legal dilemmas for the Service on decisions whether and when to list more than 750 new species and designate millions of acres of habitat over the next four years.

Within the past two months, the Service has already been forced to seek permission from litigious groups and the court to extend settlement deadlines to allow for more public input and consideration of new data and science that are required by law.

Several Western states are legitimately concerned about the lack of transparency of Greater Sage Grouse technical documents developed by the Service and the Bureau of Land Management. States were promised prompt approval of state-developed conservation plans, but the Service's deadlines and questionable science could force a listing and block activities on millions of acres of mining and grazing lands.

Recent Freedom of Information Act documents received by the State of Idaho suggest serious interference by multiple Interior officials in the development of the National Technical Team Report. It has been nearly five months since the Committee requested documents from the Service relating to their sage grouse efforts.

As of this date, the Service has failed to provide requested emails and communications about sage grouse efforts. I expect the Director to provide the Committee the documents as requested.

Last year, the Service finalized a highly questionable rule to designate nearly 10 million acres of habitat in Washington, Oregon, and California for the Northern Spotted Owl—doubling down on twenty years of failed federal forest management. Despite this, the numbers of owls continues to decline, due primarily to catastrophic wildfires and another, larger predatory species of owl.

The rule comes amidst recent reports that the Service for years contracted with biologists who are now under federal investigation for embezzling nearly $1 million in federal funds that were intended specifically for northern spotted owl research.

The most recent example of the Service's transparency failings is occurring in the Congressional District I represent in Central Washington with the White Bluffs Bladderpod—a plant that is slated to be listed under the settlement "workplan" this year. The Service failed to consult the local county or affected landowners on why it considers "critical" 419 acres of habitat it proposes to designate on private property.

A recent university research study confirms the plant's DNA is indistinguishable from bladderpod plants in other areas, and may mean the plant doesn't require listing at all. I expect a commitment today from the Service that it will withdraw its listing proposal and re-evaluate the science in light of this new information.

I look forward to hearing from the witnesses about how to improve transparency of ESA decisions that deeply affect species and people.

The CHAIRMAN. And with that I will yield to the distinguished Ranking Member for his comments.

Mr. DEFAZIO. Thank you, Mr. Chairman.

STATEMENT OF THE HON. PETER A. DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. DEFAZIO. As on several other issues that have come up recently before the Committee—hazardous fuel reduction and others—I think we have some potential here for a balanced, reasonable, and honest conversation. I am not going to say the Act is perfect. I mean the Endangered Species Act has not been reauthorized since 1992. Our understanding of species and their needs and science has come a long way since 1992.

I was involved in an effort back in 1997 with George Miller from California, and we attempted, with a bipartisan approach, to reauthorize the Endangered Species Act and make it more relevant, at least in 1997, to our understanding of science and needs. Some of those things still have not been fully adopted and still would merit consideration in a reauthorization. We have provisions to provide more certainty to land owners who were required to develop habitat conservation plans. That is an enduring problem.

We would require the Federal Government to work with States on species recovery plan development implementation. We have heard a lot about sage-grouse and other things and frustrations with States on the Committee in testimony in the last few weeks. Those kinds of provisions that Mr. Miller and I had at that time would help the States to be more involved as active partners and participants, not to short-circuit the law, not to ignore the needs of species, but to more cooperatively develop a viable scientifically based plan to recover or protect those species.

And then, in particular, we had a provision to deal with multiple species conservation plans. That is, move toward an ecosystem-based approach. We often find that individual species in proximity to one another have conflicting needs. I remember a discussion of the Kootenai sturgeon—and this was between two dams—and it can only spawn with high flows. But those same high flows were detrimental to an endangered stock of salmon, who happened to be migrating up the river at that point in time.

So, we need to deal with these things in a way that makes sense for all the species. I was out in the forest with Drs. Franklin and Johnson last year, looking at what they have as new science regarding the needs of the owl and what are the real needs in the western forest systems, at least in Southwest Oregon. And there was a Fish and Wildlife representative there, and we got involved in a very active discussion, because the scientists were proposing to remove some rather large fir trees in an area that had been dominated by pine.

And one of the environmentalists there was very upset at the idea of the timber volume coming out. And they said, "Well, but this is based in science, and those trees don't belong there, and they are detrimental to the long-term health of the stand, and they

are not something that is needed for the recovery of the owl." And the person kept persisting.

And then, finally, the Fish and Wildlife representative said, "You know, what is good for the forest is good for the owl." So, a larger perspective view of these endangered species problems I believe would benefit everybody. Transparency, to me—I mean there is just no question that there should be transparency throughout this entire process. And there is no reason that these decisions are made behind closed doors or without full revelation of the science involved. So I would agree there.

But there are other changes that need to be proactively made. And I would hope that we won't go down the false path, as we did with former Chairman Pombo in totally gutting the Act, but instead look at bringing the Act up to date in terms of our new understandings, and provide some of the flexibility I just discussed here.

With that, Mr. Chairman, I look forward to the testimony.

[The prepared statement of Mr. DeFazio follows:]

Statement of The Honorable Peter A. DeFazio, Ranking Member, Committee on Natural Resources

Today, the majority has called the latest in a series of what have so far been unproductive oversight hearings on the Endangered Species Act. I am the first to admit that the ESA is not perfect. I understand and remain frustrated by the significant challenges that efforts to protect and restore salmon runs and populations of the northern spotted owl have posed to communities and businesses in my state of Oregon. But to hear Republicans on the Committee tell it, you would think protection of endangered species had crippled the U.S. economy and destroyed the American system of private property rights. We need to have a more balanced, reasonable, and honest conversation.

We also need to put some things in perspective. We have plowed or paved 99 percent of our country's tallgrass prairie, cut down 95 percent of our old growth forests, and filled in more than half of our wetlands in the lower 48 states. This massive alteration of some of our most diverse and productive landscapes has made it nearly impossible for many species of plants and animals to survive without the ESA's protection.

I have long supported moving away from a focus on individual species toward a strategy that protects and restores endangered ecosystems. A proactive, adaptive, and collaborative approach that creates partnerships in conservation between governments, landowners, and other stakeholders seems a much more intelligent way to go about preserving the valuable biodiversity and environmental services that healthy ecosystems provide. As Paul Henson, the Fish and Wildlife Service director for Oregon told me once during a forest tour: "what's good for the forest is good for the owl."

Right now, however, the ESA is the only tool we have to hold the line against massive extinction of species, and in that regard the law has been incredibly effective. Ninety-nine percent of all species listed as threatened or endangered under the Act still exist. The ESA has also produced some major success stories. The gray whale, which was declared recovered in 1994, is the main attraction of Oregon whale watching, which draws tens of thousands of tourists to our coasts and generates millions of dollars for our economy each year. And the bald eagle, a national symbol once on the brink of extinction, can now be seen from coast to coast.

Some on this Committee would prefer to ignore these facts, focusing instead on what they believe is a glut of frivolous lawsuits and sweetheart-deal settlements between federal agencies and conservation groups. To be clear, settlement agreements are a legitimate and cost effective way to avoid drawn out, expensive courtroom battles. Further, the suggestion that the citizen suit provisions of the ESA and other environmental statutes are somehow making government less transparent is flat out wrong. The ability of affected parties to hold their government accountable is a cornerstone of our democracy.

I am committed to finding commonsense ways to protect our environment while promoting economic development. I am encouraged that agencies tasked with implementing the ESA are starting to show signs of more flexibility in the form of Can-

didate Conservation Agreements and other strategies to help facilitate proactive conservation that minimizes the impacts to economic interests. I would encourage more of that kind of creative activity, and I look forward to hearing from Director Ashe about the Fish and Wildlife Service's efforts.

The CHAIRMAN. I thank the gentleman for his statement and, obviously, for his willingness to work on this issue, because it does affect us. And I think coming from the Western part of the United States, this probably affects us more than other parts of the country.

But I want to thank the first panel of witnesses. We have Mr. Damien Schiff, who is the principal attorney for the Pacific Legal Foundation out of Sacramento, California; Mr. Dan Ashe, who is the Director of the U.S. Fish and Wildlife Service here, in Washington, D.C.—thank you for coming, Director Ashe. And I have a constituent of mine, Mr. Kent McMullen. He is the Chairman of the Franklin County Natural Resources Advisory Committee that is based in my home town of Pasco, Washington. And he is accompanied, I might add, by a Franklin County Commissioner, also a constituent, Brad Peck, sitting right behind the next person I am going to introduce, who is Dr. Rob Roy Ramey—Ramey? I could have gone both ways, and I went the right way. He is a Ph.D. from Nederland, Colorado.

Let me point out how, if you haven't had the opportunity to testify here, how this works. We have timing lights. First of all, the statement that we asked you to submit, the statement in its entirety, will be part of the record. But I would ask you to keep your oral remarks to within the 5 minutes. And the way this fancy machine works here, when you start the green light will come on, and that means you are just doing fabulously well. But when the yellow light comes on, it means that you have 1 minute to go. And I would try to ask you to wrap it up before the red light comes on, because we—it doesn't look like it, but those seats are special seats there that—no, I am just kidding.

[Laughter.]

The CHAIRMAN. At any rate, if you could keep the response within the 5 minutes, we would very much appreciate it. And we will start with Mr. Damien Schiff. Mr. Schiff, you are recognized for 5 minutes.

STATEMENT OF DAMIEN M. SCHIFF, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION, SACRAMENTO, CALIFORNIA

Mr. SCHIFF. Thank you, Mr. Chairman and members of the Committee. My name is Damien Schiff. I am a principal attorney in the environmental practice section of the Pacific Legal Foundation. Founded in 1973, PLF is the Nation's oldest public interest legal foundation, fighting for the protection of private property rights and individual liberty in State and Federal courts throughout the country. And today I will focus my testimony on the Endangered Species Act and provide, for me, troubling examples of the U.S. Fish and Wildlife Service's practice of settling, rather than defending controversial litigation with environmental groups, with the upshot that private property owners are unjustly burdened.

Commencing in the 1990s, the Service regularly designated critical habitat in conjunction with the listing of species, and these designations tended to be very broad, often times including habitat that was marginal, at best. During the George W. Bush Administration, under the leadership of Julie MacDonald, Deputy Assistant Secretary for Fish and Wildlife and Parks, the Service changed its approach, adopting, in my view, a more scientifically and factually credible standard.

Secretary MacDonald demanded that the Service employees demonstrate that their actions, such as designating critical habitat, be supported by adequate data. In particular, Secretary MacDonald, who was skeptical of the designation of "unoccupied critical habitat." But in the wake of a negative Inspector General report and the change in Administration, the Service resumed its prior less rigorous and legally deficient approach.

For example—environmentalist lawsuits and relying on the Inspector General report, the Service refused to continue to defend against legal challenge the 2007 critical habitat designation for the spikedace and loach minnow, two fish found in streams in New Mexico and Arizona, as well as the 2005 designation for the bull trout, found in Washington, Oregon, Nevada, Idaho, and Montana.

In both cases, Pacific Legal Foundation attorneys represented organizations of affected property owners who had intervened in these lawsuits to prevent the expansion of critical habitat. In both cases, the Service obtained the requested remand from the Federal court, and following remand, the Service increased the amount of critical habitat—in the case of the spikedace and loach minnow by 20 percent, in the case of the bull trout, the Service increased lake habitat by 140 percent, and its stream habitat by 400 percent.

In other cases, as well, the Service has been quite friendly to the environmentalist critique. For example, in 2007, the Service issued critical habitat for the Hine's emerald dragonfly. Environmental groups then sued, claiming that the Service wrongfully excluded about 13,000 acres of habitat in two already-protected national forests in Michigan and Missouri. The Administration changed and, not surprisingly, the environmental groups and the Service settled, with the Agency agreeing to re-analyze the designation. And then the Service issued a new designation that more than doubled the size of the prior designation.

Similarly, Wild Earth Guardians, an environmentalist organization, sued the Service in 2008 over the Agency's failure to designate critical habitat for the Shirakawa leopard frog. The Service listed the frog in 2002, but determined at that time that critical habitat designation would not be prudent. Wild Earth Guardians' suit sought to overturn the Service's determination. And after substantive briefing had commenced, and a change in administration, the Service settled the case. In the settlement the Service agreed to revisit its determination and, ultimately, the Service designated over 10,000 acres of critical habitat.

And one final example. The western snowy plover is a shore bird listed in 1993 whose habitat extends from Central California up to the Canadian border. The Service originally designated critical habitat for the bird in 1999, but that designation was successfully

challenged in 2003 for the Service's failure to conduct an adequate economic impact assessment.

In 2005, the Service published a revised, less expensive critical habitat designation. But in 2008, the Center for Biological Diversity sued the Service, contending that many areas were improperly excluded from the designation. Pacific Legal Foundation attorneys intervened in this lawsuit on behalf of land owners and off-road vehicle enthusiasts, whose property and dune buggy grounds the Center wanted included in critical habitat. Sadly, rather than defend the designation, the Service chose to settle. The Foundation's clients were given no opportunity to participate in these settlement discussions. And in 2012 the Service issued a new critical habitat designation that nearly doubled the size of the 2005 designation and included our client's formerly excluded properties.

In conclusion, reasonable people can disagree about the utility and morality of the Endangered Species Act. But in my view, no one can legitimately approve of a less-than-transparent administration of that Act. Unfortunately, over the last several decades, the U.S. Fish and Wildlife Service has implemented the Act in a way that, frankly, puts Agency policy ahead of the law and the public interest.

Moreover, the Agency's administration of the Act sometimes bears no relationship to the best interests of protected species, but serves only to aggrandize government power or satisfy particularly litigious environmental groups. Unfortunately, this practice has continued through the current Administration.

Groups like Pacific Legal Foundation can help prevent individual injustices, but systematic improvement to the Act and its administration is this Committee's and Congress's prerogative and duty.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Schiff follows:]

Statement of Damien M. Schiff, Principal Attorney, Pacific Legal Foundation, Sacramento, California

I. Introduction

The topic of this hearing is the negative effects of close-door settlements arising out of Endangered Species Act litigation during the Obama Administration. My fellow panelists will ably discuss this particular subject. I, however, would like to address the subject of transparency and the Endangered Species Act a little more broadly, because some of the issues that have arisen during the current Administration are perennial, and reflect persistent failings in the manner in which the United States Fish and Wildlife Service and National Marine Fisheries Service administer the Act.

II. Failing to delist expeditiously

The goal of the Endangered Species Act is to bring species from the brink of extinction to recovery, so that the species no longer need the Act's protections. *See* 16 U.S.C. § 1531(b). One would think that the Services would be eager to delist species or "downlist" them from endangered to threatened status, to prove the Act's effectiveness. Remarkably, the opposite is true: the Services rarely act to delist or downlist a species, even when they acknowledge that the species merits delisting or downlisting. To make matters worse, the agencies have essentially adopted the policy that no delisting or downlisting will occur unless and until a court orders it to happen. Below, I discuss two examples that demonstrate this troubling practice.

A. The bald eagle

In 1999, the Fish and Wildlife Service announced the recovery of the bald eagle and formally proposed to delist it from the Act. *See* 64 Fed. Reg. 36,454 (July 6, 1999). Yet the Service did not act on that proposal until 2007, *see* 72 Fed. Reg. 37,346 (July 9, 2007), only after having been forced to by court order as a result

of a lawsuit brought by Pacific Legal Foundation attorneys on behalf of Edmund Contoski, a Minnesota landowner. *See Contoski v. Scarlett,* 2006 WL 2331180 (D. Minn. Aug. 10, 2006). Mr. Contoski owned several acres of lakefront property in northern Minnesota. He wanted to subdivide the property and ultimately construct a vacation cabin on it. Unfortunately, the property contained an active bald eagle's nest. Under the Service's Endangered Species Act eagle management guidelines, Mr. Contoski was unable to construct anything within several hundred feet of the eagle nest. And yet, the Service had acknowledged that the eagle had recovered and no longer needed these protections. Mr. Contoski's development plans, and his property rights, were put on hold for eight years for no reason whatsoever.

The Service says at one time that the eagle is recovered, yet at another that private property owners must suffer devaluation of their property for no valid reason. Where is the transparency?

B. The Valley elderberry longhorn beetle

A similar sad story of lack of transparency can be found in the controversy over the Valley elderberry longhorn beetle. The beetle, native to California's Central Valley, was listed as a threatened species with designated critical habitat in 1980. *See* 45 Fed. Reg. 52,803 (Aug. 8, 1980). As a result of the beetle's listing and habitat protections, property owners, farmers, and levee districts have been significantly injured. If one has an occupied elberberry bush on one's property, it is nearly impossible to develop the property, or to farm it, or to maintain the flood control levees on which the bush sits. Mitigation for elderberry bushes can run into the hundreds of thousands of dollars. For example, the Sutter Butte Flood Control Agency is a joint powers agency with jurisdiction over flood control facilities in the northern part of California's Sacramento Valley. The Agency is trying to fund a project to remedy geotechnical deficiencies in 41 miles of levee along the Feather River. The total cost of the project is about $30,000,000, of which **$4,250,000** is for elderberry bush mitigation. That mitigation price amounts to 15% of the first-year construction cost, or almost one mile of additional levee that could be repaired.[1]

The safety threats from the beetle's listing do not end with higher costs. As Levee District 1 of Sutter County—one of California's oldest flood control agencies—explained in a recent comment letter to the Service, the beetle's regulation prevents needed flood safety practices, *e.g.,* elderberry bushes can greatly interfere with the visual inspections that flood control agencies must conduct for levee maintenance.[2]

One would think that the Service would ensure an expeditious delisting of the beetle once it has been demonstrated to have recovered. To the contrary, the Service has dawdled, much to the detriment of property owners and public safety. In 2006, the Service determined that the beetle had recovered.[3] Yet the agency did not begin the delisting process until Pacific Legal Foundation attorneys filed a lawsuit on behalf of affected property owners, farmers, levee districts, and other organizations to force the Service to act on its own conclusions. *See N. Sacramento Land Co. v. U.S. Fish & Wildlife Serv.,* 2:12–cv–00618JAM–CKD (filed Mar. 12, 2012). In 2012, the Service finally proposed to delist the beetle, some six years after determining that it had recovered. *See* 77 Fed. Reg. 60,238 (Oct. 2, 2012).

The Service's conduct in the beetle case is part of a larger problem. The Act requires that the Service conduct a status review every five years for each listed species, to determine whether listing is still appropriate. *See* 16 U.S.C. § 1533(c)(2). The Service, however, has taken the position that it is not required to do anything as a result of such status reviews, unless and until an interested party petitions for action and then follows up with a lawsuit. *See Coos County Bd. of County Comm'rs v. Kempthorne,* 531 F.3d 792 (9th Cir. 2008). Most members of the regulated public, however, are not in a position to file lawsuits so easily. Thus, many species continue to receive the protections of the Act even when they are not necessary, and innocent property owners must continue to suffer needlessly.

The Service says that a species is recovered, yet resists delisting to allow affected property owners and local agencies the freedom to act as they need to. Where is the transparency?

III. Critical habitat

The Act authorizes the Services to designate "critical habitat" for listed species. 16 U.S.C. § 1533(a)(3)(A)(i). In practice, critical habitat can have a significant nega-

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[1] *See* http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0037 (last visited July 24, 2013).

[2] *See* http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0029 (last visited July 24, 2013).

[3] *See* http://ecos.fws.gov/docs/five_year_review/doc779.pdf (last visited July 24, 2013).

tive economic impact on the value of private property. As just one particularly glaring proof: the Fish and Wildlife Service itself estimated that the annual economic impact of critical habitat designation for the California gnatcatcher is over **$100,000,000**.[4]

Commencing in the 1990s, the Services regularly designated critical habitat in conjunction with the listing of species. These designations tended to be very broad, oftentimes including habitat that was marginal at best. *See Home Builders Ass'n of N. Cal. V. U.S. Fish & Wildlife Serv.,* 268 F. Supp. 2d 1197 (E.D. Cal. 2003), *overruled in part, Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.,* 616 F.3d 983 (9th Cir. 2010).

During the Bush Administration, under the leadership of Deputy Assistant Secretary for Fish and Wildlife and Parks, the Service changed its approach. Secretary MacDonald demanded that Service employees demonstrate that their actions, such as designating critical habitat, be supported by adequate data. In particular, Secretary MacDonald was skeptical of the designation of "unoccupied" critical habitat. But in the wake of a critical inspector general report[5] and a change in administration, the Service resumed its prior, more relaxed, and legally deficient approach. The case of the Western snowy plover nicely exemplifies this retrenchment.

The plover is a shore bird, listed in 1993, whose habitat extends from Central California up to the Canadian border. 58 Fed. Reg. 12,864 (Mar. 5, 1993). The Service originally designated critical habitat for the bird in 1999, but that designation was successfully challenged in 2003 for the Service's failure to conduct an adequate economic impact assessment. *See id.* at 36,729–30. In 2005, the Service published a revised, less expansive, critical habitat designation. 70 Fed. Reg. 56,970 (Sept. 29, 2005). In 2008, the Center for Biological Diversity sued the Service, contending that many areas were improperly excluded from the designation. *Ctr. for Biological Diversity v. Kempthorne,* No. 3:08–cv–4594–PJH (N.D. Cal. filed Oct. 2, 2008). Pacific Legal Foundation attorneys intervened in the lawsuit on behalf of landowners and off-road vehicle enthusiasts whose property and dune-buggy grounds the Center wanted included in critical habitat. Sadly, rather than defend the designation, the Fish and Wildlife Service chose to settle. *See* Notice of Filing Settlement Agreement, Doc. No. 55 (filed May 11, 2009). The Foundation's clients were given no opportunity to participate in these settlement discussions. In 2012, the Service issued a new critical habitat designation that nearly doubled the size of the 2005 designation, *see* 77 Fed. Reg. 36,728 (June 19, 2012), and included our clients' formerly excluded properties, *see id.* 36,742.

The United States Chamber of Commerce has recently reported on similar sue-and-settle critical habitat cases.[6] In 2007, the Fish and Wildlife Service issued critical habitat for the Hine's emerald dragonfly. *See* 72 Fed. Reg. 51,102 (Sept. 5, 2007). Environmental groups then sued, claiming that the Service wrongfully excluded about 13,000 acres of habitat in two (already protected) national forests in Michigan and Missouri. *See Northwoods Wilderness Recovery v. Kempthorne,* No. 08–01407 (N.D. Ill.). The Administration changed and, not surprisingly, the environmental groups and the Service settled, with the agency agreeing to reanalyze the designation. Then, the Service issued a new designation more than double the size of the previous designation. *See* 75 Fed. Reg. 21,394 (Apr. 23, 2010).

Similarly, WildEarth Guardians, an environmentalist organization, sued the Service in 2008 over the agency's failure to designate critical habitat for the Chiricahua leopard frog. *WildEarth Guardians v. Kempthorne,* 08–cv–00689–NVW (D. Ariz. filed Apr. 9, 2008). The Service listed the frog in 2002, but determined at that time that critical habitat designation would not be prudent. *See* 67 Fed. Reg. 40,790 (June 13, 2002). WildEarth Guardians' suit sought to overturn the Service's determination, and after substantive briefing had commenced (as well as a change in Administration), the Service decided to settle the case. *See* Doc. No. 32. In the settlement, the Service agreed to revisit its determination, and ultimately the Service designated over 10,000 acres of critical habitat. *See* 77 Fed. Reg. 16,324 (Mar. 20, 2012).

The Service at Time 1 produces a reasonable designation that deserves a vigorous defense in court. Yet, at Time 2, once the administration has become "greener" and environmental groups sue, the Service gives up. Where is the transparency?

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[4] *See* http://www.fws.gov/economics/Critical%20Habitat/Final%20Draft%20Reports/CA%20coastal%20gnatcatcher/CAGN_DEA_Feb2004.pdf (last visited July 24, 2013).

[5] *See* http://voices.washingtonpost.com/washingtonpostinvestigations/2008/12/report_interior_office_meddled.html (last visited July 24, 2013).

[6] *See* http://www.uschamber.com/reports/sue-and-settle-regulating-behind-closed-doors (last visited July 25, 2013).

IV. The salmon wars: counting all the fish

For over two decades, a near-incessant conflict has raged in the Pacific Northwest between the environmental community, on the one hand, and water users and others who rely on the benefits to the human community that various hydroelectric and reclamation projects provide, on the other hand. The environmental community contends that these projects harm various populations of protected salmonids—in ESA parlance, "evolutionarily significant units" of salmon and steelhead. *See* 56 Fed. Reg. 58,612 (Nov. 20, 1991). Generally speaking, the federal courts have endorsed the environmentalists' views. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 481 F.3d 1224 (9th Cir. 2007) (overturning the management plan for the Federal Columbia River Power System because it was insufficiently protective of ESA-listed salmonid populations). But on one crucial point, which I discuss below, the courts originally sided with property owners and their allies. Yet the National Marine Fisheries Service has succeeded in taking a less-than-transparent path to avoid even this one judicial limitation on its policy preferences.

The issue concerns how the Service defines what constitutes an evolutionarily significant unit. Until the early 2000s, the Service followed a Hatchery Listing Policy whereby it entirely ignored the existence of hatchery-raised salmon when determining whether a given population of salmon merited listing. *See* 58 Fed. Reg. 17,573 (Apr. 5, 1993). This was a crucial move on the Service's part, because by refusing to count these hatchery-raised individuals, the Service was able to give the (false) impression that the salmon population at issue was closer to extinction than actually was the case.

To right this wrong, Pacific Legal Foundation attorneys filed suit on behalf of property owners and their allies in federal court in Oregon, challenging the Service's policy of not counting all the fish. The district court ultimately agreed with the Foundation's position, ruling that it was arbitrary and capricious for the Service to acknowledge that (1) hatchery-raised fish are genetically indistinguishable from naturally spawning fish, and (2) offspring of hatchery fish are deemed naturally spawning, *but* (3) hatchery-raised fish must be excluded by definition from the population unit proposed for listing. *See Alsea Valley Alliance v. Evans,* 161 F. Supp. 2d 1154 (D. Or. 2001). The court therefore ordered the Service to redo its policy.

But the Service, rather than agreeing to faithfully implement the court's order, opted for an end-run. The agency's strategy succeeded in two ways.

First, it issued a new Hatchery Listing Policy (ultimately upheld by the Ninth Circuit on principles of judicial deference to agency decision making, *see Trout Unlimited v. Lohn,* 559 F.3d 946 (9th Cir. 2009)) under which hatchery-raised fish are considered part of the protected population, but their presence is deemed *a negative impact* on the naturally-raised component, therefore making it more likely that the population *as a whole* will be listed. *See* 70 Fed. Reg. 37,204. An admittedly clever approach: not only does the revised policy undercut the *Alsea* decision, it potentially makes things worse for the regulated public. Before *Alsea,* hatchery-raised fish were not regulated under the Act. Now, such fish are included within the protected population, yet, per the policy, cannot help the population as a whole to recover.

Second, the Service has begun to use a rationale for listing salmonid species that is different from the evolutionarily significant unit rationale but better serves the agency's preferred policy ends. Specifically, the Service has begun to use its Distinct Population Segment Policy, *see* 61 Fed. Reg. 4,722 (Feb. 7, 1996), to list salmonid populations that otherwise would be subject to its evolutionarily significant unit policy, *see Modesto Irrig. Dist. v. Gutierrez,* 619 F.3d 1024 (9th Cir. 2010). The reason for the Service's shift is that the Distinct Population Segment Policy allows the Service to divide populations based on behavior rather than "reproductive isolation." Although hatchery-raised fish are genetically indistinguishable from their wild-spawning cousins, they can exhibit behavioral differences. Thus, using the distinct population segment rationale also allows the agency to effect a perfect end-run around *Alsea.*

Hatcheries have been used to sustain salmonid populations in the Pacific Northwest for over a century.[7] Indeed, without such hatcheries, many runs of salmon might be far worse than they are today (or even extinct). Does it serve transparency to first ignore this fact and then systematically to characterize it as a bad thing?

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[7] *See, e.g.,* http://www.hatcheryreform.us/hrp/summary/welcome_show.action (last visited July 25, 2013) (Congressionally established Hatchery Scientific Review Group noting that "hatcheries play an important rolein the management of salmon and steelhead populations in the Pacific Northwest").

V. Convenient taxonomy

The Act does not authorize the Services to list any population they wish. Rather, the Act carefully circumscribes the Services' authority to list only species, subspecies, and distinct population segments of species. *See* 16 U.S.C. § 1532(16). Nevertheless, recent history reveals the Services' desire to use less-than-transparent processes to ensure that they can find a listable unit. I give two examples below.

A. California gnatcatcher

The California gnatcatcher is a small songbird that ranges from Mexico to southern California. The gnatcatcher species as a whole is not endangered with extinction, but in 1993 the Service decided to list as threatened the California segment of the gnatcatcher as a separate subspecies. *See* 58 Fed. Reg. 16,742 (Mar. 30, 1993). The Service justified its determination largely on the work of one scientist, Jonathan Atwood. *See id.* at 16,742. Since then, several published studies have concluded that the Atwood subspecies classification is invalid. In fact, Atwood was a co-author of a subsequent study that substantially undercut his earlier work. Accordingly, in 2010, Pacific Legal Foundation attorneys, representing various interested industry and property rights groups, petitioned the Service to delist the gnatcatcher. Remarkably, the Service rejected the petition, reasoning that, although the new science undercut the old science, the agency was not prepared to move forward with delisting until more science was done. *See* 76 Fed. Reg. 66,255, 66,259 (Oct. 26, 2011).

B. Orca whale

Similarly fishy is the National Marine Fisheries Service's listing of the Puget Sound population of orca whale. The Service listed the population in 2005 as the result of an environmentalist lawsuit. *See* 70 Fed. Reg. 69,903 (Nov. 18, 2005). At the time, the Service acknowledged that the worldwide species of orca is not in danger of extinction, and that the Puget Sound population of orca whale does not qualify as a distinct population segment of the species as a whole. *See id.* at 69,903. So, what did the Service elect to do? Invent a new *subspecies* of orca whale, and list the Puget Sound orcas as a distinct population segment of that never-before-and-never-since-recognized subspecies of whale. *See id.* at 69,907. When protections for this whale population were used as part of the justification for imposing draconian water cutbacks to farms and towns in California's San Joaquin Valley, Pacific Legal Foundation attorneys submitted a delisting petition on behalf of affected farmers. The petition argued that new science has definitively established that the unnamed subspecies of orca whale is bogus, and that the listing is illegal. The Service is currently reviewing the petition. *See* 77 Fed. Reg. 70,733 (Nov. 27, 2012).

These examples of the gnatcatcher and orca whale support the conclusion that the Services view taxonomy as just one obstacle, or convenient excuse, relating to the ultimate goal of listing species, whether endangered or not. Where is the transparency?

VI. Economic impact analysis

The Act does not allow the Services to take into account economic impacts when determining whether to list a species. *Cf.* 16 U.S.C. § 1533(a)(1). However, the Act requires such considerations to be taken into account when designating critical habitat. *See id.* § 1533(b)(2). Nevertheless, the Services have tried to minimize their responsibility to assess critical habitat's economic impact by using a so-called "baseline" approach. According to this baseline theory, the agencies must estimate what the world would look like without the designation, and compare it to what the world would look like with the designation. This interpretation appears at first blush to be reasonable, but in reality it makes a mockery of the economic impact analysis. The reason why derives from the Services' position that many of the economic impacts attributable to critical habitat designation are also attributable to a species' listing. But, because the Services are not allowed to take into account economic impacts when considering whether to list a species, the Services assert that they must ignore these impacts *for all purposes,* including for critical habitat designation.

Hence, the Services produce economic impact analyses concluding that there are no or very few negative economic impacts from critical habitat designation, which is of course demonstrably false. As one prominent economist has explained, "[d]esignation of critical habitat can impose significant costs by raising the cost of development, reducing the amount of usable land and delaying completion of

projects."[8] Moreover, he notes that the Service's baseline approach has serious flaws, because it ignores regional market impacts, as well as impacts to consumers, not just developers and landowners.[9]

A much more reasonable approach—known as the "coextensive" theory—would take account of *all* impacts from designation, even if those impacts are "coextensive" with listing impacts. The Service's baseline position has been adopted by one circuit court of appeals, *Az. Cattle Growers Ass'n v. Salazar,* 606 F.3d 1160, 1173 (9th Cir. 2010), but rejected in favor of the coextensive approach by another, *see N.M. Cattlegrowers Ass'n v. U.S. Fish & Wildlife Serv.,* 248 F.3d 1277 (10th Cir. 2001). The Service has now pending a proposal to make the baseline approach part of the agencies' regulations. *See* 77 Fed. Reg. 51,503, 51,506–07 (Aug. 24, 2012).

How is transparency served when the agencies convert their obligation to assess the economic impacts of critical habitat designation into a paper exercise?

VII. Amending a forest plan through settlement

Conservation Northwest v. Sherman, 715 F.3d 1181 (9th Cir. 2013), is the latest in a long tradition of litigation over the Northwest Forest Plan, which governs logging and other activities for over 24 million acres of federal land between San Francisco and the Canadian border. In 2007, environmental groups challenged, under a variety of laws including the Endangered Species Act, the Bureau of Land Management's and Forest Service's decision, approved by the Fish and Wildlife Service, to excise the "Survey and Manage" Standard from the Plan. This Standard, which the agencies found difficult to administer, required them to take a close look at the impacts of logging on some 400 species of concern. *Id.* at 1184. The D.R. Johnson Lumber Co. intervened to defend the agencies' abandonment of the Standard. The environmental groups, however, prevailed in the district court on their claims under the National Environmental Policy Act, and then proceeded to negotiate a settlement with the agencies. The settlement ultimately approved, over the lumber company's objections, effectively amended the Plan by imposing new management standards for various species.

Happily, the lumber company successfully appealed the settlement's approval to the Ninth Circuit, which held that the district court abused its discretion in okaying the settlement. The appellate court reasoned that, although judicial decrees normally are not subject to notice and comment, this agreement was illegal because it imposed new, substantive, changes to the existing Plan, and because these changes were potentially of indefinite duration. *See id.* at 1187–88.

Nevertheless, had it not been for judicial correction, the agencies would have managed, through "sue and settle" tactics, to amend their regulations without adhering to the required notice-and-comment procedures. Where was the transparency?

VIII. Conclusion

Reasonable people can disagree about the utility and morality of the Endangered Species Act, but no one can legitimately approve of a less-than-transparent administration of the Act. Unfortunately, over the last several decades, the United States Fish and Wildlife Service and National Marine Fisheries Service have implemented the Act in a way that puts agency policy ahead of the law and the best interests of the regulated public. Moreover, the agencies' administration of the Act oftentimes bears no relationship to the best interests of protected species, but serves only to aggrandize government power or satisfy particularly litigious environmental groups. The last five years have simply exacerbated these odious practices. Groups like Pacific Legal Foundation can help prevent individual injustices, but systematic improvement to the Act and its administration is this Committee's and Congress' prerogative and duty.

The CHAIRMAN. The time of the gentleman has expired.

Mr. GOHMERT. Mr. Chairman, may I ask unanimous consent before our wonderful next witness, Mr. Ashe, to ask unanimous consent to submit testimony from Susan Combs, the Texas Comptroller of Public Accounts, for this hearing?

The CHAIRMAN. Without objection, it will be part of the hearing.

Mr. GOHMERT. Thank you so much.

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[8] David Sunding, *The Economic Impacts of Critical Habitat Designation,* 6 Agricultural & Resource Economics Update 7 (July/Aug. 2003), *available at* http://giannini.ucop.edu/are-update/6/6/the-economic-impacts-of-c/ (last visited July 25, 2013).

[9] *Id.* at 10.

[The information submitted for the record by Mr. Gohmert follows:]

Statement of Susan Combs, Texas Comptroller of Public Accounts, Austin Texas

First, let me say I very much appreciate the Committee holding this important hearing to look at how settlement agreements have circumvented transparency and the use of scientific data in decisions made under the Endangered Species Act (ESA). I would also like to thank Congressman Gohmert (TX–1) for submitting my testimony for the record.

The ESA is of concern to Texas because a species listing can have a significant effect on the state's economy by limiting business activity and the use of private property. Texas' economy is strong and, by most economic indicators, is outperforming the rest of the nation. This can be attributed in part to the state's emphasis on preserving private property rights and creating a regulatory environment in which industry can thrive.

As the Texas Comptroller of Public Accounts, I am the state's chief financial officer and responsible for monitoring and reporting on issues that can affect the economic well-being of Texas such as Federal regulatory matters, including the ESA, which can impact the state's economy.

I have been involved with the ESA for many years. My involvement began as a private landowner/rancher in West Texas. It continued as I was elected to serve first as a state representative and later as the Texas Agriculture Commissioner. Most recently, as Comptroller, I currently serve as the presiding officer of the Interagency Task Force on Economic Growth and Endangered Species which was created by the Texas Legislature in 2009. Additionally, in 2011, the Texas Legislature provided authority to the Comptroller to coordinate and develop conservation plans and hold corresponding Federal permits issued by the U.S. Fish and Wildlife Service (FWS).

Because of my experience, I recognize the importance of using sound scientific evidence when making a decision to list a species given the consequences of such actions. An example everyone is familiar with is the Northern Spotted owl. The FWS believed the owl needed protection under the ESA primarily due to logging operations. This action devastated local economies. Since the listing of this species, logging in the region's national forests has dropped from 4 billion board feet per year to about half a billion board feet per year; as many as 200 mills have closed.[1] Twenty years after the owl was listed as threatened, the owl population continues to fall by an average of about 3 percent annually.[2] Recent evidence now indicates the primary threat to the owl comes from a bigger and tougher rival, the barred owl.[3]

Using reliable data is especially important considering the flood of species petitions being received by FWS. From 1994 to 2006 the agency received petitions to list an average of 20 species annually. Since 2007, however, FWS has been petitioned to list 1,250 species. This sharp increase is the result of "mega-petitions" calling for the protection of dozens or even hundreds of species at a time—one petition filed in 2010 included 404 species.[4]

As a direct result of the use of mega-petitions, FWS has been subject to many lawsuits by environmental groups. In 2011, two environmental groups settled multidistrict litigation with FWS that centered on the agency's failure to meet deadlines prescribed by the ESA.[5] This is commonly referred to as "sue and settle."

According to analysis conducted by my office, about 1,000 species included in the 2011 settlement will be subject to some action under the ESA, including 250 that must be reviewed for final listing as threatened or endangered by 2016. However, the number of species subject to review under the ESA in Texas continues to grow.

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[1] Les Blumenthal, "After 20 Years of Protection, Owl Declining but Forests Remain." *McClatchy Newspapers* (Sept. 5, 2010).

[2] U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)* (Portland, Oregon, June 28, 2011), pp. III–42.

[3] U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spoiled Owl (Strix occidentalis caurina),* pp. III–59.

[4] Center for Biological Diversity, 404 Southeastern Freshwater Fish, Mussels, Crayfish, Birds, and Others Petitioned for Protection as Endangered Species, "April 10, 2010. http://www.biologicaldiversitv.org/news/press_releases/2010/southeast_petition-04-20-2010.html (Last visited July 29, 2013).

[5] U.S. Fish and Wildlife Service, "Improving ESA Implementation," http://www.fws.gov/endangered/improving_esa/listing_workplan.html (Last visited July 29, 2013).

To date, we are monitoring 125 species in Texas.[6] It is interesting to note that more than half of these species resulted from the settlement agreement.

Despite the 2011 settlement, the environmental groups who agreed to it continue to sue or threaten to sue over many actions, including several already addressed in the settlement. For example, on June 18, 2012, the Center for Biological Diversity (CBD) filed a notice of intent to sue FWS for failure to make 12-month findings for several species in the workplan.[7] FWS did make 90-day findings on these species on Sept. 26, 2011, as required in the workplan.[8] In April 2013, CBD announced another settlement with FWS regarding a timeline for decisions on several of these and other species across the country.[9]

The use of mega-petitions and sue and settle tactics is very concerning. The current process gives plaintiffs undue advantages over the Federal government and affected stakeholders including state and local governments, communities, businesses and private property owners. The 2011 settlement, for instance, was a closed-door arrangement between FWS and the two environmental groups. Those directly affected by the settlement were *not* consulted or included in the negotiations.

To ensure fairness and bring balance to the ESA it is important that any ESA decisions or settlement agreements be transparent and inclusive. The public should have access to information and be aware of settlement negotiations while they are occurring. Additionally, stakeholders must always be included in settlement negotiations since these decisions can have a significant impact.

Most important, however, is ensuring credible and complete scientific evidence and data is used in ESA decisions. I have long been an advocate for science not litigation driving listing decisions. Introducing better research into the process and ensuring a high scientific standard can be accomplished without ESA reform. The ESA standard of "best scientific and commercial data available" should equate to sound, verifiable scientific data.

In that vein, Texas is pioneering an initiative to provide credible and complete data on species that may be subject to ESA listing. The purpose of this initiative is to identify, prioritize and bridge gaps in species research and ensure pertinent listing decisions are based on accurate not erroneous data. During the 83rd Texas Legislative Session, $5 million was appropriated to my office to conduct species research. Working with FWS, state universities and other non-governmental organizations, we will develop high quality research on priority species to be used by FWS in its ESA listing decisions. We will use a process that includes strong internal controls including independent audits and ongoing research verification. It is my understanding that no other state has a comparable program. It is my hope this effort establishes a new standard for high-quality species research and creates better state and Federal partnerships regarding research needs in ESA listing decisions that ultimately helps protect the state's economy.

This is not the first time Texas has led the way. Examples of the state's innovation in working with the ESA began with Fort Hood. As agriculture commissioner, I worked with the military, private landowners and other state and Federal stakeholders to uphold the military mission at Fort Hood despite ESA regulations required for the endangered golden-cheeked warbler (GCW). This effort resulted in the development of the Recovery Credit System (RCS), a ground breaking pilot program to provide incentives to private landowners near Fort Hood to conduct conservation practices to benefit the GCWs.[10] The credits generated by participating landowners were used to offset disturbances of GCW habitat located on the military base. This increased the United States Army's training capacity and sustained Fort Hood's ability to enhance national security. Fort Hood remains an important part of the local and the state economy.

Continuing the drive to create innovative solutions in response to ESA actions, the Texas Conservation Plan (TCP) for the Dunes Sagebrush Lizard (DSL) was developed and includes many of the successful features of the RCS. As Comptroller, I hold the Federal enhancement of survival permit for this landmark conservation agreement, which was developed by public and private stakeholders and ultimately

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[6] Comptroller of Public Accounts, Keeping Texas First, http://texasahead.org/texasfirst/species/watch.php (Last visited July 29, 2013).

[7] Center for Biological Diversity, 60-day notice of intent to sue the U.S. Fish and Wildlife Service, June 18, 2012, http://fws.gov/southeast/candidateconservation/pdf/IntenttoSue_10FLSpecies.pdf (Last visited July 29, 2013).

[8] 76 Fed. Reg. 59836–59862 (Sept. 27, 2011).

[9] Center for Biological Diversity, "New Agreement Moves Rare Orchid, Marten, Turtle, Marsh Bird Closer to Endangered Species Act Protection," http://www.biologicaldiversity.org/news/press_releases/2013/10-species-04-26-2013.html (Last visited July 29, 2013).

[10] Texas A&M Institute of Renewable Natural Resources, "Recovery Credit System Proof of Concept," http://rcs.tamu.edu/proof-of-concept/ (Last visited July 29, 2013).

was used by FWS not to list the DSL as endangered.[11] This plan provides conservation for the DSL and valuable scientific research that will continue to better inform any future ESA decisions for the DSL. The TCP also provides a safety net for the oil and gas and agriculture industries enabling them to continue their operations without permanent mitigation. This is achieved through private landowner conservation activities that can be used to offset any disturbances in DSL habitat, similar to the RCS.

In closing, I am hopeful that through highlighting the areas in the ESA that are problematic, and insisting on the use of complete and accurate science, an improved and sound public policy can be created to balance the needs of all parties impacted by the ESA.

My office continues to monitor ESA activities and has developed a dedicated, comprehensive website, www.KeepingTexasFirst.org, to track such Federal regulatory actions. I encourage you to visit this site and learn more about what Texas is doing.

Should the Committee have any questions regarding the efforts Texas has underway regarding the ESA, please do not hesitate to contact me or my office.

The CHAIRMAN. Now we will welcome Director Dan Ashe of the U.S. Fish Wildlife and Service here in Washington, D.C. Director Ashe, you are recognized for 5 minutes.

STATEMENT OF DAN ASHE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, WASHINGTON, D.C.

Mr. ASHE. Thank you, Mr. Chairman. It is always an honor to appear before this Committee.

As I testified in December 2011, the Service is an equal opportunity litigation target. While at times this makes it challenging to meet our statutory deadlines and balance our workload, I want to re-emphasize that litigation is far from our principal challenge in effectively implementing the Endangered Species Act. In fact, today, our listing program stands on its strongest footing ever, largely because of the multi-district litigation settlement that I think we will hear much discussion of today.

We have heard allegations, speculation, and rhetoric about so-called sue-and-settle strategy. What we haven't seen is supporting evidence. One aspect is true, Mr. Chairman. The settlement was our idea, and we pursued it aggressively. But an accurate characterization of it would be get out of court and get to work.

Like it or not, Congress placed specific deadlines in the Endangered Species Act. When the Service is sued for missing deadlines, we have no defense. And common sense dictates that we settle, rather than waste taxpayer dollars in a losing battle. Through years of case-by-case settlements—case-by-case settlements—based simply on the order in which lawsuits were filed, we gradually lost control of our workload. So we decided to take control. Rather than allowing seven district courts to determine our work schedule, we successfully consolidated that litigation before a single court, reaching a comprehensive and favorable settlement.

Yes, the settlement discussions were held only with plaintiffs, as they always are. But there is nothing secret about it. The settlement agreement was subject to court approval in a public setting, and was widely announced to the public and our partners. We fully briefed Congress and have freely shared our work plan and its

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[11] U.S. Department of the Interior, "Landmark Conservation Agreements Keep Dunes Sagebrush Lizard off the Endangered Species List in NM, TX," June 13, 2012, http://www.fws.gov/southwest/es/Documents/R2ES/NR_for_DSL_Final_Determination_13June2012.pdf (Last visited July 29,2013).

deadlines with the public and our partners. I can tell you, Mr. Chairman, unequivocally, there was no collusion or pre-meditation between the Service and the plaintiffs. There is no evidence to support that claim. In fact, these were contentious negotiations. But, in the end, we all agreed that this comprehensive settlement is a win for good government, sensible implementation of the law, and species conservation.

The settlement commits the Service to follow nothing more than a schedule in making listing determinations that are required by the law. In return, the plaintiffs agreed to substantially limit their listing-related litigation. The settlement schedule provides unprecedented predictability and transparency for stakeholders. Rather than uncertainty regarding whether or when the Service might propose to list a given species, stakeholders now know, in some cases years in advance.

Each of these species proposals will follow the full process and standards of the law. They will be subject to scientific peer review, as well as public review and comment, before we make a final determination. All our decisions are subject, ultimately, to judicial review. This process is the essence of transparency, and ensures the use of the best available scientific and commercial information, as we make these important decisions.

Perhaps most important, this schedule provides unprecedented opportunity to proactively conserve species before we need to make a listing determination. Certainly the Service will be reviewing the status of a candidate—the fact that the Service will be reviewing a status of a candidate species is incentivizing voluntary and creative efforts to address extinction threats before a listing determination is made. We saw this happen with the due sage brush lizard in New Mexico and Texas. We are seeing it now across the 11-State range of the greater sage-grouse.

The MDL deadline of September 30, 2015 is spurring a historic conservation effort on the part of the Service, the Bureau of Land Management, the Natural Resource Conservation Service, the U.S. Forest Service, the 11 States, industry, and private land owners. Even if listing is still warranted for the sage-grouse and other species, these measures can be rolled into candidate conservation agreements, habitat conservation plans, and special rules under Section 4(d) of the law, providing certainty for land owners and businesses.

Frankly, this agreement is ensuring that the listing process works as Congress intended it to work. Critics seem to want to have it both ways, painting the ESA as a failure because of litigation, but insinuating that we have done something wrong when we use the judicial process strategically to get out of court and get to work conserving species. We all have an interest in sustaining our Nation's biological diversity. This settlement is a big step forward. It is good government brought to you by very talented and dedicated public servants, and I am proud of this effort and I am happy to answer your questions.

[The prepared statement of Mr. Ashe follows:]

Statement of Dan Ashe, Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior

Good morning Chairman Hastings, Ranking Member DeFazio and Members of the Committee. I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service) at the Department of the Interior (Interior).

Mr. Chairman, I appreciate the opportunity to discuss the Service's administration of the Endangered Species Act (ESA), especially our experience with litigation and settlement agreements.

In the forty years since it was passed, the ESA has prevented the extinction of hundreds of species and promoted the recovery of many others, including gray wolves in the Northern Rocky Mountains and the Western Great Lakes, Aleutian Canada geese, and the Tennessee coneflower. This great conservation work has helped to achieve Congress's call to preserve the nation's natural resource heritage, and it has happened alongside robust and sustained economic development.

But, as witnesses at your last ESA hearing testified, increasing numbers of species are facing the threat of extinction. The petition process, deadlines, and citizen suit provisions of the ESA provide appropriate opportunity for parties to challenge the pace and priorities of the Service in administering our listing duties. This contributes to a seemingly unlimited workload with limited resources sometimes resulting in missed statutory deadlines for which we are often sued. Settlement agreements are often in the public's best interest because we have no effective legal defense to most deadline cases, and because settlement agreements facilitate issue resolution as a more expeditious and less costly alternative to litigation.

When we settle a deadline case, we agree on a schedule for taking an action that is already required by the ESA. We do not give away our discretion to decide the substantive outcome of those actions, and the notice and comment and other public participation provisions of the ESA and the Administrative Procedure Act still apply.

ESA Litigation History

As I testified in December 2011, the Service is an equal opportunity litigation target, challenged frequently by industry, environmental organizations, states, tribes, and individual citizens. ESA-related litigation, particularly regarding our responsibilities for reviewing petitions to list, making listing determinations, and designating critical habitat, is not a recent occurrence; such litigation has been a fact of life for the Service for nearly twenty-five years. Most of that litigation has challenged the pace and priorities of the Service in addressing a backlog of listing actions.

The Service has faced a listing backlog from virtually the beginning of our implementation of the ESA. The 1973 Act directed the Smithsonian Institution to identify species of plants that might warrant listing, and their subsequent Report identified more than 3,000 at-risk plants. In the late 1970s and early 1980s, the Service spent considerable time and resources working through that initial backlog.

Amendments to the ESA enacted in 1978 required the Service to also designate critical habitat concurrent with listing. The slow pace of listing determinations at the beginning of the Reagan Administration led the Congress to amend the ESA again, and in the 1982 amendments to establish strict deadlines for making petition findings and shorten the time allowed between proposed and final rules from two years to one. And tight deadlines are appropriate, because for species facing the threat of extinction, time is the most critical ingredient in success.

By the early 1990s, the Service had determined that hundreds of species warranted consideration of listing and the protections of the ESA. Taking that action on these "candidates" for listing was precluded due to limitations on available Service resources and the need to act on higher priority ESA actions.

Based on the number of species on the candidate list, and a perception that the Service was not making progress on listing these species, in 1993 the Fund for Animals sued the Service for its failure to make expeditious progress in carrying out its listing duties. The Service settled this litigation at the end of the George H.W. Bush Administration, agreeing to make listing determinations for the 401 species then on the candidate list by September 30, 1996. While the Service concluded that the listing of some of these candidate species was not warranted, listing was warranted for many others. As a result, the Service listed more species from 1991 to 1995 than in the previous 17 years since the ESA's inception.

At that time, in an effort to align work effort and limited resources with the highest conservation priorities, the Service concluded that it was not prudent to designate critical habitat for many of those newly listed species. That led to more litiga-

tion challenging the failure to designate critical habitat, and the courts ultimately made it clear that our discretion not to designate critical habitat was very limited.

By late 2000, the Service was subject to so many court orders to designate critical habitat that it was unable to carry out any other listing activity. In order to restore some balance to the Service's listing activities, early in the George W. Bush Administration the Service and environmental plaintiffs entered into another comprehensive settlement agreement, called the "Mini-Global Settlement." The Service agreed to act on a list of petition findings, proposed rules, and emergency listing decisions. In return, the plaintiffs agreed to work with the Government to obtain modifications to court orders and settlement agreements in three cases to extend deadlines for critical habitat designations and dismiss a fourth case.

By the late 2000s, the Service was facing a new wave of deadline litigation—this time focused on petition deadlines.

Between 1994 and 2006, the Service received, on average, 17 petitions covering 20 species per year. In contrast, between 2007 and 2010, the Service was petitioned to list over 1,000 species—more species than the Service has listed during the previous 30 years of administering the ESA. Three "mega-petitions" overwhelmed the listing capacity of the Service and led to missed deadlines for petition findings for many species. During 2009 and 2010, the Service faced more than 20 lawsuits in numerous district courts challenging missed deadlines for more than 100 species. The Department of Justice asked the Judicial Panel on Multidistrict Litigation to transfer 20 petition deadline cases from seven district courts and assign them to the U.S. District Court for the District of Columbia. After the Panel agreed to do so, the District Court consolidated all of the cases, and referred the consolidated case to the court's mediation process, and that mediation ultimately led to the 2011 Multidistrict Litigation (MDL) settlement agreements.

Settlement Agreement Benefits of the Multidistrict Litigation

The MDL settlements have accomplished our objectives of making our listing activities more certain and predictable, and allowing the Service to focus more of our limited resources on actions that provide the most conservation benefit to the species that are most in need of help. The MDL settlement committed the Service to make the listing determinations required by the ESA for 251 species on a workable and publicly available schedule. The settlements did not commit the Service to add these species to the list; rather, they committed the Service to make a determination by a date certain as to whether listing was still warranted and, if so, to publish a proposed rule to initiate the rulemaking process of adding a species to the list.

The MDL settlement agreement has served to reduce deadline litigation. Through the agreement, the plaintiffs have agreed to substantially limit or eliminate their deadline litigation. Again, this allows the Service to use our objective, biologically-based priority system to establish our work priorities, rather than have our priorities overridden by litigation seeking to advance plaintiffs' priorities.

Between 2008 and 2010, the Service was also engaged in litigation for missed deadlines on petition findings for approximately 895 species. Since the MDL agreements were approved and the Service made its workplan public, the Service has seen an almost 96 percent reduction in species subject to lawsuits filed for missed deadlines on petition findings.

To that end, last year a federal judge cited the MDL settlements as the sole basis for finding that the Service is making expeditious progress in upholding an FY 2015 date for a listing determination for greater sage-grouse. Rather than force the Service to make a listing decision on a far more aggressive schedule sought by the plaintiff, this ruling in support of the MDL settlements is providing time for the Service and our partners to develop and implement conservation measures that work best for the species and local communities.

The MDL provides predictability for stakeholders and local communities. Prior to the settlement agreements, stakeholders were in limbo while species were on the candidate list, unsure when the Service might pursue a listing determination on a candidate species. The settlements have allowed the Service to establish and make available to the public a multi-year schedule for listing determinations on our candidate species. Stakeholders know in advance, in some cases years in advance, when we will be reviewing these candidates to determine whether a listing proposal is still warranted.

The MDL settlements have also served to encourage proactive conservation efforts by landowners, industry groups, local communities, and government agencies. For example, planning and implementation of conservation efforts is happening right now for the greater sage-grouse, a candidate species for which the Service has committed to make a listing determination by September 30, 2015. Sometimes proactive conservation efforts can make an ESA listing no longer necessary, as was the case

with the dunes sagebrush lizard in Texas and New Mexico. With more certainty and predictability about when the Service will make listing decisions, Candidate Conservation Agreements with Assurances (CCAAs) can also be developed and permitted to provide regulatory assurances to participating landowners in the event that listing is still warranted. Conservation efforts developed by stakeholders may also be rolled into Habitat Conservation Plans that provide predictability and ESA compliance for landowners, industry groups, or local communities. A clear example of the compatibility of working landscapes and species conservation can be found in the Sentinel Landscapes partnership, a federal, local and private collaboration designed to preserve agricultural lands, assistant military readiness and restore and protect wildlife habitat. Through this initiative, the U.S. Department of Agriculture (USDA), Interior and the Department of Defense (DoD) will work together in overlapping priority areas near military installations to help farmers and ranchers make improvements to the land that benefit their operation, enhance wildlife habitat, and enable DoD's training missions to continue.

Improving Implementation of the ESA

The title of today's hearing insinuates that settlement agreements have somehow reduced the transparency and scientific integrity of the listing decisions the Service makes under the ESA. We strongly reject that notion. Any deadline settlement we enter into commits us only to undertake a process already required by the ESA by a date certain. We do not commit to a substantive outcome of any decision or give away any of our authority, responsibility, or discretion in making a decision. Our listing decisions are based upon the best available scientific information, and proposals to add a species to the list or to designate critical habitat are subject to independent scientific peer review and public notice and comment.

The ESA is a tool by which we conserve our nation's biological diversity. Like any tool, it can be improved, and we are working hard to make those improvements to increase transparency, predictability and certainty. And like any tradesman, we are occasionally imperfect in our use of this tool. However, we are committed to continually improving the ESA's implementation in close collaboration with our partners, and I believe we have an exceptional history of doing just that. In addition to the multi-year workplan for the Listing Program, the Service and the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) are working to improve implementation of the ESA by considering appropriate changes to our practices, guidance, policies, and regulations to enhance conservation of listed species. Our priority is to make implementation of the ESA simpler, less contentious, and more effective by ensuring that key operational aspects of the ESA are current, transparent, and results oriented.

To improve the efficiency and effectiveness of the ESA in conserving endangered and threatened species, the Service and NOAA are moving toward improving the implementation of the ESA to reduce burdens, redundancy, and conflict, and at the same time promote predictability, certainty, and innovation. This effort has been guided by the following objectives, which conform with the principles espoused in President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review" and the Service's vision for the Endangered and Threatened Species Program:

- Improving the effectiveness of the ESA to conserve imperiled species;
- Making administrative procedures as efficient as possible;
- Improving the clarity and consistency of our regulations through, among other things, the use of plain language and by providing more precise definitions of many of our key terms;
- Encouraging more effective conservation partnerships with other Federal agencies, the States, Tribes, conservation organizations, and private landowners;
- Encouraging innovation and cooperation in the implementation of the ESA; and
- Reducing the frequency and intensity of conflicts when possible.

The Service and NOAA Fisheries seek to be open and transparent in our efforts to improve ESA implementation through ESA regulatory reform and meet the goals of promoting public participation, promoting innovation, increasing flexibility where possible, ensuring scientific integrity, and continuing our analysis of existing rules as set forth in Executive Order 13563.

Conclusion

In closing, Mr. Chairman, America's fish, wildlife, and plant resources belong to us all, and ensuring the health of imperiled species is a shared responsibility. We are working to actively engage conservation partners and the public in the search

for improved and innovative ways to conserve and recover imperiled species. I would like to emphasize the importance the Service places upon having a science-driven, transparent decision-making process in which the affected public can meaningfully participate.

The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

The CHAIRMAN. Thank you very much, Director Ashe, for your statement. I am sure that will provoke some questions, that is why you are here.

Next, I want to welcome Kent McMullen, like I mentioned, he is a constituent of mine, a diversified farmer in Northern Franklin County. His family has been around for a long time, and I know he was actively involved in the bladderpod issue.

So, Mr. McMullen, you are recognized for 5 minutes.

STATEMENT OF KENT D. MCMULLEN, CHAIRMAN, FRANKLIN COUNTY NATURAL RESOURCES ADVISORY COMMITTEE, PASCO, WASHINGTON

Mr. MCMULLEN. Thank you for the opportunity to provide comment here today before this Committee. My comments are in regard to the intended U.S. Fish and Wildlife Service, or Agency, listing of the White Bluffs bladderpod for ESA protection, as a threatened subspecies in Franklin County, Washington.

No notification was provided to our county's board of commissioners or land owners for this ESA listing. If not for the notification from Congressman Hastings' office staff to our Franklin County Farm Bureau, this ESA final rule would have been adopted by the Agency without any local knowledge.

Our ninth circuit court of appeals has ruled the ESA requirement that direct, actual notice be provided to local government jurisdictions 90 days preliminary to any listing action. Instead, came after a final listing has become law, when the law specifically states before. This circumvention needs correction.

Our Franklin County Commissioners, in conjunction with an outside counsel and public pressure prevailed in getting a 6-month suspension of the listing and reopening of the public comment period for 60 days, which ended July 22nd. During a public hearing on July 11th, speakers criticized the purposeful lack of notification and avoidance of utilizing best available science.

Our county's NRAC researched the ESA science references cited as support for the listings and we found a conflict of interest with the Center for Biological Diversity providing the science, in part, for the listing, while being the plaintiff in the mega-settlement requesting this listing and receiving Federal monies for conducting the science. We found a supporting reference to be a scientist with a dissenting view for subspecies status. And we found references calling for more time for research due to inconclusive data and the need for additional searches for more critical areas of habitat. The data is not accessible for public review. In all cited references, dissenting viewpoints are diminished, and supporting viewpoints prevail.

Our NRAC deemed that the best available science was lacking, so farmers hired a certified agronomist to acquire Agency permits for sampling and provide a chain of control of samples to the laboratory selected to do the DNA testing. The lab chosen was the University of Idaho's Laboratory for Evolutionary, Ecological, and Conservation Genetics. Under the auspices of Dr. Cort Anderson, director, this molecular lab is nationally recognized. Prior to DNA testing, both Dr. Anderson and Franklin County NRAC mutually agreed that the science must lead where the science leads with complete impartiality. If the White Bluffs bladderpod tested to be a subspecies, we would collaborate with the Agency to not only protect it, but work for rapid recovery. Lacking is any Agency commitment to what numbers of plants and geographic distribution constitutes recovery and delisting.

The ESA process used for listing the White Bluffs bladderpod avoids best available science through predisposed relationships between the Agency, the Center for Biological Diversity, the scientists providing reports supporting a listing, and the independent reviewers. For all participants in the ESA process, the science has evolved over the past 40 years. The selection of participants at all levels has promoted biodiversity conservation advocates. As such, best available science is no longer a fundamental principle, and advocacy has become the gold standard driving ESA expansion.

The DNA tests we conducted are the first-ever conducted for any bladderpod in the world. Our results from 15 plants spread over 6 counties in Eastern Washington and 1 county each in Idaho and Oregon showed a 100 percent identical DNA sequencing for the loci, or segments, tested. The fact, there is no subspecies in the so-named tuplashensis, that it is the same plant as the Physaria douglasii more commonly found over a four-State area. For the lack of a precursory $5,000 DNA test to compare Physaria douglasii to the alleged subspecies tuplashensis, over a decade of studies and hundreds of thousands of dollars expense ensued for what should have become a discontinued ESA listing effort.

Our county's commissioners, NRAC, and the best stewards of our resources, our Franklin County farmers, stand ready to collaborate with the Agency to expand studies. There are over 100 species of bladderpods named across this Nation, and four are pending ESA listings. Only one has achieved the benefit of best available science. That this is true after 40 years of the Endangered Species Act is but a sad indictment of the process where scientific technology has evolved, and the U.S. Fish and Wildlife Service has succumbed to unsubstantiated advocacy.

I thank you for allowing me to provide comments on this important issue on behalf of our Board of Commissioners, as Chairman of the Franklin County Natural Resources Advisory Committee. Thank you.

[The prepared statement of Mr. McMullen follows:]

Statement of Kent D. McMullen, Chairman,
Franklin County Natural Resources Advisory Committee

Thank you for taking the time for my comments today. My comments are in regard to requiring the U.S. Fish and Wildlife Service to use sound science and be required to do testing prior to listing under the ESA. The U.S. Fish and Wildlife Service (USFWS) provided no notification to our local government jurisdiction

(Franklin County Board of Commissioners) or to the thirteen landowners whose land fell within the proposed critical areas of habitat and moved forward with listing under the ESA. Operating in Washington state, the USFWS is using the advantage of our Ninth Circuit Court of Appeals decision that circumvents ESA requirements to provide ninety days notice to a local government jurisdiction preliminary to any proposed ESA listing. The Tenth Circuit Court of Appeals does respect and uphold this consideration. Clearly one of the issues that needs to be dealt with is that rules need to be uniform and not allow for the USFWS to find loopholes which allow them circumvent the process.

Our Franklin County Natural Resources Advisory Committee (NRAC), which I am Chair, received notice on May 1, 2013 of a Federal Register notice for a final rule adoption of the ESA listing and establishment of critical areas of habitat for the White Bluffs Bladderpod. The listing was to become law on May 23, 2013. If not for Congressman Hastings office, this final rule listing would have passed undetected, just as had occurred with the May 2012 Federal Register notice of the proposed listing, proposed demarcation of critical areas of habitat, and the 60 day period of public comment. The USFWS had provided "notice" to our Franklin County residents only through the Federal Register and the Spokesman Review newspaper in Spokane, WA; a newspaper not circulated in Franklin County. The view of angered landowners was that the USFWS had purposely tried to keep the first proposal and subsequent final rule "under the radar" so that it could be quietly adopted as law. This was collaborated by a USFWS employee that apologized in private to a farm family and told them that they had been told to keep the issue quiet and to not inform landowners or locals.

Franklin County NRAC serves at the pleasure of our Franklin County Commissioners and provides advice for relevant issues. In the case of this potential ESA listing of the White Bluffs Bladderpod, we advised the Board of Commissioners to retain outside counsel, Karen Budd-Falen of Cheyenne, WY for consultation. This resulted in a conference call to USFWS Washington (state) Director Ken Berg and an agency attorney. That conference call led to an agreement that USFWS would suspend the listing of the White Bluffs Bladderpod and the determination for critical areas of habitat for 6 months and reopen public comment immediately for 60 days or face an immediate filing of Franklin County's Board of Commissioners' "intent to sue". USFWS realized they were in an indefensible position in having circumvented direct public notice.

The close of the reopened comment period ended July 22, 2013. On July 11, 2013 while the comment period was open, USFWS held an oral public comment hearing at the TRAC facility in Pasco, WA to record public comments to the ESA final rule listing for the White Bluffs Bladderpod. The meeting was attended by 225 landowners, farmers, the manager for our South Columbia Basin Irrigation District, and representatives of some key ag commodity organizations.

Prior to this hearing, our Franklin County NRAC took the lead in notifying landowners and held a meeting with them on May 6, 2013 to update them of our research into the science reports cited as supporting the ESA listing of the White Bluffs Bladderpod under a threatened status. We had reviewed the references cited for support of the ESA listing and had found a major conflict of interest with The Center for Biological Diversity providing science, in part, for the listing when at the same time they were the plaintiff in the mega settlement with USFWS. Furthermore, we found a reference scientist's Phd thesis on White Bluffs Bladderpod whose report indicated her dissenting view for declaring the bladderpod (*Physaria douglasii* subspecies *tuplashensis*) a subspecies of the more common *Physaria douglasii.* Also, several referenced reports stated more time was needed for searching additional areas of critical habitat and additional research. However, although listed as references cited for support of the ESA listing, it appeared a cadre of scientists used for numerous other bladderpod species listings across the United States prevailed in declaring this White Bluffs Bladderpod as a subspecies worthy of ESA protection.

Due to those conflicting reports being referenced as supporting the ESA listing, we determined the best course of action was to hire a certified agronomist for the purpose of collecting plant samples and locating a qualified laboratory for contracting DNA testing for bladderpods from a widespread geographical area. Thus, we would allow definitive science to determine if *tuplashensis* was truly a subspecies requiring ESA protection or if it was merely part of a larger population reportedly found in four states: Washington, Oregon, Idaho, and Montana. The key interest was the full integrity of science without bias.

Mr. Stuart Turner of Turner & Company, Inc. provided us his skills as a certified agronomist for collecting bladderpod plant samples after he obtained a USFWS permit for sampling. Obtaining a permit was delayed when an agency employee refused

to respond to Mr. Turner's repeated stops at her headquarters and his pleas indicating her immediate response was necessary for a time-sensitive issue. To this date, she has completely ignored those requests. In two telephone conversations with this agent, she denied knowing anything about bladderpods and contended she was an animal biologist. Yet, she was referenced in two separate science studies supporting the W.B. Bladderpod listing and even wrote a blog about bladderpods posted on her Facebook site. We circumvented this employee and finally received a permit for sampling by applying pressure to the manager of the refuge area to where we had been directed. This effort was delayed and cost contributors additional expense for the molecular laboratory's use of additional labor to complete DNA testing and summation prior to the close of the reopened comment period.

The laboratory chosen for testing was the University of Idaho's Laboratory for Evolutionary, Ecological, and Conservation Genetics, operated under the auspices of Dr. Cort Anderson, Director. In discussions of our project, it was established early on that we wanted the DNA report to speak for itself and that there would be no biases or outside influence brought to bear upon the results. That was fully desirable and acceptable to Dr. Anderson, Mr. Stuart Turner, and our Franklin County NRAC. Dr. Anderson was fully involved in every facet of the testing and summation of results. He personally reviewed all of the nearly 45,000 base pair genetic comparisons made by the molecular testing equipment to ensure accuracy. The laboratory is nationally recognized for molecular work and, in fact, USFWS is currently using the same lab in testing other species.

In conducting research of the ESA bladderpod listing science references, we see a predisposed relationship involving four main participants. The USFWS requires ever-increasing budgets for increased staffing and burgeoning salaries and undoubtedly welcomed a plea-bargained settlement with The Center for Biological Diversity (CBD) to promulgate increased funding. The CBD achieves its goals of listing over 757 species and receives government grants for conducting science studies used to support the listings. This gives the CBD a powerful voice as the premiere environmental advocacy organization driving national ESA edicts. The other supporting scientists referenced all receive Federal funding for their studies and repeat work is always ensured with consensus to every ESA listing. Finally, the "independent" peer review panels likewise garner repeat business for consensus.

Our Franklin County NRAC found two scientists, E. A. Shaw and Reed C. Rollins, that have been cited for numerous ESA listings of bladderpods since the 1973 signing of the ESA into law by President Nixon. A 40-year career to date in naming species and subspecies. It appears that scientists, environmental organizations, and peer review panels all have economic incentives for ESA listings and have strayed from fact-driven science to become biodiversity conservation advocates. Selection for these advocates occurs for each science contributor and for Federal agency employees. This bias has become the gold standard driving ESA expansion. Pre-determined bias has supplanted factual sciences in the 40 year evolution of the Endangered Species Act.

Defects in the methodology and process used to reach the determination that the White Bluffs Bladderpod as a threatened species are evident. There is a problem with unpublished supporting data. The Federal government generally requires all documents used by or paid for by federal tax dollars to be published for public scrutiny. A key document, an unpublished manuscript by Florence E. Caplow, et al., entitled "Evidence for the Recognition of Physaria tuplashensis (Brassicaea)" 2005, is the cornerstone upon which the finding was made in the USFWS Assessment Sheet in 2010. In the Federal Register on page 23987, a document of this name is also cited as the basis, but with a date of 2006. No publisher, or means to obtain it are listed. Searches on the USFWS websites for the document were not successful. It appears that the same document was used as before, but with a one year later date and no mention of it being unpublished manuscript status. All of this type of information should have been published and publicly available. Under the Data Quality Control Act, this type of documentation should not be used as it is not credible.

Secondly, there is an issue in lack of attention by peer reviewers. The USFWS states that four peer reviewers—all experts in their field—were engaged to review the proposed listing. The USFWS acknowledges that there appear to be no investigations in the literature of the Taxon using modern DNA techniques. Yet, no peer reviewer noted that modern, inexpensive techniques were available to fill that gap of knowledge. It seems that a broader background in peer reviewers as to updated technology would have increased the probability that the USFWS would have been informed that their science supporting the White Bluffs Bladderpod listing was lacking and to have received that critique in a timely fashion. Having the requirement that DNA testing be used as a precursor to all other supporting science studies would be more time sensitive and economically prudent to possibly deter all subse-

quent expenses. This fortifies the argument that this listing was a rush to judgment to expedite terms of the mega settlement and verifies referenced science critiques that more time was needed for research and in the case of one science report, this White Bluffs Bladderpod was an ecotype, not a subspecies.

There is diverse interpretation of the ESA's Section 4 requirement for the use of best available science. It's interpretation by the public, scientists, and agency employees indicate very divergent viewpoints. The book "Best Available Science, Fundamental Metrics for Evaluation of Scientific Claims" by A. Alan Moghissi, et al. should be used as the definitive standard for ensuring the integrity of the ESA listings process.

In regard to the White Bluffs Bladderpod, the process for proposing an ESA listing requires a Small Business Administration analysis where USFWS is able to self-certify to avoid compliance with the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.). This allowance is instead, self serving. All USFWS had to do for determining economic impact on a substantial number of small entities is to conduct a purposely undervalued Draft Economic Analysis and thereby avoid the Regulatory Flexibility Analysis and its' mandated public comment period. Land values were averaged by using income figures for hundreds of thousands of acres within the Columbia Basin Irrigation Project and the year 2007 was "cherry-picked" as the year for economic analysis. Commodity values for farmland and a commensurate increase in land values have both increased dramatically in the years subsequent to 2007. In understating economic impact and contending there were only very small entities involved, the agency Director erroneously ascertained no RFA was required. This kept the listing process quiet, as the comment period was deemed not necessary.

The results of the DNA testing was based upon the testing of 7 fresh plant samples, including the alleged subspecies *tuplashensis* that were taken from the northern end, middle, and southern end of the 10.6 mile range of the White Bluffs Bladderpod population corridor established by the USFWS. A sample of the common *Physaria douglasii* was collected in Grant County. In addition, the Stillinger Herbarium at the University of Idaho provided 8 preserved samples from 4 additional counties in Washington state, and one sample each from Idaho and Oregon. Thus, 15 plant samples were analyzed for DNA sequencing. Segments of DNA (loci) were taken from areas pre-determined to always show species differentiation. Thus, one loci from the nucleus and 3 loci from chloroplasts from each plant sample were amplified and compared for nearly 3,000 base pairs of adenine, guanine, cytosine, and thymine (nucleotides) from each plant. If a subspecies does exist, one would expect variations in 4–10 genes. The results clearly showed there was a 100% match to all plants and no gene variations whatsoever within the loci that would differentiate species. Therefore, the White Bluffs Bladderpod, *Physaria douglasii* ssp. *tuplashensis* is NOT a subspecies. It is merely the same plant as the more common *Physaria douglasii*. In addition, the DNA testing proved that there was "gene flow" between this proclaimed isolated population and other distant populations of bladderpods. That means there has been ongoing genetic transfers in order to have maintained the 100% genetic uniformity of the tested loci. The ESA listing was based upon unreliable and subjective morphological differences without proper accounting for the diverse soil habitats that lead to phenotypical variations.

As evidence of soil type influence on phenotypic expression (phenotype being a set of observable characteristics of a plant from the interaction of its genotype with the environment), we happened to have a farmer whose interest in natural plants found in our native shrub-steppe habitats led he and his wife to plant a "natural" plant garden in their sandy loam soils behind their house. Two years ago, one of the plants they transplanted happened to be a White Bluffs Bladderpod (from private land). This natural plant garden receives no irrigation and plants only receive an initial watering following transplanting to prevent shock and to re-establish the root system. The transplanted "*tuplashensis*" bladderpod exhibits completely different morphology now that it is growing in a more neutral pH soil. It bloomed in 2012 and this spring, because of substantial rain (we are in a desert climate with typically less than 7 inches of precipitation per annum), there are over 100 new seedling growing. There are now 6 blooming mature plants bearing seed pods. Based upon the criteria used by scientists supporting the listing of the White Bluffs Bladderpod, this more robust transplant shows much varied phenotypic expression from when it grew in alkaline, highly calcareous paleosol soils (ancient buried soils now exposed at ridge caps due erosion) along the White Bluffs. Thus, it would be considered a different species than its contemporaries left growing along the White Bluffs. DNA testing proved this transplant was identical to all the other plant samples.

The DNA results clearly illustrate that DNA testing is far more economical and definitive than the 17 years of studies and research that have occurred to promote this erroneous ESA listing effort. DNA sequencing should be the precursor to any

ESA listing. However, a process that ensures transparency and integrity of molecular laboratory DNA testing is critical to prevent yet another participant in the machination that has become the ESA. It is interesting to note that the USFWS has a proposed budget at $602,000 for its first-year management budget should the White Bluffs Bladderpod be listed in defiance of DNA test results.

Some of the questionable expenses in the proposed first-year management budget are $100,00 per annum for hand weeding. Yet this bladderpod only grows in soils where it has limited or no competition. Furthermore, the USFWS management plan shows they want no attempts by firefighters through "foot traffic" to fight wildfires, in fear of damage to plants. But, hand weeding requires far more extensive "foot traffic". There is even $50,000 for studying the effects of climate change on the White Bluffs Bladderpod! This for a plant that has endured the toughest of environments since the Ringold soils that comprise the White Bluffs were deposited by the repeated massive floods of Lake Missoula in Montana. Any efforts and hundreds of thousands of dollars spent prior or budgeted for future management could have been saved but for the lack of intent to utilize the best available science for a mere $20,000. Our DNA testing was deemed to be the world's FIRST for any bladderpod species.

The DNA test results are included as a 10-page attachment. Our Franklin County NRAC and Board of Commissioners entered the DNA results into record on the last day of the public comment period this past July 22, 2013. Copies were delivered to the USFWS by electronic mail to the Washington office at Lacey, Washington and hand delivered to the USFWS Manager at the Mid-Columbia River National Wildlife Refuge at Burbank, WA. The agency is required to consider this evidence prior to rendering its' decision to list or cease listing efforts. It remains to be seen if Secretary of Interior Sally Jewel's testimony before this Committee on Natural Resources that utilizing best available science is the prevailing consideration trumping the rush for USFWS to comply with the time limitations of the mega settlement.

Certainly, this case of attempts to list the White Bluffs Bladderpods shows best available science has been avoided in favor of using consensus biodiversity conservation science to expedite compliance with the mega settlement. It also points out the shortcomings purposely practiced to avoid notification to those impacted by ESA listings.

Our Franklin County NRAC stands ready to collaborate with the USFWS in expanded testing of bladderpods to determine the full geographic distribution of the common *Physaria douglasii.* Based upon our results being the first DNA sequencing ever conducted for bladderpods, there are over 100 bladderpod species named nationwide that want for best available science. There are currently 3 additional bladderpod listings pending before the USFWS: the Short's Bladderpod, the San Bernardino Mountains Bladderpod, and the Zapata (Zapata County, Texas) Bladderpod.

The DNA results should serve as a watershed moment illustrating the need for DNA testing as a precursor for ALL plant and animal species nationwide that are proposed for listings and also, to be used retroactively for all species currently listed under ESA protection. The ruse of the ESA process as it currently operates is ripe for reform. Our economy cannot withstand this economic plunder, property losses, and other ESA transgressions any longer.

Thank you for the opportunity to provide written comments and testimony before the House Committee on Natural Resources. We hope our Commissioners, NRAC, farmers, landowners, and agricultural businesses and organizations collective efforts in funding this DNA testing has served as a poignant illustration for many needed ESA reforms.

The CHAIRMAN. Thank you very much, Mr. McMullen.

And last, but certainly not least, we have Dr. Rob Roy Ramey II, from Nederland, Colorado. You are recognized for 5 minutes.

STATEMENT OF ROB ROY RAMEY II, PH.D., NEDERLAND, COLORADO

Dr. RAMEY. Thank you. I have 33 years of experience with threatened and endangered species recovery on the front lines, including the successful recovery of the peregrine falcon and bringing the California condor back from the brink.

I bring to your attention two key transparency and accountability issues with the implementation of the Endangered Species Act. These are issues that undermine the legitimate conservation efforts and impose ineffective and unwarranted regulatory burdens on the public, and it is a situation made worse by ongoing litigation.

First issue. The ESA requires that decisions be made solely on the basis of the best available scientific and commercial data, not information. Although referred to as data, the Fish and Wildlife Service actually relies on published and unpublished reports, professional opinions, rather than the underlying data the studies are based upon.

Reliance on the papers and reports which summarize results, rather than the underlying data, as specifically required by the ESA, has created an untenable situation where, first, far-reaching ESA listing and regulatory decisions are made without an opportunity to independently analyze the underlying data and assumptions. Second, the scientific method has been replaced in implementation of the ESA with the opinions expressed by the authors of the cited studies. And, as we all know, if opinions are stated frequently enough, they can take on the illusion of truth.

What are the effects of this lack of transparency on the public? When the data are not publicly accessible, legitimate scientific inquiry and debate is effectively eliminated, and no independent third party can reproduce the results. This action puts the basis of some ESA decisions outside the realm of science. Furthermore, it has the effect of concentrating power, money, and regulatory authority in the hands of those who control access to the data. Information is power.

For affected members of the public, when regulations are opposed but the data is not public, it is analogous to being accused of a crime, but the accused is never allowed to see the evidence. That is neither transparent nor democratic, and it relies on challenge to authority.

There are sound reasons to question such authority. Everything—in key studies cited in ESA decisions, including some recent ones, everything has been found from mathematical errors, discrepancies between reported results and data, inaccurate mapping, subjective interpretation of results, fabricated data substituted for missing data, and, in a few cases, no data at all.

Clearly, the Agency's peer-review process and rigorous robustness checks are not effective, as they are portrayed to be. It has been my experience that when the data has not been provided to the Agency as obtainable under FOIA, then obtaining the access to the data held by researchers even after publication can be difficult, if not impossible. Seeking data from scientists and agencies can frequently resemble a shell game. Even though these studies were permitted or funded by the Federal Government.

In more than one case, a court order was required to obtain the data. In my direct experience, recovery of threatened endangered species is most effective when there is an active scientific and policy debate about the best courses of action. Such debate requires open and timely access to the data.

A solution to this issue is neither difficult nor costly. There are publicly accessible data repositories where this data can be depos-

ited. All that is needed is a requirement that the data—and by that I mean all the data—to reproduce the study is archived. And this is done before the Agency relies on the decision. And narrowly drafted exemptions can be put in place when there is a risk that is demonstrated to a species releasing the information.

Second, peer review is an imperfect filter on information quality, and it is not a substitute for public access to the underlying data and independent third-party review. Why? Peer reviews are rarely provided access to the data the study was based upon. While many peer reviewers are diligent, they often miss errors. Peer reviews are only as good as the information provided to them, and the depth of the questions asked. Conflicts of interest are not just financial, but they can be ideological, and they can occur within Federal agencies and among Agency staff that work closely together, such as the USGS and the Fish and Wildlife Service.

To avoid the pitfalls of peer review, accountability is required. Make failure to comply with the Information Quality Act an arbitrary capricious act on the part of an agency. Two, ensure that all Agency-sponsored peer reviews, and those—including those conducted internally, be public information. If it is only science, it shouldn't be protected under deliberative process. And, three, require that the agencies identify all information, including contrary information.

The American people have paid for data collection and research on threatened endangered species through grants, contracts, and agreements and permits. They pay the salaries of Agency staff who collect data, publish, and produce work based on that data. And they are, for the most part, willingly regulated on the basis of that data. It is essential that the American people have rights to access that data in a timely manner.

The ongoing bio-blitzkrieg of ESA listing petitions, lawsuits, and settlement agreements does a disservice to bona fide conservation efforts by allowing special interest groups to set priorities. There is nothing transparent about a closed-door settlement agreement. Thank you.

[The prepared statement of Dr. Ramey follows:]

Statement of Rob Roy Ramey II, Ph.D., Nederland, Colorado

"A democracy requires accountability, and accountability requires transparency." Barack Obama (from *Memorandum For The Heads Of Executive Departments And Agencies,* on the subject of the Freedom of Information Act)

My qualifications.

I am an independent scientist with 33 years of experience in conservation, research and management of threatened and endangered wildlife. Having worked on many species, including peregrine falcons; California condors; desert, Sierra Nevada, and Rocky Mountain bighorn sheep; argali sheep of Asia; meadow jumping mice; sage grouse; delta smelt and African elephants, I am well aware of the scientific issues surrounding species listing and recovery. I earned a Ph.D. from Cornell University in Ecology and Evolutionary Biology; a master's degree from Yale University in Wildlife Ecology; and a bachelor's degree in Biology and Natural History from the University of California Santa Cruz, and postdoctoral experience included research at University of Colorado, Boulder and as a visiting scientist at the Center for Reproduction of Endangered Species at the San Diego Zoo. After five years as Curator of Vertebrate Zoology at the Denver Museum of Nature & Science, I served as a consulting Science Advisor to the Office of the Assistant Secretary of the Interior in Washington, D.C. I am member of the Caprinae Specialist Group at the International Union for the Conservation of Nature (IUCN) and serve as a science advi-

sor to the Council for Environmental Science, Accuracy, and Reliability (CESAR). I consult on endangered species scientific issues and conduct scientific research with Wildlife Science International, Inc.

I bring to your attention two key transparency issues with the implementation of the U.S. Endangered Species Act. These are issues that undermine legitimate conservation efforts, waste scarce conservation dollars, and impose ineffective regulatory burdens on the public. In the worst cases, they can harm the very species they were intended to protect. I also provide potential solutions that I think both sides of the aisle may find agreement on.

Issue 1: Most ESA decisions are not based upon publicly available data.

The U.S. Endangered Species Act (US–ESA) requires the U.S. Fish and Wildlife Service (USFWS) make decisions to list species as threatened or endangered, and enact regulatory actions to aid the recovery of species, *"solely on the basis of the best scientific and commercial data available"* (16 U.S.C. 1531 et seq.)). Although referred to as *data,* the USFWS actually relies on published and unpublished studies, and professional opinion, rather than the underlying *data* the cited studies are based upon (see http://www.fws.gov/informationquality/and the Department of Interior's Scientific Integrity policies (DOI 2011)). Despite having adopted the Office and Management and Budget Information Quality Guidelines which require transparency in studies used in regulatory decision making, currently, neither the USFW, nor the National Marine Fisheries Service have a requirement that data relied upon in decision-making be publicly available.

Resource agency reliance on the papers and reports which summarize results and contain the opinions of scientists, rather than the underlying *data,* as specifically required by the ESA, has created an untenable situation where:

1) Far-reaching ESA listing and regulatory decisions are being made without an opportunity to independently analyze the underlying data and assumptions upon which the cited studies are based.
2) Resource agencies have effectively replaced the scientific method in implementation of the ESA (i.e., data, hypothesis testing, and reproducible results) with the opinions expressed by the authors of the cited studies, especially when those opinions are erroneously represented as if they were rigorously tested against the data.

What are the effects of this lack of transparency on the public? When data are not publicly accessible, legitimate scientific inquiry is effectively eliminated as no third party can independently reproduce the results. This action puts the evidentiary basis of some resource agency decisions outside the realm of science and in clear violation of the Information Quality Act. Furthermore, it has the effect of concentrating power, money, and regulatory authority in the hands of those who control access to the data (Ramey 2012).

For affected members of the public, whether they are hikers, horseback riders, hunters, farmers, or industry, when regulations are imposed (via ESA listing, critical habitat designations, or biological opinions) but the data are not public, it is analogous to being accused of a crime, but the accused is never allowed to see the evidence. That is neither transparent nor is it democratic; it relies on authority.

There are sound reasons to question such authority. Key studies used in decision making on the greater sage grouse, Gunnison sage grouse, boreal toad, Prebles meadow jumping mouse, coastal California gnatcatcher, delta smelt, desert bighorn sheep, and hookless cactus have one of more of the following: mathematical errors, missing data, errors of omission, biased sampling, undocumented methods, simulated data used when more accurate empirical data were available, discrepancies between reported results and data, misrepresentation of methods, arbitrarily shifting thresholds, inaccurate mapping, selective use of data, subjective interpretation of results, fabricated data substituted for missing data, or no data at all. Clearly, the agency's scientific peer review process that should have caught these errors is not as effective as it is portrayed to be.

It has been my experience that when data has not been provided to the agencies, then obtaining access to data held by researchers, even after publication, can be difficult, if not impossible. As the following responses to data requests illustrate, seeking data can frequently resembles a shell game:

"It is very possible that this data set does not exist any longer."

"The USFWS data was deliberately provided in a format that would not facilitate a detailed analysis by those unfamiliar with the manner in which it was collected."

"*Unfortunately we cannot provide you with the raw data you have requested at this time.*"

"We categorically do not release this information to anyone including the United States Fish & Wildlife Service and the California Department of Fish and Game."

While some researchers have been responsive to data requests, others simply ignore our data requests altogether. Some researchers apparently feel a need to control access to the data, determining if, when, and to whom it will be released, sometimes years after the data were collected. However, many of these studies were permitted and/or funded by the USFWS (or other source of federal funding) through grants, contracts, or cooperative agreements. Therefore, it follows that the data should be public, yet there is no consistent requirement from the USFWS that the data be public or provided to the agency.

This problem is more widespread than one might initially think. In a notable case, colleagues at the California Fish and Game (CDFG) had to track down and net-gun endangered desert bighorn sheep from a helicopter so they could manually download data from the GPS radio collars (that provide precise locations at regular time intervals). They were forced into this extreme course of action because a researcher had reset the access codes on the collars so only *he* could download the data remotely, and the researcher refused to share the data with the CDFG who needed it for management of the population (Dr. V. Bleich, CDFG retired and K. Brennen, pers. comm). Funding for purchase of the GPS radio collars was provided by the USFWS for use by the researcher.

In two other cases (coastal California gnatcatcher and desert bighorn sheep in the Peninsular Ranges) a court order was required to obtain the data.

Clearly, the public interest in having timely access to data overrides perceived ownership of data by some researchers. As noted by ESA scholars, Fischman and Meretsky (2001):

> "In addition to the rapid responses often needed to recover endangered species, most research in conservation biology is also distinguished by a dependence on government resources. The funding for research; the scientific permits allowing researchers to collect, harass, or harm animals; the permission for access to public lands; and the regulation controlling activities to ensure continued existence of imperiled species all point to the pervasive public interest in the resulting information. This public claim for access countervails the customary control researchers exert over data they collect."

In my experience, recovery of threatened and endangered species is most effective when there is active scientific debate and discussion about the best courses of action to identify and ameliorate threats, and how to devise more effective conservation measures. Such urgency requires open and timely access to data.

A solution to this issue is neither difficult, nor costly. There are publicly accessible data repositories (i.e. GenBank for DNA sequences and Dryad for general purpose data archiving http://datadryad.org/), as well as traditional museum and library archives where data may be archived without charge. All that is needed is a requirement the data be archived prior to the agency relying on the report or paper in its decision making, and that the data (both raw and final data sets) and methods are provided in sufficient detail to allow third party reproduction.

Are there situations where public access to data should be limited, such as revealing the locations of endangered species? In most cases, this threat is overstated. However, in those situations where there is a legitimate concern (i.e., where poaching has been clearly documented), the risk should be weighed against the potential benefits of more effective management aiding species recovery. If the risk of disclosure is real, then the solution is to allow only *"narrowly drafted exceptions to the general rule of open access"* as *"broad exceptions tempt agencies and other decision-makers to shield their programs from criticism"* (Fischman and Meretsky 2001).

Issue #2: Peer review is not a panacea.

Peer review is a useful but imperfect filter on information quality. However, it is not a substitute for public access to the underlying data that allows for an independent, third party review.

Despite the best of intentions, there are no guarantees that peer reviewers will be provided access to data, or that if data is provided, it will be used in developing their review. As previously noted, peer reviewers do not always catch errors of significance. Moreover, as detailed in my previous testimony to the Committee (Ramey 2007), if there was a bias or selective presentation of information by the USFWS to peer reviewers, the outcome of the peer review can be less than objective. And finally, despite agency assurances, there is no guarantee that reviewers be will free of conflict of interest or will deliver an impartial assessment. The reasons for this are summarized in the following excerpt from my recent paper, *On The Origin of Specious Species* (Ramey 2012):

> *"The problems that lead to these issues* [with peer review] *are three fold. First, the number of experts involved with a particular species is often limited. Whole careers are sometimes dedicated to the study of a species (or sub-*

species or population), and a listing can produce what is perceived as needed "protection" for that species under the ESA. Additionally, ESA listings can have the effect of putting these experts into positions of power, money, and authority, through their roles on Recovery Teams, Habitat Conservation Plans, and consulting as USFWS "approved biologists." Because few ESA-listed species are ever delisted, this guarantees a virtual lifetime of employment on one's favorite species. Thus, experts used in peer review may also be advocates, or have an emotional, ideological, or financial stake in the proposed listing. "

"Second, a network of individuals who work on a particular species (or issues common to several species) can form powerful "species cartels." These social networks can influence the peer review process, provide a united front to advocate for particular decisions, and repress the publication of information that does not agree with their positions." It has been my experience that the FWS and NMFS typically rely on species specialists, which exacerbates this problem.

"And third, the use of other federal biologists in peer review, especially those from the USFWS and the USGS-Biological Resources Division (USGS–BRD), cannot be viewed as conflict free. The increasing codependency of the USFWS and USGS–BRD, results in a growing and previously unrecognized conflict of interest in science used in support of ESA decisions and the use of USGS biologists as peer reviewers on information used in ESA decisions. This extends to the role of USGS biologists who serve as editors and reviewers for scientific journals, and who peer review highly influential scientific information used in ESA decisions."

To avoid the pitfalls of peer review described above, the solutions are relatively straightforward:

1) To ensure that peer reviews are transparent, conducted in an objective and consistent manner, that the underlying data are both available and analyzed by reviewers, and that potential conflicts of interest are clearly identified, accountability is required: make failure to comply with Information Quality Act an arbitrary and capricious action on the part of the agency.
2) Ensure that that all agency sponsored and administered peer reviews, including those conducted internally by biologists at the USGS, be public information if they are relied upon by the USFWS or NMFS.
3) Require that the USFWS and NMFS identify and make available online all information including contrary information that it has received.

Conclusions.

The American people pay for data collection and research on threatened and endangered species through grants, contracts, cooperative agreements, and administration of research permits. They pay the salaries of agency staff who collect data, author, edit, and publish papers based upon those data. They, for the most part, are willingly regulated based on those data. It is essential that the American people have the right to full access to those data in a timely manner, as it is in the public interest. A requirement that data and methods be provided in sufficient detail to allow third party reproduction would raise the bar on the quality and reproducibility of the science used in ESA decisions and benefit species recovery. Failure to ensure this level of transparency will undermine the effectiveness of the very programs that the data were gathered for in the first place.

It should not take a subpoena (or intrepid, net-gun toting state biologists leaping from helicopters) to obtain data that should be public under the ESA.

Accountability is needed in the implementation of Information Quality Act, particularly in regard to public access to data and the peer review process.

Qualified third party reviews have the potential to reduce the workload of agencies, and improve the caliber of regulatory actions.

The ongoing "bio-blitzkrieg" of ESA listing petitions, lawsuits, and settlement agreements does a disservice to bona-fide conservation efforts. Every time another species is added to the list of threatened and endangered species, or a new deadline is imposed by litigants, the resources to recover species becomes more thinly spread. Throwing more money at the problem is not the solution, nor is allowing decision making by fiat. The solution is to ensure that the scientific evaluations are done properly the first time, and that means relying upon data and objective application of the scientific method, as required by the ESA.

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The CHAIRMAN. Thank you, Dr. Ramey, for your testimony. I will now recognize myself for a line of questioning.

And, Mr. McMullen, I want to follow up, obviously, on what you testified to. The topic of this hearing is transparency. And in your testimony you clearly alluded that, from your perspective, there was no transparency. But let me focus on the "scientific papers" that I understand by your testimony was not made available to you, and the DNA test that subsequently was done on the bladderpod.

First of all, I don't think you said in your testimony, but that DNA test that you had the University of Idaho conduct was funded by whom? Turn on your microphone, if you would.

Mr. MCMULLEN. It was funded by farmers in the area who raised funds primarily from the land owners. There were some ag commodity groups that helped contribute, and some surrounding farmers. They understanding the implications of an ESA listing——

The CHAIRMAN. So let me get this, just to make sure. Nobody was contacted about this listing until, you said in your testimony, we got wind of this and contacted you, and then you had subsequent hearings. So none of that was done.

And, as a result of that, local farmers said, "Listen, we want to be part of the solution. Let's try to look at this scientifically." And we raised money—you raised money to conduct a DNA test.

Mr. MCMULLEN. Yes.

The CHAIRMAN. That is it.

Mr. MCMULLEN. That is correct.

The CHAIRMAN. Absolutely incredible. Now, would you contrast—how would you contrast the scientific papers and their conclusion with the DNA test and its conclusion, and which do you think is superior?

Mr. MCMULLEN. The DNA tests are far superior, because their testing is only based on subjective morphology differences, growth characteristics from plants. This plant grows in a very austere soil environment and looks different than plants in other areas that are in better soil conditions.

The subspecies status was based entirely on plant characteristics, morphology differences, whereas the DNA test proved conclusively that they have 100 percent matched DNA for the species tested, which was as wide distribution that we tested of 6 counties and from 3 States.

The CHAIRMAN. Three different States. Director Ashe, have you reviewed that DNA study that Mr. McMullen is talking about regarding the bladderpod?

Mr. ASHE. I have not.

The CHAIRMAN. Will you?

Mr. ASHE. I will not. What I will do is get a recommendation through our field and regional structure, and through our——

The CHAIRMAN. Well, just let me ask this question. You are going to get a recommendation, OK, chain of command, I guess I can understand that.

Given what you just heard Mr. McMullen say, with a scientific study comparing DNA, what conclusions can you draw from that?

Mr. ASHE. Mr. Chairman, I was qualified to call myself a biologist a long time ago. What I would say, having worked for a long time in and around the field of taxonomy is taxonomy is a field where, like many other fields, you have lumpers and splitters. And so, some people use morphology, physical characteristics, as the principal mechanism to determine speciation.

The CHAIRMAN. Well——

Mr. ASHE. Some people like to use genetic techniques. And what we are challenged to do in the U.S. Fish and Wildlife Service is look at all of that data, and determine which is the best available data.

The CHAIRMAN. Well, let me—my time is going to be running out here, and I have another question. But do you not think that at least the testimony that you have heard—and I understand you haven't reviewed it—is pretty persuasive?

Mr. ASHE. What I would say is Mr. McMullen has—and his associates—have provided to us this new genetic study. We have reopened our comment period. We have suspended the application of——

The CHAIRMAN. Well, I understand the comment period has ended. You reopened it initially, but I understand that comment period is over now.

Mr. ASHE. The comment period is over, but they provided us——

The CHAIRMAN. Right.

Mr. ASHE [continuing]. With the information during the comment period, and we will consider that in looking at this decision.

The CHAIRMAN. Do you do DNA—are DNA studies part of what Fish and Wildlife does in other areas?

Mr. ASHE. We use DNA analysis, we do.

The CHAIRMAN. OK. Let me ask you this. This is the last thing. On the White Bluffs bladderpod, your Web site lists it as threatened. Does that mean that the Fish and Wildlife Service has already made up their mind on the listing and the critical habitat designation of that, since your Web site says it is listed as threatened?

Mr. ASHE. Well, I think as you know, Mr. Chairman, we made a final determination. We have suspended that determination, pending further review. And so, the action has been taken, we have suspended the application of that action for 6 months. So it does appear on our list, but it has no regulatory effect.

The CHAIRMAN. Finally, when will you have a final decision on that?

Mr. ASHE. Six months from the date that we suspended it. So that would be about 5 months from now, I believe.

The CHAIRMAN. OK, very good. My time is expired. I recognize the Ranking Member.

Mr. DEFAZIO. Thank you, Mr. Chairman. Mr. Ashe, we have heard criticism of the multi-district litigation settlement. And I just want to get a few things on the record here, if you can answer quickly and hopefully definitively on these things.

Has that settlement resulted in more or less litigation under the Endangered Species Act?

Mr. ASHE. Over 90 percent reduction.

Mr. DEFAZIO. OK. So less, 90 percent less. Has the settlement resulted in more or less focus on conservation, as opposed to sorting and defending lawsuits?

Mr. ASHE. More.

Mr. DEFAZIO. OK. Has the settlement given more or less certainty to stakeholders who want to know the schedule for decisions about species listing that might impact them?

Mr. ASHE. Substantially more.

Mr. DEFAZIO. OK. Has it given you more or less flexibility to extend public comment periods, delay listing determinations, and improve science on species like those being discussed here today?

Mr. ASHE. More.

Mr. DEFAZIO. OK. Did you cede any governmental authority to a non-governmental group when you agreed to settle this case?

Mr. ASHE. None.

Mr. DEFAZIO. OK. And basically, now, you have been allowed to proceed with listings that have been previously filed for that you would have had to sort of randomly meet deadlines on, depending upon court decisions. Right?

Mr. ASHE. Correct. We now have a predictable schedule to work with.

Mr. DEFAZIO. OK. And did you commit to any specific outcomes in this settlement, or just that you would go through a public process with comments, testimony, and gathering of evidence to make decisions?

Mr. ASHE. We agreed to the latter.

Mr. DEFAZIO. OK. Now, the data issue, maybe this is a place where we can make some common cause—I understand that often these studies are funded publicly. And why would we not make the underlying data available for scrutiny?

Mr. ASHE. If studies are publicly funded, if the USGS does work for us, for instance, then the data would be available through the United States Geological Survey. So——

Mr. DEFAZIO. What if it was someone with a grant? I mean often——

Mr. ASHE. Not necessarily. If they have an NSF grant or another grant, we don't necessarily control access to the data.

Mr. DEFAZIO. Why would someone withhold the data if they had come to a conclusion that you are basing your work on?

Mr. ASHE. Well, again, I think we have to look at the standards. The Service follows the established OMB procedures for the Information Quality Act. And the Information Quality Act recognizes peer-reviewed, published, scientific papers as——

Mr. DEFAZIO. All right. OK, and——

Mr. ASHE [continuing]. Presumptively meeting the standard of objective science.

Mr. DEFAZIO. OK. So you are a scientist. And so, did the people who did the peer review have access to the data?

Mr. ASHE. They do.

Mr. DEFAZIO. OK. But again, why would a scientist wish to withhold that data? I mean if we gave them public funds, I guess we could require they publish the data, right? I mean we could change—we could put that in law.

Mr. ASHE. Congress could do that.

Mr. DEFAZIO. OK. That might be something we want to do. I don't understand why we would go down the path of withholding the data.

Could you just give me—Mr. Chairman, I will enter this full statement in the record in the interest of time, but this is something I have often gone back to, in the Mineral King case in California where they were proposing, essentially, to build Disney World in the Mineral King area, which has subsequently been preserved and is very heavily utilized and visited, and it was Justice Douglas. And he was talking about, basically—and again, I won't read the whole thing—but what is present in a teaspoon of undisturbed soil, and what it might mean for the future of humanity. But his conclusion I will read: "When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time. Conserve water, land, and conserve life."

It is a very elegant decision. And sometimes I have been involved in these issues as a county commissioner, a Member of Congress, and observant member of the public. And sometimes people think it is trivial that we are trying to preserve the Fender's spotted butterfly in meadow areas in Oregon, or other species. We don't know, if we drive that to extinction, what we have lost. Maybe we have lost the cure to cancer, maybe we didn't. But it would be best to keep our options open.

I want this law to work, I want it to work well, I want it to work in an orderly way. And one thing I observe is I think the budget for this Agency is inadequate, given the backlog of decisions they have, which does create uncertainty for land owners and businesses and individuals. And we can discuss that at another time. Thank you, Mr. Chairman.

Mr. BISHOP [presiding]. Thank you, Mr. DeFazio. I am going to yield myself 5 minutes for questions, because I was the next on the list, anyway.

And I have to admit, Mr. Ashe, I saw some of the news reports this morning for the first time, which does not put me in a great mood. But I do need to ask you a simple question that normally, in preparing a scientific document, one assumes that you start with the science first and then prepare recommendations based on the results of that science. Unfortunately, emails between the National Technical Team members that we have received, only because of a FOIA request, report that you have done the exact opposite. The recommendations were coming before the science.

So, in one email—I think you can see it up on the slide—a research biologist emails his team with the subject line, "Citation for

NTT Product," and he said, "I have tried to identify those biological recommendations that may need a scientific citation. I am working on an introductory part on certainty of conclusions and inference base with regard to science without relating to it in any study in particular. If we don't have the science, I am assuming that we are going to have to use our best professional judgments."

So, in other words, if you are going to do your own recommendations, if there is no particular study, you will have a chance to just make it up.

He then goes on to say, "So, if I could get each of you to take a shot and identify a research citation that supports the biological recommendations, along with a full citation, I would greatly appreciate the help."

So, Director Ashe, first, is this consistent with your understanding of the scientific process? And are you going to defend creating recommendations using professional judgment and then asking for scientific support later?

Mr. ASHE. Well, Mr. Chairman, I guess I would begin by saying yes, we use best professional judgment.

Mr. BISHOP. And then find the science later.

Mr. ASHE. When we have clear and applicable scientific data and information, we use that information. The law requires us to make a decision and use the best information available.

And so, if there is little information available, then often times we go to experts and we ask experts for their best professional judgment.

Mr. BISHOP. From where do you find those experts? Within your Agency?

Mr. ASHE. We find them within our Agency, we find them within State agencies, as is the case here——

Mr. BISHOP. So what——

Mr. ASHE [continuing]. With Colorado Parks and Wildlife.

Mr. BISHOP. So what you are telling me is, yes, you come up with the recommendations and then you go after trying to find something to justify it. And that is a legitimate practice within the U.S. Fish and Wildlife Service.

Mr. ASHE. As I read that individual's request, it is not to make up science. He is asking people to look at the recommendations, and based on——

Mr. BISHOP. I didn't say he is asking them to make up science. He is trying to find some science somewhere. The obvious recommendation, though, is you made the recommendations first; now you are trying to find the science to back it up.

Mr. ASHE. They used best professional judgment to frame the biological recommendations. And this individual is asking people if there is science to prove or disprove those recommendations.

Mr. BISHOP. All right. So the process still is reversed. You are recommending, then you are trying to find the science.

Dr. Ramey, let me ask you to comment on the slide that you see up there. Is this consistent with what peer-reviewed science documents should be created? Is this something of which a scientist should be proud?

Dr. RAMEY. No. And in my experience, a lot of these professional judgments, the Service tends to go to species specialists. And spe-

cies specialists—so, for example, people that work closely on a species such as sage-grouse—form a cartel, if you will, of information. And they tend to agree with each other. It is called confirmation bias in the area of psychology.

And so, instead of having decisions based on data, what you are getting is decisions based on opinions.

Mr. BISHOP. OK, I appreciate that. I have another question. I would like you to respond to a question that DeFazio had earlier.

But first I must—Director Ashe, I will talk about Utah. And since you are dealing with sage-grouse, I want to be Utah-specific. Your Fish and Wildlife Service sent a 16-page letter to the State of Utah criticizing our State's greater sage-grouse management and recovery plan. In view of the documents that we found through FOIA, it is difficult to support that, since you are in no position to critique the State plan because of your questionable scientific practices dealing in these reports.

Specifically, in this particular letter, came in three areas. Number one, about tall structures impacting it. You denied what the State was doing, even though, in the FOIA requests, your staff, your office, is still saying we acknowledge that the science on tall structure impacts to a greater sage-grouse is still evolving.

In buffers, we have a 3-mile buffer around the lakes, because that is where they are. You insisted on a 4-mile buffer without any kind of requirement or scientific data to support it.

And, three, you were dismissive of our disturbance limits. You wanted them from 5 percent down to 3 percent. But, once again, the 3 percent number is based on research data that has no support going with it, as well. That is according to this—I am sorry, I am 9 seconds over. I am going to ask you this. Will you withdraw that stupid letter? And if not, will you at least go through those three points and review those again and then get back to the State of Utah?

Mr. ASHE. The letter was provided at the request of the State of Utah, so I won't withdraw it. But we are in discussions with the State of Utah. We are in active discussions, and we have a very good working relationship with the State of Utah——

Mr. BISHOP. Thank you. I hope——

Mr. ASHE [continuing]. And will continue to work with them.

Mr. BISHOP. I am over, but I hope you continue on with that, simply because that letter put a damper on those efforts going forward, and is negative, and it is counterproductive. It needs to be changed, it needs to be fixed.

And I apologize for going over. Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you very much. I have a question for Dr. Ramey first. You said the data is not public. And then in another part I read that it is not always available. So how much of it is available to other researchers or to people like yourself?

Dr. RAMEY. Very few scientific journals have a data archiving policy by which the data set is published with the article or put in a repository. And so, a lot of these scientific studies are produced, but the data doesn't go public. And I have had situations where I have requested data and have been refused the data by the researchers.

Now, technically, under circular A110, the OMB, one should be able to FOIA the Agency and get the data on the research. However, if it was done under a grant versus a contract or a cooperative agreement, that is not going to be public. So there are different standards, and there is also an incredible amount of time and headache that goes into trying to obtain data.

So, to answer your question, some data, but not much, is available.

Ms. SHEA-PORTER. OK, so——

Dr. RAMEY. And then very important data that is used in decisions—so, for example, the greater sage-grouse, the 2010 listing decision is based upon a study by Garton et al, funded by the Fish and Wildlife Service to the tune of $74,000. That data has never gone public. That data is central. It is cited 62 times in the listing decision, but yet it has not been released. I have written to Garton personally and have been refused the data.

And so, myself and other peer reviewers have found in the paper mathematical errors, unaccounting for error, reliance on a antiquated and totally debunked threshold for extinction risk. And yet the data is not public, available. And here we are spending billions on protecting sage grouse in many programs across the West, but yet that fundamental data has not been available. And that goes back to 2009. Why are we still chasing the data now?

And so, the problem is it needs to be available and it needs to be available at the time of the decision. If we wait until it is too late, the clock has run out. And the clock on this one has nearly run out.

Ms. SHEA-PORTER. OK. And, obviously, we are concerned about having access to this information. But I am going to turn my question to Mr. Ashe.

It seems to me that this is a pretty—based on your own testimony, Dr. Ramey, this is kind of a dog-eat-dog world out there. I mean some of the ways that you actually talked about them is they sound almost awful, you know, one's favorite species. It sounded almost contemptuous about the way you were talking about these peer researchers, et cetera.

So, Mr. Ashe, does that make your job more difficult, if the people that you are relying on apparently have issues with one another? I mean how do you ascertain what to believe and what not to believe? And what is your position on making this more accessible? Would this lead to—in other words, do you have a majority opinion that makes you act, or are you looking at—and I understand the complexity of it all—100 different researchers challenging one another and then throwing it in your lap? And does that increase your risk of error?

Mr. ASHE. I think, first of all, I would say the vast majority of the information that we use in informing our decisions is not government information. And so, in most of the situations, the science we are using, we don't have possession of the data.

And so, as we go through this process of weighing science, of course these are significant, weighty decisions. And you get competing science. Science doesn't provide us with an answer, it is not black and white. And so we have to look at the voracity of the information. We ask other independent experts about what their

opinion is of the science. And then we actually have our draft rule and decision peer-reviewed so that we get independent scientists to look at our conclusions, based upon the scientific information. So, it is not black or white.

I would also say what Mr. Ramey is saying is intellectually stimulating, but it is challenging the very foundations of our scientific process for publication and discovery of new information in the United States. Our whole university-based system, our whole process of business research and development is based upon these principles of peer review and publication in peer-reviewed journals.

Dr. RAMEY. Science is based upon data and reproducibility, and that is the fundamental issue here, Dick Feynman, who was a Nobel Prize winner in physics, says that if the data——

Ms. SHEA-PORTER. My time has expired, but I will come back. There will be another round, right, Chairman? OK. Thank you.

Mr. BISHOP. I am making that assumption.

Ms. SHEA-PORTER. All right.

Mr. BISHOP. Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. Mr. Ashe, I would like to ask some questions of you that—because I am a little baffled. As you may recall, I used to be on the Interior Environment Subcommittee of Appropriations, and we had a discussion when I was there about a request that you all made. And I am going to go back and quote you from that testimony.

You said, "One of the things we"—U.S. Fish and Wildlife Service—"are asking the Subcommittee for in this year's proposal is to consider a cap on the amount we can spend to process ESA petitions. And that would be an important aspect of helping us manage our endangered species more closely." You further said that a listing cap is "to help us better allocate workload among basic endangered species activities such as listing consultation and recovery." I think in recent years you went on to say, "We have seen that the petition process has been beyond our ability to manage effectively."

Then I look at this testimony today, and here is my question. Are you making the case that settling cases behind closed doors is your best option?

Mr. ASHE. I think the statement that I made to you before the Interior Appropriations Subcommittee reflected what I said that, for more than two decades we had effectively lost control of our ability to set priorities under our listing program. We were asking the Committee to help us limit that by limiting, putting a cap on our petition sub-activity. But the multi-district litigation settlement addressed the same problem that we——

Mrs. LUMMIS. OK. Does that settlement agreement ban the Center for Biological Diversity and Wild Earth Guardians from filing listing petitions?

Mr. ASHE. They agreed, in the course of the settlement, to limit their——

Mrs. LUMMIS. Limit, but not——

Mr. ASHE [continuing]. Any additional petition——

Mrs. LUMMIS. OK, limit, but not an outright ban.

Mr. ASHE. Yes.

Mrs. LUMMIS. Is that correct?

Mr. ASHE. That is correct.

Mrs. LUMMIS. OK.

Mr. ASHE. And they agreed not to submit what we have come to call "mega-petitions," so where they submit a 400-species petition.

Mrs. LUMMIS. Now, does that legally constrain the NRDC or Western Watersheds Project, or Biodiversity Conservation Alliance from listing petitions?

Mr. ASHE. No, it does not. But those two groups, CBD and Wild Earth Guardians, were the two plaintiffs that were the ones that were frequently using the petition process and taking us to court for deadline litigation.

Mrs. LUMMIS. Is anyone constrained beyond the 2018 work plan, in terms of suing and these massive multi-petition listings, any other groups, including CBD?

Mr. ASHE. Beyond the term of the 6-year settlement, no, there is no limitation.

Mrs. LUMMIS. OK. So are you suggesting that the system we have now, as you have described it—backlogs, litigation, settle, and then repeat, backlog, litigation, settle, repeat—is that the best policy we can come up with?

Mr. ASHE. No, it is not, Congresswoman. But I would say my chore, and those of us in the U.S. Fish and Wildlife Service, and our partners, are charged with implementing the law as it is written——

Mrs. LUMMIS. Yes.

Mr. ASHE [continuing]. Not as we would wish it to be.

Mrs. LUMMIS. And it hasn't been authorized since 1992. Correct?

Mr. ASHE. It has not been reauthorized since 1992.

Mrs. LUMMIS. That is correct. It has not been reauthorized since 1992. So, the problem that I have is we need a 21st century conservation model going forward. And the ESA, as it is written, is a very poor model for the 21st century, very poor. We know so much more than we did when the ESA was originally written.

Let me ask Mr. Ramey. Are you opposed to the Endangered Species Act?

Dr. RAMEY. No, I have supported this. I am a long-time student of the ESA. I think we can improve the implementation quite a bit, especially in priority-setting. And I think it is most important that those priorities be set by the people, and not by special interest groups. And, second, that the data be available so that there is true and full transparency in implementation of the ESA.

Mrs. LUMMIS. Thank you gentlemen for being here. I yield back.

Mr. BISHOP. Thank you. Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. I would like to thank our panel for being here. Good to see a fellow Coloradan here. Dr. Ramey, thank you for being here.

Director Ashe, I just wanted to be able to ask you a question so that I can kind of understand what Fish and Wildlife is doing. I made a couple of notes as you were speaking, and you talked about a sensible implementation of the law, assuring best science practices, and have noted that this is good government at its best.

But we had heard Mr. McMullen make the comment that they had received no listing, in terms of information that was coming out. Is that really good government?

Mr. ASHE. I didn't say it was perfect government. And I think in the case Mr. McMullen is raising, we made a procedural mistake. We did provide notification; we did not provide the specific notification that the law and our regulations provide. So we did make a mistake in that case, and I think we are rectifying that mistake.

Mr. TIPTON. And you are going to be able to rectify that.

You know, that brings up, as I was looking at the letter that came out of the FOIA request that the Chairman put forward, it was talking about biological recommendations that were coming out. And you had noted in your comments, at least, that there may be no science available. So does it make it suspect for you that there may be some other interests involved when just biological recommendations are being made?

Mr. ASHE. Well, that particular example was not actually an ESA process. That memo was part of a Bureau of Land Management planning process, and not an Endangered Species——

Mr. TIPTON. But some of your other comments lend itself to the point that you may not have any science really available, or the data is not available——

Mr. ASHE. I think when he——

Mr. TIPTON [continuing]. To make your best guess.

Mr. ASHE. It is not a guess. If I go to a doctor, and the doctor has a limited amount of information available, a doctor uses his best professional judgment in making a diagnosis. I trust that doctor because of his experience, his knowledge in general in the medical field. And sometimes doctors have to work on limited information, especially in an emergency type of situation. And with endangered species, we are often working in an emergency-type of situation, and we have to work with the best information we have available. Sometimes that is expert opinion.

Mr. TIPTON. Well, do some of these judgments actually impact private property owners?

Mr. ASHE. They would.

Mr. TIPTON. They would? What does Fish and Wildlife—what does the Federal Government do to be able to compensate these private property owners if they are impacted by this judgment that has been made?

Mr. ASHE. We are subject to the same rules as any governmental agency with regard to our practices. And if we do something to——

Mr. TIPTON. Do they do anything for private property owners?

Mr. ASHE. We provide technical assistance, we provide assistance——

Mr. TIPTON. Any compensation if that limits their ability to be able to graze their cattle, to be able to grow crops?

Mr. ASHE. No, we don't, sir.

Mr. TIPTON. None?

Mr. ASHE. No.

Mr. TIPTON. So do you see a problem with that?

Mr. ASHE. I think that all of us, as Americans, are required to comply with the law. And so I live in Montgomery County, Maryland. If I do something, I have to comply with the law in Montgomery County, Maryland. It may cost me money, but I——

Mr. TIPTON. So if we are looking at best science practices—I know you were recently out in Gunnison, Colorado.

Mr. ASHE. I was, yes.

Mr. TIPTON. And you moved up into Garfield County, too. And, Dr. Ramey, you can probably speak to this, you are a Coloradan. Very diverse terrain that is out there. I looked at the map that was provided by the BLM for the greater sage-grouse and Gunnison sage-grouse and, literally, the western slope of Colorado reaching up into Wyoming is painted in the light pink/red color as critical habitat.

If we are going to use best science, if we have a recovery in Garfield County, it will never be taken off the listing because we may not have had the recovery up in Moffat County. Don't you think that we need to have better practices when we get recovery in given regions, given different topography, we have to be able to have better policies? Because we are hurting small businesses. You come over into my part of the world. These are families that are worried about their future.

You just told me that the Federal Government isn't going to give one aid—one bit of compensation if they are hurting people's business, their ability to be able to put food on their tables. And don't we need to really take another look at this and some of the implementation?

Mr. ASHE. I think you are taking a look at the implementation, Congressman, and I respect that. I think my challenge is to implement the law, and the responsibility is to implement the law as it is written.

If Congress, in its wisdom, decides to change the law, then we will implement the law that Congress enacts. But my charge is to implement the law as it is written. And that is what we are doing.

Mr. TIPTON. I am out of time. We will have another round. Thank you.

Mr. BISHOP. Thank you. Mr. Gosar.

Dr. GOSAR. Boy, Mr. Ashe, I really wish you would share you sentiments with the Attorney General of the United States, because he is supposed to uphold the rule of law, too. And I am furious, and I think all Americans should be furious. So I hope you share some of those thoughts with the Attorney General.

I want to start off by making a couple statements because I want to thank you all for being here. As I travel through every corner of my 40,000-plus square-mile district, I frequently hear accounts from constituents about the unintended consequences that the type of settlements we are talking about today have on local economies. I am pleased our Committee is continuing to focus on sound science and transparency.

But I see a disturbing pattern with this Administration, not just with your Agency, but across the board. Repeatedly we are finding that the Administration is using fuzzy, unverified, non-peer-reviewed science to justify a policy agenda. I will give you just a few examples in my district.

This Committee has extensively investigated the Administration's decision to withdraw over a million acres of some of the most rich uranium lands in our country from location in entry under the mining law. But the Administration has a policy agenda and move forward. In our investigation, we found internal emails where a National Park Service employee stated that the draft EIS goes to

great lengths in an attempt to establish impacts to water resources from uranium mining. It fails to do so, but instead creates enough confusion and obfuscation of hydraulic principles to create the illusions that there could be adverse impacts if uranium mining occurred. The hard science doesn't strongly support a policy position.

The EPA is currently pursuing regional regulations on coal-power plants in rural Arizona, the Navajo Generating Station, that is critical to water delivery in our State. They are imposing regulations that would require over $1 billion of investment under the guise of improving visibility at the Grand Canyon. Oh, my God. But the Administration's own REL states that there is no evidence that the required technology will lead to any perceivable improvement in the visibility of the Grand Canyon or the nearby parks or wilderness areas.

As you may not know, I was a dentist for over 25 years in Northern Arizona before I came to Congress. And as a medical professional, I take your comments disparagingly. As a scientist, I have to use peer-reviewed science and certified best practices to treat my patients. If I don't use sound science, I am going to hurt my patients, potentially lose my license. So I have to go to peer-reviewed studies. Yes, I use that innate knowledge, but I don't go to poets and philosophers for that information. And I think that would be the head of CBD who said, "I am more interested in poets and philosophers than science guys." Go back, look up CBD, Center for Biological Diversity. You know, you are required to do statistics; go back and do it.

Dr. Ramey, I am concerned—you didn't get a chance—you really wanted to answer Mr. Tipton's question in regards to—would you like to start answering that question?

Dr. RAMEY. Let me just say that when I go to a doctor—and I think most people in this room have a very serious medical issue—you seek a second opinion. And when you go to get that second opinion, you bring the data with you. And that means you bring your x-rays and your medical records. You don't just go in and ask for an opinion.

Dr. GOSAR. So let me stop you there. So you start with a hypothesis, right? You got a problem. You test it, so you do investigation. You come with the conclusion, and then you go back and re-verify.

Dr. RAMEY. Correct, and——

Dr. GOSAR. Scientific method.

Dr. RAMEY. And you should be verifiable by outside, independent, third parties.

Dr. GOSAR. So you see a problem here. We are not getting this data. Ms. Shea-Porter brought it up, the lady across the aisle here. How do we remedy this? Because we are not—this isn't even close. I mean this is just one tip of the iceberg kind of problem, and I gave you two or three more in my State. Tell us. How do we remedy this, coming from your opinion?

Dr. RAMEY. It is very simple. Before the Agency relies upon a study, the data has to be put into an archive. And by that data, we mean all the data and the methods that are used to produce the final data set used in analysis. It is as simple as that.

Dr. GOSAR. I mean is this an unusual ask? I mean when, you know——

Dr. RAMEY. No. In fact, there is a reproducibility group at the University of British Columbia, Vancouver. They published a paper in the journal "arXiv" out of Cornell University, arguing that it is very simple for papers to be published and the data to be archived in these public repositories. National Science Foundation and others provide for data Dryad to be an online service. It is easy to put the data in there. It is not a burden.

Dr. GOSAR. And so, I mean, I want to come back to this doctor thing.

Dr. RAMEY. I mean we are hard on the data in science, and hard on the issues. This is not personal disputes. It all comes down to what does the data show.

Dr. GOSAR. Thank you, and I have run out of time.

Mr. BISHOP. Thank you, Mr. Gosar. Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman. I have a couple for Mr. Ashe.

Thank you for joining us here. A couple issues in our area here, in Eastern California. Fish and Wildlife has designated about 2.2 million acres across the Sierra as critical habitat geared toward the mountain yellow-legged frog. This is something of very keen interest in my district, as well as my colleague, Mr. McClintock, on the east side. And that is—first of all, that is a lot of acres, 2.2 million acres for critical habitat and all the accompanying difficulties with using that land, terrain, et cetera, including 20 percent of one of the counties I represent, Nevada County, would be in this category.

So we have—you see Berkeley, San Francisco State, National Science Foundation, U.S. Forest Service and every other researcher has shown that, again, given the mountain yellow-legged frog, that there is a fungus that is affecting the frog and its population, and the species is called the chytrid fungus—the way I pronounce it—and that is what is responsible for the decline of the population of this mountain yellow-legged frog. It doesn't have anything to do with timber operations or home-building, off-roaders, hiking, or other activities that people are involved. But instead, a fungus that has been known to be in the area, as well as having impact not just in California, but in many other areas of North America, and even around the world.

So, what I am trying to understand is why are we, in California, being targeted once again for what is a naturally occurring problem. It does remind one of the issue with the spotted owl years ago, where people were blamed for a population that was mentioned earlier in this Committee that largely might be laid at the feet of the barred owl competing or taking out the spotted owl. So what you might have here is a situation where interference would actually stand in the way of the natural process of things in nature, where, unless somebody comes up with some type of cure for the chytrid fungus, that the remedy doesn't involve, once again, perhaps changing human behavior for something that really has no impact. What would you say to that situation?

Mr. ASHE. I would say you ask a very good question, but what I would say—the word "natural" is a term that people will interpret differently. And so, if we think about something like the chytrid fungus—I was talking with Ms. Shea-Porter yesterday about white nose syndrome in bats. Chytrid fungus is not a native

fungus to the United States. It was imported to the United States like white nose syndrome was imported to the United States from outside. It is an invasive disease in frogs.

And so, in the movement of barred owls into the Pacific Northwest, it was not a natural event. It was made possible when the people populated the prairies and planted trees and forests grew up in the U.S. prairies and the barred owl moved across the West into the Pacific Northwest. So some people may see that as natural, other people may see that as human-driven.

But the point is the law requires us to consider disease as an impact to endangered species. So when we make a listing determination, we have to consider whether disease is a factor, but if disease is the cause, then that doesn't mean that we have to regulate other activities. And so, forestry, grazing, the things that are not causing impact to the frog are not regulated, because the cause is, in that case, disease.

Mr. LAMALFA. Well, they very likely will be. We see the pattern of that when you have a critical habitat listing, that whatever that habitat may be is going to have further regulation upon its usage or its entrance by human populations. So this is something that we are very interested in, what that impact will be, what remedies might be put in place by your organization and many others.

So, what I would ask of you is that we will be having a town hall hearing on this in Nevada County on September 4th, and we request that you have some of your folks there so they can answer the questions for why 20 percent of Nevada County will be subject to a critical habitat that could affect their very lifestyle.

Mr. ASHE. We would be happy to do that.

Mr. LAMALFA. Thank you. All right. I yield back.

Mr. BISHOP. Thank you. Mr. McClintock.

Mr. MCCLINTOCK. To follow up on Mr. LaMalfa's line of questioning, Mr. Ashe, you seem to miss the point. The point that Mr. LaMalfa is making is that the Fish and Wildlife Service itself admits that the two principal causes for the decline in these populations is the importation of the fungus and of non-native trout that just love to eat these little critters. And yet, you are proposing declaring critical habitat as 2.2 million acres which is essentially the footprint of the Sierra Nevadas, from Lassen County down to Kern County.

This is an area that has already been devastated economically by enormous restrictions that have already been placed on that region. It means severe limitations on what remains of grazing, logging, mining, recreation use, fire suppression programs. And yet, your own Service admits this isn't the principal cause of the decline.

Mr. ASHE. Well, again, I am not intimately familiar with the issue, so——

Mr. MCCLINTOCK. Well, you need to get intimately familiar, because it affects the lives of hundreds of thousands of families in my district and Mr. LaMalfa's district for no apparent reason, other than you seem to feel like doing it, when you admit that the science itself does not support such a conclusion.

Dr. Ramey, when we were being told of the science-based approach that Fish and Wildlife Service uses, you were shaking your head and you responded, "Well, science is data-based, it is not spec-

ulative." That comports with my understanding of science, which is that science follows facts, it leads them to a conclusion, they don't start with a conclusion and then cherry-pick facts to support it. You were about to comment on that when Ms. Shea-Porter finished questioning. Would you like to finish your thought?

Dr. RAMEY. It means consideration of all the data and all the information, including contrary information. And so, in my experience in these situations, sometimes hypothetical threats get elevated to the level of real threats, but yet the basis of those is very, very sketchy.

And having followed the boreal toad issue as well, I can point out that this chytrid fungus issue, it is a worldwide problem, and that it is not something that critical habitat and regulations are going to solve.

Mr. MCCLINTOCK. And yet——

Dr. RAMEY. But let me add this other point here about science. And I want to bring up this point about it is not just the data, but it is in peer review—this is put forward as this gold standard, it is not necessarily—I mean it can be very good. But if they don't provide the peer reviewers with all the information, then it can end up being biased.

And let me just point out a quick one. Mr. Schiff put in a petition on the Coastal California gnatcatcher. Turns out that the peer reviewers on that study didn't have a report that I wrote to Interior in 2006 that revealed that the data that were used in the basis of that decision had large parts of it that were made up, and that was obtained under deposition. And so——

Mr. MCCLINTOCK. Made up by whom?

Dr. RAMEY. Pardon?

Mr. MCCLINTOCK. By whom?

Dr. RAMEY. That was produced by—the deposition was taken by Rob Thornton, former Majority counsel here in 1978.

Mr. MCCLINTOCK. No, but who was making up the data.

Dr. RAMEY. That was the scientist, Atwood, who did his dissertation work—was a petitioner for the listing of the Coastal California gnatcatcher.

Mr. MCCLINTOCK. And you mentioned even just basic mathematical errors.

Dr. RAMEY. Well, actually, there were missing cells in the data. And then what Atwood did was to fill in the missing cells using—he wasn't sure—he didn't remember how he did it, and he didn't remember which cells of the data he filled in with this fabricated, if you will, data.

And so, subsequently, this was analyzed, used in the Service's decision. But the peer reviewers on this review, they were never provided this information, even though this deposition was provided to the Carlsbad Fish and Wildlife Service. I have the copy of the letter from Rob Thornton, along with the entire deposition and then my report to Interior, which, by the way, never came out under FOIA. It was held back. So, once again——

Mr. MCCLINTOCK. And this——

Dr. RAMEY [continuing]. If all the information isn't put forward, things can be biased.

Mr. MCCLINTOCK. OK. So deliberately fabricated reports based——

Dr. RAMEY. No, no, no. I am going to say the data, the missing cells in the data he had created—we are not sure if he used population means or what—to produce that. It was completely artificial, not empirical.

Mr. MCCLINTOCK. And this is what the Director assures us is their science-based approach to these issues that impact hundreds of thousands of families.

I think we are going to have another round of questioning, so we can resume the impact of these policies in the next round.

Dr. RAMEY. It is an egregious example.

Mr. BISHOP. Thank you. Mr. Southerland.

Mr. SOUTHERLAND. Thank you, Mr. Chairman. Mr. Ashe, I would like to ask a couple questions. And thank you for being here today. On page one of your testimony you stated, "The Service is an equal opportunity litigation target challenged frequently by industry, environmental organizations, States, Tribes, and individual citizens." Those were your exact words.

What is the percentage break-down—plus or minus a few—of each of those? More specifically, what percentage of litigation to the Service does the Service face from environmental, non-governmental organizations?

Mr. ASHE. I will have to get that information.

Mr. SOUTHERLAND. Ballpark. You are a smart man.

Mr. ASHE. With regard to the current litigation that we have now with regard to petition deadlines, about 40 percent of that workload comes from industry.

Mr. SOUTHERLAND. OK. As far as—when you say industry, does that—because in your words you said industry, environmental organizations. What is the percentage of environmental organizations?

Mr. ASHE. I don't know that. I will get that——

Mr. SOUTHERLAND. But you know industry. So we know we have 60 percent remaining. So, therefore, of the 60 percent remaining, if we exclude industry, the environmental organizations—I mean plus or minus 5 percent, 10 percent—what would be—the majority?

Mr. ASHE. The majority, I would say.

Mr. SOUTHERLAND. OK, thank you. On page two of your testimony you mentioned that the Service agreed to make listing determinations for 401 species. You said that some of those species were not warranted to be listed. If they were not warranted to be listed, did they end up getting listed?

Mr. ASHE. I am going to have to ask you to repeat your question.

Mr. SOUTHERLAND. OK.

Mr. ASHE. I can't——

Mr. SOUTHERLAND. On page two of your testimony you mentioned the Service agreed to make listing determinations for 401 species. You said that some species were not warranted to be listed. So if they were not warranted to be listed, did they end up getting listed?

Mr. ASHE. No.

Mr. SOUTHERLAND. OK. Did the Service face any additional litigation if they, in fact, as you just admitted, did not get listed? Did

you face litigation from these groups—and you mentioned industry, environmental, States, Tribes, and individual citizens—did the determination that those species not get listed, and the action that followed by omitting those, did that end up becoming litigated by outside groups?

Mr. ASHE. I do not know specifically. As I said in my testimony, though, all of our decisions are subject to judicial review. And we are frequently challenged by both industry, by States, by Tribes, by private citizens, by environmental groups.

Mr. SOUTHERLAND. OK. And I know with our time waning here—do I understand correctly that—or, excuse me, on page three of your testimony you mentioned from 2007 to 2010 the Service was petitioned to list over 1,000 species. You mentioned that in 1982 changes were made to make strict deadlines for making petition findings and shorten the time allowed between the proposed and the final rules from 2 years to 1 year.

So, as I understand it, you have 1,000 species and you have a year to make that determination. Is that——

Mr. ASHE. During that period of time, 2007 to 2010, we had 1,000 listings. We have 90 days when we get a petition, we have 90 days to make an initial determination. Then if we make a determination that substantial information is provided, we have one year to do a detailed status assessment and make a proposal if we think it is——

Mr. SOUTHERLAND. Right.

Mr. ASHE [continuing]. A listing is warranted. And then we have an additional year after that to make a final listing determination.

Mr. SOUTHERLAND. I am also on the Fisheries Subcommittee and we talk about data all the time. I am just curious. How does the Service assess the populations of 1,000 species, when at the same time NOAA cannot do a stock assessment on one species of fish in the same time period? I mean what kind of magical counting technique can you perform to do 1,000 determinations on 1,000 different species, when another agency can't even give us a stock assessment for the red snapper?

Mr. ASHE. Again, in my testimony I said that our listing program had essentially been overwhelmed by these——

Mr. SOUTHERLAND. Right.

Mr. ASHE [continuing]. Petitions and deadlines. That is why we entered into the settlement agreement. The settlement agreement gives us more time to deal with that, because time is the commodity that is most important in dealing with that.

Mr. SOUTHERLAND. And I appreciate that. And I propose the fact that if you are overwhelmed, then NOAA is underwhelmed. And with that, I yield back.

Mr. BISHOP. Thank you. We will start a second round of questions. Mr. DeFazio, do you have more questions?

Mr. DEFAZIO. I do, but I was going to defer to Ms. Shea-Porter, who has another pressing engagement.

Mr. BISHOP. Ms. Shea-Porter?

Ms. SHEA-PORTER. Thank you very much. How many of you agree that currently one quarter of the world's mammals, nearly one-third of amphibians, and more than one of all bird species are

at risk of extinction? Could you raise your hand if you agree with that statement?

Dr. RAMEY. One hundred percent are at risk of extinction, because eventually almost everything goes extinct.

Ms. SHEA-PORTER. OK. Do you agree right now that one-quarter of the world's mammals, one-third of amphibians, and more than one of all bird species are at risk?

Dr. RAMEY. I would like to see the data.

Ms. SHEA-PORTER. OK. Because I think what we are looking at here is a pretty ideologically driven panel. For example, Mr. Schiff talks about changes in Administration. And the comment that reasonable people can disagree about the utility and morality of the Endangered Species Act—I am not sure—utility you can say what you want, but the morality of protecting endangered species is unusual to me.

Dr. Ramey, I am very confused by what you are saying to us. OK? I thought politics was rough. This is what you said. "Because few ESA-listed species are ever delisted, this guarantees a virtual lifetime of employment of one's favorite species. Second, a network of individuals who work on a particular species can form powerful species cartels. These social networks can influence the peer review process, provide a united front to advocate and repress the publication of information." Then you turn around and say to me, "It is all data. It is all data." But what you are telling me here—and you said it is not personal.

So, first, you are telling me that it is personal, that these guys are twisting the data. Then you are saying it is not, it is just the data. So here is my question. If it is the data, and scientists come to different decisions, are they lying? Or is it possible that you and all of us don't know everything, which means that the U.S. Fish and Wildlife Service will make mistakes in this? It sounds like you think other scientists do that.

And so, can we get to a point where we say, "All right, at least we know that we are united," or I thought we were, "in trying to preserve these species, and that this is not exactly just data," because you can't have it both ways. You either accused your colleagues of lying—and it sort of sounded like you did—or there is something besides data interpreting, trying to look forward, and trying to see what happens. Because it is more than just the data, as you know. It is what comes next that is going to have the impact. And we don't have that data yet, we don't have everything we need to know about what this country will look like in 5 years, how many wildfires there will be, how much rain there will be, how many invasive species will come.

So I don't really understand, so I hope that you can explain that to me better.

Dr. RAMEY. Certainly. First, about ideology. As an initial matter, you have to understand that, in truth, I have risked my life for endangered species. I have climbed 1,200 feet up the face of El Capitan with peregrine falcon chicks in my backpack to put them in a nest because of DDT——

Ms. SHEA-PORTER. I am not questioning that. And I thank you for that.

Dr. RAMEY. So I have a lifelong——

Ms. SHEA-PORTER. But I would like you to explain to me——

Dr. RAMEY [continuing]. Commitment, like Director Ashe has, as well.

Now, to go to your point about these scientific issues, the problem with science is that it is performed by humans, and that people can have various preconceived notions and biases that go into issues. And so, the behavior is as wide as the human race.

And so, Director Ashe, when we walk out of this room, we are the kind of scientists who will sit down and we are hard on the issues, but we are not hard on each other. However, we can't speak to that for other people. And it doesn't matter what side of the aisle people are on, what side of the issue, you do get the fringes that are like that.

The problem that I pointed out in that paper on the origin of species is that you do get people who become emotionally invested in single species their whole life, even just in some populations of animals, their whole life is wrapped up in it.

Ms. SHEA-PORTER. Well, let me as you——

Dr. RAMEY. And so it is hard for them to see the bigger issues out there.

Ms. SHEA-PORTER. I understand. Some people actually call them experts, but I know what you are talking about, that there could be another interpretation. But what I am asking you right now is do you have the ability to rule just on the data and make right decisions all the time, or is there room for U.S. Fish and Wildlife and you and others to make mistakes and fail in predictions?

Dr. RAMEY. Debate is the open and complete access to information and debate about the issues.

Ms. SHEA-PORTER. I am good with you having access.

Dr. RAMEY. That is the way we arrive at truth.

Ms. SHEA-PORTER. And I agree.

Dr. RAMEY. And there can be differing viewpoints on this. But that is the only way. And, just by example, that is the way our court system works.

Ms. SHEA-PORTER. Well, let me go back then.

Dr. RAMEY. It is a joint fact-finding——

Ms. SHEA-PORTER. So in other words—but I am running out of time, Doctor, I appreciate it. My question is—you said "just data driven"—that when they look at the data, it is possible for Mr. Tipton to come to a different conclusion than I come to, and for Mr. Ashe to come to a different conclusion and for you to come to a fourth conclusion. It is possible, right?

Dr. RAMEY. If you use the scientific method, you set your hypotheses in advance of data collection so that you have an objective way of measuring those against the data. What I am saying is that is the ideal. That is the scientific method. That is what is the litmus test of science. And instead, what we see too often are opinion surveys.

Ms. SHEA-PORTER. But it is still possible to be wrong. Thank you, and I yield back.

Dr. RAMEY. It is always possible to be wrong, but it requires a second opinion.

Mr. BISHOP. All right. I went 30 seconds over, so I am allowing you this. But you beat me by 8 seconds, so we can't do that again. I'm going to yield myself a couple minutes for questions, if I could.

Mr. Schiff, it is not my goal to have you just sitting there, listening to everything. So I have two questions, if we can quickly go through them with you. In your testimony you state that critical habitat designations can have a significant economic impact on private property and local communities. Can you quickly explain the impact of the Obama Administration's proposed rules to consider only baseline critical habitat economic impacts?

Mr. SCHIFF. Yes, Mr. Chairman. The problem, of course, is that by using that approach it renders the obligation to assess the economic impact of critical habitat a dead letter. And the reason why is because the baseline approach says we are only going to assess those economic impacts that are solely attributable to critical habitat and that can also be associated with the listing of the species. And because the Act says you can't take economic impacts into account when you list species, therefore you can't take them into account for any purpose, whatsoever.

And so, what you end up having is, in my humble opinion, you end up having a farce, where the Service produces these hundred-thousand-acre designations and say, "There is basically no economic impact, because we are simply adding on a superfluous layer of regulation that is no different from the status quo," and I think that is demonstrably false.

Mr. BISHOP. I thank you for that. Let me do a second one. The testimony we got as to sue-and-settle or sue-and-surrender from Dr. Ashe was riveting, to say the least. They are quick to settle lawsuits to meet deadlines to list species. Are they meeting the law on delisting and/or have they often agreed to settle lawsuits to delist species that warrant being removed from the list?

Mr. SCHIFF. Well, on that I think it is more of a one-way eagerness to cooperate. We do, at the Foundation, file lawsuits to require the Service to act on its statutorily mandated deadlines. But we find that they are very loathe to act when their own science says that species are recovered. One example from California is the valley elderberry long-horned beetle, which the Service declared all the way back in 2006 was fully recovered. And, mind you, the protections for this beetle prevent very important levee and other flood maintenance activities in Northern California. And notwithstanding the fact that the Service's own science and review said it was recovered in 2006, the Service didn't file its proposal to delist the species until just last year.

Mr. BISHOP. All right, thank you. Director Ashe, as I said, I was deeply disturbed by what I was reading online as I was getting ready this morning. To call your Agency somewhat troubled may be a compliment. But apparently, you have ignored months of stern warnings from the Deputy IG as to retaliation against whistle blowers to expose scientific misconduct within the Agency.

Chairman Hastings has written you a letter asking for four specific elements of information. We have had a problem, clearly, with the Department of the Interior, in getting information back in a timely manner. My question is, how long will it take you to respond to Dr. Hastings' letter on these very significant allegations?

Mr. ASHE. I can't give you a specific timeline, Congressman Bishop, but we are working with the Department and we will respond to the Chairman's request.

Mr. BISHOP. Can you give me a ballpark of when that will be? As I said, we waited months. And these kind of allegations cannot go on that long.

Mr. ASHE. We just got the request yesterday, and we are looking at the request, and I cannot give you a timeline.

Mr. BISHOP. I find that somewhat unfortunate, that we cannot get that kind of timeline. I wanted to ask a question about one of the other statements you gave—I think it was to Mr. Southerland, that 40 percent of these lawsuits are coming from the business industry. Is that dealing with critical habitat? That dealing with listings? How do you make that kind of a basic assumption? I realize you told them you needed to come up with firm data later on, but you were making that off the top of your head. I have questions about where the top of your head is.

Mr. ASHE. What I gave him was—we were discussing this matter yesterday, that the nature of the pending deadline litigation—so these are deadline-based cases that are currently pending. Forty percent of those have come from industry.

Mr. BISHOP. So you are not saying that all litigation is coming—40 percent of all litigation is coming from industry.

Mr. ASHE. No, sir, I am not.

Mr. BISHOP. OK. That would be much more accurate. I do want to say one last thing about your analogy with the doctor, and I am glad that Dr. Gosar took issue with it at the same time. With your analogy, it would simply be when I made an appointment with the doctor he would make a recommendation, a diagnosis when I called on the phone, and when I visit he would immediately start to operate on me.

What we are talking about is the order should be science, expert opinion, then come to recommendations. You have reversed that process. You are making recommendations, trying to find science. In lieu of that you are going to expert opinions. And that is what I find frustrating.

All right. To Mr. Costa—I don't know if you are prepared. You have not—effort to give any questions here. Do you have some? I am—let me rephrase that.

Mr. COSTA. I am always prepared.

Mr. BISHOP. Well, I am not going to respond to that one. Are you prepared to ask questions now, or do you need some time?

Mr. COSTA. No, I am going to pass at this time——

Mr. BISHOP. OK.

Mr. COSTA [continuing]. Mr. Chairman. Thank you very much for your inquiry.

Mr. BISHOP. Thank you. Mr. DeFazio you passed the last time. Are you ready to go back at it?

Mr. DEFAZIO. Yes, I will. Thank you, Mr. Chairman. As I mentioned in my opening remarks, George Miller wrote, and I was a cosponsor with him—had been involved in an attempt to update the Endangered Species Act back in 1997. And one of the key components of that was to have the Federal Government require the Federal Government to work with States on species recovery plan,

development, and implementation, which has been a bone of contention here over a number of listings, particularly the sage-grouse on that.

Do you have a tool now where you can do that, work with the States on these——

Mr. ASHE. We can, Mr. DeFazio, and we are. I think we are working with States through our traditional Section VI grants, Section VI of the Endangered Species Act. We have just recently announced an innovative and ground-breaking effort with the State of Florida, where we are making joint determinations with Florida under their endangered species law. We have a vibrant relationship with the State of California and the implementation of their law. We are working with all 11 range States to help come up with a comprehensive strategy for the conservation of the sage-grouse. We are working with all of the five range States within the range of the prairie chicken to work on a range-wide conservation plan.

So, States are an integral part and a growing part of the implementation of the Endangered Species Act. We have worked with the Association of Fish and Wildlife Agencies, and we have put together a joint Federal-to-State Task Force on the implementation of the Endangered Species Act. So trying to work on how we can improve, what are some of the innovations that we can do a better job working with our State partners.

Mr. DEFAZIO. Is that what the Cooperative Endangered Species Recovery Fund is used for?

Mr. ASHE. In part. Yes, sir.

Mr. DEFAZIO. In part. And, in your opinion, is that fund adequate? I know it is being proposed that it be reduced $9 million, which would be—on the House side, which would be $17 million less than the President's request. I mean do you feel these funds are—which you apparently use to cooperate, as I understand it, with States to work on particularly non-Federal lands, if you are developing these comprehensive plans, are——

Mr. ASHE. I think as you know, if we compared the President's budget in 2013 and 2014 to where we ended up with the continuing resolution and sequestration and now the bill that the House Subcommittee reported last week, I think you will see a pretty stark difference in terms of what we are requesting. We have requested increases in the Cooperative Endangered Species——

Mr. DEFAZIO. Right. But I mean there are States who are interested in working with you, but they also lack resources.

Mr. ASHE. Right.

Mr. DEFAZIO. And this is one way to help the States to work with you. Right?

Mr. ASHE. They do. And one of the casualties in the Subcommittee's budget mark-up from last week was the State Wildlife Action grants. And those State grants are the money that the States use to hire what we call non-game professionals. So a lot of the people that are working on these endangered or threatened species issues with the U.S. Fish and Wildlife Service, that funding was completely eliminated.

Mr. DEFAZIO. OK. Back to this issue of data. If you let—I believe that he mentioned—did you say the sage-grouse, that they let the grant——

Dr. RAMEY. Yes.

Mr. DEFAZIO. And so you let the grant for the sage-grouse, and yet you didn't require—I mean couldn't you condition your grants to say, "If we give you a grant, you are going to have to publish the underlying data and give us the report?"

Mr. ASHE. If the Fish and Wildlife Service issues a grant, then we will have access to the underlying data.

Mr. DEFAZIO. And make it publicly available?

Mr. ASHE. Yes.

Mr. DEFAZIO. OK. So that is a requirement in the grants themselves?

Mr. ASHE. I do not know the answer to that question. But if we issued the grant, then we will have access to the underlying data.

Mr. DEFAZIO. OK.

Dr. RAMEY. It is not a condition in that particular——

Mr. DEFAZIO. What is that?

Dr. RAMEY. It is not a condition in that particular—a cooperative agreement or a grant.

Mr. DEFAZIO. Right.

Dr. RAMEY. So——

Mr. DEFAZIO. But, you know, I think from what you have heard here today, we would be interested that, if public funds are used, generally, that should be made publicly available.

Mr. ASHE. I agree with that principle.

Dr. RAMEY. Simple fix. It is a simple fix.

Mr. DEFAZIO. Yes. Well, hopefully. I am just finding out if they have administrative authority to do it, or whether we need to give statutory authority. It seems that they have administrative authority to do that. So—OK.

I was going to—I have one other question, very quickly. We mentioned the 40 percent of the litigation on deadlines is from industry. And then we had Pat Parento from Vermont who said that 80 percent of the critical habitat litigation is from opponents of listing. Does that sound right to you?

Mr. ASHE. I would have to get back to you on that question. But as I said, we are frequently sued by industry.

Mr. DEFAZIO. Both sides. OK. Thank you. Thank you, Mr. Chairman.

Mr. BISHOP. Thank you. Mrs. Lummis, do you have other questions?

Mrs. LUMMIS. Yes. Thanks, Mr. Chairman. Dr. Ramey, is the lack of data and the secretive nature by which the Fish and Wildlife treats the data a problem that is on par with litigation, in terms of challenges that we face to successfully implement the recovery of species?

Dr. RAMEY. Well, they are different issues. But the ongoing issue with the lack of data, that cuts across administrations. That is a long-term issue.

Mrs. LUMMIS. OK. So is the problem with the Act itself?

Dr. RAMEY. I think the Act is actually very clear in its language, because it requires best-available scientific and commercial data. So it is clear there. It is just in the implementation of that Act.

Mrs. LUMMIS. If you could make any changes to the Act itself, what would they be?

Dr. RAMEY. I have been asked that before. I would ensure that the data the decisions are based upon is public. And by that I mean all the data from raw data to final data sets that is used in that are publicly available, and that is be for free. Because it is the little guy that can't afford to chase down the data and pay thousands of dollars for it from the Natural Diversity data base programs. I mean those are thousands of dollars, those requests, for some of the locations.

Mrs. LUMMIS. Thank you. Same questions. Do you think the Act itself, ESA, is adequate to address some of the issues that we are debating today?

Mr. SCHIFF. I think the problem is—in large part, as Dr. Ramey explained—the question of administration. Certainly the Service can be more forthright in the presentation of its materials. Also, the Service can more closely abide by the law.

Part of the problem with the critical habitat litigation that we have been discussing is that the Service has a practice of not following the strict definition of "critical habitat," and rather, uses a broad-brush approach and relies upon the regulated public to say, "No, you have proposed something too broadly; you should narrow it down."

Mrs. LUMMIS. Has part of the sort of creep in the way that ESA is written versus the way it is administered come through the courts?

Mr. SCHIFF. I think it is fair to say that the courts have certainly OK'd many of the Service's interpretations of the Act, but that ultimately is a problem with the U.S. Supreme Court's decision in *TVA* v. *Hill*, where the court basically said that the Endangered Species Act makes species preservation the highest priority of the Federal Government, which I think is demonstrably false, and, again, I would say is immoral.

We have situations, for example, in California where Endangered Species Act regulation led to significant water cutbacks to farms and towns in the Central Valley, leading to double-digit unemployment, and I think that is, frankly, immoral, and, frankly, not what the 1973 Congress intended when it enacted the Endangered Species Act.

Mrs. LUMMIS. How could Congress step in and rectify that?

Mr. SCHIFF. Well, it is certainly not my place to recommend legislation. But just as a citizen, I think it is only fair that if individual land owners are forced to bear disproportionately the cost of environmental regulation to produce a benefit that we all enjoy—say species preservation—they should be compensated for that. It is unjust that they should have to disproportionately bear the cost of something that we all enjoy from.

Mrs. LUMMIS. Mr. McMullen, would you like to weigh in on this?

Mr. MCMULLEN. Yes. And with the land owners that were not notified on the White Bluffs bladderpod issue, there were severe repercussions for an ESA listing. Buffer zones could be imposed, which the director of the Washington office of the U.S. Fish and Wildlife denied, and we showed them that buffer zones are routinely imposed. And it also has had an economic impact right now, because some of these people are retired and lease their farms out to other farmers. Farmers are not willing to grow crops on that

land because they fear ESA impositions. So, yes, there is severe——

Mrs. LUMMIS. I know the feeling. Our land was posted regarding the Preble's meadow jumping mouse.

Mr. Ashe, what is your opinion on these—on this round of questions?

Mr. ASHE. Can the Endangered Species Act be improved? I would certainly say yes. Yes, it can. It is like every other law. And our implementation of the law over time has taught us how to—I think how to implement the law better, and how to use the inherent flexibility in the Act.

But I think, as you know—to get back to the issues of the scientific information, Mrs. Lummis—like when we delisted the wolf, the environmental community doesn't agree with our science.

Mrs. LUMMIS. Right, right.

Mr. ASHE. And so, the first course of action for people who disagree with our decisions is to try to challenge our science and so I think that the law can certainly be better, and we are involved with efforts now to continue to improve the law and make it better and learn from our mistakes and learn from our successes.

Mrs. LUMMIS. Thank you. Mr. Chairman, I yield back.

Mr. BISHOP. All right. Panel, you are going to have now three Californians in a row, so this is the difficult time for you.

Mr. Costa, you ready?

Mr. COSTA. Ready. To follow up on the last question, I mean, isn't that really putting the finger on part of the great challenge with the Endangered Species Act, and that is trying to get any sense of agreement on what sound science is?

Mr. ASHE. That——

Mr. COSTA. I mean the science changes in many——

Mr. ASHE. That is a challenge. I mean science does change over time. We learn over time. We learn new things. And as Ms. Shea-Porter was talking about, reasonable people will look at the same——

Mr. COSTA. Set of facts.

Mr. ASHE [continuing]. Information and come to different conclusions.

Mr. COSTA. And come up with different conclusions. And to that end, isn't the default position always—it seems to me on these issues affecting ESA—the default position is that if you don't agree with the final decision, is to then say that sound science wasn't applied?

Mr. ASHE. That is quite frequently the default.

Mr. COSTA. Mr. Schiff, would you concur?

Mr. SCHIFF. Well, I think it is fair to say that using the best available data is often times the crux. But often times it is just a question of the interpretation of the law. And in my experience, I think the Fish and Wildlife Service has routinely adopted an interpretation of the law that is broader than necessary.

Mr. COSTA. And that changes from administration to administration.

Mr. SCHIFF. It certainly depends upon the practice of the Agency.

Mr. COSTA. Right. And I mean, regardless of the change politically, you have a whole host of folks at the mid level, biologists and

other officers, administrations come and go, but they stay. Is that not correct? And therefore, it becomes a challenge to make changes, even if there is different interpretation of how the ESA is applied.

Mr. SCHIFF. There is no doubt—in my written testimony I make clear that many of the problems we see today are simply an exacerbation of long-term trends.

Mr. COSTA. Yes. Mr. Ashe, you have been there since 2011 in your current position. Is that correct?

Mr. ASHE. June of 2011. And Mr. Schiff, are both of you familiar with the issues that we have had in California with the biological opinions on salmonid and delta smelt?

Mr. ASHE. I am.

Mr. COSTA. OK.

Mr. SCHIFF. Yes, I am as well.

Mr. COSTA. Wonderful. So, we have biological opinions on both the salmonid and the smelt, as you both know, that were found in court to be remanded, of which the Department of the Interior is now doing, and they are actually doing what they should have done in the first place, which is combining the two biological opinions.

Senator Feinstein and I requested a National Academy of Science report that maybe both of you are familiar with that confirmed more or less what the court determined, and that is that the best science wasn't being used. And yet, we saw the application this year of the operation of this Federal and State water projects continuing to operate under opinions that have been determined by the court to be not using the best science, and that are currently being reformulated. Can you explain that to me?

Mr. ASHE. I will try. That, the Bay delta area and the Bay delta conservation planning process, certainly one of the most——

Mr. COSTA. No, no, no, I—don't filibuster me. I know all——

Mr. ASHE. I think that——

Mr. COSTA. I am deeply involved in all of that is going on. Why are the projects operating currently under these flawed opinions?

Mr. ASHE. While we were——

Mr. COSTA. The court has determined——

Mr. ASHE. While we are working on a new biological opinion we have to work under the existing biological opinion.

Mr. COSTA. Even though they are flawed?

Mr. ASHE. Even though they are flawed. We can recognize and we can work within those——

Mr. COSTA. Wouldn't that question—and your cooperation with the Bureau of Reclamation to then determine some sort of flexibility, realizing that you are now going back to the drawing board and formulating a new combined biological opinion in terms of how you go forward and operate in the interim basis, given the crisis we are having on water?

Mr. ASHE. Well, I would give great credit to the Bureau of Reclamation, because I think we are working hand-in-glove with the Bureau to ensure that the project can operate and continue to provide the benefits that it provides for the citizens of California and conserve the species while we revise the biological opinion.

Mr. COSTA. Under the current biological opinion you had an opportunity to opine—and you did—as to whether you operated under the most conservative regime of the levels of fish intake versus—

out of 370 that you could take, you ended up, I think, well under 300—280-some.

Mr. ASHE. Under 300.

Mr. COSTA. Right.

Mr. ASHE. Yes.

Mr. COSTA. And as a result of that, we lost 400,000 acre-feet of water in January, February, and March. Some estimate as much as 812,000 acre-feet of water. We can do better than that. You—in terms of the operations of these projects.

Mr. ASHE. Well, hopefully we can do better. And we are working with the State of California and others to try to get to a place where we can——

Mr. COSTA. But that is the long-term stuff. The short-term stuff is what is so critical. We have 200,000 to 300,000 acres of very productive land that is not in production this year as a result of the decisions you made in January, February, and March.

Mr. ASHE. Well, we made decisions in accordance with the biological opinion that is currently pending. And so we are following the law. I understand the frustration, but I will note——

Mr. COSTA. But you will use the flexibility that you have.

Mr. BISHOP. OK, I am going to interrupt here. I appreciate your good questions, though. Mr. LaMalfa?

Mr. LAMALFA. Thank you, Mr. Chairman. I want to follow-up with Mr. Ashe on the yellow-legged frog.

So, am I to conclude when—your answer earlier, that a designation of 2.2 million acres, but the acknowledgment that the chytrid fungus is something that is not human-caused, therefore, in the designation of these 2.2 million acres, there would be no curtailing of human activity of timber operations or home-building or off-roaders because the fungus isn't the fault of those activities? Is that a conclusion that we can assume, that the fungus is at fault and not these activities on these lands that are——

Mr. ASHE. I guess I would say, Congressman, I am adopting your presumption. You said that the Fish and Wildlife Service has found that is the only cause of the decline of the yellow-legged frog. And——

Mr. LAMALFA. No, it was UC Berkeley, San Francisco State, National Science Foundation, U.S. Forest Service, and every other researcher has found that the fungus is responsible.

Mr. ASHE. I would say that I think that the critical habitat that you were discussing is a proposal by the U.S. Fish and Wildlife Service. And so, yes, we would consider—we have a similar situation with the wolverine, where the wolverine is declining and its habitat is being lost as a result of climate change. And it relies on a deep snowpack well into the summer, as habitat. We are proposing to list the wolverine. But because the impact to the wolverine is caused by a changing climate, we are not proposing to regulate forest practices or road construction or grazing or ski area development or anything like that, because those are not the contributing factors.

Mr. LAMALFA. So what does a critical habitat area mean, if you are not curtailing people? Because you can't curtail weather, you can't curtail a fungus.

Mr. ASHE. It may likely mean nothing. The law, though, requires us to designate critical habitat. It is not a non-discretionary function. The law requires us to do it.

Mr. LAMALFA. Well, there is a lot of latitude in the law. We were hearing about the biological opinion that you would have latitude—or maybe a misused opinion, but the latitude within it. And then it seems like the latitude has expanded a lot.

Mr. ASHE. But the law does not allow us latitude regarding the publication of critical habitat. It requires us to publish——

Mr. LAMALFA. No, but in the data leading up to it as to what the critical habitat area should be, or how that is interpreted, that——

Mr. ASHE. Exactly.

Mr. LAMALFA [continuing]. We keep coming back to Mr.——

Mr. ASHE. We do have discretion there.

Mr. LAMALFA. OK.

Mr. ASHE. Yes.

Mr. LAMALFA. Let me shift gears to another important issue in Central California. We have a real problem with private property here. And a gentleman, he and his brother, Kenny and Andrew Watkins down in Central California—and we have a picture that can be brought up on the screen, if our folks are ready for that—but we have a member of the Fish and Wildlife Service who basically was in plain clothes, in a plain vehicle, trespassing on these brothers' property, and would not identify himself, nor would the gentleman even come to the fence to have a conversation with the land owners. They then called upon the sheriff, because they have a trespasser out there.

And this has been an ongoing problem for the family down there, where Fish and Wildlife and others are making decisions about their property that is presently being tied up in a hearing process, or litigation process—I don't know where it sits right now. But this is like really bad PR for the organization, you know?

When your marked vehicles show up in a community and you hear about these stories and you have people being treated in such a fashion—look at that fellow standing there. He won't even approach the fence. Got his hand in his pocket, his leg cocked there, pretty—being actually defiant of the property owner and perhaps the sheriff's deputy who has arrived there.

Now, is this the kind of attitude or public relations your organization really wants to present to the public, to the agricultural community, to the private properties, to the taxpayers? How do you view that?

Mr. ASHE. I don't know the facts of the case, so I would say, Congressman, if you provide me with the facts I will get you an answer. So all I am looking at is a picture and listening to your characterization of it. But if you get me the facts——

Mr. LAMALFA. Well, I don't have any reason to make that up.

Mr. ASHE. I would be happy to come to your office. Well, there are many potentials. Is it a law enforcement agent? Is the individual in the field, is he a law enforcement agent?

Mr. LAMALFA. He is one that has been—on two previous occasions been other agents out there looking for something to do——

Mr. ASHE. Well, if he is a law——

Mr. LAMALFA [continuing]. In the agricultural operations. These fellows and others run into problems with changing crops or dealing with their—whatever their cropping strategy is going to be, someone saying, "Oh, you can't do it there now, because we don't think you should be able to use this portion of your property that you are making payments and paying taxes on." And so——

Mr. ASHE. But I would just say if he is a law enforcement officer, then he is not trespassing. Because under the open fields doctrine——

Mr. LAMALFA. He is not trespassing without a uniform, without a badge, in an unmarked vehicle?

Mr. ASHE. No, he is not. No, sir.

Mr. LAMALFA. Is this what the founders had in mind 230 years ago with private property and a person—basically, he was being defiant to the land owner when asked to identify himself. I don't think that was what was in mind.

So, I will finish, Mr. Chairman.

May I request of your Agency the background and the paperwork——

Mr. ASHE. Sure.

Mr. LAMALFA [continuing]. And what is going on with the litigation and all that?

Mr. ASHE. Absolutely.

Mr. LAMALFA. I would like to have that and be able to bring it in to this Committee and have that——

Mr. ASHE. Absolutely.

Mr. LAMALFA [continuing]. For the record, because it is very important that these people get this resolved. So I appreciate it.

Mr. ASHE. Absolutely.

Mr. LAMALFA. Thank you.

Mr. ASHE. Thank you.

Mr. BISHOP. Thank you. Mr. McClintock.

Mr. MCCLINTOCK. Thank you. Mr. Schiff, Ms. Shea-Porter suggested that the morality of the ESA is above reproach. Would you comment on the moral aspects of a policy that deliberately destroys the livelihoods of thousands and thousands of innocent, hard-working families, based on nothing more than specious claims and highly questionable data?

Mr. SCHIFF. I think it is well stated that the Endangered Species Act can often times be immoral in its application. I mentioned before the question of the delta smelt that Representative Costa was focusing on, but also there are plenty of other species. We represent clients now who are challenging the listing of the Utah prairie dog. And these are property owners who have seen their loved ones' graves desecrated by burrowing animals. The airport has caved in parts the airplanes can't use. The city can't manage its parks. And there is no reasonable accommodation that our clients have been able to come to with respect to managing the prairie dog.

And there seems to be plenty of examples where, notwithstanding the good intentions of those who enacted the Endangered Species Act, there can be pernicious impacts. And yet, the Agency, the Fish and Wildlife Service, has shown too often too little consideration for those negative impacts.

Mr. MCCLINTOCK. Well, let's talk about some of those negative impacts and get back to the Central Valley of California and the delta smelt. Mr. Ashe says that the Endangered Species Act is compatible with "robust and sustained economic development." Unemployment in the San Joaquin Valley is reaching 40 percent in some communities because of the pumping restrictions caused by the delta smelt findings. We are looking at another tough water year.

On July 15th the Wall Street Journal pointed out that "more smelt are captured by biologists conducting population surveys each year than are trapped by pumps." In fact, Federal and State biologists killed 2,316 endangered smelts in 2011—2,316. The pumping took 211.

Mr. Ashe, is it true that your biologists have the authority to actually take more delta smelt than the water projects that meet the needs of millions of people?

Mr. ASHE. Congressman, the number of smelt that are taken by the pumps is an index. So what they are measuring are ones that are actually observed, captured, on the screens. And so they use that as an index. But the number that are killed in the pumps is much larger than the number they are actually measured on the screen. That is just an index. And so they use that as a way—so we—but our biologists and State biologists do surveys for delta smelt.

Mr. MCCLINTOCK. I hate to contradict you, but this is part of the incidental take statement.

Mr. ASHE. Yes, sir.

Mr. MCCLINTOCK. Well, do you understand the frustration of the folks throughout my region when they see a biologist killing 2,300 endangered smelt, the pumps taking 211, and your turning off the water for farms that mean thousands and thousands of jobs and affect the economy of a region of hundreds of thousands of families?

Do you understand the frustration of families in my region that are looking at your critical habitat designation which is essentially affecting the entire Sierra Nevadas with the implication that has to what remains of their already devastated economy?

The economy is already devastated by previous policies of this nature, when your Agency itself admits that there is—that human activity is not the principal cause of the decline of these populations. Do you understand that?

Mr. ASHE. I understand the frustration, Congressman. I don't——

Mr. MCCLINTOCK. Do you care, I guess is the question, about these thousands of real families?

Mr. ASHE. I would certainly——

Mr. MCCLINTOCK. That are now out of work because of the policies that you are pursuing.

We will pursue this later. I think you are going to be coming out to a—or your people are going to be coming out to a meeting where they are going to hear directly from these folks.

Mr. Ramey, one final question. In the Klamath they are trying to tear down four perfectly good hydroelectric dams because of what they see as a catastrophic decline of the salmon populations on the Klamath. When I went up there I said, "Well, how many are

left?" "Oh, just a few hundred," they said. I said, "Well, why doesn't somebody build a fish hatchery?"

They tell me, "There is a fish hatchery, the Iron Gate Fish Hatchery at the Iron Gate Dam. It produces 5 million salmon smelts a year, 17,000 return as fully grown adults to spawn every year, but they don't let us include them in the population counts." And then, to add insult to insanity, when they tear down the dams, the Iron Gate Fish Hatchery goes with it. Is there any rational, scientific basis for such a policy?

Dr. RAMEY. Not so long as they interbreed. But let me go back to this delta smelt thing. We published a paper in 2011 where the data were public, we tested the hypotheses of various threats against the delta smelt, and found that the pumping could be attributed to about 10 percent mortality of the population. But the bulk of the problem—and this came out in the NAS report—tends to be relative to the ammonia put in to the system by the Sacramento Wastewater Treatment Plant. So while we are regulating on the basis of pumps under this flawed biological opinion, this problem with food chain collapse continues.

And so, this came about as a third-party independent review. And there is a massive collateral damage that can happen with some of these decisions, like you point out with the economic part.

But let me just say it is the little guy that doesn't have the resources to litigate this that is severely affected. And there is no appeals process for some of these opinions, so——

Mr. BISHOP. Thank you. I am sorry I wasn't watching the clock myself. I apologize.

Mr. Stewart, you are the representative of those prairie dogs that were just mentioned.

Mr. STEWART. I am, Mr. Chairman.

Mr. BISHOP. They are in your district?

Mr. STEWART. Yes.

Mr. BISHOP. You are recognized for questions.

Mr. STEWART. Thank you. Thank you, Mr. Chairman, for holding this hearing. Thank you to the witnesses. These are important issues for the American people, and we appreciate your expertise. These are emotional issues, as I am sure has been demonstrated this morning. And I think we have seen adequate conversation about why there is so much frustration on the part of the American people.

And Mr. Chairman and Mr. Schiff, you mentioned the Utah prairie dog, and I would like to come back to talk about that in just a moment.

But before I do, Mr. Ashe, a tough morning for you, I am supposing. Thank you for being here. Thank you for the effort you made yesterday to reach out to me in my office. And I am supposing you are doing the same thing with other offices on both the Congress and the Senate side. I think that is a smart thing to do. I appreciate that you recognize that relationships can be effective in solving some of these problems. And, honestly, I wish the Administration in general had been more effective of that, and I hope that they will maybe make a renewed effort in that. And I wanted to thank you again for beginning that process.

If I could now, coming to an issue which is—as we discussed yesterday, Mr. Ashe—important to me in my district, and frankly, it should be important to the people in other locations as well, because of the precedent it sets, and that is talking about the prairie dogs in Iron and Garfield Counties. And the frustration we have there is this. Simply put, it is that you have an endangered species, which we have been effective at monitoring and nurturing and assisting that species, to the point where there are many of them now. But the problem is we can only count those on Federal lands, and we don't count those on private lands.

And we had a chance to talk with Ms. Jewell, Secretary Jewell, on July 17th, which was just a few weeks ago. And I asked her this question. And she said—and I would like to quote her comment, and then, Mr. Ashe, ask you to respond to that and get your thoughts, if you could, about this frustration on counting these endangered species on private lands. She says, "My understanding is that when we do Endangered Species Act assessments we count all animals on private and public lands, because we may have many endangered species that are on private land." Seems like a reasonable approach.

Mr. Ashe, do you share that opinion? And, again, I would appreciate your comments on that, if you could.

Mr. ASHE. I think the Secretary predicated her remarks by saying she wasn't directly familiar with that. But I think—as we talked about yesterday, the recovery plan for the Utah prairie dog focuses on public lands. And so, because of the way the recovery plan is drafted, for the purposes of recovery, there is only consideration of the prairie dogs that are on public land. And so that is, in fact, the case.

Mr. STEWART. And understanding that, as you said, the case, does that make sense to you, though? I mean doesn't it seem reasonable that we would—if a species is endangered, that we would want to know how many there are in entirety, not how many there are in locations for which isn't ideal for them—and to their choosing, they would prefer to inhabit private lands.

Mr. ASHE. Well, and I want to thank you for the conversation yesterday. I didn't participate in the development of the recovery plan, but I think that when they drafted—as I understand, when they drafted the recovery plan, there weren't a lot of prairie dogs on private land, and there were a lot of practices in place that were persecuting prairie dogs on private land. And so they did not anticipate that private lands would play a significant role in recovery.

Can we look at that again in the context of today and what we know today? Yes, I think we can.

Mr. STEWART. OK. Thank you, sir. And I have to say, just in the few seconds I have left, I was encouraged after our meeting yesterday. You gave us some names of individuals that you thought could be helpful to us. We have reached out to those individuals already. They seemed to be anticipating our phone call. And I am more optimistic than I have been in quite a while that we are going to be able to work with your Agency to resolve this and not, as we said yesterday, not in 30 years and $100 million later, but in a very short period of time. And I thank you, sir, for your willingness to

work with us on that, and I look forward to doing so. And with that, Mr. Chairman, I yield back.

Mr. BISHOP. Thank you. Mr. Mullin?

Mr. MULLIN. Thank you, Mr. Chairman. My question is for Director Ashe. Director Ashe, I understand that you recently have indicated that you will be moving forward with processing the proposed oil and gas Candidate Conservation Agreement with Assurance, CCAA, to conserve the lesser prairie chicken in five affected States, which includes my home State, Oklahoma. I view the CCAA as critical to protect the species through voluntary agreements with the industry, and to provide the basis for preventing a listing.

Can I have your agreement or your commitment today that you will expedite the process for the range-wide plans for the oil and gas CCAA?

Mr. ASHE. Thank you, Congressman. We met with the oil and gas industry and our State partners last weekend at the Western Association of Fish and Wildlife Agencies. The industry has agreed to pay the cost associated with the environmental review and provide the support that is going to be necessary to do that. We told them we would work with them toward an objective of having a CCAA approved by December. That is an optimistic scenario, it involves some optimistic assumptions about NEPA compliance, but we agreed to work toward that objective.

Mr. MULLIN. We continue to see goals set when we would like to see something done, and it seems like we are never able to reach it. I would rather see something that is realistic, something that we can plan on.

As a business owner, it is really hard to plan projects when you have a target date and you assume—in the private world, when you give someone a finish date, that means you have to hit it, or there are penalties. In this world, it is up for debate. And typically, it doesn't happen. Well, what happens in the private world is it holds us back. And if you don't think you can hit December, could you give me a realistic time? Because assumptions up here really mean nothing.

Mr. ASHE. Again, Congressman, what I can tell you is we told them that we would do everything we can do to meet their target date. Their target date is December. And we told them we would do everything that we can do to meet that target date, and we will do that.

Mr. MULLIN. What is the Agency's target date?

Mr. ASHE. We don't have a target date. We have committed to working with them to do everything possible we can do to meet their date.

Mr. MULLIN. The Oklahoma delegation recently sent you a letter on the topic of the American burying beetle, which I call the dung beetle, because in my State or in my pastures, where you can find a dry patty, you can kick it over and you can find this beetle that, honestly, we used to throw at each other as kids. As we continue to have frustration about delays on the target date for the draft for the general conservation plan, we are asking you to put forward some type of internal guidance that may be used by the industry allowing the projects to continue during the final weeks of the bee-

tle's active season. As these delays are troublesome to our economy and the progress in our State.

I would like to also ask you if you would update the recovery plan for delisting the beetle. And if there is a problem with that, you can come to my property and you can do a study on finding out if this thing is really endangered or not.

Ultimately, the ability to delist the beetle is important to my State and the industry. I have experienced the dung beetle in my own private sector life and in my business, and I have seen the hurdles firsthand surrounding this beetle's listing. It is extremely costly to our industry, and it is almost a joke. We were all surprised when this thing got listed. I never knew there was such a thing as them being endangered, and they have held up projects after projects after projects.

And here, in this conference, and—with, ultimately, the White House's own plan, they say that they are wanting to create jobs. The way to create jobs would be delisting it. Can you give me an update on that?

Mr. ASHE. We have a very good record of working with the industry on the American burying beetle. Just this past year we worked with TransCanada to work on the approval of the southern leg of the Keystone Pipeline, going from Cushing, Oklahoma to the Gulf Coast, and we——

Mr. MULLIN. Right through my district.

Mr. ASHE. We produced a habitat conservation plan in 6 months, a record time, and we did that by working with the industry, sitting down with them face-to-face, working on these issues, what can they do to conserve the beetle. So I think——

Mr. MULLIN. But where are we at getting it delisted? I mean all the numbers show this beetle has done really well.

Mr. ASHE. As regards to the status, Congressman, I am not familiar with the status and where we are with recovery. I would be happy to come meet with you and bring our experts and talk about that.

Mr. MULLIN. Please do. Thank you. Thank you for your time.

Mr. ASHE. Thank you, sir.

Mr. MULLIN. Thank you, Mr. Chairman. I yield back.

Mr. BISHOP. Thank you. All right. I appreciate your willingness to be here. I have three last questions for you. Mr. Ashe, you are going to get two of them anyway, so let me start with the first one.

Last year this Committee was informed about a college student who was doing biological surveys under Fish and Wildlife Service Section X recovery permits. And it had in 1994 falsely reported seeing an endangered species on his survey area. This was in California. Two other scientists were aware of the false report, but did not immediately report it, and the student later said that this was all a joke. But as a result of the joke, a nearby gravel operation was told it had to modify its operation to avoid a taking for this fabricated species.

I am troubled that the research permit under which the survey was conducted was not revoked, that the company overseeing the work, Mad River Biologists, were allowed to continue doing these surveys and other population surveys, despite the falsified science.

Why has the Fish and Wildlife Service, and under your management, allowed this to continue?

Mr. ASHE. I am going to have to get back with you for the record with the answer to that question, Mr. Bishop.

Mr. BISHOP. Got a timeframe for that return? How soon can you get back with me on that one?

Mr. ASHE. I can get back with you within a week.

Mr. BISHOP. Good. I will time you.

For all of you, this can simply be a yes/no answer. I am going to go down the line. Would you agree that, in this day and age of the Internet, it is both possible and preferable that actual data be used for ESA decisions that affect both species and people, and should be available for everyone to see online on the Internet?

I'll start with you, Mr. Schiff.

Mr. SCHIFF. Yes.

Mr. BISHOP. Mr. Ashe?

Mr. ASHE. Yes.

Mr. BISHOP. Mr. McMullen?

Mr. MCMULLEN. Yes, absolutely.

Mr. BISHOP. Dr. Ramey?

Dr. RAMEY. Yes.

Mr. BISHOP. That was a simple-enough one. I am going to give the last attempt, Mr. Ashe. I mentioned the letter that you sent to the State of Utah on our sage-grouse issue. Can I get the assurance that you will at least look at those three issues I recommended that have questionable data that was given to them on tall structures, buffers, and disturbance limits?

Mr. ASHE. Yes, I will look at it.

Mr. BISHOP. Thank you. This letter had an amazingly negative impact in trying to move us forward. So I hope the Fish and Wildlife Service will look at that significantly.

Final one. The answer to Chairman Hastings' letter as to the Inspector General's report which is a very serious consideration, I would ask you to, in all deliberate speed, respond to that quickly. This Committee needs to know the answers to that. That is a significant issue. I want to give you some time to actually prepare that, obviously.

Mr. ASHE. Thank you.

Mr. BISHOP. But this Committee needs to have that data in terms of days, not in terms of months. So I appreciate that.

With that, I want to thank all of you. Many of you have traveled great distances to be here. We have appreciated you coming and giving your testimony. On behalf of the Committee there may be some other questions that will be submitted by either side in writing. If they do, we would ask you to respond to them in writing in a relatively quick timeframe.

And if there is nothing else, then this particular hearing—with our appreciation for you coming here and giving the testimony—stands adjourned.

[Whereupon, at 12:27 p.m., the Committee was adjourned.]

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