H.R. 3824, THREATENED AND ENDANGERED SPECIES RECOVERY ACT OF 2005

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

Wednesday, September 21, 2005

Serial No. 109-31

Printed for the use of the Committee on Resources

Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

23-837 PDF WASHINGTON : 2006

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LEGISLATIVE HEARING ON H.R. 3824, TO AMEND AND REAUTHORIZE THE ENDANGERED SPECIES ACT OF 1973 TO PROVIDE GREATER RESULTS CONSERVING AND RECOVERING LISTED SPECIES, AND FOR OTHER PURPOSES. "THREATENED AND ENDANGERED SPECIES RECOVERY ACT OF 2005."

Wednesday, September 21, 2005
U.S. House of Representatives
Committee on Resources
Washington, D.C.

The Committee met, pursuant to call, at 10:03 a.m., in Room 1324, Longworth House Office Building, Hon. Richard W. Pombo [Chairman of the Committee] presiding.

Present: Representatives Pombo, Duncan, Gilchrest, Cubin, Radanovich, Cannon, Gibbons, Walden, Hayworth, Drake Fortuno, McMorris, Gohmert, Renzi, Rahall, Abercrombie, Udall of New Mexico, Grijalva, Bordallo, Costa, Boren, Miller, DeFazio, Inslee, Udall of Colorado, Cardoza and Herseth.

The CHAIRMAN. The hearing will come to order. We are holding a hearing today on H.R. 3824, the Threatened and Endangered Species Recovery Act.

STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The Endangered Species Act was signed into law and introduced to the American public in 1973, more than three decades ago. Right around this time, Americans were also being introduced to the first VCRs, jumbo jets, and Atari TV game consoles. In medicine, ultrasound diagnostic techniques were discovered, and the sites of DNA production on genes were discovered.

Since then, Americans have experienced the introduction of innovative wonders like Microsoft Windows, the Internet, cellular phones, antilock brakes and air bags, Nintendo game cube, the Blackberry, et cetera. But, most importantly for our species, science, technology and the freedom of innovation have led to incredible advances in medicine. What was once a 7-day hospital stay

in 1973 is now a half-day outpatient visit, perhaps even just a prescription from your doctor.

America's endangered species, unfortunately, have not been the beneficiary of those society-wide advancements over the last three decades. America has been getting better, but for all intents and purposes, the ESA is still stuck in 1973 wearing leisure suits, mood rings and collecting pet rocks.

According to the U.S. Fish and Wildlife Service, only 10 of the roughly 1,300 species on the ESA list have recovered in the Act's history. That is a less than 1 percent success rate. And the Service's data on our species' progress toward recovery today isn't much better. Yet, despite these facts, ESA's groupies would have you believe that it is better than ever before. They defend the Act's original language from updates as if it were Shakespeare's works that we were editing. It has been 99 percent successful, they will tell you, because all but nine species are with us today.

The official Fish and Wildlife Service data, however, tells a much different story: 39 percent of the Act's listed species are in unknown status—they have no idea; they could be extinct; 21 percent are classified by the Service as declining; 3 percent, though currently still on the list, are believed to be extinct; 30 percent are classified as stable, though for many of the species in this category, this is only a result of corrections to the original data errors rather than an actual accomplishment of the Endangered Species Act; and, finally, 6 percent are classified as improving, 6 percent.

The math just doesn't add up. And across the board, according to the Service, 77 percent of all the listed species have only achieved somewhere between zero and one-quarter of their recovery goals.

In fairness, I am sure this number includes the species in the unknown category, because if you don't know where the species is or if it is still around, you can't accurately gauge its status. Now, we all know it takes time to recover endangered species, but after three decades of implementation, do these sound like the statistics of a successful law? Of course not. But the defenders of the three-decade-old status quo are just getting warmed up. To help demonstrate what some of them have called their blind faith in the law, opponents of change may even go as far as to tell you that species with designated critical habitat are more likely to be improving, even though the official position of the Service in successive administrations, both Republican and Democrat, is that 30 years of critical habitat have done very little, if anything, to help species. On the contrary, it causes conflict, litigation and wastes valuable agency resources that could otherwise be spent in the field on species in need.

I could go on and on, but the bottom line is the Endangered Species Act is in desperate need of an update. I would wager that none of my colleagues on the dais could say with a straight face that almost 34 years ago when Congress passed its first attempt at a species recovery law, we got it exactly right. Congress gets nothing exactly right.

The ESA must be updated to incorporate 30 years of lessons learned. It must be modernized for the 21st century to provide the flexibility for innovation to achieve results. We must change the

Act's chief unintended consequence of conflict and litigation into real cooperative conservation. The ESA's regulatory iron curtain has prevented this from happening. It has hurt species' recovery by leading the trend we all know as shoot, shovel and shut up. And it has hurt family farmers and ranchers by taking their property away unnecessarily.

In my 13-year experience in Congress with the Endangered Species Act, it is here that the opposing line in the sand has always been drawn. Everyone here today wants a slot of work to conserve and recover endangered species, but not everyone wants to enlist the help of the private property owner to do it. Perhaps it is just an ideological difference. But I submit to you that if we do not enlist the property owner, we will never increase the Endangered Species Act's results for species recovery, because 90 percent of all endangered species in America have habitat on private land. We can never reasonably expect to achieve success if we do not make the landowner an ally of the species and a partner in that recovery. In this regard, protecting private property rights of American landowners is not only what is right constitutionally, it is the key to increasing our rates of species recovery.

The bipartisan Threatened and Endangered Species Act will do just this. It begins to solve the longstanding problem of the Endangered Species Act by focusing on species recovery by creating recovery teams and requiring recovery plans by a date certain, increasing openness and accountability, strengthening scientific standards, creating bigger roles for state and local government, protecting and incentivizing private property owners, and eliminating dysfunctional critical habitat designations that cause conflict without benefit.

So as we move forward in this process, I ask the Committee to rise above the partisanship, as the sponsors of this legislation have, and engage in honest debate. When you hear the tired and inane rhetoric of gut, rollback, eviscerate, take a step back and look at the conflict and ask yourself: What could we possibly have to roll back? It is not working. It is time to move forward, update this law, and bring it into the 21st century.

At this time, I would recognize the Ranking Member, Mr. Rahall.

STATEMENT OF THE HON. NICK J. RAHALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. RAHALL. Thank you, Mr. Chairman.

You know, some of the words you used remind me of this past weekend. I spent all weekend helping my mom move out of her house, the house in which I grew up. I found a lot of leisure suits, moon rocks, marbles, other items to which you refer in your opening comment. Perhaps I should have worn one of my leisure suits today.

Mr. Chairman, it is no secret that, for the past couple of months, you and I, as well as our staffs—and I salute them as well—have sought to find common ground and common cause on amendments to the ESA. I came to the table with a view that the Act does not require significant modification; that, where problems exist, those problems are largely caused by unanswered knocks on the Treasury door. You came to the table with a long history of seeking to

make significant changes to the law; that, in fact, we had a patient in cardiac arrest and major surgery was in order. And I will admit that, throughout our long negotiations, that a mortal frame from a Grateful Dead song kept popping through my mind: Sometimes the light's all shining on me; other times I can barely see. Lately it occurs to me what a long strange trip it's been.

Which brings us to the here and now. I figured you'd love the Grateful Dead, which brings us to the here and now. Despite our best efforts, our good intentions, we have not reached a consensus approach on amending the Endangered Species Act. But I want to make one thing perfectly clear. Throughout our negotiations, you were exceedingly fair. You were open minded. You treated me, my staff with dignity, with respect, and I have nothing but the utmost respect for the manner in which you have conducted the negotiations and which you have treated the minority side, and I salute you for that.

But, of course, as Oscar Wilde once said, one should always play fair when one has the winning cards. In this case, your straight flush that you hold beats my three of a kind any day. So the legislation that's the subject of this hearing and which our Committee colleagues will have the opportunity to consider during markup tomorrow basically represents the end point of our negotiations as far as they went. I would like to briefly outline where we agreed, the major areas where we continue to disagree.

Realizing that Congress will not appropriate what I believe to be adequate funding to implement ESA in its current form, I concluded that certain efficiencies could be built into the law, and chief among them was the elimination of the designation of critical habitat. Despite the law's requirement that critical habitat be delineated at the time of listing or within one year of listing, the fact of the matter is that only about 37 percent of the over 1,200 listed species have such habitat designated. It occurred to me that available resources could be better put to use by devising strong recovery plans with species habitat needs more appropriately determined during that process.

At the same time, it was exceedingly important to me that we enact a strong jeopardy standard to guide the section 7 consultation process. This in a sense is the very backbone of the Endangered Species Act.

We agreed on those issues. But where we disagreed were in several areas which I felt would not enhance recovery. Chiefly, four major areas still separate us. First, the legislation you've introduced contains what I view to be a nebulous alternative consultation process which the Interior Secretary may devise. There are no parameters in the legislation to guide that process. I simply fail to see any need for an alternative consultation process to begin.

Second, while we both agree that recovery plans, as is currently the case, are nonregulatory, the legislation you have introduced goes further to state they are also nonbinding. Yet, at the same time, the Secretary is to implement these nonbinding plans. If we are to have recovery, I believe that recovery plans must be something more than paper which, once completed, gathers dust on a bookcase.

Third, we disagreed on the treatment of threatened species with the legislation you have introduced, the leading current law protective standards for them. My fear is that this would rapidly lead to threatened species leapfrogging to the endangered species list.

And, fourth, there is a provision in this legislation which requires the Secretary to give landowners a decision within 90 days on whether their proposed development might impact, or, in the parlance of the law, result in an individual take of a listed species. As I read the legislation, it is unclear whether this 90-day period in the Interior Department may request additional information even if the proposal is grossly inadequate. And, further, if the proposal is not acted upon during that 90-day period, it is deemed to comply with the law.

But the Secretary tells the landowner he needs to alter his development plan slightly to benefit listed species, then the landowner—if the Secretary so says that, then the land owner may seek compensation from the Federal Government. The justification for this provision from what I can tell is that property owners deserve to have a final decision rendered at some known point. However, as drafted, the provision goes much further, saying property owners are entitled to compensation for the foregone use of their property even when there are procedures in place to allow their proposed development to proceed. These provisions, taken as a whole, raise a whole host of questions and concerns, including constitutional matters, I might add, which transcend the ESA in this debate. As well, they may have ramifications for a whole host of other environmental laws. Once we go down this path, my fear is that, as Julius Caesar noted, all bad precedence begin as justifiable measures.

Again, Mr. Chairman, again, I salute you for your fairness. We did enter these negotiations in good faith. That good faith has not broken down, in this gentleman's opinion. The manner in which you have treated us is, as I said in the beginning, to be highly commended. But I look forward to continuing our dialog. And as I end, I want to quote the self-help author Dennis Foley who said, and I quote: Expecting the world to treat you fairly because you are a good person is a little like expecting a bull not to attack you because you are a vegetarian, end quote.

I've served in this body for 30 years and not enough years though to carry that type of expectation—not to carry that type of expectation, I should say. But at the same time, Mr. Chairman, I must commend you for the integrity and the fairness in which you conducted our negotiations. Thank you.

[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall, Ranking Democrat, House Resources Committee

Mr. Chairman, it is no secret that for the past couple of months you and I, as well as our staffs, have sought to find common ground, and common cause, on amendments to the Endangered Species Act.

I came to the table with the view that the Act does not require significant modification. That where problems exist, those problems are largely caused by unanswered knocks on the Treasury door. You came to the table with a long history of seeking to make significant changes to the law, that in fact we had a patient in cardiac arrest and major surgery was in order.

I will admit that throughout our long negotiations that immortal refrain from a Grateful Dead song kept popping through my mind: "Sometimes the light's all

shining on me, other times I could barely see, lately it occurs to me...what a long strange trip it's been."

Which brings us to the here and now. Despite our best efforts, our good intentions, we have not yet reached a consensus approach on amending the Endangered Species Act. But I want to make one thing perfectly clear. Throughout our negotiations you were exceedingly fair and open-minded and treated me, and my staff, with dignity and respect. And for that, I salute you. Of course, as Oscar Wilde once noted, "One should always play fair when one has the winning cards." In this case, the straight flush you hold as chairman beats my three of a kind any day.

The legislation that is the subject of this hearing, and which our committee colleagues will have the opportunity to consider during markup tomorrow, basically represents the end point of our negotiations as far as they went. I would like to briefly outline where we agreed, and the major areas where we continue to disagree.

Realizing that this Congress will not appropriate what I believe to be adequate funding to implement the Endangered Species Act in its current form, I concluded that certain efficiencies could be built into the law. Chief among them was the elimination of the designation of critical habitat. Despite the law's requirement that critical habitat be delineated at the time of listing, or within one year of listing, the fact of the matter is that only about 37% of the over 1,200 listed species have such habitat designated.

It occurred to me that available resources could be better put to use by devising strong recovery plans, with species habitat needs more appropriately determined during that process. At the same time, it was exceedingly important to me that we enact a strong jeopardy standard to guide the section 7 consultation process. This, in a sense, is the very backbone of the Endangered Species Act.

We agreed on those issues. But where we disagreed were in several areas which I felt would not enhance recovery. Chiefly, four major areas still separate us. First, the legislation you have introduced contains what I view to be a nebulous alternative consultation process which the Interior Secretary may devise. There are no parameters in the legislation to guide that process. I simply fail to see any need for an alternative consultation process to begin with.

Second, while we both agree that recovery plans, as is currently the case, are non-regulatory, the legislation you have introduced goes further to state they are also "non-binding." Yet, at the same time, the Secretary is to implement these "non-binding" plans. If we are to have recovery, I believe that recovery plans must be something more than paper which once completed, gathers dust on a bookcase.

Third, we disagreed on the treatment of "threatened" species, with the legislation you have introduced deleting current law protective standards for them. My fear is that this would rapidly lead to threatened species leapfrogging to the endangered species list.

And fourth, there is a provision in this legislation which requires the Secretary to give land owners a decision within 90 days on whether their proposed development might impact, or in the parlance of the law, result in an incidental take of a listed species. As I read the legislation, it is unclear whether during this 90-day period the Interior Department may request additional information even if the proposal is grossly inadequate. Further, if the proposal is not acted upon during that 90-day period, it is deemed to comply with the law. But if the Secretary tells the land owner he needs to alter his development plans slightly to benefit listed species, the land owner may seek compensation from the Federal government.

The justification for this provision, from what I can tell, is that property owners deserve to have a final decision rendered at some known point. However, as drafted, the provision goes much further, saying that property owners are entitled to compensation for the foregone use of their property even when there are procedures in place to allow their proposed development to proceed.

These provisions, taken as a whole, raise a whole host of questions and concerns, including Constitutional matters, which transcend the Endangered Species Act and this debate. As well, they may have ramifications for a whole host of other environmental laws. Once we go down this path, my fear is that, as Julius Caesar noted: "All bad precedents begin as justifiable measures."

I look forward to continuing our dialogue Mr. Chairman. The self-help author Dennis Wholey said: "Expecting the world to treat you fairly because you are a good person is a little like expecting the bull not to attack you because you are a vegetarian." I have served in this body for enough years not to carry that type of expectation. At the same time, I must again commend you for the integrity and fairness with which you conducted our negotiations.

Thank you.

The CHAIRMAN. I thank the gentleman. And I will say that, in our efforts, as we move forward on this bill, that your staff and the staff of both minority and majority on the Committee did a fantastic job of working through a lot of very contentious issues. During the many hours that you and I spent together in trying to work this out, I believe that I was treated fairly and that we shared a common goal of improving the Act, most of which, most of this bill we agreed on. There are a few issues that we could not agree on, and the decision was made to let the Committee work its will on those particular issues. But I do appreciate the work that you put in, realizing that going into those negotiations, you did not believe the Act needed major changes and you worked with me all the way through that. And I appreciate that and I appreciate the good work that your staff and the Committee staff put in to get us to this point today.

It is not normally the position of the Committee to allow opening statements other than the Chairman and Ranking Member. But because of this particular issue and the importance of it, I have made the decision to allow a few opening statements for members who have requested that opportunity. And at this time, I would like to recognize Mr. Saxton for his opening statement.

STATEMENT OF THE HON. JIM SAXTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. SAXTON. Thank you very much, Mr. Chairman.

And let me commend you for your great effort on this. I know how long you have had a desire to address the issues that are important to you. And I know Mr. Rahall and you have worked diligently for quite some time this year in bringing this matter before the Committee for a hearing today and, I understand, the markup tomorrow.

I would normally say in an opening statement at this juncture that I look forward to working with you to resolve any issues that may remain open. However, given the fact that we are having this hearing today and the markup tomorrow, I suspect that the die is pretty well cast as to the final product here.

Having said that, I would just like to note that when the Committee was reorganized—this full Committee was reorganized in 1985—I became the Chairman of the Fisheries, Conservation and Wildlife Subcommittee, and one of the first efforts that we made back in those days was to get together a group of variety of stakeholders who had issues relating to the—of concern relating to the Endangered Species Act. And for months, just like you just have, we met in a good-faith effort to come to a resolution on a way to strengthen the Act. We recognized that it is not perfect. As a matter of fact, yesterday morning, I sat on the west side of the Chesapeake Bay looking across the bay at my friend's district, Mr. Gilchrest, and I sat by the owner of a marina. And we sat and watched the sun come up and thought about what we were going to do that day to try to get my boat back in operation. And as we sat there, he said, you know, he said, Congressman, I have lived here all my life. He said, I have watched this bay since I was a little kid, as long as I can remember. And he said, it is really sad that we have failed to manage our natural resources in such a way

that this bay could be as healthy as it was when I was five years old.

And as we talked about it, we talked about the Chesapeake Bay watershed. We talked about our inability to adequately manage natural resources. We talked about our seeming inability to protect wildlife habitat in the watershed. And I understood from his perspective at that point how important these issues are. He concluded our conversation by saying: I don't think the bay will ever be like it used to be.

And that is a pox on all of our houses. Those are changes that we need to make to conservation laws and regulations like those involved with the Endangered Species Act.

My concern about the legislation before us today is that with the elimination of the protections in the Endangered Species Act that relate to habitat, it seems to me that we are going in the wrong direction, and that concerns me a great deal. And I know that there are different approaches and other things that some, including yourself, have in mind that may help us to do a better job in managing natural resources like those in the Chesapeake Bay watershed, but I have great concern about the elimination of some of the provisions that are in the existing law which this legislation before us today proposes to change.

So, on the one hand, I look forward to working with you as we move forward. On the other hand, that I see that we are having a hearing today and a markup tomorrow, I suspect that your votes are pretty well lined up. But, in any event, during the next 48 hours or so, 24 hours I guess it is, I will try to make my presence known and to express my views on how I think we should move forward.

The CHAIRMAN. Thank you.

I would like to recognize Mr. Cardoza.

STATEMENT OF THE HON. DENNIS A. CARDOZA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CARDOZA. Thank you, Mr. Chair.

When the Endangered Species Act was adopted by Congress in 1973, it was heralded as a landmark piece of environment legislation for the protection and conservation of threatened and endangered species. At that time, it was clearly understood that the ultimate goal of the Act was to focus sufficient attention on listed species so that in time they could be returned to a healthy state and removed from the list.

I listened to Mr. Saxton just now about the Chesapeake. And when I was in college—I went to the University of Maryland—and I sailed on the Chesapeake, and I thought it was a wonderful place. And it still is. The Potomac, however, had signs all along it that said, don't enter the water, because it was so polluted. We have made progress in some areas. We have not made progress in other areas. But we need to make sure that the laws of our country promote the successes and correct the failings.

I fully support the goals of species protection and conservation, and believe that recovery and the ultimate delisting of species should be a U.S. Fish and Wildlife top priority. I am an original

cosponsor of the threatened Endangered Species Recovery Act because I think it is an innovative and creative approach to ending the long-running conflict between protecting species and enforcing conservation actions on private land.

The current system of critical habitat designations exemplifies the problem and the need for reform. I have seen numerous cases in my district where the designation of critical habitat seems to defy all logic completely. For example, in 2002, the Service proposed to designate over 1.7 million acres as critical habitat in California and Oregon for vernal pool species. Almost a third of my entire county in the acreage of Merced where I live would have been designated as critical habitat and included current housing developments and parking lots.

In 2003, the Service proposed 4.1 million acres in California as critical habitat for red-legged frog. Ladies and gentlemen, one must wonder: If it can be found on 4 million acres, then is it truly endangered? Or, on the flip side, are all 4 million acres truly critical to the red-legged frog?

The Threatened and Endangered Species Recovery Act will fix the problem associated with critical habitat by replacing it with a recovery plan which will shift the focus from litigation to biology and recovery, provide for greater cooperation between the Service, the land owners and States, and establish new incentives for voluntary conservation efforts.

Coming up with a thoughtful way to enable recovery of endangered species without costly litigation has been a top priority for me since I have been elected to Congress, and I believe this bill does just that, and that is why I dropped my current bill to fix the critical habitat problem. My original bill, 2933, from the 108th Congress tied the development of a balanced recovery plan to the designation of critical habitat. This Act takes that idea one step forward, further and eliminates the recovery plan system—excuse me—elevates the recovery plan system to the primary mechanism to protect the species.

I also feel compelled, however, to mention a few things that this bill does not do. This bill does not gut, eviscerate, repeal or even weaken the ESA as has unfortunately been claimed in the recent press reports. In fact, I think many members of this Committee would be interested to know that my office has been inundated by representatives from the regulated community requesting certain provisions that were once included in the bill be put back in. This bill in no way is a home run for anyone, which in my opinion generally means that it is probably pretty good policy.

I think it is unfortunate that many members of the environmental community, including some of those representatives here today, choose to continue to offer nothing but negative review after negative review when much of this bill text was a compromise as the Chairman and Ranking Members have indicated today.

If the truth be known, much of the opposition comes from those who profit from the filing of critical habitat process suits. Will another opportunity be missed to move the ball forward when one side chooses to immediately dismiss the Act as it is in its entirety without so much as a meaningful discussion?

Mr. Rahall mentioned a number of things that might be included in the bill. And I will tell you, sir, that I tend to concur that there are things that still need to be worked out in the bill. But I also believe that those things can be worked out and be discussed. Not all of them, possibly, but there can be adjustments.

I have some concerns about the time line that you mentioned as well, and I think we can work on those things. Those are legitimate issues to be brought up.

I want to, in closing, direct the audience and the Members to look at the picture that is posted up on the screen. That is in my district. It is a tire track on the top of a levee. It is teeming with ferry shrimp. It is about 200 yards away from some other vernal pools. It had occurred after a very heavy rain in my district, and all the vernal pools in my area were in full bloom. The reason why I show you that tire track in that particular location is, when I was on the city council of my hometown, we did a 2040 plan, which was, it was 45 years from the date of 2040 when we implemented it. And we devised a plan that would provide for the future growth of our community in the most environmentally friendly way that wouldn't destroy ag land, that wouldn't destroy other sensitive features in the area. There is 23 acres of vernal pools here that are not of any particular great category as opposed to hundreds of thousands of vernal pools that are special in the near foothills about 10 miles away from this site. But because there are 23 acres of substandard vernal pools in this area, the entire city plan, which designates the proper environmental path, is going to be hampered. And we can't build the streets and the things necessary to do good environmental planning because of an act that has gotten in the way of common sense.

Ladies and gentlemen, this Act, the Endangered Species Act of 1973, is severely broken and needs to be fixed, and that is why we need to do it in a thoughtful way.

Mr. Chairman, thank you for the time.

[The prepared statement of Mr. Cardoza follows:]

Statement of The Honorable Dennis Cardoza, a Representative in Congress from the State of California

Thank you, Mr. Chairman.

When the Endangered Species Act was adopted by Congress in 1973, it was heralded as a landmark piece of environmental legislation for the protection and conservation of threatened and endangered species.

At that time, it was clearly understood that the ultimate goal of the Act was to focus sufficient attention on listed species so that, in time, they could be returned to a healthy state and removed from the list.

I fully support the goal of species protection and conservation, and believe that recovery, and ultimately delisting of the species, should be the U.S. Fish and Wildlife Service's top priority under the ESA.

I am an original cosponsor of the Threatened and Endangered Species Recovery Act, because I think it is an innovative and creative approach to ending the long-running conflict between protecting species and enforcing conservation actions on private land.

The current system of Critical Habitat designations exemplifies this problem, and the need for reform. I have seen numerous cases in my district where the designation of critical habitat seems to defy all logic completely, for example:

- In 2002, the Service proposed to designate over 1.7 million acres as critical habitat in California and Oregon for vernal pool species. Almost 1/3 of the entire acreage of Merced County, where I live, would have been designated as critical habitat.

- In 2003, the Service proposed over 4.1 million acres in California as critical habitat for the red-legged frog. One must wonder, if it can be found on 4 millions acres, then is it truly endangered, or on the flip side—are all 4 million acres truly "critical."

The Threatened and Endangered Species Recovery Act will fix the problems associated with critical habitat by replacing it with a Recovery Plan which will:

- Shift the focus from litigation to biology and recovery
- Provide for greater cooperation between the Service and landowners and states
- Establish new incentives for voluntary conservation efforts.

Coming up with a thoughtful way to enable recovery of endangered species without costly litigation has been a top priority for me since being elected to the Congress and I am pleased that this bill does just that.

My original bill, H.R. 2933 from the 108th Congress, tied the development of a recovery plan to the designation of critical habitat. The Threatened and Endangered Species Recovery Act takes that idea one step further and elevates the recovery plan system to the primary mechanism to protect species.

I also feel compelled, however, to mention a few things that this bill does not do. This bill does not gut, eviscerate, repeal, or even weaken the ESA as has unfortunately been claimed in recent press reports.

In fact, I think many members of this Committee would be interested to know that my office has been inundated by representatives from regulated community requesting that certain provisions that were once included in this bill be put back in. This bill is in no way a "home run" for anyone, which in my opinion generally means that it is the best policy.

I think it is unfortunate that many members of the environmental community, including those represented here today, choose to continue to offer nothing but negative review after negative review when much of this bill text was a compromise worked out between the Chairman and the Ranking Member.

Another opportunity has been missed to move the ball forward together when one side chooses to immediately dismiss the Threatened and Endangered Species Recovery Act in its entirety, without so much as a meaningful discussion.

Whether some people want to admit it or not, the ESA is not working the best of its ability to protect species and it is our job as Members of Congress and members of this committee to do something about it.

Thank you again, Mr. Chairman for recognizing me, I look forward to today's hearing and to the testimony from the witnesses.

The CHAIRMAN. Thank you.

Mr. Gibbons.

STATEMENT OF THE HON. JIM GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEVADA

Mr. GIBBONS. Thank you very much, Mr. Chairman.

And like many of us here, I am pleased to be here to discuss this important piece of legislation. And I am proud to be a co-sponsor. As you know, in Nevada, more than 85 percent of the State is—or the land mass of the State of Nevada is controlled by the Federal Government, and as a result, many of us in Nevada have seen firsthand problems associated with the current ESA and in its current form. And for too long, Mr. Chairman, local ranchers, farmers, and State and local governments have found themselves as well as their scientific information on the outside of the ESA process. While the goal of the ESA is a noble one, too often the desire to preserve our sensitive species is driven by emotion rather than by science. Now, throughout Nevada, there are a myriad of examples of the need for incentives for landowners caught up in ESA procedures, for mechanisms to include sound science from local managers and for greater participation in the process by a broad range of stakeholders.

Now, the people of Nevada know all too well about the misuse of the ESA, which can economically devastate a community. Past

negative experiences with the ESA led Nevada to develop a very aggressive, locally led effort to keep the sage grouse off the endangered species list. Mr. Chairman, this program has been a great success. Locally led conservation efforts have provided a wide range of stakeholders with the most effective tools to preserve the species and to remain engaged in conservation. Now, efforts like this will be encouraged by passing reforms contained in H.R. 3824, so I am proud, Mr. Chairman, to be here today, proud to be a co-sponsor of this legislation that will help restore integrity to the Endangered Species Act, and to ensuring that both the environment and the interests of our communities are protected. And I will yield back the balance of my time.

The CHAIRMAN. Mr. Miller.

STATEMENT OF THE HON. GEORGE MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MILLER. Thank you, Mr. Chairman.

And I, like many of my colleagues have already said, have been interested for a long time in changes in the Endangered Species Act, and I was initially rather interested when you suggested you were going to work with the stakeholders to focus the Act on recovery. I, like my colleague Mr. Saxton, believe that the die is probably cast here in terms of those discussions before this Committee. Maybe there will be an opportunity, but it doesn't look like that's going to happen in the House with the schedule that has been announced.

I am disappointed with the legislation that is before us this morning. It really doesn't provide the kind of focus on the recovery of species that we need. I recognize and I have had many conversations with you and others from our delegation since our congressional districts are some of the most heavily impacted areas with the blanket designations of critical habitat that are unworkable, uneconomic and just don't make a lot of sense. But to go from that to this legislation where we really don't then have a recovery plan that would then designate that habitat that is necessary, it is pretty clear from most of the known science that these species will not recover without that habitat. And I was hoping that we would be able to make the tradeoff that you and Mr. Rahall had discussed for some considerable period of time of a very strong standard for that recovery, and then the designation of that recovery plan and the necessary habitat to do that recovery. But that apparently didn't work out, and that isn't here.

I'm also concerned that the protective standards appear to have been eliminated for threatened species. I think that only makes the job more difficult down the road in terms of keeping these species from extinction and that if we don't take care of and think about the threatened species, we will simply just end up with more seriously endangered species that require more intensity, more action for their protection. And my concern also is that, in the time lines that have been laid out here and the idea that you make a proposal for the use of your land and if the Secretary doesn't find within 90 days that that is not—there is no takings there, you can go forward with that. It doesn't suggest that this has to be an approved use, it just—that you may get—you may not get to use your land

because the zoning board decided they didn't want a landfill, they didn't want a hotel, they didn't want a whatever it is, and then the reading appears to suggest that there is an obligation to compensate you for whether or not that—for whatever reasons. Well, I think we—I guess we'll go through that in the markup or maybe some of the witnesses can testify to that. And also the suggestion that these suggestions for recovery are in fact nonbinding, nonregulatory I think also the status of these recovery plans has to be clarified in this legislation.

So those are my remarks at the moment.

The CHAIRMAN. Thank you.

Mr. Walden.

STATEMENT OF THE HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. Thank you very much, Mr. Chairman. I appreciate your work on this and your efforts to put together a bill that has achieved a level of bipartisan support to reform the Endangered Species Act and update it in a way that we've not seen before. Like my colleague from California, Mr. Cardoza, who worked so hard on the area of habitat, critical habitat designation reform, I've put my efforts in on the side of science. As I learned, coming out of the water cutoff in the Klamath Basin, that when we got the National Academy of Sciences to do independent rigorous peer review of the decisions that led to the cutoff of the water, they concluded that the science really wasn't there to back up the decisions that cost 1,200 farm families their water that season. And in fact, some of the decisions made by the Federal scientists could have actually imperiled both the sucker fish and the coho salmon by changing how the system was managed.

So what we are doing in this bill I think makes a lot of sense, a little different than what I originally proposed, but provides, the Secretary of the Interior shall within a year craft the criteria for what is considered to be the best science, and that a component of that will be the notion of peer review. And I just think that is really important.

When the fate of a species or the fate of a community hangs in the balance, what's wrong with getting a second opinion and making sure that the data being used to formulate the decisions can withstand the rigors of review? We require that for publication in a medical journal and a scientific journal. Why wouldn't we require that same rigorous review by very certified by smart people when it comes to the fate of a species?

And then I think, as we look at the recovery efforts, we have to look at some of the conflicts that are there. And I don't necessarily know if this bill gets all the way into this, but let me give you an example of what happens in the Pacific Northwest: 28 percent of our power costs go to salmon recovery efforts; 28 percent of the price ratepayers pay for power goes to salmon recovery efforts. And meanwhile, in the Columbia River, the Marine Mammal Protection Act has seen the return of sea lions, some 300,000 today versus 80,000 in 1972 when the Act was passed. Thirty sea lions in 45 days consume 54,000 endangered salmon. Now, you think about that, 54,000 endangered salmon, 45 days by 100 sea lions hanging

around the dams. The summer spill regime that's taking place this year cost ratepayers $77 million and was projected to help the passage of 20—20 endangered Snake River salmon.

So we have some conflicts here in the law where we are advocating one species over another in a recovery effort that's doomed to failure the way we are proceeding today. I believe these changes are thoughtful, reasonable and will set in motion the kinds of public and private partnerships that are essential.

The portions of this legislation, Mr. Chairman, that you've crafted that provide for grants to private landowners is similar to what we have done in the State of Oregon where we recognize that recovery and species don't recognize property lines. And if you are going to have a plan that really works to recover the species, then you have to be able to reach out and build partnerships in the private sector side, and I think this bill does that.

So, Mr. Chairman, I look forward to the hearing today and the markup tomorrow. With any bill, I am sure there are areas where we can continue to refine and improve as it goes through the process both in the House and hopefully in the Senate and in conference. So I wish you well on this journey, and I look forward to continuing to work with you on this legislation. Thank you.

The CHAIRMAN. Thank you.

Ms. Bordallo.

STATEMENT OF THE HON. MADELEINE Z. BORDALLO, A DELEGATE IN CONGRESS FROM THE TERRITORY OF GUAM

Ms. BORDALLO. Thank you, Mr. Chairman. And good morning.

I, too, welcome the witnesses today and thank them for sharing their perspectives on the Endangered Species Act and on H.R. 3824. I want to state, Mr. Chairman, for the record my support for amending the Endangered Species Act to better orient this law toward species recovery, and my support for H.R. 3824. And I thank you, Mr. Chairman, for your leadership on this issue and for your efforts to bring about needed reform of this law.

Mr. Chairman, my district Guam, like other communities across the country, has been witness to costly and burdensome conflict and litigation over the ESA. The law in its current form can and deserves to be improved. There are 11 listed species in Guam, and on average, it has taken the Fish and Wildlife Service a decade and a half to develop recovery plans for each of these species. In three cases, it has taken the Service nearly 30 years to do so, and that is why I am encouraged by the fact that H.R. 3824 would require a recovery plan within 2 years of the listing determination.

In Guam's case, two of our native species were delisted two years ago, but they were not delisted for recovery. Sadly, they were declared extinct. I look forward to hearing the comments today from the witnesses with respect to the improvements proposed for recovery planning and execution.

And last, as I stated last year during the hearing on Mr. Cardoza's critical habitat reform bill, landowners' access to their private property in Guam has been impacted by the ESA and actions of the Fish and Wildlife Service. These access issues still remain the source of concern and will be alleviated with the repeal of the critical habitat requirements in the current law.

Again, I wish to thank you, Mr. Chairman, for your leadership on this issue, and I look forward to continuing to work with you and the members of the Committee to improve this law. Thank you.

[The prepared statement of Ms. Bordallo follows:]

Statement of The Honorable Madeleine Z. Bordallo, a Delegate in Congress from Guam

Good morning Mr. Chairman. I too welcome the witnesses today and thank them for sharing their perspectives on the Endangered Species Act (ESA) and on H.R. 3824. I want to state for the record my support for amending the Endangered Species Act to better orient this law towards species recovery, and my support for H.R. 3824. I thank you Mr. Chairman for your leadership on this issue, and for your efforts to bring about needed reform of this law.

My district, Guam, like other communities across the country, has been witness to costly and burdensome conflict and litigation over the ESA. The law in its current form can and deserves to be improved. There are 11 listed species in Guam, and on average, it has taken the Fish and Wildlife Serves a decade-and-a-half to develop recovery plans for each of these species. In three cases it has taken the Fish and Wildlife Service nearly 30 years to do so. That is why I am encouraged by the fact that H.R. 3824 would require a recovery plan within two years of the listing determination. In Guam's case, two of our native species were de-listed two years ago, but they were not de-listed for recovery. Sadly, they were declared extinct. I look forward to hearing the comments today from the witnesses with respect to the improvements proposed for recovery planning and execution.

Lastly, as I stated last year during the hearing on Mr. Cardoza's Critical Habitat Reform bill, landowners' access to their private property in Guam has been impacted by the ESA and actions of the Fish and Wildlife Service. These access issues remain a concern, and the limitations on access will be alleviated with the repeal of the critical habitat requirements in current law.

Again, I thank you Mr. Chairman for your leadership on this issue, and I look forward to continuing to work with you and the Members of the committee to improve the ESA.

The CHAIRMAN. Thank you.

Mr. Gilchrest.

STATEMENT OF THE HON. WAYNE T. GILCHREST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. GILCHREST. Thank you, Mr. Chairman. I want to applaud you for your effort to reform and reauthorization the Endangered Species Act after so many years. This is a very difficult process, and Mr. Rahall made a comment about the ability to be compatible in your discussions to bring us to this point. And so I know this is a lot of hard work, and it is very difficult. And it is very complex, and we are dealing with an issue that the public assumes that Congress is going to restore the prodigious bounty of nature's design and people in many industries are heavily dependent upon that. So your attempt to bring this through fruition through this Committee, through the Floor vote is commendable.

I want to add, though, a little perspective from my district. A number of people here today commented on the Chesapeake Bay, and we have endangered species issues in the Chesapeake Bay. But there was one that I read recently in the New York Times about something called a tiger beetle where there was a community, which is actually about a mile from my house across an estuary, a tidal basin called the Susquehanna River, where there is a series of homes that have been built fairly recently on a bluff that

is about 100 feet, a magnificent view of this tidal basin, which is about 12 miles long, and the Chesapeake Bay. The issue was, according to the New York Times, that the people wanted a hardened riprap at the bottom of the bluff to prevent erosion because the bluff was eroding at about a foot a year, and they were concerned about their property. The Endangered Species Act kicked in to evaluate whether or not a hardened riprap would affect this endangered species, a tiger beetle, which is about an inch long, and it looks like a saber tooth tiger. What happened, though, in the months ahead—and there is pretty much a resolution to this issue now—was that—which is what causes me concern with your reform of the Endangered Species Act, because I see that the kind of scientific review that was present with this, the kind of consultation between the various Federal agencies that were involved, the kind of habitat that was then looked at, the kind of things that are present now in the Endangered Species Act, which I realize in certain parts of the country certainly need improvement, certainly need efficiency, but the kind of active human exchange of information and dialog under the present circumstances revealed a number of telling things that the engineers for the community and the community themselves were unaware of prior to this.

For example, if you built a riprap the way that they wanted to protect their shoreline, obviously that would have impacted the tiger beetle, but what it would have done on either side of that stone riprap, it would have accelerated erosion on other people's property.

The second thing with the geological service, they came in and they did an evaluation that basically said the Delmarva peninsula, of which this is a part, was formed by silt, sand, mud and tiny gravel coming down the Susquehanna River over tens of thousands of years. So, in essence, the entire Delmarva peninsula is a sand bar. It is a barrier island. Its soil is unstable. And so much of the problem from the erosion of the bank did not come from the water or the wakes of boats or storm surges. It came from simple rain falling on the land, going through the sand, soil, hitting various areas of clay, being forced out to the bluff and causing the erosion from that perspective. So after an understanding of habitat and an understanding of the geological history of the area and understanding the ability for the various Federal agencies to consult with each other, the resolution was not a stone riprap. The resolution is probably going to be more trees and more vegetation on those banks which can be a part of it. The other possible solution is a break water off the shoreline to buffer some of the wave action. And the other solution is natural, which came about as a result of the conservation programs for agriculture, reducing the nutrients into that particular estuary, and it has abounded with SAVs or subaquatic vegetation. That abounding of grass offers a buffer, reduces the energy of storm waves and boat wakes.

So the point is, if you eliminate the idea of habitat, you take away the consultation. You change the ability of communities to discuss this, bringing in these kinds of specific scientific assessments. My feeling on this particular issue is that everybody wins. Reducing those steps which causes that consultation to take place in the way that the bill is presently, I think, reduces the

opportunity to find the solution that we found in my particular district. But I would like to continue to work with the Chairman between now, the Floor and certainly the Conference Committee. Thank you.

The CHAIRMAN. I appreciate the gentleman's comments. And I am sure, as he gets more and more into the legislation, what we actually put in the bill, you would agree that what we are trying to do is exactly the same kind of things that you described as what happened in Maryland. In that case, you did have the State legislature that stepped in. Our efforts to bring State and local government into being part of this, the incentives and grant programs that are in the bill are designed so that we do bring property owners into being part of the solution. If in every case we were able to work it out the way that we did in Maryland, it would be a very different implementation of the law. Unfortunately, that is not the way it is implemented most of the time.

Mr. Inslee, did you have a comment you wanted to make?

STATEMENT OF THE HON. JAY INSLEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. INSLEE. I do. And I appreciate your courtesy as always, Mr. Chair.

I just wanted to point out what we are talking about today is not really the first Endangered Species Act. The first Endangered Species Act reads: Bring out every kind of living creature that is with you, the birds, the animals and all the creatures that move along the ground so that they can multiply on earth and be fruitful and increase in number upon it to keep their various kinds alive throughout the earth.

Genesis really had the first Endangered Species Act. And the heart of Genesis is a continuation of the concept found in Corinthians. It says: This is the Lord's and everything in it.

And the reason I point that out is the subject we are talking about, namely, the Creator's creatures, really does not belong do us. And the reason I point that out is it seems to me that, when we're dealing with this Act, we should do so with infinite care realizing that the weight of eternity is on us, because once these species are gone, they are gone forever.

So the question I have is, have we done in this proposal we have before us tomorrow, shown that infinite care that we ought to with this important Act? And I just want to say this is a bipartisan concept. I was at Cape Disappointment. It's the westernmost point in the United States where Lewis and Clark went, and I was at a lighthouse. And I was inside the lighthouse, and I heard these people outside, just a few weeks ago. And all of a sudden, all these people were screaming. I didn't know what was up, so I ran out there and I ran out. And what they were screaming about, I mean, literally yelling, was a great whale that was about 100 yards off the coast working its way up toward Alaska. And the thrill and the ecstasy these people seeing this endangered creature that is being restored in large part because of this Act is really something that's a very strong sentiment and value statement of the American people I believe on a bipartisan basis. So I have to ask myself: Is this bill that we'll consider tomorrow consistent with those values of

Americans? And I don't believe it is by a long stretch. I think this bill is not modernizing the Act; it is euthanizing the Act. And the reason I use euthanizing, and I am not using the words the Chairman has asked us not to use, I am not using the word eviscerate or gut or one of those other words. I use the word euthanize because it is putting it down with the guise of kindness, putting it down with the guise of making it stronger. What are the fish without the oceans? What are the birds without a tree to nest in? They are nothing. And without a critical area, ability and tool to recover species, the Endangered Species Act is largely nothing. It is the major tool to prevent the way we—and I stress we—are leading these creatures to extinction, which is to destroy their habitat.

And the thing that is very curious to me and I cannot fathom, it is argued here that we need to take away this tool in our tool box of recovering these species because the Act doesn't work well enough. It doesn't save enough species quick enough. And we would all like to see the Act save them quicker and with more reliability. But the thing that I cannot understood is, if you had a rash of bank robberies, and you didn't think your law was strong enough and effective enough to deal with bank robberies, would the Congress's first act be to take away the police cars, to take away the whistles, to take away the firearms? This is the major enforcement tool of the Endangered Species Act because it addresses the main reason these species go extinct. The main reason these species go extinct is not because our constituents go out there and gas them and shoot them intentionally. That is largely not the problem we have with extinction. It is that we—I stress we—are destroying their habitat at rates—we're the sixth largest, the sixth great period of extinction. And I wish this Committee would look at the science a little bit more. There's been five great periods of extinction. We now for the sixth time in the globe's history are destroying creatures faster than they are evolving. It is the sixth time that's happened in world history. And I wish this Committee would look at that science a little bit, that one-third of all the mammals—one-third of all the mammals on earth, according to the most recent science, could be endangered in the next several decades.

So I don't think we've shown the care we need to show to try to truly modernize this Act. And I think in this hearing what we'll find is the reason this Act is not being as effective as we would like is that the executive branch doesn't have the resources to do the job we've given it, and that's why these species are sitting on these lists too long. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Brown.

STATEMENT OF THE HON. HENRY E. BROWN, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. BROWN. Thank you, Mr. Chairman. And I appreciate your holding this hearing today. And I certainly appreciate your leadership and oversight of the issue that's reforming the Endangered Species Act of 1973. I know that this issue has been one of your biggest priorities, and I am proud to be an original co-sponsor of the Threatened and Endangered Species Recovery Act of 2005. It

is an issue that is very important to many of my constituents in South Carolina's First District.

Mr. Chairman, as you know, in the 32 years that the Endangered Species Act has been in effect, we have learned a lot of lessons over time. I believe the Threatened and Endangered Species Recovery Act of 2005 keeps the best parts of the Endangered Species Act of 1973 but reforms the sections that need to be reformed. The bipartisan support of the proposed legislature is evidence of the support that these reforms have across the country.

Mr. Chairman, and South Carolina's first district is a very unique district. It encompasses the majority of the coastline of South Carolina. It has a sensitive ecosystem that many of my constituents work on the ocean for their livelihood.

I would like to give you an example of the eastern oyster as one of the examples out of many as to why the Endangered Species Act needs to be reformed. The eastern oyster has been in decline in the Mid-Atlantic region for over a century primarily because of fishery mismanagement and various oyster diseases. However, the same species is thriving elsewhere up and down the eastern coast including South Carolina and along the Gulf Coast. U.S. shellfish farmers produce over half a billion eastern oysters every year, nearly twice the wild harvest. Unfortunately, the way the current Endangered Species Act is written, any listing will have to encompass the species throughout its range from Maine to Texas. Listing the eastern oyster as an endangered species will run counter to scientific evidence and common sense. It would also destroy an entire industry in South Carolina, killing thousands of jobs and creating economic hardships, and do more damage than good to both the species and the environment.

How is it that the Endangered Species Act could be so badly misused? Unlike other environmental laws, such as the Clean Air Act and the Clean Water Act which are updated every few years, the Endangered Species Act hasn't been significantly revised in three decades. Mr. Chairman, there is a better way to protect endangered species, and I believe it is the Threatened and Endangered Species Recovery Act of 2005 which will resolve this problem. Thank you very much for your leadership.

[The prepared statement of Mr. Brown follows:]

Statement of The Honorable Henry E. Brown, a Representative in Congress from the State of South Carolina

Chairman Pombo, thank you for holding this hearing, I appreciate your leadership and oversight on the issue of reforming the Endangered Species Act of 1973. I know that this issue has been one of your biggest priorities and I am proud to be an original cosponsor of the Threatened and Endangered Species Recovery Act of 2005; it is an issue that is very important to many of my constituents in South Carolina's 1st District.

Mr. Chairman as you know in the 32 years that the Endangered Species Act has been in effect we have learned a lot of lessons over time. I believe the Threatened and Endangered Species Recovery Act of 2005 keeps the best parts of the Endangered Species Act of 1973 but reforms the sections that needed to be reformed. The bipartisan support of the proposed legislation is evidence of the support that these reforms have across the country.

Mr. Chairman, South Carolina's 1st District is a very unique district it encompasses the majority of the coastline of South Carolina. It has a sensitive eco-system and many of my constituents work on the oceans for their livelihood.

I would like to give you the example of the Eastern Oyster as one example out of many as to why the Endangered Species Act needs to be reformed.

The Eastern Oyster has been in decline in the Mid-Atlantic region for over a century, primarily because of fisheries' mismanagement and various oyster diseases. However, the same species is thriving elsewhere up and down the East Coast including South Carolina and along the Gulf Coast.

U.S. shellfish farmers produce over a half-billion Eastern Oysters every year—nearly twice the wild harvest. Unfortunately, the way the current Endangered Species Act is written, any listing will have to encompass the species throughout its range, from Maine to Texas. Listing the Eastern Oyster as an endangered species will run counter to scientific evidence and common sense. It will also destroy an entire industry in South Carolina—killing thousands of jobs and creating economic hardship—and do more damage than good to both the species and the environment.

How is it that the Endangered Species Act could be so badly misused?

Unlike other environmental laws, such as the Clean Air Act and Clean Water Act, which are updated every few years—the Endangered Species Act has not been significantly revised in three decades.

Mr. Chairman, there is a better way to protect endangered species and I believe it is the Threatened and Endangered Species Recovery Act of 2005.

The CHAIRMAN. Thank you.

Mr. Boren.

STATEMENT OF THE HON. DAN BOREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. BOREN. Thank you, Mr. Chairman. Thank you, Ranking Member Rahall, for holding today's hearings.

This is an issue that's very important to my district. As a representative from eastern Oklahoma—and from eastern Oklahoma the Endangered Species Act is a complicated issue, because we are a region of sports men and women, but we are also an area that looks at economic development.

As we all know, the challenge we face in reforming the ESA is to create a balance between the important goal of conservation and preservation of some of our Nation's most beloved and important species, and making sure our property owners, businesses, workers and communities don't suffer unnecessarily for these efforts.

As an avid sportsman, and I think many of you all have probably been in my office and you see the deer heads and the bear that I have in my office, you all know that I am a hunter. I appreciate the importance of saving and restoring the Nation's species of our great country.

I also represent one of the poorest congressional districts in the United States. And local economic growth, small and medium-sized businesses are our only hope for the future.

Unfortunately, too many times, the ESA law as is currently written stand in the way of this economic development that we need in our part of the United States. I have heard from numerous communities in my district which must put off construction or expansion of businesses due to the various requirements of the ESA. One such community in my district is Durant, Oklahoma, which is in part of the historic range of the American bearing beetle. The leaders of Durant have worked hard and had success in bringing businesses to their area of far southeastern Oklahoma, but each year, the construction of new sites for these businesses is brought to a screeching halt to look for the bearing beetle, but no presence of the beetle has been found since the year 2003.

This disruption costs the community time, money and potential for future job growth.

There must be a better way to balance the needs of the species and the needs of the communities. I feel this legislation we are here to discuss today achieves much of that balance.

I want to thank you, Mr. Chairman. I am a proud coauthor of this legislation. I also want to thank Congressman Cardoza for his leadership, and thank you again Mr. Chairman for allowing me to have a statement. Thank you.

[The prepared statement of Mr. Boren follows:]

Statement of The Honorable Dan Boren, a Representative in Congress from the State of Oklahoma

Thank you Chairman Pombo and Ranking Member Rahall for holding today's hearing on an issue that is very important to me and many constituents in my district. I appreciate the work you have both done to bring us here today.

As the representative from eastern Oklahoma, the Endangered Species Act is a complicated issue because we are a region of sportsmen and women as well as a region that is in great need of continuing economic development. As we all know, the challenge we face in reforming the ESA is to create a balance between the important goal of conservation and preservation of some of our nation's most beloved and important species and making sure our property owners, businesses, workers and communities don't suffer unnecessarily for these efforts.

As an avid sportsman myself, I appreciate the importance of saving and restoring the native species of our great country. I also represent one of the poorest Congressional districts in the United States and local economic growth—small and medium sized businesses are our hope for the future. Unfortunately, too many times the ESA law, as it is currently written, stand in the way of this economic development. I have heard from numerous communities in my district which must put off construction or expansion of businesses due to various requirements of the ESA.

One such community is Durant Oklahoma, which is in part of the "historic range" of the American Burying Beetle. The leaders of Durant have worked hard and had success in bring businesses to their area of far southeastern Oklahoma, but each year the construction of new sites for these businesses is brought to a screeching halt to look for the Burying Beetle, but no presence of the beetle has been found since 2003. This disruption costs the community time, money and the potential for future job growth.

There must be a better way to balance the needs of the species and the needs of the communities. I feel this legislation we are here to discuss today achieves much of that balance and look forward to hearing from today's witnesses and moving this legislation forward tomorrow. Thank you Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Gohmert.

STATEMENT OF THE HON. LOUIE GOHMERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GOHMERT. Thank you, Mr. Chairman. I'm delighted that you have had the courage to take this on. It's an emotional issue, and when it was originally passed, it seems to me it was based more on emotion than well-thought-out policy.

People are agreeing on both sides on many issues, but then some are saying, Well, gee, it's not working. And to address the analogy that bank robberies—to try to discourage bank robberies, this bill would be like doing away with law enforcement officers. I think the analogy is better put to say that since, the way the law is now, we are providing incentives to landowners who find endangered species to eliminate the species before anybody finds out about it, it is more analogous to providing incentives to banks to leave

everything unlocked and unattended so that there are more bank robberies. That's really more analogous to what we are dealing with in the current law.

So I applaud the efforts to provide incentives to retain endangered species, rather than to get rid of them the way it exists now. And it sounds like a lot of good thought on both sides went into it.

One thing I would like to mention, especially in view of things like Hurricane Katrina and terrorist threats that are alive and upon us, a provision potentially that if it is a matter of national security, that that might trump some litigation that may arise. Because we have already heard—and I haven't looked into it beyond the news reports—that there were ecological groups suing to prevent strengthening of the levees that would have saved lives in New Orleans.

I realize there are some environmental groups that feel like the animal world has more rights and is better off if there are not humans alive. But I'd point out to those groups that there are no animal rights unless humans are around to preserve them and see that they are observed. Otherwise, I have noticed, lions, if they disagree with somebody's rights in the animal world, they just eat them. They don't preserve their rights.

So I would say the number one factor and thing to consider is making sure that our species is preserved so that we can be about preserving the rest of the species; and also a way to—I think there's good thought in this—to try to curb litigation. Any additional steps to doing that would be wonderful, because litigation ends up going, if it goes the full avenue of opportunity, clear to the Supreme Court, that's already said they think it's fine for government to take away privately owned property and give it away to somebody that's going to pay them more money, their good old buddies that'll pay more to the local government. So we can't trust them to preserve property rights.

We need to have the teeth in here to avoid as much litigation as possible.

But thank you so much for your courage in moving forward and the consensus you brought, Chairman.

The CHAIRMAN. Thank you.

Mr. DeFazio.

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

Mr. DEFAZIO. Thank you, Mr. Chairman. Thank you for the time.

You know, there are problems with the Endangered Species Act, and they are real problems. We don't need mythology. And as I understand the case in the Southeast, it was actually Mr. Fortuno, the fact that suits over the locks and the necessity of diverting money from the levees to the locks was what the litigation was based on. But perhaps we can do that in another venue.

In 1992, the law expired. In 1996, we had a legitimate effort in this Committee to try and update and reauthorize the act; and I supported a bipartisan proposal, I believe it was by Mr. Saxton and Mr. Gilchrest at that time, which failed to get a majority.

There are problems particularly with multispecies, as my colleague from Oregon pointed out. I give one example: The sturgeon that spawns below Libby Dam needs high flows to spawn. It hasn't spawned in a long time. The salmon coming upstream need lower flows to come upstream. So we have an inherent conflict here which the law gives—the current law gives us no way of satisfactorily resolving. So those things do need to be dealt with.

The bipartisan proposal I supported a number of years ago would have set up multispecies HCPs that would have covered basins, would have involved States in that process; and if a State could come up with a satisfactory plan to prevent a listing or to move forward a recovery that could take the place of the Federal action—as my State has done recently with the sage grouse under the existing law, as difficult as it was to get there—it should be easier to get there.

But I think there are some extraordinary defects in the proposal before us. Let me—I have read parts of the bill and particularly Section 14 on compensation. As I see it—let me give an example.

My State, say you own some F2 forest land which you are not allowed to develop, and in return for that, you get a tax break from the State in terms of your property taxes, and you grow timber as a business, and you can't develop it. You're also required to have a riparian setback even for timber harvesting on that land.

Someone who owned that land under this Section 14, as I understand it, could say, despite State law—because the riparian setback is to recover salmon, could say, we intend to build waterfront condominiums on our forest land, and we would like to be compensated for that. End of story, according to Section 14.

I proposed it. You can't evaluate it. You can't assess it. You don't have to show it's compliant with State law, that it's feasible, practicable, out of the floodplain, anything. You have to pay me for that fantasy. It's a lot like the MAI, which was an international preemption which was being proposed for a loss of possible property, which would have preempted a lot of Federal laws here in the United States of America because of multinational corporations. That is an extraordinary defect in this. It doesn't have a way to set fair market value.

You know, when I was a freshman on this Committee, I joined with Mr. Miller in opposing then-Chairman Mo Udall on a property transfer, because the taxpayers weren't getting fair market value because there was going to be a change in zoning after. We were assessing the Federal land as undevelopable, saying it's worthless, we're giving it to a developer who then was going to develop it at a very high cost, but we're getting that value. So I opposed that.

And under this, people who have undevelopable land could be making claims which will have to be evaluated in 90 days, with no way of getting additional information, no requiring it be compliant with State law. So I see this as a license to speculate.

If I were a—you know, if there are smart speculators out there, and there are a few, I would look at the movement of this bill, assess whether or not I thought it was going to go into law, and I would say, Gee, I'm going to go out and buy some land now which is prohibited from development, that's cheap; and, you know, even though under State law I couldn't develop it, I'm going to make

claims under Federal law, get compensated and more than make my money back, and then continue perhaps to have a tree farm on this property. There's also no current ownership requirement.

That would be one way to get at the speculators, as we did in a recent measure, adopted in Oregon, which said you had to have owned the land at the time this law went into effect originally, which would be say perhaps pre-1973 ownership of land; then you could make this sort of a claim under the Endangered Species Act. Otherwise, you have—you know, you may have knowingly purchased land.

So—and then I don't understand where the money is going to come from to compensate these claims which can't be evaluated and aren't set at fair market value. So I think there are some real problems.

I would hope that the negotiations between the majority and the minority could continue. I don't understand the rush to have one hearing 1 day, mark the bill up the next day. The law expired 13 years ago, and it's annually renewed. We could take maybe a week, 2 weeks, another month to go through it and, you know, perhaps come to some consensus on the needs for updating and improvement and reauthorization of the law.

I would hope the Chairman would consider that request. And I'm going to—no disrespect to the witnesses, but I have to go a hearing on the imponderable future of Amtrak, where we are doing the same thing, but we aren't going to mark up a bill tomorrow. We're going to hold a hearing today and start thinking about how that bill might work.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, listening to the gentleman, with all his ifs and possible scenarios, unfortunately, a lot of the scenarios that you draw out in your statements don't have anything to do with what's actually in the bill. And we do have a provision in there—you talk about Section 14; the bottom of page 57, 14, number 3, goes into State and local law, nuisance law.

Mr. DEFAZIO. Mr. Chairman.

The CHAIRMAN. And to stop the individual from speculating in a manner——

Mr. DEFAZIO. Would the Chairman yield on that?

The CHAIRMAN. Sure.

Mr. DEFAZIO. It says "nuisance." in my State, nuisance does not go to development; development is not considered a nuisance. But development can be prohibited under State law without being a nuisance.

This is—that word "nuisance" has a very different meaning in my State. Perhaps in California development is a nuisance. Not in my State.

Thank you.

The CHAIRMAN. We will have the opportunity to continue to discuss that provision, but it reminds me of something my dad used to say to me all the time, "If frogs had wings, they wouldn't hit their butt on the ground so hard when they jumped." and it's like, we keep up with all these scenarios, it's way beyond what—anything that's in the bill. And I'd ask my colleagues to try to limit their support or opposition to what's actually in the bill.

At this point, I'd like to——

Mr. MILLER. Mr. Chairman.

The CHAIRMAN. Mr. Miller.

Mr. MILLER. Well, maybe it's possible at some point before this bill gets voted out of Committee for your staff, or you could walk us through it section by section and tell us what you think these sections mean, because these aren't "what-if" scenarios. There's a whole range of proposals that could be made by a landowner that have nothing to do with nuisance, have nothing to do with State law, in which we could end up on a mandatory basis having to compensate that individual and maybe having to compensate that individual over and over and over again.

I think, you know, we should have some kind of walk through this legislation. Most members of this Committee have not seen this legislation until the last couple of days, and if these questions are not valid or not supported by the language in the law or prohibited by the language in the law, then we ought to know that that's the reading of it.

I mean, that's the purpose of this process that we go through, but we're not going to go through that process.

The CHAIRMAN. I'll be happy to walk the gentleman through this.

Mr. MILLER. Walk the Committee through it.

The CHAIRMAN. I'll be happy to walk the Committee through it. We're holding a hearing and a markup, and through that entire process I'd be happy to do that for him.

Mr. MILLER. OK.

The CHAIRMAN. At this point, I'd like to call up our first witness, The Honorable Judge Craig Manson, Assistant Secretary for Fish and Wildlife and Parks.

If I could have you remain standing briefly, and as is customary in the Committee, to take the oath.

[Witness sworn.]

The CHAIRMAN. Thank you, Mr. Manson. Welcome back to the Committee.

I know that you and your staff have had an opportunity to review the proposed legislation. We've had an opportunity to talk over the past several months on issues that you felt were important that we address, so the Committee is anticipating—looking forward to your comments on the legislation that's before us today. Thank you for being here. And when you're ready, you can begin.

STATEMENT OF THE HONORABLE CRAIG MANSON, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR

Mr. MANSON. Thank you, Mr. Chairman. I do appreciate this opportunity to comment on H.R. 3824.

Since the bill was—although we have had a chance to chat over the last several months on various provisions of the Endangered Species Act and possible reforms to it, since the bill was just introduced, we have not had time as an Administration to develop a formal position on the bill; and after we've had more time as an entire Administration, we'll be happy to state a formal position and discuss more with the Committee in that respect.

But generally we support provisions of the bill that enable the Department and the Fish and Wildlife Service to better set priorities, provide stability for landowners and encouragement of private stewardship and focus over the long term on the recovery of species. We also recognize the importance of decisions informed by scientific standards that are transparent and generated by generally accepted scientific practices.

We have made great strides improving the administration of the Act. For example, under the banner of cooperative conservation, we have a host of programs that promote partnerships with States, landowners and other citizen stewards to protect and enhance habitat for threatened and endangered species. Those programs and related programs also help to maintain, protect and restore habitat in ways to help prevent the need to list species as threatened and endangered.

We do recognize that habitat loss is one of the key factors that contribute to the decline of species, and over the last 4 years, we have spent literally hundreds of millions of dollars to restore hundreds of thousands of acres of habitat for threatened and endangered species. We've implemented streamlined Section 7 consultation processes for activities such as hazardous fuel treatment projects, habitat restoration and cutting completion time of consultations by up to one-third.

We recognize that the successful completion of fish and wildlife—protection of fish and wildlife species depends significantly on cooperation of private landowners, who manage the vast majority of habitat, and we look forward to opportunities to partner with private landowners. We recognize that private landowners bear a burden of protection of habitat that is important, and they—and we recognize that they bear that burden on behalf of society as a whole.

For certain areas in the Act, we need Congressional action in order to update and improve implementation. And with that in mind, I offer the following comments on H.R. 3824.

For many years now, the Department has noted that one area of the Act that continues to be a challenge and a source of controversy is the designation of critical habitat. We have been supportive and continue to support the need to change critical habitat, to provide discretion to focus on those actions that provide the greatest benefit to species in he most need of protection. We believe that the habitat needs of species can be better addressed through conservation actions such as Section 7 consultations, the recovery planning process, Section 6 funding to States, as well as cooperative conservation programs and partnerships.

And as I've testified before, the Fish and Wildlife Service has been embroiled in a relentless cycle of litigation over the implementation of the critical habitat provisions of the Act for well over a decade.

Section 3 of the bill would define best available scientific data and require the Secretary to issue within 1 year of enactment regulations to establish necessary criteria to identify such data. We recognize that the data and scientific information utilized by bureaus must meet the highest possible ethical and professional standards.

Section 10 of the bill provides new criteria for developing and issuing recovery plans. And as I've said, we've been supportive of developing a robust recovery program because we do believe that that is the purpose of the Act, after all.

There are provisions of the bill that we've had time to study that concern us, and they involve the species conservation contracts as well as the exceptions to prohibitions that include the land—the property owner's ability to request a written determination with respect to the proposed use of the property owner's property.

We emphasize that private property owners, as I said earlier, bear a burden of protecting habitat that society at large should bear. However, the concern that we have with these provisions involve the lack of flexibility as well as the cost of implementing them. It is unclear from these provisions how the determination of fair market value would be determined other than between the Secretary and the property owner. And it's unclear what property interest would be acquired under the conservation grant program.

We're willing to work with the Committee to explore other ways to lessen the potential burdens of the Act on private property owners, and we look forward to finding ways to continue to enhance the partnership that private property owners have in carrying out the protection of species on their land.

It's important to understand that private property owners, as I said earlier, bear that burden that society at large should bear and that the protection of habitat on private property is essential to the Act. And that's why we've engaged in these cooperative programs.

These programs reflect the President's vision of citizen stewardship and, if taken to their logical zenith, would actually eliminate the problem of the burdens on private property owners. So we're fully supportive of the philosophy behind the provisions, but we remain concerned about the cost and the methods of implementing those provisions.

I'm prepared to answer any questions, Mr. Chairman, that you or the Committee might have; and I want to express our appreciation of your efforts with Mr. Rahall and other members of the Committee to bring this bill forward.

Thank you very much.

[The prepared statement of Mr. Manson follows:]

Statement of The Honorable Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior

Mr. Chairman and Members of the Committee, I am Craig Manson, Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior. Thank you for the opportunity to testify before you today regarding H.R. 3824, the "Threatened and Endangered Species Recovery Act of 2005."

At the outset, let me note that because the bill was introduced just days ago, on Monday, September 19, we have not had sufficient time to fully analyze the legislation or to develop a formal Administration position on the bill. After we have had more time to review the bill, we would be happy to more fully discuss its provisions with the Committee. Given this, I plan today to provide some general observations on the Endangered Species Act and the Department's role in implementation, and then offer some preliminary comments on the Threatened and Endangered Species Recovery Act.

Generally, we support provisions of the bill that better enable the U.S. Fish and Wildlife Service to set priorities, provide stability for landowners and encouragement of private stewardship, and focus, over the long term, on the recovery of species. We also recognize the importance of decisions informed by scientific standards that are transparent and generated by generally accepted scientific practices.

The Department's Role in Endangered Species Act Implementation

The Endangered Species Act was passed in 1973 to conserve plant and animal species that were in danger of extinction. The Act states that the policy of Congress is that the federal government will seek to conserve threatened and endangered species, and that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of treaties and conventions such as the Convention on International Trade in Endangered Species (CITES).

Under the law, species may be listed as "endangered" or "threatened." All species of plants and animals, except pest insects, are eligible for listing if they meet the criteria specified in the Act and, once listed, the species is afforded a range of protections available under the Act, including prohibitions on killing, harming, or otherwise taking listed species of animals. In addition, federal agencies are to utilize their authorities to carry out programs for the conservation of endangered or threatened species, and must insure that any action authorized, funded, or carried out by the federal agencies is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of a listed species' critical habitat, which is designated pursuant to the Act.

Currently, there are 1,268 listed domestic species (993 endangered and 275 threatened). Of these, 286 are candidate species being reviewed on an annual basis. The Service has determined that these candidate species warrant listing, but listing proposals are precluded by higher priorities. In addition, the Service currently has published proposed rules to list 16 species as either endangered or threatened. The Service has 58 pending petitions to list a total of 76 species as either endangered or threatened. Of these petitions, the Service has published 11 findings that the petitioned action to list the subject species may be warranted, and has initiated a status review for the involved species.

The Department has made great strides in improving administration of the Act. For example, under the banner of the Department's Cooperative Conservation Initiative, we have a host of grant programs that promote partnerships with states, landowners, and other citizen stewards to protect and enhance habitat for threatened and endangered species. These and related grant programs also help maintain, protect, and restore habitat in ways that help prevent the need to list species as endangered or threatened. The Service has worked to improve our recovery program, including the establishment of a process whereby high priority recovery needs of species can better be allocated and addressed by Service Regions, and the development of a new recovery implementation database for better tracking of recovery actions. We have also implemented streamlined section 7 consultation processes for several kinds of activities, such as hazardous fuels treatment projects, habitat restoration, and recreational activities in the Pacific Northwest, cutting completion time for consultations under the program by one-third.

The Service has also worked with the National Marine Fisheries Service to develop an analytical framework for use in consultations and the preparation of Biological Opinions. This framework makes the process more transparent, objective, and reproducible, and yields more consistent and legally defensible conclusions.

We recognize that successful protection of many fish and wildlife species depends significantly on cooperation of private landowners who manage the vast majority of habitat. The Department developed our Cooperative Conservation Initiative programs, among others, to enhance successful implementation of the Act by working with landowners. The Service looks for opportunities to partner with private landowners.

The President's budget emphasizes investments that work through partnerships to help improve habitat and recover populations of at-risk, threatened, and endangered species. Building on Secretary Norton's vision of cooperative conservation, in 2002, the Department launched two new conservation initiatives: the Landowner Incentive Program and the Private Stewardship Grants Program (referred to collectively as the Species Protection Partnership Program). Both programs offer incentives for private landowners to protect imperiled species and restore habitat, while engaging in traditional land management practices like farming or ranching. Nationally, the Landowner Incentive Program offers a positive, non-regulatory opportunity for landowners and Tribes to protect at-risk and endangered species, most of which depend upon private land for habitat. Together, the Landowner Incentive Program and Private Stewardship grants reflect a cooperative way of doing business—working in partnership with landowners. The response from landowners is overwhelmingly positive. In addition, other tools such as the Cooperative Endangered Species Grants (section 6) and funds provided for habitat conservation planning assistance and related land acquisition also support cooperation.

For example, in Fiscal Year 2004 the Service, through its Partners for Fish and Wildlife Program, established partnerships with private landowners to restore valuable fish and wildlife habitats. The Service, in cooperation with its partners, restored and improved over 36,000 acres of wetlands; almost 263,000 acres of native prairie and grasslands, and other uplands; 375 miles of riparian corridors, streambanks, and instream aquatic habitat; and 28 fish passage barriers were removed.

Unfortunately under the Act, our work related to endangered species has been in large part driven by lawsuits. As of September 8, 2005, the Service is involved in 34 active lawsuits on listing issues with respect to 93 species; including 8 lawsuits on 90-day petition findings for 11 species, 8 lawsuits on 12-month petition findings for 11 species, 11 lawsuits regarding final determinations for 22 species, 11 lawsuits regarding critical habitat for 13 species, and 22 lawsuits regarding merits challenges on 65 species. The Service is also complying with court orders for 51 lawsuits involving 103 species.

For many years now, the Department has noted that the one area of implementation that continues to be a challenge and a source of controversy is the designation of critical habitat. The Service has been embroiled in a relentless cycle of litigation over its implementation of the listing and critical habitat provisions of the Act for over a decade. This has resulted in a Section 4 program with serious problems due not to agency inertia or neglect, but to a lack of scientific or management discretion to focus available resources on the listing actions that provide the greatest benefit to those species in utmost need of protection. In FY 2004, the Service proposed critical habitat for 12 species and completed critical habitat designations for 25 species. Currently, the Service is working on 31 critical habitat proposals for 51 species. All of the FY 2004 and FY 2005 proposed and final designations were the result of court orders or settlement agreements.

Protection of habitat is the key to sustaining and recovering endangered species. However, the critical habitat process under the Act is not an effective means of conserving habitat; the Service has characterized the designation of critical habitat as the most costly and least effective class of regulatory actions it undertakes. In 30 years of implementing the Act, the Service has found that the designation of critical habitat provides little additional protection and can result in negative public sentiment, and also because there is often a misconception among the public that, if an area is outside of the designated critical habitat, it is of no value to the species. At the same time, the designation of critical habitat imposes burdensome requirements on federal agencies and landowners and can create significant economic and social turmoil.

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. Almost universally, the courts have declined to grant relief. Consequently, as the result of court orders and court-approved settlement agreements, the Service has little ability to prioritize its activities to direct resources to listing program actions that would provide the greatest conservation benefit to those species in need of attention. As noted by the previous Administration, lawsuits that force the Service to designate critical habitat necessitate the diversion of scarce federal resources from imperiled but unlisted species that do not yet benefit from the protections of the Act.

The Service is not operating under a rational system that allows them to prioritize resources to address the most significant biological needs and, as a direct result of litigation, the Service has had to request a critical habitat listing subcap in its appropriations request the last several fiscal years in order to protect funding for other Endangered Species Act programs. At this point, compliance with existing court orders and court-approved settlement agreements will likely require funding into Fiscal Year 2008.

Preliminary Comments on the Legislation

For certain areas in the Act, we need Congressional action in order to update and improve implementation. With this in mind, I offer the following preliminary comments on H.R. 3824, the Threatened and Endangered Species Act of 2005.

Section 3: Definitional Changes

Section 3 of H.R. 3824 would define "best available scientific data" and require the Secretary to issue, within one year of enactment, regulations to establish necessary criteria to identify such data. Because we recognize that our resource management decisions can have an impact on communities, individuals, and natural resources, the Department has been working to strengthen the science behind our decisions for some time. We recognize that the data and scientific information

utilized by our bureaus must meet the highest possible ethical and professional standards.

Section 5: Repeal of Critical Habitat

We have been supportive of need to change critical habitat to provide individual agency discretion to focus on those actions that provide the greatest benefit to the species most in need of protection. We believe that habitat needs of listed species may be addressed through conservation mechanisms such as listing; section 7 consultations; the recovery planning process; section 9's prohibitions of unauthorized take; section 6 funding to states; and the incidental take permit process, as well as through cooperative conservation grants and partnerships.

Section 10: Recovery Plan Provisions

Section 10 of H.R. 3824 provides new criteria for developing and issuing recovery plans under the Act. Recovery of threatened and endangered species is the primary purpose of the Act. The recovery planning process and on-the-ground implementation are among its most important components. Our available resources would be better spent focusing on those actions that truly benefit species in need—like the development and implementation of recovery plans.

Most importantly, section 10 would elevate the importance of recovery planning by requiring that final recovery plans for listed species be published within 2 years after the date a species is listed, and, for species listed on the date of enactment but without a recovery plan, would require the Secretary to develop a priority ranking system for preparing and revising recovery plans, along with a schedule for development or revision of plans. These changes should advance the recovery planning process and ensure that recovery remain a primary purpose of the Act.

There are provisions in the bill that, even with the small amount of time we have had to study the bill, concern us. Several of these concerns are detailed below.

Section 10: Species Conservation Contract Agreements

Section 10 of H.R. 3824 would create long-term "species conservation contract agreements." These provisions would require the Secretary to enter into these agreements in cases where a landowner presents a contract to the Secretary and the Secretary finds that the landowner owns the land or sufficiently controls the use of the land to ensure implementation of such an agreement. The Secretary would then be responsible for funding between 60 and 100 percent of the landowner's costs to implement conservation practices specified in the agreement. The payments have no matching requirement.

We have concerns about the lack of flexibility under these provisions as well as the cost of implementing them.

Section 13: Exceptions to Prohibitions

Section 13 of H.R. 3824 includes a provision that allows a property owner to request from the Secretary a written determination that a particular proposed use of the owner's property complies with section 9(a) of the Act. The provision provides that, if the Secretary does not provide a written answer within 90-days (subject to an extension that may be granted by the property owner), the Secretary is deemed to have determined that the proposed use complies with section 9(a) of the Act.

We recognize the importance of stability and certainty for landowners, and the need to create incentives to encourage landowners to protect species habitat. However, we have concerns with this section. We believe it could add significant additional process to our implementation of the Act. In addition, in many cases the 90 day deadline may not be adequate time to complete such a determination. Finally, while the Secretary may request an extension, it is not at all clear that an extension would be granted and, for those requests that result in "deemed decisions" that the use does not comply, the Secretary would be required to pay compensation under the provisions of Section 14 of H.R. 3824.

Section 14: Private Property Conservation

Section 14 of the legislation would establish a new conservation aid program for private property owners who receive determinations from the Secretary that proposed uses on the property would not comply with section 9 of the Act. Grants awarded under these provisions would have no matching requirement, and would be in an amount of no less than the fair market value of the proposed use. The provisions would require mandatory payments by the Secretary to a landowner if certain criteria are met.

As noted above, we recognize that successful protection of many fish and wildlife species depends significantly on cooperation of private landowners who manage the vast majority of habitat. The Department's Cooperative Conservation Initiative and

other programs are specifically designed to provide opportunities to partner with private landowners. In fact, we believe that if participation in these programs was taken to its logical zenith, they could eliminate the problem the Committee is seeking to address.

We have concerns about the lack of flexibility under section 14 as well as the cost of implementing it. We are also concerned that the determination of fair market value lies with two interested parties—either the Secretary or the property owner. Finally, it is unclear from the language of the bill what, if any, property interest the United States is acquiring from the property owner after payment of fair market value. We are willing to work with the Committee to explore other ways to lessen potential burdens of the Act on private landowners.

Conclusion

Mr. Chairman, we realize that assembling this legislative package has been a monumental task, and we greatly appreciate your continued commitment to species conservation. I have presented here, in very summary fashion, some initial comments that we have identified in this bill. We look forward to working with the Committee as we move to strengthen and improve the Endangered Species Act.

The CHAIRMAN. Thank you, Mr. Secretary.

In your opinion, would repealing the current critical habitat requirement allow the Agency to utilize other existing conservation mechanisms listed in your testimony, such as listing Section 7 consultations, et cetera, to better provide for threatened and endangered species?

Mr. MANSON. Yes.

The CHAIRMAN. Under current law, under the current implementation of the Act, is it your opinion that critical habitat listings, the way that they're currently being done, lead to recovery?

Mr. MANSON. Currently, the way critical habitat—and it's important to understand that when we talk about critical habitat designations, we're talking about a legal process as opposed to the actual creation, enhancement or restoration of habitat on the ground that actually contributes to the recovery of species. We're talking about a process-laden activity that is driven by litigation more than anything else. And, in fact, we've noted over the years, as did the previous Administration, that it results in diversion of resources, both fiscal and personnel, from tasks that really contribute to recovery of species.

We have biologists testifying in court. We have biologists preparing declarations for use in court. We have resources being used to pay attorneys' fees and things of that nature instead of going into actual on-the-ground conservation efforts under the current scheme of designating critical habitat.

The CHAIRMAN. If we look at the way it's working right now, you're familiar, obviously, with critical habitat listings on things like the red-legged frog——

Mr. MANSON. Yes.

The CHAIRMAN.—where the critical habitat map that was originally released included subdivisions and places that were not critical habitat or habitat that was necessary to recover a species. You contrast that with the proposed legislation that we have in front of us, where the habitat that is protected is directly related to a recovery plan.

Under that scenario, would not an adopted recovery plan with specified habitat that is necessary for the recovery of that species—

would that—in your opinion, would that not work better in terms of working toward a recovery of that species?

Mr. MANSON. Yes, and I believe I've testified in this Committee to that effect before.

The CHAIRMAN. In your testimony, you also acknowledge the importance of creating incentives for private landowners who protect habitat. This, I happen to believe, is one of the most important parts of the proposed legislation.

You note that there are concerns with the 90-day deadline and potential burdens. However, you don't dispute the merit of providing a written determination. In your opinion, what would be an acceptable timeframe for the Secretary to provide a written determination?

Mr. MANSON. Well, if I may, Mr. Chairman, there are ways that the Fish and Wildlife Service could work with a private property owner to say, you know, here's something that would work and here's something that wouldn't work. In fact, in our Partners Program, that's something that goes on. In terms of a timeframe, that's something that I think we would have to spend some time working on.

And I understand the need for certainty and the need for expeditious resolution of issues. I don't have an answer for that question right now as I sit here. But certainly there are ways that the Fish and Wildlife Service can work with private landowners, just as county extension agents and The Natural Resources Conservation Service and other agencies work with landowners and some of our folks do themselves in various programs to define activities that are acceptable and those that are not acceptable.

The CHAIRMAN. Once a property owner enters into what has become the common practice of informal consultation, is there anything that requires Fish and Wildlife to ever give that property owner an answer under current law?

Mr. MANSON. Well, of course, informal consultation is usually a prelude to a formal consultation if we're talking under the Section 7 process. And of course, the Federal action agency can request that formal consultation commence. And once that happens, then there are timeframes for that to go on.

But if, in fact, a—if we're talking about a situation where there's an application for a Section 10 permit or there's just an informal request for advice for something of that nature, there are no time limits under current law or an informal request for advice by a private landowner.

The CHAIRMAN. Recognizing the pivotal role that is played by private landowners, because they manage the vast majority of habitat, the Department's cooperative conservation initiative is not being taken to its logical zenith in that something else needs to be done.

Noting that you don't dispute the merits of private property conservation, in your opinion, would allowing a property owner to use a certified third-party appraiser answer that concern?

Mr. MANSON. That would answer the concern that we have specifically about the fair market value issue, yes.

The CHAIRMAN. Thank you. My time has expired.

Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

Judge Manson, thank you for being with us today. And you raise an issue which I have had in mind in regard to the pending legislation. Currently, the Interior Department has a Cooperative Conservation Initiative which includes a landowner incentive program to provide incentives to private landowners to conserve sensitive species habitats which we've been discussing.

There's also the private stewardship grants program where funds are provided to property owners to fund conservation actions for imperiled species on private lands. Additionally, the Department has a Challenge Cost Share Program and the Partners for the Fish and Wildlife Program both are well—both, as well, involving private property owners.

We all know that the appropriations process is hard to come by these days. And at the same time, as I believe you noted, these programs can achieve the same goal as what is being proposed by Section 14 of the pending legislation.

Do you believe that we can afford a new, probably redundant program as envisioned by Section 14. And the issue of cost aside, is such a program necessary in light of the existing departmental programs in this area?

Mr. MANSON. That's a question, Mr. Rahall, that I'm afraid I don't have an answer for you as I sit here today. That's something that I would need to study a little more and consult with other elements in the Administration.

But certainly you—we're certainly in favor of, as Mr. Pombo suggested, carrying the cooperative conservation notion further, and we agree that it's not been taken to its logical zenith yet.

Mr. RAHALL. Well, although we are on a fast track to get this bill through the House, I'm sure it will not be quite as fast a track in the other body and we'll have time before a conference committee. So I'd appreciate it if the Department could get some more consultation and insight into this question.

Mr. MANSON. We certainly will.

Mr. RAHALL. A second question. No, I'm sorry; that's the only question I have. And I'd like, Mr. Chairman, to ask unanimous consent to yield the balance of my time to Mr. Miller.

The CHAIRMAN. Without objection.

Mr. MILLER. I thank the gentleman for yielding.

And I thank you, Mr. Manson, for your testimony. You touched upon this in your testimony.

On page 26 of the bill it says, nothing in the recovery plan shall be construed to establish regulatory requirements or otherwise to have the effect other than a nonbinding guidance except with respect to any program or project covered by the implementation agreement under this paragraph.

What is the Department's position on the idea that the recovery plan in this instance would be nonbinding and nonregulatory?

Mr. MANSON. Well, that's the current state of the law, that recovery plans are nonbinding and nonregulatory. And the way that has worked out in practice is that recovery plans are given great deference by State agencies, by the Fish and Wildlife Service itself, and by other agencies that have to work with recovery plans.

It seems to me that just looking at the way the recovery planning process is set up here that it's likely that that practice would continue.

Mr. MILLER. Let me ask you, on the question that you also raise in your testimony, and that is the idea that a written proposal is submitted to the Secretary and the Secretary has 90 days in which to make a determination of whether or not that proposal constitutes a take.

What is the Department's position on that?

Mr. MANSON. Well, as I said, there's no—understand, there's no formal Administration position on this. But we're very concerned about that particular provision, that implementation of that would be difficult, that it creates administrative difficulties in meeting that requirement, that it's somewhat inflexible, that——

Mr. MILLER. The position is, or the point that you make in your testimony is that the Secretary, within that 90-day period, either makes a decision that this is a take and therefore would be required to provide for compensation; or makes a decision that it's not a take, and that's the end of the process, and that's based upon the written submission by the requester, as stated in the bill. Is that correct?

Mr. MANSON. That's right.

Mr. MILLER. And no additional information can be—or no extension can be extended to the Secretary to gather additional scientific evidence or whatever other kind of evidence if the requester does not go along with that.

Mr. MANSON. Well, it's certainly not clear.

Mr. MILLER. Well, it says that the requester may—the Secretary may request and the requester may agree to it or not.

So it's in the hands of the requester?

Mr. MANSON. Right. And it's not clear that the requester need grant an extension.

Mr. MILLER. So if the Secretary asks for an extension to get additional scientific evidence, or whatever kind of evidence, the requester can say, No, make the ruling in 90 days.

Mr. MANSON. And that would be a concern.

Mr. MILLER. That would be a concern, yeah. I'd assume that would be a concern because that would also set up the litigation of whether or not the Secretary may or may not have been arbitrary in making a decision because the Secretary didn't have the information.

Mr. MANSON. That would be a concern, yes.

Mr. MILLER. So this proposal—and, again, there's no guidance in the bill at all of what that proposal contains. It can simply be, I want to build 250 condominiums on 300 acres, and if you don't let me do it, you have to compensate me or either tell me it's not a take, right?

Mr. MANSON. That's the way it would appear, yes.

The CHAIRMAN. The gentleman's time has expired.

Mr. MILLER. Thank you.

I thank the gentleman also for yielding me his time.

The CHAIRMAN. Mr. Duncan.

Mr. DUNCAN. Thank you very much, Mr. Chairman. And first, I want to welcome Judge Manson back here. He's been here before

us many times, and he always handles his very difficult job in a very intelligent, very sensitive way.

I really don't have any questions. I just want to, first of all, commend the Chairman for what I regard as very common-sense legislation and commend the Chairman and his staff for all the hours and all the work they've put into this.

The latest figures I have show that Tennessee has one of the highest numbers of endangered species on the list and so, as you can imagine, this is a big issue in my State. And everyone has read and heard horror stories of ridiculous rulings that have come out over the last many years. And these rulings and the way the law presently is always hits the hardest on the smallest of our landowners. It hits the hardest on the small- and medium-size farmers, and the people that are least able to fight it. The big giants always seem to be able to get their way.

But I think that what we're trying to do in this legislation is help what—I don't like to refer to it as "the little guy," but that's what I think most people understand or would refer to it as. And so I commend the Chairman.

You know, the worst polluters in the world, the worst environmental protection in the world is in the Socialist and Communist countries. Only in the free market, free enterprise system can you generate the excess funds to do the good things for the environment that all of us want done. And I think that anyone who approaches this legislation with a truly open mind would call this a very moderate bill. In fact, in almost any country in the world, this legislation would be hailed as great environmental legislation.

The United States has made greater progress in regard to environmental protection than any country in the world in the last 25 or 30 or 40 years. Yet there are some, what I'd regard as extremist groups, who can't seem to admit that we've made progress; and they always have to tell people, tell their members that—how bad everything is and how terrible a piece of legislation is. And I think it's probably more related to fund-raising than it is to actual concern about endangered species.

But I thank you, Mr. Chairman, for yielding me this time.

The CHAIRMAN. I appreciate the gentleman's comments, and I know that over the years he has worked extremely hard on this issue, and I appreciate his input into the legislation and to the Committee.

I'm going to recognize Mr. Miller under his own time.

Mr. MILLER. Thank you, Mr. Chairman.

And thank you, Judge Mason—Manson, excuse me. On the question of fair market value, there's a provision here that fair market value must be paid for the affected portion of the property and that the owner shall establish the fair market value, and that that is a rebuttable presumption on behalf of the owner, what the owner establishes that fair market to be, and then further ambiguities on fair market value would be resolved in the favor the property owner.

I can have some discussions about whether or not that's fair to the taxpayer in terms of setting up these presumptions. But, in any case, if that determination is made and fair market value is arrived at under that process, it says, "Funds available to the Secretary

that are not mandated by law shall be spent for other activities.'' so the Secretary will be mandated to pay these out of other funds available to the Secretary. It, in fact, says, ''Any funds available to the Secretary that are not mandated by the law to be spent on other activities.''

The fact of the matter is, much of the spending of the Department of the Interior is contained in the report language of the Appropriations Committee or under different arrangements that various Members of Congress have made there.

Can you comment on what funds you think would be available to the Secretary to pay these compensations under this provision?

Mr. MANSON. Well, I haven't had a chance to—I'd have to go back and sit down with the budget and go through that. I haven't had a chance to consider that particular issue.

Mr. MILLER. Does the Department—do you have a position, or the Department have a position, on whether or not these other funds in the Department should be readily available to pay these claims?

Mr. MANSON. That's something that we've not yet analyzed.

Mr. MILLER. Well, I think that would be important. A lot of us have interest in many other areas, whether it's the national park system or whether it's the BLM or these other lands and the stewardship of those lands and the funds that are available. And I think if this is sort of an indirect appropriation of those monies, we would want to know what the Secretary's position is and what the Department's position is, because it may also dramatically change the way people are going to have to legislate around here if, in fact, they think that some other use of that money is going to be made available for one purpose and then, in fact, it's commandeered for another purpose.

Mr. UDALL OF COLORADO. Would the gentleman yield?

Mr. Miller.

Mr. MILLER. Yes, I do yield.

Mr. UDALL OF COLORADO. I know a lot of us on the Committee have been working on this whole issue of PILT funding, and it's been a bipartisan effort. I wonder if the Secretary would comment on whether these moneys might come out of the PILT moneys which are short-funded at this point in time already.

Mr. MANSON. I don't have a position on that at this time.

Mr. UDALL OF COLORADO. There is nothing on the bill that would prevent those moneys perhaps being directed into these landowner payments.

Mr. MANSON. I couldn't comment on that right now.

Mr. UDALL OF COLORADO. I think it's worth considering.

I thank the gentleman for yielding.

Mr. MILLER. I thank you.

The other question you raised is the—we now have different arrangements with landowners, and sometimes they work out in cooperation with State and Fish and Wildlife agencies and others about the use of those lands. You raised some concerns about the species conservation contract agreements that require the Secretary to enter into these agreements and then to fund those agreements.

Could you elaborate on that?

Mr. MANSON. Well, the concern that I have there—let me just move back to where I was on that particular issue.

The concern there is that, as I said earlier, there's—I'm concerned about the cost of implementation there. It calls for 60 to 100 percent of the landowner's costs in implementing the conservation practices there. There's a—there's no matching requirement there, particularly, and a lot of our grant—existing grant programs do have matching requirements.

And those are concerns that I would categorize as not overwhelmingly significant, but they are concerns when you talk about grant programs.

The CHAIRMAN. The gentleman's time has expired.

Mr. MILLER. Thank the gentleman.

The CHAIRMAN. Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman.

Welcome, Mr. Manson. It's been a long time since we've been together on the Eastern Shore, Blackwater Refuge and other places, restoring habitat, planting bay grasses and so on. And I hope you're feeling well.

Mr. MANSON. I am, thank you.

Mr. GILCHREST. That's wonderful. I have just one quick comment and three quick questions. The comment is looking at all the provisions in the legislation before us, to go back to the example, and there are thousands of examples, and this is not a major one by any stretch of the imagination.

But it shows me, in this issue on the Sassafras River with the tiger beetle, that the present regulations in the present statute of ESA brought people together so that they could exchange information; Section 7 consultation worked, the scientific community elaborated and made a broader view of what the issue was, rather than just that bluff and just that beetle, to look at the whole ecosystem.

And my concern is that some of the provisions in the present legislation that would reduce the potential for that kind of exchange of information, which brings that issue to a much broader success, would not work. The question I have, though, is—that's just my opinion, my strongly held opinion.

In Section 8, Section 4(d), this deals with the present ESA threatened species and endangered species—the same for many different circumstances, certainly for buying and selling, importing and exporting, et cetera, et cetera. It seems to me that Section 8, 4(d), separates those two designations, so that the endangered species will receive the protection of Fish and Wildlife Service, but the threatened species, one species at a time, would have to be reviewed and regulated to receive that protection.

I'd just like you to comment on that.

Mr. MANSON. Well, in fact it struck me as I read Section 8 of the bill, that what it does is it restates the existing Section 4(d), existing Section 4 and then adds some caveats to existing Section 4(d).

Under existing Section 4(d), threatened species are treated differently than endangered species. The prohibitions of Section 9, the take prohibitions of Section 9 do not apply under the current statutory language of existing Section 4(d). It's only by regulation adopted some 25 years ago that the prohibitions of Section 9 apply to threatened species.

This provision, as I read it, in Section 4(d), existing Section 4(d), does allow the Secretary, by regulation, to apply prohibitions of Section 9 to threatened species. And this Section, as I read it, puts some caveats on those regulations that would be adopted. It says that each regulation published under 4(d) would have to be accompanied by a statement of reasons for applying that particular prohibition. And then——

Mr. GILCHREST. If I could interrupt just for a second, so you're reading number 2?

Mr. MANSON. Number 2, yes, sir.

Mr. GILCHREST. Each regulation published under this subsection shall be accompanied by a statement of the Secretary of the reason or reasons for applying any particular prohibition to the threatened species.

That's existing law?

Mr. MANSON. No, that would be new law.

Mr. GILCHREST. Now, would that be cumbersome for the Secretary or the Fish and Wildlife Service to do that for each particular species?

Mr. MANSON. No, because, I wouldn't think so. As Section 4(d) works out in practice right now, individual regulations are published for—the prohibitions, when the effect of the existing 4(d) regulation is relieved, we publish individual regulations. So this would be just doing it the other way around, in essence, so—and then three——

Mr. GILCHREST. I probably have 30 seconds.

Well, I don't have any time left. I'll have to—well, we'll continue. I had some other questions about, does this in fact lessen the protection for threatened species?

Do threatened species under this bill, in your opinion, have less protection than existing law?

Mr. MANSON. Not under—no, not under the existing statute, no.

Mr. GILCHREST. So the proposed statute before us did not reduce the protection for threatened species?

Mr. MANSON. Not from the existing statute, no, because the protections that threatened species have under the existing statute are the same as they would have under this statute. Now the issue has to do with regulations and the nature of regulations adopted under the statute.

Mr. GILCHREST. Thank you very much.

Mr. RAHALL. Mr. Chairman, may I speak very briefly out of order?

The CHAIRMAN. Yes, Mr. Rahall.

Mr. RAHALL. I want to apologize to the next panel, to the Committee for having to leave. A higher power is calling me for a delegation meeting, that is, our senior Senator, Robert Byrd, so I do have to depart; and I want to express especially to the next panel and Jamie Clark my appreciation for all of the work that she has put in on this issue over many, many years and especially during these consultation processes and these negotiations.

I appreciate her invaluable help and I apologize for having to run.

The CHAIRMAN. Thank you.

Mr. Cardoza.

Mr. CARDOZA. Thank you, Mr. Chairman.

Mr. Manson, we've heard a number of times before that a substantial amount of your budget is consumed in the litigation process, which hampers the ability for your agency to do sound science and actual restorations. Is that correct?

Mr. MANSON. Yes. We've testified in this Committee before about the issues, particularly with respect to critical habitat, the amount of money that we spend on litigation over critical habitat, in particular, and how that diverts resources from other activities that we feel would contribute more to the conservation of species.

Mr. CARDOZA. In fact, when we were doing significant work on my particular area with the $1.67 million acres of rental pools for ferry shrimp and red-legged frog, when I talked to the folks that were in the process of that, and we criticized the fact that there were parking lots that were paved over that were included in the listings and all, it was told to me at that time that there was no money to buy current zoning maps because of the overextension of the budget.

Mr. MANSON. I don't recall the specific issue about zoning maps.

Mr. CARDOZA. I don't know the gentleman that told me that, but someone told me that.

Do you have any idea, the amount of money that's being spent by your agency on litigation?

Mr. MANSON. I do. I don't have the figure with me right now, but we are currently involved in 35 active lawsuits, and complying with another 42 court orders; and with each of those court orders comes the payment of attorneys' fees as well.

Mr. CARDOZA. That's my point. Because it's my understanding that there are certain organizations that continuously, like a mill, just churn out these lawsuits, and then because of the way the law is written, they get compensation that continues to fund their activities because they are churning out these suits.

Would that be a fair characterization of your experience?

Mr. MANSON. I would say that we see the same plaintiffs over and over and over again.

Mr. CARDOZA. Thank you. In your opinion, you mentioned to Mr. Pombo, I believe, or in response to Mr. Rahall that you had some concerns about the time line portion of getting the answer back to the landowner.

Mr. MANSON. Yes.

Mr. CARDOZA. I have conflicts in both areas. I believe the landowner deserves a timely answer, and as well, I am concerned that we've enough time to do the science that Mr. Walden has said that we need do in some of these areas.

How do we reconcile that in the best way that—I know you haven't had a long time to think about this, but do you have any opinions about what would be the best way to reconcile this? Because the Committee is going to have to deal with that issue.

Mr. MANSON. Right, I see the tension there and I agree that that's an issue. I also agree that landowners deserve timely answers to any issues that they bring. Any citizen deserves a timely answer to issues they bring in front of the government. And in this area, in particular, landowners deserve timely answers because things that they are doing on the land are time sensitive, whether

it's farming or ranching or development or whatever it is; those are all time-sensitive activities.

And I think my concern is not so much that we've time to do the science, because I think that in most cases the science is done for those kinds of questions that would be asked. My concern is more on the administrative side of getting those things done and having the resources to respond responsibly and timely in an administrative fashion. If we do some of these other things that are being talked about, we may, in fact, have some of those resources freed up to do some of those things.

Mr. CARDOZA. Thank you. In my area there is a community of Newman and there's a creek called Orestimba. And the community was unable to clear the creek when it had been maintained for a number of years because of something called the elderberry bark beetle. And the community flooded, I believe it was three times in about a 10-year period, for lack of the ability to clear that beetle.

So what we're talking about, oftentimes—it's often pitted as developers against the environment. But, in reality, this channel that was created to divert the water away from the community to keep it from flooding was then overgrown by a shrub that enhanced the habitat for elderberry bark beetle. They then go into that area. And it wasn't developers, but it was really a vulnerable community who was trying to gain protection there.

How often do you see these kinds of situations, the real-life situations not being development, but being—trying to protect our citizens, somewhat maybe like the hurricane that we just experienced or other things?

Mr. MANSON. Well, that's much like the situation we had with trying to keep our forests healthy. There are a number of situations like that. It's not all about building and development. But there are situations where work has to be done on the land and the issues come down to very similar things such as you described. And that happens not only in California, but across the country.

Mr. CARDOZA. I have one additional question, sir.

Clearly, there are issues that we still need to correct. This is early legislation that has some technical corrections and glitches that are still in it. But from your perspective as the person who implements the current law and would have to implement this law, do you see—we're hearing terms, "eviscerate the environment" and "devastating consequences to the world as we know it." from your perspective, as the regulator who would have to oversee this law versus current law, which do you think might work better in real practice?

Mr. MANSON. Well, on the provisions that I have commented on, aside from the ones that we have concerns about, I think that these are reasonable approaches and workable ones.

Mr. CARDOZA. Thank you, sir.

The CHAIRMAN. Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman.

And thank you, Judge, for being here. We really do appreciate all the cooperation that you always give us.

One of the major goals of this legislation, as you know, is to ensure the utilization of the best available scientific data when listing, downgrading or delisting a species under the ESA. This bill

grants the Secretary a fair amount of flexibility in determining within 1 year regulations to help determine what constitutes best-available scientific data.

So what currently underused, underutilized data sources, such as local governments and so on, impact studies, do you foresee that the Secretary would be able to use to include within the new regulations?

Mr. MANSON. Well, you mentioned State agencies, for example. We have made an effort to recognize that State agencies are repositories of great scientific knowledge, particularly about their areas. We continue to try to strengthen our cooperative relationships with academic institutions, particular natural States where there is a great connection to the land and to endangered species issues, particularly in the West.

And I'm sure there are others. Those are several that come to mind right off the bat.

Mrs. CUBIN. Thank you.

According to Fish and Wildlife Service, only 10 out of the 1,264 listed species or listed and threatened species have been recovered, while I think it's 24 have gone extinct. And I wonder if you'd agree that poorly defined recovery plans played a significant role in what I consider to be, frankly, an embarrassing rate of less than 1 percent recovery.

Mr. MANSON. Well, in some cases, that certainly may have contributed. The fact is that we have a lot of species that don't have recovery plans. We have species that have been on the list for years or decades in some cases for which there are no recovery plans, and that I think is a shame, and we have not done a good job focusing on recovery.

Mrs. CUBIN. So, how do you foresee the recovery plan requirements included in this legislation assisting the Department in working with individual State governments to manage the recovery process of the ESA listed species?

Mr. MANSON. Well, if these provisions became law, there are time limits on getting recovery plans done. There are requirements that we adopt regulations to define the recovery process. And I would, without prejudging how that would come out, but we made it in this Administration an important element of our program to work with States. And in various regions of the Fish and Wildlife Service, although not in all regions, the Service has made States an important part of the recovery planning process, and I imagine that that is something that would likely turn up in regulation.

Mrs. CUBIN. I don't have anything further.

Thank you very much, Judge.

The CHAIRMAN. Thank you.

Mr. Abercrombie.

Mr. ABERCROMBIE. Thank you, Mr. Chairman.

Mr. Secretary, thank you. I realize you are in a difficult position, having just received the bill, you know, a day or so ago. But you are aware of some of the discussions that have been going on, and I appreciate and you can appreciate our difficulty, too. Some of our questions may seem a bit abstract because we are trying to figure out what we do with, all scientific information versus best. And we

have—you know, where individual words become very important, so we are going to look at those kinds of things.

But you did say in your testimony you had some general observations, and that's what I'd like to concentrate on here a little, a little bit of the philosophy.

So you understand my position, I think a lot of this can be—a lot of the confrontation that's taking place, a lot of the 35 active lawsuits and the 42 court orders might be obviated, actually put to the side if we could agree on compensation, on the question of compensation for the taking of land. Not even getting into a real argument about what constitutes a taking, because that's always subject—that's been subject to court decisions from the time of the revolution as to what constitutes—in fact, there's a big argument right now, is there not, across the country about whether land can be taken for a public use or a private use.

So I'm not really concerned about pejorative examples like 2,000 acres is going to be developed and the Service allows them to do it. I don't know about the rest of the country, I just asked Mr. Cardoza about California, but I can tell you, in Hawaii, the Fish and Wildlife Service doesn't make zoning decisions. It doesn't make a decision about whether somebody is going to put houses on land, that kind of thing. That's up to our county council and zoning boards and all kinds of things like that. So I think that's a shimmer; I don't think that that's a real issue.

The question I have for you, and my reaction to your answer was—I thought it was a little vague. I understand. But philosophically, doesn't the Bush Administration support paying compensation to property owners if the government deems it in the public interest to take land?

Mr. MANSON. Philosophically, we do support paying compensation to landowners whose land——

Mr. ABERCROMBIE. If we could just get that on the record, I think we'll be a long way down the road. Now, you don't have to go back now and have Karl Rove down and beat on your head and say: What did you do? I am just—I wrote a little note to myself, fair market value; is the Administration prepared to support this? And that is—if we can get that far, then we can wrestle with this legislatively as to how to make that work.

What I mean by fair market value: Supposing you've got land. You know, all of us are going to decide a lot of our position on the basis of where we are locally anyway. Right? Because that's who you have to answer to electorally. The fact that somebody wants to develop land for housing, we've got a situation like that in my district right now, it doesn't mean it's going to happen. The fair market value isn't based on highest and best use necessarily; that would be something we'd have to get squared away in our legislation here. Because highest and best use, you can put all kinds of implications into that as to what the profitability might be. That presumes financing is there and all the rest of it. But if you are doing fair market value and land was presently, say, in conservation or in agriculture, that's how you would make your judgment. Wouldn't you think? Is that a fair assessment?

Mr. MANSON. That's a fair assessment.

Mr. ABERCROMBIE. Or should we make that—maybe the better question to you is: Should we make that clear in the legislation as to what we're talking about when we talk about compensation?

Mr. MANSON. Well, there are a lot of ways to skin the compensation cat, so to speak.

Mr. ABERCROMBIE. And I was going to suggest to you, we could do things like tax credits. We could do things like bonds. You know, it doesn't necessarily mean that you're going to have to come up with, I mean, the final legislation.

Mr. MILLER. Would the gentleman yield?

Mr. ABERCROMBIE. Sure.

Mr. MILLER. I think this is kind of—you are at a central point in this legislation. It says that it would be the fair market value of the foregone use of the affected portion of the property. So in the scheme of things, the best thing I could do as a landowner, if I want to build—and this is not unusual in the central valley. I want to develop 2,000 lots. I just want to develop 2,000 lots. That's probably going to be ruled as a take. Now, irrespective of what happens later in the zoning process when I go through the county, I go through all the rest of that. So, instead of 2,000 lots, I end up with 1,500 lots. But the take's already been established, and the theory is that I've foregone those 500 lots. It doesn't say whether I was able to get those 500 lots based upon—so, and that is established by the landowner.

Mr. ABERCROMBIE. Can I take back my time? I understand. That's why I raise the issue. I think we need to come to grips with that, as to what we mean by taking and the definition. I am not sophisticated enough in legal terminology at this stage to know whether or not what Mr. Miller just cited means that somebody could say, well, 10 years from now, I expect to be putting in 2,000 house lots down here, whatever it is, even though that may be something that has to go through six or seven different zoning hoops and county councils and all the rest of it. It may never happen. So we need to come to grips with that. That's really my point. We need to make clear in this legislation what we mean by fair market value if we have some question as is indicated here as to whether that could be taken advantage of in some adverse way. That's up to us to do that in the legislation. Right?

Mr. MANSON. I think that's an issue that we're concerned about.

Mr. ABERCROMBIE. OK. But philosophically though.

Mr. MANSON. Philosophically, we're not opposed.

Mr. ABERCROMBIE. We're not opposed to trying to reconcile the legitimate, as defined by legislation——

Mr. MANSON. Right.

Mr. ABERCROMBIE. A legitimate interest of landowners and those who see a threatened or endangered species in connection with that land.

Mr. MANSON. Absolutely, we're not opposed to the notion of paying compensation to landowners whose land is taken by the government for what is a public use.

Mr. ABERCROMBIE. Now, one other question. My time is up. But I think we need to explore this 90-day question as to whether that's sufficient time, really, to do this in the wake of trying to understand what is best available scientific evidence and so on. We

will have to explore that at another point, Mr. Chairman. Thank you.

The CHAIRMAN. I thank the gentleman.

Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman.

Judge, a couple of questions. When you appeared before our Committee a year or two ago on the legislation—required independent peer review of the science legislation I had, I know you expressed some reservations about that bill at that time. You've had a chance to read through these provisions, I would assume. Have the concerns that you raised at that time been addressed by the language in this legislation?

Mr. MANSON. I believe so.

Mr. WALDEN. Are you comfortable with the scientific data requirements that are written into this proposal?

Mr. MANSON. I can say I'm comfortable with those.

Mr. WALDEN. Thank you.

Second, I want to get to the issue Mr. Abercrombie and Mr. Miller both raised, because I think it is—and I like the way that you got at this issue. Because I believe that if the government comes in and tells you, you can't use your property, then it's a public interest and the public needs to step up and help compensation so that all the burden isn't on the private property owner. And I'm not a lawyer, but you are. Help me understand this. Because when you are talking fair market value, doesn't that really mean that I can't come to you with some speculative venture that would never be allowed under State or local laws and come to the Federal Government and say, hey, I want to do 2,000 condo units and you don't want me to do any, so therefore you've got to pay me for the loss; when in fact maybe the local zoning or State laws would never have allowed you to do 2,000 units? You'd still have to meet whatever the local zoning and State laws were. Right?

Mr. MANSON. Well, you certainly would have to, as I understand the bill as written, it talks about foregone use. And you would have to show that was—I would imagine you would have to show it was a use that you could actually have foregone.

Mr. WALDEN. Exactly. And to do something other than that, wouldn't that verge on fraud? Wouldn't it be a fraudulent claim to the government to come to the Federal Government and say, I was going to do 2,000 units because that's what I want to do. Oh, by the way, the local governments never would have allowed me to do it, but that's beside the point.

Mr. MANSON. It certainly would not be a valid claim, I would think.

Mr. ABERCROMBIE. Would the gentleman yield 10 seconds on that?

Mr. WALDEN. Sure.

Mr. ABERCROMBIE. Mr. Secretary, can you define in the context of Mr. Walden's question what you understand the phrase "foregone use" to mean in the context of this bill?

Mr. MANSON. Well, it would seem to me just by looking at the plain meaning, and I'm making an assumption here, that it would mean a use that one could legally and feasibly have accomplished and not something that one wished one might have done.

Mr. WALDEN. And then let me—if that got to your point, Mr. Abercrombie, then let me go to the next stage. This isn't some radical concept of compensation. Don't we do this very thing when we run a highway through somebody's ranch?

Mr. MANSON. Well, through a condemnation process.

Mr. WALDEN. Right. But then we establish a fair market value process. That's the piece I'm getting at.

Mr. MANSON. Well, and that's true. And my concern was that the fair market value provisions as written in this bill don't seem to conform with any usual processes that are known and used in those situations. The provisions seem to suggest that the landowner could establish a fair market value himself or herself. And there are accepted systems and means of doing that, and those did not seem to appear in this particular bill.

Mr. WALDEN. Your suggestions are very helpful, because we want to get it right. We don't want to have a blank check to anybody that just wants to say, well, my property is worth a gazillion dollars.

I have a question for you on the jeopardy language in the bill, and I hope you've had a chance to look at that. In your personal opinion, do you think that the jeopardy standard in the bill would apply to currently ongoing Federal projects? And, if so, do you think that would trigger a reconsultation of all of them that are in the works?

Mr. MANSON. I think there's a question about that. I think that that is a—that that is an arguable proposition. And so there's—that would be of concern I think to those who are involved in situations where they've got ongoing projects.

Mr. WALDEN. And finally, a broader ESA question. Doesn't the language of the ESA prohibit the killing, harassing of species that are on the list?

Mr. MANSON. Section 9 does, yes.

Mr. WALDEN. Why then, for example, the wild Chinook Snake River salmon, why are they allowed to be harvested out in the ocean? Why is that not a violation of the ESA?

Mr. MANSON. That, of course, is something that is under the jurisdiction of NOAA. And as I understand it, they have a 4-D rule for commercial harvest.

Mr. WALDEN. That allows the harvest of a species that is threatened with extinction? Is there anything in your jurisdiction where you allow the harvest of any species that is either endangered or threatened?

Mr. MANSON. Well, we don't have species that are of commercial value, so we don't have things that are harvested.

Mr. WALDEN. Well, how about sport value?

Mr. MANSON. We do have species that are allowed to be taken for sport fishing purposes.

Mr. WALDEN. This whole concept bothers me. When you look at the amount of money and effort we put into recovering a species, and yet there are some, because of outside political pressures, whether it's sporting or commercial or whatever, we allow to be harvested.

Mr. MANSON. Well, the theory of, at least in the case of species under the jurisdiction of the Interior Department, that are allowed

to be taken for sport fishing purposes is a limited number of species. The theory is that the sport fishing does not—is not something that contributes to the threat to the species.

Mr. WALDEN. Thank you.

The CHAIRMAN. Mr. Inslee.

Mr. INSLEE. Thank you, Mr. Chair.

Judge, some have suggested that we need to change this Act because the Act is flawed. Some have suggested that the executive branch of the Federal Government is flawed, that it has not complied with its statutory obligation to the American people to recover these species. So I'm going to ask you some questions about that, of that nature.

During the Clinton Administration, the American people had 521 species that were listed for protection. During the first 4 years of the first President Bush's Administration, 234 species were protected for the American people. Can you tell us the number of species that have been protected by listing during your Administration that were not required by court order or lawsuit or citizen petition? In other words, you weren't forced to do it.

Mr. MANSON. Well, first of all, citizen petition is the usual way that species get on the list. As to those that have been listed other than by court order, I think the number is probably less than five.

Mr. INSLEE. Well, less than five.

Mr. MANSON. Yes.

Mr. INSLEE. I want to make sure I understand that. Clinton Administration, 521 species protected for the American people. The first Bush Administration, 234. The second Bush Administration, 5 or less. And if you'd count——

Mr. MANSON. I'm talking about court order.

Mr. INSLEE. Zero. Now, does this in all fairness—we can assume that, all of a sudden, species didn't get healthy with the election in 2000, can we? There is not some biological thing that suggests that these species are no longer suffering. Is that a fair statement?

Mr. MANSON. I think it's fair to say that there is no correlation between a Presidential term and the health of species, yes.

Mr. INSLEE. Unfortunately, that seems to be the case. What then explains, if the biology indicates that we continue to have increasing numbers of species under stress, and this compliance with the law during the first Bush Administration and the second Bush Administration, now we see this precipitous drop to almost zero, almost zero protection of these species for the American people, how do you explain that?

Mr. MANSON. Well, first of all, when I say—my answer to your question was the number listed other than by court order. That's an important thing to understand. There were a number of species listed by court order in both of the two previous Administrations that you listed.

Second of all, we have taken an approach that avoids listing to some extent by focusing on the creation and restoration and enhancement of habitat. And you heard several members of the Committee mention the sage grouse, and there are other examples, where we determined that listing was not required because of efforts to restore and enhance and protect habitat that reduced

threats below the level necessary to find that listing was warranted.

The other factor is that the fact that we have so many petitions for—we have so many court orders, as I've testified in this Committee before, that we do very little discretionary work.

Mr. INSLEE. So I guess what you're saying then is that this Bush Administration is doing it right by not listing species for protection, and the first Bush Administration did it wrong by listing species for protection when they listed 234. Is that kind of what we understood?

Mr. MANSON. I'm saying we are doing it differently.

Mr. INSLEE. That is certainly the case. You are doing it differently.

Let me ask you about critical habitat. You came before this Committee in April, I believe, of 2004. And at that time, you said that there had been some legislation amending the Act, and you said, quote: Later this week, this draft critical habitat guidance will be finalized, and the Service will begin applying it, close quote. And that was referring to a critical habitat guidance that has been missing from your agency for years that prevented critical habitat from being designated, which was one reason for the difficulty of recovering these species. Your agency didn't have guidance to your employees how to designate critical habitat, and you were rightfully criticized for over a year about that and you refused to act. And then, in April 2004, you came to our Committee and said you were going to do it that week. Has that been done?

Mr. MANSON. Well, we have not done formal guidance.

Mr. INSLEE. I guess, the answer—excuse me. Go ahead. I don't want to interrupt.

Mr. MANSON. What we have done is we have done informal guidance, and we continue to develop that informal guidance as we go along. And the fact is that field offices get guidance constantly on how to do critical habitat.

Mr. INSLEE. Well, Judge, we're talking about what I would characterize as euthanizing the Endangered Species Act, thereby removing and stripping the Federal Government of the ability to protect critical habitat and statutorily removing that very important tool to protect these species. People have criticized the Federal Government saying, well, this system is messed up about designation of critical habitat. And it is. And the reason is, is that your agency under your leadership has abysmally failed to give guidance to your employees about how to designate critical habitat. And you came to us, these people right here, Republicans and Democrats, when we justifiably criticized your failure in that regard, and you told us you were going to do it that week. It's been over a year now. Now, are you telling us now that what you said in April was just false? Or have you now concluded that it's not important, this is not an important issue enough to give guidance to your employees? Which is it?

Mr. MANSON. Neither one. We actually decided to take a different approach to critical habitat guidance as we got more and more court decisions about critical habitat, and so we have taken the approach of giving informal guidance to the field offices, and that's what we've done.

The CHAIRMAN. The gentleman's time has expired.

Mr. INSLEE. Thank you.

The CHAIRMAN. Miss McMorris? Pass.

I did want to move to the next panel. If anybody had one additional question that they would like to ask Judge Manson before we excuse him.

Mr. UDALL OF NEW MEXICO. Mr. Chairman.

The CHAIRMAN. I'm sorry.

Mr. UDALL OF NEW MEXICO. There's some here that haven't——

The CHAIRMAN. I'm sorry. Mr. Udall.

Mr. UDALL OF NEW MEXICO. And then Ms. McMorris hasn't and then I think Mark Udall hasn't. Thank you.

Just to be really clear about, Mr. Secretary—first of all, let me thank you for your testimony here today. I wish that you had had a real opportunity to study this bill and analyze it and be able to take a position, because the unfortunate thing today with this rocket docket we have going on here is that when the crucial questions have been before us, you have made statements. Mr. Miller asked about the 90 days notice, and you said that's a concern. You were asked on the appropriations for Section 14. Well, we haven't had a chance to consider it. No, we haven't had a chance to analyze it. In your testimony, your written testimony, you say: We haven't had a sufficient time to fully analyze the legislation or to develop a formal Administration position on the bill. After we've had more time to review the bill, we'll be happy to fully discuss its provisions with the Committee.

This is—you are not going to have a chance to discuss it with the Committee. We're marking it up tomorrow, we are sending it on to the House Floor. Does that concern you at all? Wouldn't you like—you're the—you are the expert. You are the—and the experts below you. We are not going to get to hear from any of the scientists, we are not going to have the opportunity to hear from any of the people that really know this in your agency, and we're moving forward on this rocket docket to hear the bill today, mark it up tomorrow, and send it on to the House. Does that concern you at all?

Mr. MANSON. Well, certainly it's always nice to have the luxury of time. But sometimes it doesn't work that way, and I understand that.

Mr. UDALL OF NEW MEXICO. So it doesn't concern you, that sounds like. You as the—you're the representative of the experts in the government that know and understand the Endangered Species Act, and you have really been cut out of the process. And that doesn't bother you at all?

Mr. MANSON. If the Congress chooses to pass this bill, then we will make it—we will do our utmost to work with the Committee and make it work.

Mr. UDALL OF NEW MEXICO. But you think that's a wise course, to not listen to the people that are under you that have the expertise?

Mr. MANSON. It's not up to me to make judgments about the congressional——

The CHAIRMAN. Would the gentleman yield?

Mr. UDALL OF NEW MEXICO. I would like to address the Chairman. I think that this is an extraordinary procedure where we

aren't able to actually hear from the agency. And I would just ask the Chairman to delay this rocket docket we're on and give us the opportunity to hear from the Administration fully on this bill. And I would just respectfully make that request to the Chairman, and I would hope that some of my colleagues would join me in that request. And at this time, I will yield to the Chairman.

The CHAIRMAN. I appreciate the gentleman yielding. Over the last couple of congresses, we've had over 45 hearings on the Endangered Species Act where we have heard from the Administration, from any and every outside group that anybody could dream up to testify on the Endangered Species Act. It's not like this is a new issue. I realize that this is a new bill, and there are issues that we need to work out, and I'm continuing to work with members in the minority and the majority on what their issues are. But this is not a new issue. And the gentleman has sat through hours and hours and hours of testimony and discussion on the Endangered Species Act. So to try to act like this is something that we haven't fully vetted and it has not been before this Committee, I think, is a little bit more than disingenuous.

Mr. MILLER. Would the gentleman yield?

Mr. UDALL OF NEW MEXICO. I will yield——

Mr. MILLER. Just on that point. I don't think this is about pointing fingers. I've been here 31 years, I've sat through a zillion hours on the Endangered Species Act. But we are now down to the bill, and I think the question is really the airing of the bill. And it's not about good faith or any of that, it's that we're now down to what will become the law. And I think it's important that people have an opportunity to comment on that, whether they're Members of Congress or they're outside organizations. I think that's the point that we're trying to make. Not to delay this, not to push this to the next Congress. You know, I differ with some of my colleagues on this side and with many in the environmental community on this idea. I don't think that you can ever get it right. I suspect the informal guidances you're giving as to how to stay out of a lawsuit, not how to protect a species, it's just that more of that's the concern there because you are trying to weave your way through the courts. And I think that if we could deal in a proper fashion with critical habitat, we could probably erase 70 percent of the delays, the bureaucracy, all the problems, the lawsuits and the litigation and all the rest of that. And so this law becomes very important because it goes right to the issue of critical habitat. The question is, has this been properly balanced? And I don't say that, again, accusing people of intentions or bad faith, but we are now down to that point; we have sort of broken the dam here to talk about critical habitat. I think it's very important that we do that. So when we're talking about time to get this right, it's not that we are going to end up in agreement or consensus, but there may be, as I've seen I think already Mr. Manson's testimony already, there are some things that we have to rethink in terms of how this bill will in fact operate.

The CHAIRMAN. I'm going to give Mr. Udall an additional minute because we burned his time.

Mr. UDALL OF NEW MEXICO. Mr. Chairman, and Mr. Miller said it very well. I would just like to say it, maybe, a little bit

differently. I think that this is a—this piece of legislation which with the way it's moving now is headed for the Floor very, very quickly and being marked up within the next day or so. It's 74 pages of new information. It has the possibility of passing the House. Your party's in the majority. It looks like it has support. It seems to me that we're rushing to judgment here. We should have the opportunity to at least hear from the Administration. They are the ones that have administered this law. They've got the experts. They've got the scientists. And I do it with no intent of delay. I just think we could—I'm sure that Mr. Manson within a week or so would be able to come back and tell us his formal position on what all these provisions are and us have the opportunity to question him. So I would just renew that request.

I also have several other questions of Mr. Manson, and I think others on this side do also, so I would like to have another round. I hate the idea of keeping this other panel waiting, but I would like that opportunity. Thank you, Mr. Chairman.

The CHAIRMAN. I recognize the other Mr. Udall.

Mr. UDALL OF COLORADO. Thank you, Mr. Chairman.

Judge Manson, I'd like to go back to section 8 of the bill. I'm concerned that perhaps we left my friend and colleague, Mr. Gilchrest, with the wrong impression about section 8. And starting at the top of page 15, as I read it, the first three lines on that page would repeal part of what's now Section 4(d) of the Act itself. And if I could, I want to read to you the part of the current law that would be repealed: Whenever any species is listed as a threatened species pursuant to subsection C of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.

So, in that context, isn't it true that section 8 would eliminate the current requirement that steps be taken to conserve a threatened species?

Mr. MANSON. The wording is different. The effect, I think, is not necessarily to eliminate the requirement or the ability of the Secretary to issue regulations to conserve threatened species. I think, it seems to me, the aim of it is at the section 9 prohibitions.

Mr. UDALL OF COLORADO. I think you've focused on a key question, and piggy backing what Mr. Udall from New Mexico visited with you about and we just discussed in Committee. As lawmakers, whenever you see a shall versus a may, of course it draws your attention. And in your proposed section of the legislation in this, it reads: The Secretary may by regulation published on or after the date of publication. Current law says shall. And this is why, again, I think it's so important to have additional opportunities to give the Department of the Interior a chance to understand what this may or may not involve.

If I could just, moving to another point, and then I want to yield to my friend from California, Mr. Miller, if I have time remaining. Mr. Walden made the point about foregone use. And the bill doesn't define foregone use. Would it be helpful to have a definition in this proposed legislation when it comes to the concept of foregone use?

Mr. MANSON. In legislation, generally, it's frequently helpful to have definitions. I don't know that—I don't know in this instance that we could come up with a definition of foregone use that's any

more specific than the plain meaning of foregone use. And, if so, it would have to be one that relates to the term foregone use as would be generally understood with respect to compensation and condemnation and those sorts of considerations generally.

Mr. UDALL OF COLORADO. It sounds like that's as close to a yes as I'm going to get from you.

Mr. MANSON. I think it is.

Mr. UDALL OF COLORADO. I would like to yield to my colleague from California, Mr. Miller.

Mr. MILLER. I thank the gentleman for yielding. And I don't think there's much time on your clock, but let me see. And I hope we do have a second round because I have a question on compensation.

But the point that Mr. Udall just raised with you on the protective regulations, section 8, the fact of the matter is that first sentence that is being stricken from the law, I think you unintentionally misspoke when you said it's just a question of regulations. The law requires the Secretary to provide for the conservation of such species as he or she determines for the conservation. We don't—we are not all in agreement here on the ESA. But that is clearly a different approach in terms of providing for that conservation of the species early on that is threatened as opposed to what may or may not take place if the Secretary so desires under the bill as it's written, and it's a very fundamentally different approach. It's sort of like mitigation before the hurricanes to fix the levees so you don't have to recover the city that's flooded. If you deal with threatened species and you provide for the conservation of species, you may be able to tread more lightly on private property owners in the consideration as that species is drawn into consideration in the path of timber, mining development or what have you. So it's a very different and I think fundamental change to the core integrity of the Endangered Species Act.

And I just want to point out, that's a matter of statute, not a matter of regulation. It was a decision by the Congress that in fact the threatened species should have their conservation provided for in this instance. So I don't think it's just, well, the Secretary may do it. The Secretary shall do it and shall provide for the conservation. There's nothing in the bill at the moment that would suggest that the conservation has to be key to that.

Mr. UDALL OF COLORADO. I think you have to look historically at how it's been done. And historically, what happened with Section 4(d) was, about 25 years ago or so, a regulation that——

Mr. MILLER. I understand that. That regulation has been very controversial. But the question of whether you want to amend that regulation is one thing, and whether you have to amend it in compliance with the law as is currently written or you want to do something else under the bill. And you may want to do that, and that's my point. I just think we just have to recognize, as Mr. Udall did, this is a fundamental change in the direction of the Endangered Species Act with respect to threatened species and the conservation of those species. Again, I'm not asking you to agree with me on the intent or what you want to do, but that's what that section of the law that is being repealed in this Act requires for threatened species.

I thank the gentleman for yielding me his time. And, Mr. Chairman, I would join in the request that we have a second round with Mr. Manson, Judge Manson.

The CHAIRMAN. Mr. Costa.

Mr. COSTA. Thank you very much, Mr. Chairman.

I think it's important that the recommendations that Judge Manson made in his comments in his opening statement we consider. And I also would like to weigh in and looking at creating flexibility as it relates to the comment period. I think 90 days creates all sorts of new issues and flexibility, and that particular area as was commented on earlier, I think, is something that needs to be addressed in the bill.

I would like to—Judge Manson, it's good to see you. It's been some time.

Mr. MANSON. Yes.

Mr. COSTA. In a previous life for both of us, we worked on a number of issues in California. And I'd like to ask you a question as it relates to that on this measure that we're considering on the issue of incidental takes. And I'm not sure if we're talking about section 9 or some other references that we may see in the legislation. Most of the conversation that we've dealt with here this morning has focused on change of use of land and the impacts and how you compensate landowners. As you may know, part of my area—and as they say, all politics is local—is Kern County. Kern County has perhaps among all the counties in California the most listed endangered species. If it's not the leading county, it's up there, one or two or three. We had a case back in the early 1990s that you might remember that involved a farmer, Mr. Lin, I might if my memory serves me correctly, who was arrested by the U.S. Fish and Wildlife Service for an incidental take and as it related to, I believe, the kangaroo rat, and his tractor was later confiscated as corroborating evidence. I always thought that was rather unusual but interesting. And, obviously, it created a lot of I think frustration among many people in the valley who were attempting to try to deal with habitat conservation plans. Mr. Cardoza talked about the problem with the beetle issue that we dealt with earlier as well. And I'm wondering how you think this would apply, should this legislation become law, with current use practices of landowners on the issues of incidental take.

Mr. MANSON. Well, that's an interesting question. Presumably, under this legislation, perhaps Mr. Lin could have gone to the Fish and Wildlife Service in advance and said: Here's what I'm planning to do, give me my 90-day letter, or however long it turned out to be. And——

Mr. COSTA. But he's engaged in normal everyday farming activity, cultivating, working his land. This isn't virgin land; this is land that is in production.

Mr. MANSON. Right. And so that's an issue I'd have to think about how this particular bill would relate. I think, under current practices, that case would not have occurred, quite frankly. And, of course, under the way the State law bill that you and I worked on in California, it wouldn't occur, either.

Mr. COSTA. Well, obviously, that was in part to address that issue there. But, I mean, there are—I concur with many of my

colleagues that this is obviously important legislation and one that needs to be gone over thoughtfully as it relates to the changes that are being considered. But I am as concerned not just about change of land issue, which we have a lot of in parts of California and other parts of the country, but also landowners that are engaged in current normal practices in which there are habitat issues that exist in which they have, in essence, been there for generations. And, frankly, I think the law has not been compatible in the past, and I think any changes we need to make needs to take that into account.

Mr. MANSON. That's a well taken comment.

Mr. COSTA. Thank you very much, Mr. Chairman. Reserve the balance of my time.

Mr. ABERCROMBIE. Mr. Chairman, I was going to ask Mr. Costa to yield to me.

The CHAIRMAN. He yielded back his time. You're out of luck.

Mr. COSTA. For the gentleman of Hawaii, I would be happy to yield my time.

The CHAIRMAN. Your time's up now.

Neil, we're going to go ahead and do another round because I know that George had additional questions.

Mr. ABERCROMBIE. Well then, Mr. Chairman——

The CHAIRMAN. OK. One quick question.

Mr. ABERCROMBIE. No, for you. Just a reminder. Because, in relation to the last point. Is it on the record that the Secretary will try to provide for the Committee what the costs of litigation have been to this point?

The CHAIRMAN. Mr. Secretary, can you do that?

Mr. MANSON. I can do that by this afternoon.

The CHAIRMAN. Over what period of time, Neil?

Mr. ABERCROMBIE. I'd like to know since the—I'm not trying to create a separate issue here. I just want to make sure that that I understood it correctly from before: That the argument here is that we haven't been able to get to some of the recovery plans and some of the other issues in terms of expenditures because there are enormous costs associated with litigation and that. And you said you thought you would be able to provide an answer. I just want to make sure that that doesn't slide off the table.

Mr. MANSON. Right. If it's over the last 4 years, we can get something over today.

Mr. ABERCROMBIE. Well, these are ongoing suits. You have 35 suits going on. It doesn't necessarily have to be today. But you understand, if we can get something of an idea of what's been spent by the Department, regardless of the Administration, over the—since this has come into effect. Because what the Chairman is trying to get at and what I think a lot of us are trying to get at is, how can we actually get to recover species? How do we actually get to protect species? And if millions of dollars or tens of millions of dollars are in lawsuits, then we've got to do something to the law to end it. Everybody wants to do that.

Mr. MANSON. If you mean since 1973, that's a little more daunting a task.

Mr. ABERCROMBIE. Well, just say the current suits that you're defending.

Mr. MANSON. We can get you that today.

Mr. ABERCROMBIE. How much it has cost, because I presume that that transcends Administrations.

Mr. MANSON. Yes, it does.

Mr. ABERCROMBIE. That's all.

Mr. UDALL OF NEW MEXICO. Neil, could I—could you just yield just a second? Could you add to that just how much the bill is going to cost? How much money is going to be paid out on the bill? Give us an estimate on that, too? That would be great.

Mr. MANSON. That would be quite a bit more daunting a task, so I don't know that I could do that.

The CHAIRMAN. Mr. Miller had a follow-up clarification.

Mr. MILLER. Just for a point to clarify. I asked you earlier about the question that nothing in the recovery plans should be construed as regulatory, and then in the legislation or otherwise to have the effect other than as a nonbinding guidance. That's not—when you answered, I'm not sure you addressed that part of it. That's not the current situation. It's my understanding, is recovery plans are in fact enforceable. You entered into an agreement for the recovery plans. So the idea that they are nonbinding, I don't know if—you want to explain that? If——

Mr. MANSON. Well, no, recovery plans—under this bill, there's a provision that you can enter into an agreement with respect to recovery plans. But recovery plans as they currently exist can be—there's no requirement that anybody enter into any agreement with respect to a recovery plan. Now, a habitat conservation plan is a binding agreement, but a recovery plan itself——

Mr. MILLER. So you are saying, once you establish a recovery plan, under current law, it's not binding on anyone?

Mr. MANSON. Right.

Mr. MILLER. Thank you.

The CHAIRMAN. I'm going to excuse the judge at this point and thank you. Other members have questions, there will be follow-up questions, and if you can provide those for the Committee as quickly as possible, it would be greatly appreciated. But I'm going to excuse you at this point and call up the next panel. Thank you very much.

Mr. MANSON. Thank you.

The CHAIRMAN. I want to welcome our second panel.

We've got Gary J. Taylor, Legislator Director, International Association of Fish and Wildlife Agencies; Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife; and James S. Burling, Principal Attorney, Property Rights Section, Pacific Legal Foundation. If I could have you rise and raise your right hand.

[Witnesses sworn.]

The CHAIRMAN. Thank you very much. Let the record show, they all answered in the affirmative.

Welcome back to the Committee. I appreciate you taking the opportunity to come in and testify on this legislation.

Mr. Taylor, we are going to begin with you.

STATEMENT OF GARY TAYLOR, LEGISLATIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

Mr. TAYLOR. Thank you, Mr. Chairman.

I am Gary Taylor, Legislative Director of the International Association of Fish and Wildlife Agencies, and I appreciate the opportunity to appear before you today to represent our perspectives on H.R. 3824, a bill to reauthorize the Endangered Species Act. All 50 State fish and wildlife agencies are members of the Association.

The Act has proven to be a vital conservation tool for protecting threatened and endangered species, but we recognize that improvements are needed in its design and statutory basis and in its implementation. The Association welcomes this opportunity to work with you and the Committee, to encourage Congress to reaffirm and clarify the important role of the States in the management of listed species.

We find several aspects of the bill to be an improvement over current law. Most of the recommendations of our General Principles, which are attached to our testimony, are grounded in the authority and role of the State fish and wildlife agencies, and it is the primary focus of our comments with respect to this bill. We are appreciative that the bill addresses some of our concerns and recommendations and point out other opportunities to do that.

We strongly believe that, over the last 30 years, the States' role in managing resident threatened and endangered species has departed from what Congress originally intended. Federal law is well settled that it is the State's role to manage resident fish and wildlife within their borders. Now is the opportunity to reaffirm that role in the Endangered Species Act. Congress specifically provided for the States' role in section 6 of the Act. This authorizes the Secretary to enter into a cooperative agreement with any State that establishes and maintains an adequate and active program for conservation of listed species. Congress intended that the States have a strong partnership with the Federal Government. And this is well substantiated in legislative history.

Unfortunately, over the past 30 years, the role of the State fish and wildlife agencies in implementing the Act has been poorly utilized. This is particularly true for missed opportunities in section 6 cooperative agreements between the States and the Fish and Wildlife Service. Section 6 has merely served as a vehicle for Federal funding of State programs. H.R. 3824 is an opportunity to ensure that the States' role in managing listed species is clearly spelled out. The bill goes a long way to remedy the consequences of a 1977 memorandum from an assistant solicitor that misread section 6(f) in isolation from the rest of the Act, and concluded that all permits for take of threatened or endangered species must be decided by the Fish and Wildlife Service and cannot be part of a section 6 cooperative agreement with the State.

Further, as Judge Manson referenced, the Fish and Wildlife Service published a blanket role which imposed on threatened species all of the applicable take provisions for endangered species unless it publishes a less restrictive 4-D role.

The combination of these two policies has seriously constrained what we believe was Congress's original intent, and that is for the

States to be the lead in particular in threatened species conservation. That is the type of management teamwork that we believe Congress intended under the Act for State and Federal agencies. H.R. 3824 restores that congressional intent.

We are encouraged by the bill's emphasis on species recovery and the provision of certain landowner incentives, but strongly urge the addition of bill language affirming the States' role in the full range of recovery planning and implementation, including the opportunity to take the lead on recovery plans. H.R. 3824 requires the development of criteria and a recovery plan identifying when species recovery is met, but we strongly believe recovery plans must have a statutory trigger directing the Secretary to initiate the process for down or delisting a species once population and habitat recovery objectives are met. We urge the addition of that language to H.R. 3824.

We believe that post delisting monitoring obligations and process also needs revision. It is too onerous and too subject to Federal agency discretion. The Association recommends that Congress simply eliminate that part of the statute requiring Federal approval of a post delisting monitoring plan. Once delisted, these species simply come back under the full and exclusive authority of the State fish and wildlife agencies or concurrent authority with Fish and Wildlife Service with respect to migratory birds; they don't simply fall off the jurisdictional radar screen.

Guidance for developing post delisting monitoring and other considerations can be part of the recovery plan. The Secretary would retain emergency authority to list the species under circumstances of precipitous decline.

Mr. Chairman, the Association wishes to emphasize that the desire of the States is not just to achieve better coordination as Federal agencies implement the Act, but to have recognized in statute the States' role as peer agencies in developing and implementing the full range of conservation programs within their borders. Opportunity to comment on a course of action is not the same as opportunity for meaningful participation in shaping that course of action. State participation should not be limited by lack of an invitation to participate.

Thank you, Mr. Chairman, for the opportunity to share our perspectives, and I would be pleased to answer any questions.

[The prepared statement of Mr. Taylor follows:]

Statement of Gary J. Taylor, Legislative Director, International Association of Fish and Wildlife Agencies

Thank you, Mr. Chairman, for the opportunity to appear before you today to share the perspectives of the International Association of Fish and Wildlife Agencies (IAFWA) on the Endangered Species Act, particularly the role of the State fish and wildlife agencies in implementing the Act, and for the opportunity to provide comments from our preliminary review of H.R. 3824 the bill which you just introduced on Monday. I am Gary Taylor, Legislative Director of the International Association of Fish and Wildlife Agencies, and we look forward to working with you and Committee staff as H.R. 3824 matures through the legislative process

We agree with many of the goals and objectives of H.R. 3824, although we are still analyzing the full details of the bill in comparison to the IAFWA General Principles for ESA Reauthorization, which are attached to this statement. We are encouraged by the emphasis on recovery and the provision of certain landowner incentives but, again, need to fully understand the details of the bill. We appreciate that H.R. 3824 proposes two legislative remedies which would enhance the role of the

states, and we would sincerely encourage your serious consideration of an even greater role for the states in several other areas I will address later. There are also some proposals in the bill, such as compensating landowners for forgone use, which we do not support since they are not consistent with established Association policy. In other areas, as Section 7 consultation changes, we prefer to comment later following further review. One final general observation, Mr. Chairman, is that with the addition of the more sophisticated process contemplated by H.R. 3824 much more robust Congressional appropriations will be required in order to satisfy the requirements of this bill.

The International Association of Fish and Wildlife Agencies was founded in 1902 as a quasi governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of the states, provinces, and the federal governments of the U.S., Canada, and Mexico. All 50 states are members. The Association has been a key organization in promoting sound resource management and strengthening federal, state, and private cooperation in protecting and managing fish and wildlife and their habitat in the public interest.

The Association affirms that the Endangered Species Act has been and must continue to be a vital conservation tool for protecting threatened and endangered species and their habitats. However, the Association recognizes that improvements are needed in the design and statutory basis of the Act, and in its implementation and administration.

Since passage of the ESA, the State Fish and Wildlife agencies have identified what works and what does not work in meeting the goals of the Act, and have through extensive discussion and dialogue over the past 15 years, arrived at a set of recommendations for necessary statutory amendment or other reform through policy or regulation. As previously indicated, these recommendations (IAFWA: Reauthorization and Reform of the Endangered Species Act: General Principles, September 30, 2004") are included as an appendix to my testimony. The ESA must be streamlined for efficiency, amended to ensure increased authority and responsibility for States, and reformed to provide increased certainly and technical assistance for landowners and water user.

The State fish and wildlife agencies objectives are very straightforward: 1) to successfully carry out our responsibility as public trust agencies to ensure the vitality of our fish and wildlife resources for present and future generations; and 2) to encourage, facilitate and enhance the opportunities, means and methods available to all citizens and especially landowners in our states to contribute to meeting this conservation objective in cooperation with our agencies and our federal counterparts. Much of this involves solving problems and reconciling differences, and we believe any ESA bill should provide new and useful tools, opportunity and direction to achieve both of these objectives.

Let me now reflect on the need for reaffirmation and enhancement of the role of the state fish and wildlife agencies in ESA implementation. State fish and wildlife agencies are particularly interested in having a greater role in listing decisions and in on the ground efforts to recover listed species.

First, we believe that any ESA bill must restore Congressional intent that reflects and respects the authorities, role and responsibilities of the state fish and wildlife agencies in fish and wildlife conservation in general, and listed species in particular, through the Section 6 language which says that "In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States". We firmly believe that reaffirming the role of the State fish and wildlife agencies in all aspects of the ESA to reflect our concurrent jurisdiction over listed species sets the stage for more efficient and effective administration of endangered species programs.

The State fish and wildlife agencies have broad statutory responsibility for the conservation of fish and wildlife resources within their borders, including on most Federal public lands. The states are thus legal trustees of these public resources with a responsibility to ensure their vitality and sustainability for present and future citizens of their States. State authority for fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law. State fish and wildlife agencies must be given the opportunities to be fully involved in every aspect of the Act, from consideration of listing petitions to de-listing through meaningful recovery plans. With appropriate and adequate funding, states are in the best position, exercising their expertise and relationships with landowners, other governments, etc., to more fully engage in implementation of the ESA.

Further, we believe any ESA bill must restore Congressional intent for a statutory distinction between "threatened" and "endangered" status. The Executive branch agencies have blurred this distinction to a point where there is de facto no

difference. Congress intended the distinction, and specifically prescribed different statutory obligations and liberties. The flexibility of this distinction needs to be restored as a tool for appropriate use by the resource agencies. A careful reading of section 6 of the ESA and its legislative history will conclude, we believe, that Congress originally intended he states to be the lead in threatened species recovery, as long as they qualified under an approved section 6 cooperative agreements. However, an ill-advised USDI Solicitor's opinion regarding section 6, combined with a blanket rule (50 CFR17.31) promulgated by the FWS that presumptively extends the take prohibition to threatened species unless a less restrictive specific 4(d) rule is developed, minimizes the utility of the threatened status and the potential for state lead in threatened species conservation. We appreciate that some clarity on this issue has been provided in H.R. 3824. A section has been added to Section 6 cooperative agreements, to provide for incidental take to be covered in the agreement. The language on P.38, Line 20 could be clearer if reference was made to apply to all covered species instead of "such species" which might be construed to reference only incidental take of candidate species. Further, the added provisions in Section 6 (P. 38, Line 10, etc.) provides a program for candidate species, a category not defined in ESA. Candidate is defined in 50 CFR 424.02 as "any species being considered by the secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule". The regulations are clear that "none of the substantive or procedural provisions of the Act apply to a species that is designated as a candidate for listing. 50 CFR 424, 15(b). If a third category of species is being contemplated by this bill, a definition of candidate species should also be included in the bill.

The Association strongly urges Congress to clarify it's original intent that the States may, under an "approved full authorities cooperative agreement" with the United States Fish and Wildlife Service (Service) incorporate endangered and threatened species "take" provisions into their conservation programs. Unfortunately, over the last thirty years, certain administrative actions have been put in place that we believe are contrary to Congress' original intent for the Act. These practices have tied the hands of the State government agencies in being full partners with the Service and have undermined the authority of State government agencies to manage their resident fish and wildlife populations. Although not required by the terms of Section 6 of the Act, it has become the practice for the federal government, through the Service, to control the process to permit regulated "take" of listed species. A plain reading of the Act and examination of legislative history assumes that States which are parties to "full authorities" cooperative agreements will establish their own implementation process, so long as the process conforms to the requirements for approval by the Service. Through this Section 6 process, the State is implementing provisions of the federal ESA, not just implementing its own State conservation program. Such an agreement is still subject to Section 7 consultation and must also comply with NEPA.

A 1977 Memorandum of a USDI Assistant Solicitor stated that Section 6(f) of ESA imposes a federal "minimum floor" on State laws concerning taking of endangered and threatened species. Under this misreading of Section 6, (which isolates Section 6(f) instead of reading all sections of the ESA together) all permits for the "take" of endangered or threatened species have been determined to require issuance by the FWS and cannot be a part of a section 6 cooperative agreement with a State. A correct reading of ESA permits a State that follows the requirements set out in Section 6 to incorporate terms of "take" provisions in an agreement it may reach with the Service. We believe language in H.R. 3842 does provide clarity to this matter but request that it be further clarified to ensure that it applies to all covered species under the agreement.

Further the ESA makes a clear distinction between species that are "threatened" and those that are "endangered". The Act provides for them in different ways, allowing more leeway for management flexibility for species that are threatened. However, the Service developed a blanket rule published at 50 CFR 17.31. This blanket rule imposed all of the applicable take provisions for endangered species on threatened species, unless the Service publishes a less restrictive rule for a particular threatened species. The blanket rule is often referred to as the "default setting".

Section 4(d) of the ESA permits the Secretary (Service) to issue necessary regulations for the conservation of threatened species. Section 4(d) requires the Service, to the greatest extent possible, to cooperate with the States that have entered into full authorities cooperative agreements in developing those rules. Congress intended the States to play a significant role in threatened species conservation. Congress stated this intent by giving the State the potential lead in developing Section 4(d) rules. This important component of the ESA has not been recognized by the States' Federal partner. This, in turn, has crippled State fish and wildlife agencies in their

role to manage and protect threatened species. When a State's Section 6 cooperative agreement is silent as to Section 4(d) rules, the blanket "default setting" rule becomes applicable. All applicable take provisions for endangered species are imposed on threatened species. This is not the Federal and State management teamwork Congress intended. H.R. 3824 begins to address this default setting by providing discretion to the Secretary regarding the promulgation of take restrictions to threatened species. The blanket or default setting presumption is eliminated. Further, the bill requires a species specific 4(d) rule. All of these points provide some clarity to the impact of a 4(d) rule.

Turning to the listing process, the Association concurs with the provision in H.R. 3824 which requires the use of best available scientific data but we are concerned that administrative rulemaking that would establish standards for that could lead to even further litigation. As an alternative, the Association recommends that the state fish and wildlife agencies be institutionalized in the ESA in two particular listing process amendments:

Prelisting Data Collection and Reviews: State agencies have expertise in conducting population status inventories and geographic distribution surveys to facilitate review of which species should be advanced to the official proposed stage for listing consideration. The use of the states in this role in the 90 day review process would need to be amended into the ESA to address a recent federal court decision (Center for Biological Diversity v. Morganweck, CV-04-F-0108, D. Colo. (2004)) which directed the USFWS to not engage the states in the 90 day review of the listing petition. The USFWS and NOAA Fisheries can and should avail themselves of the States' expertise by contracting with (or by use of other means) the States to provide these data and analysis.

Presumption of State Information: If a determination is made that substantial information is submitted with a listing petition, the Secretary should be required to provide all listing petitions to the appropriate State fish and wildlife agency or agencies for review as H.R. 3824 proposes. We recommend further, that there should be a statutory rebuttable presumption in favor of State information and recommendations on listing, which the Secretary could refute if the Secretary disagreed with the State recommendation, only through required use of formal peer review. The Secretary would, however, retain authority for the final decision regarding listing.

With respect to Recovery Plans, Congress needs to make these more meaningful with both incentives and obligations for all parties to the plan. H.R. 3824 is a step in the right direction, particularly with respect to financial incentives for private landowners to engage in conservation efforts identified in the recovery plan. However, with respect to other federal agencies, while H.R. 3824 authorizes and allows the Secretary to enter into an agreement with other federal agencies to implement the plan, in the absence of such an agreement, the recovery plan remains non-binding guidance. We encourage you consider providing further incentives such as expedited section 7 consultation for federal agency actions that are consistent with an approved recovery plan, in order to encourage other federal agency engagement. Meaningful recovery plans that are appropriately funded and implemented should be the blueprint for conservation of listed species, i.e. delivering on the ground what is necessary to bring those species to a point where the provisions under the ESA are no longer necessary.

We are encouraged that H.R. 3824 begins to address the complex issue of delineating state-specific recovery goals and objectives, as a means of articulating both approaches to recovery and opportunities for delisting as recovery is achieved. The latter will, we believe, provide very strong incentives for states and local partners to take aggressive conservation action on behalf of wide-ranging species. Perhaps as no other species has, the sage grouse provides clear instruction on how state-by-state conservation, with full engagement by local partners, can result in rangewide progress.

H.R. 3824 requires the development of criteria in the recovery plan identifying when species recovery is met but we strongly believe recovery plans must have a statutory trigger to compel the Secretary to initiate the down or de-listing process once population/habitat recovery objective are met. Further, the process to down or de-list needs to be expedited, which also requires a statutory change. The Secretary should be directed in statute to initiate the process for down or de-listing a species once the objective, measurable criteria as set forth in the recovery plans are reached.

The post de-listing monitoring obligations/process also needs revision—it is too onerous and subject to too much federal agency discretion. For example, the states believe that biological recovery objectives for grizzly bear have long been satisfied but the Service has never settled on a post—de-listing monitoring plan and thus until

very recently, held up a delisting proposal for this species. The same is true of the bald eagle. That is simply unacceptable and needs to be changed.

The Association recommends that Congress simply eliminate that part of the statute requiring federal approval of a post—delisting monitoring plan. Once delisted these species simply come back under the full and exclusive authority of the state fish and wildlife agencies; they don't fall off the jurisdictional radar screen. Guidance for developing post de-listing monitoring and other considerations can be part of the recovery plan. The Secretary would retain emergency authority to list a species under circumstances of precipitous decline.

Creating and implementing meaningful recovery plans will require both Congressional action in amending the ESA and as importantly, in appropriating adequate funding. We also recognize that it will require a significant shift in the focus and workload of the Service and NOAA—Fisheries in implementing the recovery plans, and in changing their budget focus from listing species and designating critical habitat to recovery emphasis. State fish and wildlife agencies should be given the opportunity to take the lead in developing and implementing recovery plans, and we see no provision authorizing that in H.R. 3824. In fact, we note with concern that H.R. 3824 appears to provide opportunity for the Service to bypass state fish and wildlife agency participation in recovery planning by authorizing the Service to enter into an agreement with private landowners to develop short and longer term recovery agreements. We strongly urge the addition of language affirming the states role in the full range of recovery planning and implementation. Since State Fish and Wildlife agencies are expected to play a significant role in drafting and implementing recovery plans, adequate funds will need to be made available to the states for that purpose.

With respect to the proposal in H.R. 3824 which would eliminate the statutory requirement to designate critical habitat, the Association is in agreement with moving critical habitat to the recovery planning process and to remove the statutory mandate to designate. However we recommend that the Secretary be provided the discretion to designate critical habitat when needed because there may be instances where protections through designation are appropriate and prudent. The statute needs to be appropriately amended so that the Secretary's discretion over when and whether or not to designate critical habitat is clarified and broadened. State agencies should be equal partners with federal agencies in evaluating the need for critical habitat and the rule-making and decision making process for identification and designation.

Finally, let me highlight another of our general principles "preventative conservation. The Association reemphasizes that it is vitally important to secure funding (separate from ESA) for the States to provide for conservation programs for nongame fish, wildlife and their habitats in order to facilitate a conservation safety net before it is necessary to impose the ESA to prevent species extinction. If we can address the limiting factors causing a species decline before they reach a stage where the ESA is the only protection against extinction, we can employ a series of voluntary, non-regulatory approaches that provide more flexibility and creativity for conservation programs with private landowners and other jurisdictional entities. This preventative management makes good biological and economic sense. However, emphasis on preventative conservation must be coupled with ensuring that the states' authorities in this area are not eroded through federal rulemaking under the ESA. As an example, when candidate species and other "at-risk" species are brought into federal ESA-based conservation agreements (e.g. Habitat Conservation Plans and Candidate Conservation Agreements). to which the state(s) may not even be a partner, if can serve as a strong disincentive for state conservation action.

We continue to urge Congress to look favorably on the dedication of funds from various potential sources (Outer Continental Shelf gas and oil royalties and leases; gas and oil royalties and leases from exploration and development on federal public lands; or other sources, that will be matched with state and private funds) to finance these state-based preventative conservation programs.

It is only through dedicated and assured funding that we can get out ahead of the curve of endangered species listing.

Thank you for the opportunity to share our perspectives and I would be pleased to answer any questions.

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

REAUTHORIZATION AND REFORM OF THE ENDANGERED SPECIES ACT: GENERAL PRINCIPLES

SEPTEMBER 30, 2004 [1]

Introduction

The Association affirms that the Endangered Species Act (ESA or Act) has been and must continue to be a vital conservation tool for protecting threatened and endangered species and their habitats. However, the Association recognizes that improvements are needed in the design and statutory basis of the Act, and in implementation and administration of the ESA.

In 30 plus years of experience with the ESA, the State Fish and Wildlife agencies have identified what works and what does not work in meeting the goals of the Act, and herein provide recommendations for necessary amendment or other reform through policy or regulation. Significant reform could free up human and financial resources to serve more species, put more money on the ground, and allow more people to interact positively with rare or declining species. The ESA must be streamlined for efficiency, amended to ensure increased authority and responsibility for the States, and reformed to provide increased certainty and technical assistance for landowners and water users, for example:

a. The Association concludes, from member agency involvement in the application of the Act, that the Act provides some degree of discretionary flexibility. However, administration of the Act often results in regulatory approaches and judicial challenges that are forced upon the Federal agencies by special interest groups and which alienate local communities and result in the courts deciding how the Act is applied.

b. The Association opines that this era of "conservation through conflict" has been beneficial to neither the health of the species and habitats the Act seeks to protect, nor the Act itself. In fact, it erodes rather than builds public support essential to achieving the admirable goals of the Act. Recent Federal agency movement toward increased State and public participation in recovery planning should be enhanced, but must recognize and respect State authorities and responsibilities for planning on-the-ground delivery of collaborative conservation programs. The States are not just another voice to be heard in the public process; they have a primary responsibility for wildlife conservation.

c. The Association opines that federal agencies have not recognized or applied the statutory distinction provided for between the classifications of "threatened" and "endangered" or fully embraced the role of the states in threatened and endangered species recovery. This has compromised effectiveness of the Act.

d. Similarly, the lack of consistent definitions of recovery (e.g. in terms of population size and distribution), "significant portion" of a species range, and what constitutes historical range and constituent elements of critical habitat has lead also to compromised effectiveness of the Act, and unnecessarily prolonged debate as to which conservation actions will be given priority for funding and implementation.

e. The Association advocates and supports efforts to take ecosystem and broader (e.g. regional) approaches to management and recovery, and to apply the Act to "clusters" or "guilds" of species, as already allowed for under the Act. These approaches greatly enhance the utility of the Act, and improve both the efficiency and efficacy of the listing, critical habitat designation, and recovery processes. Listed and imperiled species sharing a common habitat often require compatible protection and recovery actions. Therefore, the agencies should, where appropriate, more frequently employ this means of conservation.

f. The Association appreciates recent changes by the Administration to provide incentives to State and private landowners through new funding programs; to provide regulatory protections for landowners that voluntarily do good deeds to aid endangered species under safe harbor, candidate conservation and state conservation agreements; and to provide certainty of protections under the "no surprises" and "PECE" policies and enhancement of survival permits. These changes improve the effectiveness of the Act, and the Association advocates

[1] Adopted by the Association at the March 1993 meeting in Washington, D.C.; revised, modernized and approved at the September 1995 meeting in Branson, MO; and updated and adopted at the September 2004 meeting in Atlantic City, New Jersey. This position paper is an evolving work, reflecting the best information available at the time of adoption, but subject to change as new issues and information arise. Although adopted by the International Association of Fish and Wildlife Agencies, and endorsed by Regional Associations, each State reserves the prerogative to take its own position on issues of concern.

that, along with the changes recommended in this document, these policies be established in law.

Guiding Principles and Recommendations for Reform

I. Preventive and Restorative Management

The Association reaffirms its commitment to prudent, proactive conservation of fish, wildlife, and the natural communities on which they depend, so the need to impose the rigors of the ESA for common species is minimized and to ensure that species in greatest conservation need are restored. We do not advocate avoiding application of the Act; rather, we advocate addressing species and habitat declines by cooperative prevention strategies before a crisis situation is reached, and benefiting multiple species by taking a coordinated, comprehensive, management approach once species are listed. Federal and State agencies and their partners must, where possible, anticipate impacts on species and habitats, and address those factors comprehensively (where feasible) and proactively, rather than by reacting to them. We must design remedies that restore the few, and benefit the many.

The ESA should and does play a crucial role as the necessary tool of last resort for protecting against extinction, but it also must work in concert with, and not against, other management actions. In concert with preventive management actions, the ESA could not only restore species undergoing precipitous declines, but also ensure that they persist and never need the protections of the Act again.

Federal and State conservation agencies must cooperate fully in coordinating application of the many existing Federal statutes relating to public lands management (NFMA, FLPMA, etc.), habitat conservation (HCPs, SHAs, CCAAs, SCAs, Critical Habitat), and project impact review (ESA Section 7, NEPA, etc.); comparable State laws (nongame and endangered species laws; habitat protection laws; and environmental review statutes and programs); and county and local land-use planning ordinances and programs. A more comprehensive integration of the relevant statutes at all levels would enhance their utility for conservation of fish and wildlife and their habitats, ensure sustainability of ecological communities, restoration of species at risk, and preclude the need to list other species.

Further, there needs to be a major thrust to adequately fund endangered species recovery efforts and (distinct from ESA reauthorization) to fund broader State/Federal programs for conservation of the vast majority of non-game fish and wildlife species that are currently receiving far less than adequate attention, and thereby providing the means to prevent species from becoming endangered. Based programmatically on the highly successful Sportfish and Wildlife Restoration Programs under the Wallop-Breaux and Pittman-Robertson Acts, the fish and wildlife diversity funding initiatives of the past several years, which have been supported by IAFWA, all 56 fish and wildlife agencies among the States, and by a large and still-growing grass-roots coalition across the country, are intended to secure permanent, dedicated funding to provide among other things, for prevention of species imperilment, through development of comprehensive wildlife conservation strategies and provision of routine fish and wildlife management practices by the States and their conservation partners.

Finally, the Association encourages use of both legally binding State Conservation Agreements and inter- and intra-governmental agreements for candidate species and species of concern in lieu of listing them as candidate, threatened or endangered, where management actions specified under such Agreements can remove the threat(s) to the species. Broad, non-regulatory, landscape scale, comprehensive habitat-based agreements must also be encouraged. Clarification of the Endangered Species Act to recognize and support such cooperative agreements is required. Affirmation of State authority for non-listed species must be legislatively assured and the role of the State fish and wildlife agencies in this process must be institutionalized. By requiring the Secretary to concur with State-led conservation agreements involving affected jurisdictional entities and private landowners (where appropriate) that are determined by the Secretary to be adequate to address the needs of and recovery of declining or at-risk species, the Secretary will be legally shielded from a requirement to impose certain regulatory implications through suspension of the consequences of listing. Private landowners should be given legal assurances that, once they commit to certain responsibilities under such agreements, no additional liabilities will be imposed on them, unless by mutual agreement. The incentive for Federal agencies to participate is that they would incur no liability under Section 7 if actions to recover declining species were taken prior to listing.

II. The Role of State Fish and Wildlife Agencies

The Association advocates legislative assurance of the co-equal role of the State fish and wildlife agencies under the Act. Under the ESA, States share jurisdictional

authority for listed species, which is executed through a cooperative agreement (ESA Section 6) with the U.S. Fish and Wildlife Service (USFWS) or the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries). And yet, the State fish and wildlife agencies are often not adequately included in the implementation of the Act. The States, where they have the fiscal resources, expertise, staff, and political support to do so, should play a much greater role in administration of the Act with the USFWS and NOAA Fisheries. The Section 6 Cooperative Agreement should be redesigned to function as a true partnership agreement between and among the States, USFWS, and NOAA Fisheries, requiring close collaboration, coordination, and mutual agreement on implementation of all aspects of the Act. The Section 6 agreement can be the vehicle to identify the respective roles of the States and federal agencies. It should provide the flexibility to allow States that so chose to assume the lead for, or total assumption of, aspects such as pre-listing conservation, recovery planning and implementation oversight, SHA and HCP administration, delisting responsibilities, and post-delisting monitoring. Even when States do not take the lead, their involvement should be co-equal with the Federal agencies. States should also be given the financial resources to assume an expanded role in ESA administration and implementation.

There should be coordinated joint rulemaking and decision-making processes between and among the USFWS, NOAA Fisheries, and the State fish and wildlife agencies for administrative and regulatory actions. In the rare cases where the States, USFWS, and NOAA Fisheries cannot reach agreement on administrative, regulatory, and implementation actions, the respective Secretaries of Interior or Commerce should have the final decision to resolve disagreements.

The role of the State fish and wildlife agencies in coordination/co-administration of the Act with the Federal agencies must not be subject to the Federal Advisory Committee Act (FACA), since the States share jurisdictional authority with USFWS and NOAA Fisheries for listed species. It is simply not appropriate for the day-to-day cooperation between the States and Federal agencies to be subject to FACA. Thus, the ESA must be amended to ensure that FACA does not apply to any aspect of State participation in all aspects of the ESA.

III. Listing

The Association contends that other features of the Act, such as the recovery plan process, should provide sufficient latitude for balancing or harmonizing the needs (socio-economic) of mankind, without changing the listing process itself to embrace those issues. Listing should be decided based solely on biology, and States should be equal partners with the federal agencies in petition evaluation, data review, rulemaking and decision-making for all listing, downlisting and delisting actions.

The State fish and wildlife agencies can and should be fully empowered and authorized to facilitate the listing process. Areas of reform include:

a. **Prelisting Data Collection and Reviews:** State agencies have expertise in conducting population status inventories and geographic distribution surveys to facilitate review of which species should be advanced to the official proposed stage for listing consideration. The USFWS and NOAA Fisheries can and should avail themselves of this expertise by contracting with (or by use of other means) the States to provide these data and analyses.

b. **Reliance on Sound Science:** The threshold of what constitutes substantial information provided in a listing petition to warrant further consideration must be raised. The petitioner should be required to provide the data on which they are relying in the petition. The Services need broad flexibility to reject petitions lacking scientific basis.

c. **Adequate Time Frames for Listing Decisions:** The statutory time frames allowed for listing decisions are too short to provide for adequate information to be collected and analyzed. This causes a flawed decision making process precipitated by legal action. The Services should have flexibility to delay decisions, especially on species where there is little information with which to make a decision or in cases where major scientific studies are underway that will provide information for decision making.

d. **Presumption for State Information:** If a determination is made that substantial information is submitted with a listing petition, the Secretary should be required to provide all listing petitions to the appropriate State fish and wildlife agency or agencies for review. There should be a rebuttable presumption in favor of State information and recommendations on listing, which the Secretary should be required to refute through peer review if the Secretary disagreed with the State recommendation.

e. **Exclusions of a State or Geographic Area in the Listing Process:** The Act should provide greater flexibility to not list a distinct geographic area or

State within the range of a species if it is receiving adequate management within that portion of its range. Providing geographic exclusions will ensure that States that have adequate management programs for rare species are not penalized for lack of effort or result elsewhere, and would provide an incentive for States to provide adequate management. Similarly, there should be greater flexibility to delist a distinct geographic area or State within the range of a species where ESA protections are no longer needed.

f. **Joint Rule-Making and Decision Making Between the USFWS, NOAA Fisheries and the State Fish and Wildlife Agencies:** State agencies have jurisdictional authority for species prior to listing, and share jurisdiction for species when listed and during post-delisting monitoring stage. Because of this co-equal role with the Federal agencies, State agencies should be given the choice to participate fully in petition evaluation, data review and rule-making processes, and be given an equal say in listing decisions. Decisions should be made on a consensus basis, whenever possible, by the State agencies, USFWS, and NOAA Fisheries. If the partners cannot agree on a listing decision, the respective Secretary of Interior and Commerce should make the final decision.

IV. De-Listing

Efforts to recover listed species must receive enhanced attention, at least concomitant with the attention given to listing. The Association suggests that additional focus and attention on recovery planning and achievement will lead to species population status commensurate with down- or de-listing. Legislative criteria linking the process to initiate down- or de-listing action to meeting objectives in approved recovery plans should be mandated. Incremental down- or de-listing by State or geographic population should proceed with much greater priority than it now receives. De-listing must be maintained and activated based solely on biology. To emphasize the importance of the de-listing process, funding for de-listing actions should be increased and receive a specific-line item within the appropriations provided for listing actions. Until the USFWS catches up with the backlog of listing proposals, delisting actions too often get relegated to a low priority because of the process pressures and legal challenges with many listing petitions. This approach does not recognize the importance of acknowledging and rewarding accomplishments under the Act to building public support for the Act and the conservation programs carried out under it.

The Association advocates that the States be authorized to design and develop monitoring programs on de-listed species, with recognized (by the federal agencies) full legal responsibility for species conservation, and report annually to the Secretary during the five-year period on the status of the monitored species. Funds must also be provided to the States to conduct these monitoring and evaluation efforts.

V. Critical Habitat Designation

The Association advocates that critical habitat designation should occur concurrently with recovery planning, except when there is an urgent eminent threat to a significant amount of occupied habitat that would warrant designation at the time of listing. The Secretary should retain discretionary authority over when and whether or not to designate critical habitat, and not be under a statutory mandate to always designate critical habitat. State agencies should be equal partners with the Federal agencies in evaluating the need, planning, identifying areas, rule-making, and decision making processes for all critical habitat designations.

State fish and wildlife agencies have expertise, knowledge and data regarding a species extant and historic ranges, where it may now be extirpated, and which habitats might have the potential to facilitate species recovery. Habitats for recovery may include those that were historically occupied, if they are still capable of supporting the species; in the absence of such areas, non-occupied but potential habitat should be identified for recovery. Whether either or both kinds should be identified as "critical habitat" must be decided on a species-by-species basis. The Association recommends clarifying the regulatory implications of what constitutes "adverse modification of critical habitat" (discussed in the section on Prohibited Acts).

The Association recognizes the value of voluntary non-regulatory efforts of many landowners to protect, manage and restore habitats needed for recovery. Many landowners have implemented or are willing to commit to implement management programs that equal the biological protections of critical habitat. Providing these conscientious landowners with protections from the regulatory implications of critical habitat designations rewards their good acts and provides incentive for other landowners to do likewise. The Act provides that the Secretary has discretion to exclude areas for critical habitat designation, if the benefits of exclusion outweigh the

benefits of designation. The Association recommends expanding the types and use of exclusions and institutionalizing them in policy and statute, including:

a. exclusion of all lands covered by a HCP, SCA, SHA, or other approved conservation plan from critical habitat designations;
b. exclusion of State lands that have protection equivalent to that provided by designation of critical habitat; which provide a net benefit to the species through protection and management of the land; and which have an effective management program;
c. exclusion of county and private lands under a cooperative management agreement between the State and the Service, another Federal agency, or private conservation organization or partnership that has protection equivalent to that provided by designation of critical habitat; provides a net benefit to the species through protection and management of the land; and which provides an effective management program;
d. exclusion for important Military training areas that have adequate Integrated Natural Resource Management Plans;
e. provide a stewardship incentive exclusion for state, county and private lands that would be voluntarily entered into conservation partnerships or some other form of management agreement;
f. automatic removal of critical habitat designations for all future HCPs, SCAs, and SHAs when approved by the Service according to standards that the plans or agreements achieve a net conservation benefit and have undergone public review.

VI. Recovery Plans/Recovery Teams

Once a species is listed, States must make every effort to address the factors that will result in recovery of the species and its ultimate delisting. The intent of the Act is to recover species, not just list them. The States can and must play a major role in recovery planning and implementation. State fish and wildlife agencies should always be given the opportunity to take the lead on recovery planning, or in the absence of an appointed recovery team or appropriate surrogate, to provide professional review of draft recovery plans prepared by a FWS or NOAA Fisheries staff or contractor. The utility of a team approach not only provides for application of a broad base of knowledge and perspectives, but also better intergovernmental coordination regarding biological, social, economic and environmental factors. State fish and wildlife agency participation brings management expertise, practicality, and experience in working with both private landowners and local land use regulatory agencies (county Planning and Zoning agencies, for example), both of which are vital to success of recovery programs.

Recovery plans should present a number of recovery options that are technically feasible and will lead to species recovery and delisting. Different recovery options may have significantly different social, economic and environmental consequences. Statutory deadlines should be imposed on the agencies to produce a draft recovery plan no later than 2 years after listing, a final recovery plan not later than 3 years after listing, and a revision every 10 years. Recovery plans should:

a. identify jurisdictional responsibilities through implementation agreements;
b. provide multiple recovery approaches that are technically feasible, as options for agencies to use to best meet social, economic, and environmental needs;
c. have the flexibility to provide short term interim management strategies for those species for which there is little information with which to develop a full recovery plan or when interim recovery strategies are the best approach to stabilize populations;
d. identify specific (i.e. quantified, measurable) population and habitat objectives that, when attained, trigger down or delisting;
e. include appropriately documented and credible justification for all goals, objectives, and implementation approaches;
f. identify habitat important for recovery of the species, designate (if appropriate) critical habitat for regulatory purposes; and provide an indication of important habitat factors necessary for the species—i.e., simple protection may not be the best course of action—recovery and maintenance may require habitat changes such as openings, diversity, early successional stages, etc.;
g. provide pro forma Section 7 approval for Federal agency and State agency actions that are consistent with recovery plans;
h. provide "short form" HCPs for private landowners for certain activities, and (where appropriate) exemption from Section 9 and 10 restrictions for others;
i. provide certainty to cooperating landowners regarding their fate under the ESA;
j. be exempt from NEPA, if comparable State process is satisfied; and

k. satisfy plan amendment requirements for ESA under NFMA, FLPMA and other Federal land management acts, if the proposed actions are consistent with the appropriate recovery plan.

VII. Distinction between Threatened and Endangered

The ESA distinguishes between "threatened" and "endangered" species, with the status of "endangered" being subject to more protective regimes than "threatened". Clearly, two separate categories were legislatively provided for in the Act for very definite and distinct purposes. Although threatened species are imperiled and at risk of becoming endangered, there is greater leeway for management flexibility and protections provided. The USFWS and NOAA Fisheries apply rules for protecting endangered species to threatened species as well, regardless of whether additional protections are warranted. The agencies or congress must reassert the distinction between these classifications in the Act, including greater application and involvement by the States in development of Section 4(d) rules allowing for management flexibility.

VIII. State Conservation Agreements, Candidate Conservation Agreements, Safe Harbor Agreements and Habitat Conservation Plans

The Association supports the use of state conservation agreements, candidate conservation agreements, safe harbor agreements, and habitat conservation plans. The State fish and wildlife agencies can provide contacts, expertise, and knowledge to contribute toward successful use of these tools in conserving listed species and their habitats. The use and applications of these tools should be more fully clarified and understood by all agencies. State Conservation Agreements, Candidate Conservation Agreements, and Safe Harbor Agreements provide incentives to states and private landowners to invest in conserving rare species and in recovering species that are listed. They can remove the threat of future regulatory restrictions that are too often associated with listed species. Habitat Conservation Plans, in their limited application thus far, have already been used effectively to bring together affected and interested parties, to examine and agree on short-term objectives and long-term goals, and provide certainty to the recovery process while minimizing impacts on private lands and meeting the recovery needs of affected species. The Act should be amended to specifically include these as recovery tools.

IX. Certainty and Incentives for Private Landowners

Private landowners can play a major positive role in species recovery, if they are involved in the process early, given appropriate information on what they can and cannot do, and have certainty about the fate of their own land management practices under ESA. Most landowners want to be good stewards of their land. Most will work with fish and wildlife resources agencies, if they are approached with courtesy and respect, and sensitivity to their interests and plans. Federal agencies and States must do a better job of matching existing incentives (under several programs at all government levels, such as Farm Bill programs, the Landowner Incentives Program, and Private Lands Stewardship Program, etc.) with landowners who are interested in conservation. In return, Federal and State agencies need to assure landowners that, if they agree to certain habitat conservation measures, we will not require any more of them. This certainty must be assured for prelisting State Conservation Agreements, Safe Harbor Agreements, and Habitat Conservation Plans.

Several areas are ripe for providing additional monetary conservation incentives for private landowners including changes to inheritance tax law to remove the disincentive that forces the breaking up of large tracts of land to pay taxes; and establishment of a permanent statutory basis for the Landowner Incentive Program for fish and wildlife habitat conservation on private lands.

X. Prohibited Acts

The Association advocates that the USFWS and NOAA Fisheries clarify the standards they will apply in making a determination if alteration to habitat constitutes harm, and thus a "take" under Section 9 of the Act. Not all habitat actions lead to species decline; some disturbance, in fact, may be vital to recovery of species dependent on early successional stages.

The Act should be amended to affirm the current regulatory standard for prohibiting "destruction or adverse modification of critical habitat" for federal actions under the Section 7 process. The prohibition now applies if the "destruction or adverse modification of critical habitat" would jeopardize the continued existence of a listed or proposed species. The Association is concerned that a more restrictive standard, i.e. one that would prohibit any minor loss or adverse modification of critical habitat, would establish quasi-sanctuaries on state and private land and create regulatory grid-lock for many federal actions including those funding State

programs. The Act needs to provide both adequate protection and flexibility to manage the quantity, quality and location of critical habitat for species recovery. The Association believes that as long as adequate mitigation is required in the Section 7 process to offset any minor loss or adverse modification of critical habitat, than the current "jeopardy" regulatory standard is appropriate.

XI. Funding

The Association supports enhanced appropriated funding for all aspects of the ESA. We realize the challenges faced by Congress in meeting all national needs. However, we strongly urge a re-focus of appropriated dollars so that Section 6 funding can be significantly increased, if necessary by reallocating non-traditional Section 6 granting funds. The amount available in recent fiscal years to States is both grossly inadequate, and not at all proportionate to the responsibility of the State fish and wildlife agencies for listed species. The amount of funding provided under the program has not grown in relation to increases in the number of listed species. In 1977, Congress provided $4.2 million for assistance to states to deal with 194 listed species. In 2002, the number of listed species (1,263) was more than six times as large, yet Congress provided just $7.52 million for assistance to States. This represents a decline in real support for this program, when adjusted for inflation. We also suggest that as States assume a greater lead in administering the ESA, Congress should redirect other Federal appropriations now going to USFWS and NOAA Fisheries to the States for funding implementation of the Act.

At the same time, we believe that existing funding must be more effectively spent, and alternative-funding sources should be fully explored. The Association suggests that continuing to spend substantial money on species that are essentially recovered, at least in part of their range (such as the bald eagle), should be from sources other than those available under the ESA. The USFWS, NOAA Fisheries, and State fish and wildlife agencies all need to explore processes for assigning funding to listed species to ensure that those in the most significant need of recovery attention (and not just those that are the most charismatic) are addressed first.

Finally, the Association reemphasizes that it is vitally important to secure funding (separate from ESA) for the States to provide support for conservation programs for nongame fish, wildlife and their habitats in order to facilitate a conservation safety net before it is necessary to impose the ESA to prevent species extinction. This preventive management makes good biological and economic sense.

The Association's Teaming With Wildlife initiative, and other wildlife diversity funding programs that build on the tremendously successful Pittman-Robertson and Wallop-Breaux user pay-user benefit programs for wildlife and sportfish, would provide new reliable sources of funding for State programs. These funds should be allocated to the States for conservation, recreation and education programs relating to fish and wildlife and their habitats. If we can address the limiting factors causing a species decline before they reach a stage where the ESA is the only protection against extinction, we can employ a series of voluntary, non-regulatory approaches that provide more flexibility and creativity for conservation programs with private landowners and other jurisdictional entities.

The CHAIRMAN. Thank you.

Ms. Clark.

STATEMENT OF JAMIE RAPPAPORT CLARK, DEFENDERS OF WILDLIFE

Ms. CLARK. Thank you, Mr. Chairman, and members of the Committee. I appreciate the invitation to speak on behalf of Defenders of Wildlife, Environmental Defense and World Wildlife Fund on H.R. 3824.

Before coming to Defenders of Wildlife, I worked for the Federal Government for almost 20 years for both the Department of Defense and Department of the Interior. I have seen the Endangered Species Act from different perspectives, that of an agency working to comply with the law, leading the agency charged along with other Federal agencies, States and private landowners with implementing the law, and now from a conservation organization

working to ensure the law is fully implemented to conserve endangered and threatened plants and wildlife.

The common lesson I've drawn from all these experiences is that the Endangered Species Act is one of our most farsighted and important conservation laws. That's why it is so important to make sure that any changes to the Act will make it more effective in conserving species and their habitat.

As you know, Mr. Chairman, our organizations were asked by Mr. Rahall to provide technical assistance to him in his negotiations with you over this bill. We did so, and having heard you say many times that you believe that the Act was not doing a good enough job recovering species, we were hopeful that you and Mr. Rahall could reach agreement on a bill that would enhance the recovery of species.

Frankly, Mr. Chairman, after reviewing the bill when it became available 2 days ago, we were very disappointed. Far from enhancing species recovery, H.R. 3824 will not only actually undermine species recovery in several important ways but could lead to further species extinctions. I have described these in detail in my written testimony but will highlight four major problems this afternoon.

First, the bill eliminates the protection of critical habitat but fails to replace it with adequately protected habitat necessary for the recovery of endangered species.

Second, the bill undermines the fundamental requirement of the Act that Federal agencies consult with the Secretary to ensure their actions will not jeopardize threatened or endangered species, removing the essential checks and balances of section 7 consultation and the benefit of expert advice from the services.

Third, the bill creates a windfall for developers by allowing them to bypass by the Act's prohibition against killing or injuring endangered species and its procedures for mitigating the impacts of such takes by requiring that it will take permit or statement.

Fourth, the bill eliminates protection for threatened species, species such as the bald eagle, the loggerhead sea turtle, the southern sea otter by deleting the current mandatory requirement that the Secretary issue regulations that are necessary and advisable for the conservation of threatened species.

In evaluating any bill to change the Endangered Species Act, the benchmark has to be: Does it truly aid species conservation? If the answer is, no, then we have failed. By that measure, H.R. 3824 is a failure because it clearly will undermine species conservation.

There is a better way. The Endangered Species Act can be improved to enhance species conservation and make the law more workable for landowners and others, and we suggest the following steps.

First, make species recovery the central focus of the Act. There are three essential elements. One, provide an unambiguous statutory definition of jeopardy as any action that will impair species recovery. Two, require that the habitat necessary for the recovery of a species be identified in recovery plans. And, three, require that the impact of agency actions on this habitat be considered in determining whether the action will result in jeopardy to a threatened or endangered species. Changes to the critical habitat provisions of

the law today should only be considered if these three elements are first in place.

Second, enhance the science underlying species conservation by establishing science advisory boards for the Fish and Wildlife Service and the National Fishery Service modeled after those very successfully used by the Environmental Protection Agency. Rather than Congress telling agencies what constitutes best available science, provide the resources and allow the agencies to seek the advice of clearly qualified scientists.

Third, promote greater partnerships with the States. Section 6 of the Act should be amended to specify that there be consultation with state fish and wildlife and conservation agencies on the full range of endangered species decisions from conservation of candidate species to recovery of listed species. Federal funding in support of State conservation efforts should be increased as well.

Fourth, provide incentives for conservation on private lands.

And, fifth, funding for implementation of the Act should be dramatically increased.

With these steps, the Endangered Species Act can be improved to enhance its ability to recover species. With these steps, you can keep the commitment to future generations Congress made in 1973 when it adopted the Endangered Species Act. Thank you.

[The prepared statement of Mr. Clark follows:]

Statement of Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife, on behalf of Defenders of Wildlife, Environmental Defense, and World Wildlife Fund

Mr. Chairman, Mr. Rahall, and Members of the Committee, I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife. Thank you for this opportunity to present the views of Defenders of Wildlife, Environmental Defense, and World Wildlife Fund on H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005.

SUCCESS OF THE ENDANGERED SPECIES ACT

Prior to coming to Defenders of Wildlife, I worked for the federal government for almost 20 years, for both the Department of Defense and the Department of the Interior. I served as Director of the U.S. Fish and Wildlife Service from 1997 to 2001. Thus, I have seen the Endangered Species Act from different perspectives: that of an agency working to comply with the law; leading the agency charged, along with other federal agencies, states, and private landowners, with implementing the law; and now leading a conservation organization working to ensure that the law is fully implemented to conserve threatened and endangered plants and wildlife.

The common lesson I have drawn from all of these experiences is that the Endangered Species Act is one of our most farsighted and important conservation laws. For more than 30 years, the Endangered Species Act has sounded the alarm and saved wildlife that we humans have driven toward extinction. Today, we have wolves in Yellowstone, manatees in Florida, and sea otters in California, largely because of the Act. We can still see bald eagles in the lower 48 states and other magnificent creatures like the peregrine falcon, the American alligator, and California condors, largely because of the Act.

Indeed, there can be no denying that, with the Endangered Species Act's help, hundreds of species have been rescued from the catastrophic permanence of extinction. Many have seen their populations stabilized; some have actually seen their populations grow. Some have even benefited from comprehensive recovery and habitat conservation efforts to the point where they no longer need the protections of the Act.

In so many ways, Congress was prescient in the original construction of the Endangered Species Act. First, it crafted an Act that spoke specifically to the value—tangible and intangible—of conserving species for future generations, a key point sometimes lost in today's discussions.

Second, it addressed a problem that, at the time, was only just beginning to be understood: our looming extinction crisis. Currently there is little doubt left in the

minds of professional biologists that Earth is faced with a mounting loss of species that threatens to rival the great mass extinctions of the geological record. Human activities have brought the Earth to the brink of this crisis. Many biologists today say that coming decades will see the loss of large numbers of species. These extinctions will alter not only biological diversity but also the evolutionary processes by which diversity is generated and maintained. Extinction is now proceeding one thousand times faster than the planet's historic rate.

Lastly, in passing the Act, Congress recognized another key fact that subsequent scientific understanding has only confirmed: the best way to protect species is to conserve their habitat. Today, loss of habitat is widely considered by scientists to be the primary cause of species endangerment and extinction.

Reduced to its core, the Act simply says the federal government must identify species threatened with extinction, identify habitat they need to survive, and help protect both accordingly. And it has worked. More than 1800 species currently protected by the Act are still with us; only 9 have been declared extinct. That's an astonishing success rate of more than 99 percent. It highlights that the first step toward recovering a species is to halt its decline.

With this record in mind, the benchmark against which to measure any proposal to change the Act is: Does it truly aid species conservation? If the answer is no, then we have failed.

H.R. 3824 UNDERMINES SPECIES RECOVERY

Mr. Chairman, you have been quite critical of the Act for not doing a better job of recovering species. The Act can be improved to better promote species recovery. Unfortunately, the bill you have introduced, H.R. 3824, is very disappointing. Instead of promoting recovery, H.R. 3824 would deal a tremendous setback to the recovery of threatened and endangered species.

H.R. 3824 undermines species recovery in several ways:

1. H.R. 3824 Fails to Protect Habitat Necessary For Species Recovery

H.R. 3824 establishes new recovery planning requirements that fail to ensure that habitat necessary for species recovery will be adequately protected or even considered in determining, under section 7 of the Act, whether agency actions are likely to jeopardize the continued existence of threatened and endangered species. Thus, the bill's elimination of critical habitat without providing an improved way of protecting habitat essential to species recovery is a significant step backward, one that seriously undermines the purpose and intent of the law.

2. H.R. 3824 Weakens the Obligation of Federal Agencies to Consult on Their Actions

H.R. 3824 significantly weakens the substantive and procedural protections of section 7, generally considered the Act's most important and effective provision. For example, authorizing the Secretary to establish undefined "alternative procedures" for complying with section 7 could all but eliminate the current requirement that each federal agency consult with the Services on "any action" which is likely to harm endangered or threatened species. Further, H.R. 3824 creates several exemptions from the requirements of section 7 with respect to section 10 conservation plans and section 6 cooperative agreements. If federal agencies are not even required to engage in section 7 consultation, the bill makes it highly unlikely that they will do anything to promote species recovery.

3. H.R. 3824 Creates a De Facto Exemption From the Prohibition Against Take of Endangered Species

H.R. 3824 creates a broad and unwarranted de facto exemption from the current prohibition against take of an endangered species, contained in section 9 of the Act. Under H.R. 3824, a landowner can demand from the Secretary a written determination of whether a proposed activity will violate the take prohibition. If the Secretary fails to respond within 90 days, the bill provides that this shall be deemed a determination that the activity will not result in a take. Given the overburdened U.S. Fish and Wildlife Service, bogged down already in a morass of missed deadlines, it is easy to see how landowners will be able to secure de facto exemptions from the Act simply by waiting 91 days. Not only will this impede species recovery, it may result in piecemeal whittling away of important habitat, thereby accelerating species extinctions.

4. H.R. 3824 Weakens Protection of Threatened Species

H.R. 3824 undercuts prospects for recovery of threatened species as well as endangered species. Currently, section 4 of the Act requires regulations for threatened species that meet a highly protective standard: "necessary and advisable for

the conservation" of the species. In other words, under current law, the Secretary is required to issue regulations that are necessary and advisable for the recovery of threatened species. H.R. 3824 eliminates any requirement whatsoever for regulations protecting threatened species. Moreover, even where the Secretary chooses to issue a regulation for a threatened species, H.R. 3824 eliminates the protective standard for such regulations.

5. H.R. 3824 Weakens the Scientific Foundation for Endangered Species Decisions

H.R. 3824 weakens the role of science in virtually every decision under the Act. Language requiring scientific information to comply with the Data Quality Act, to be empirical, peer-reviewed, and consistent with yet-to-be-written regulations before it can be considered the "best scientific data available" creates new procedural hurdles that threaten to exclude important scientific information such as population modeling and projections. Moreover, by failing to provide additional resources to comply with these new requirements, while maintaining and adding new deadlines, the bill virtually guarantees continued problems implementing the Act, further reducing the likelihood of species recovery.

6. H.R. 3824 Eliminates the Endangered Species Committee, the Act's Ultimate Safety Valve

H.R. 3824 eliminates the Cabinet-level Endangered Species Committee, established by Congress in 1978 to resolve truly irreconcilable conflicts between species conservation and development. The exemption provisions contained in section 7(e)-(n) have only rarely been used, testifying to the Act's flexibility for resolving conflicts. Nevertheless, the availability of the Endangered Species Committee, with its power to decide the ultimate fate of a species, has served as an important caution sign and an essential safety valve for conflict resolution. Eliminating it will only lead to further controversy over species conservation, rather than promoting species recovery.

7. H.R. 3824 Requires Taxpayers to Pay Developers and Corporations Not to Violate the Law

H.R. 3824 requires taxpayers to pay developers, corporations, and others the fair market value of any use of their property which is determined to violate the prohibition against take of an endangered species. Under the bill, developers are not required to first avail themselves of the Act's permit procedures under section 10 or, if a federal permit is involved, section 7 consultation. There is no requirement that the proposed activity be more than speculative and there is no limit on the number of times a developer can receive compensation for different proposed activities on his or her land. Thus, a developer might propose construction of a shopping center that will wipe out the habitat of an endangered species. Once the developer has been compensated for that use, he or she can propose an office park on the site and become entitled to compensation again. Instead of promoting species recovery, this provision creates a windfall for developers and corporations, requiring taxpayers to pay them over and over again for not killing or injuring endangered species.

IMPROVING SPECIES RECOVERY UNDER THE ACT

Mr. Chairman, your bill, H.R. 3824, will not make the Endangered Species Act do a better job at recovering species or improve the Act generally. Those goals are achievable, however, if this Committee and the Congress will take a more productive path The following steps would improve the Act and ensure it works better for all stakeholders:

1. Make species recovery the central focus of the Act
2. Properly protect and manage habitat that is needed for species recovery.
3. Enhance the science underlying endangered species conservation
4. Promote greater partnerships with the states
5. Provide incentives for conservation on private lands
6. Significantly increase funding for the Act

Allow me to elaborate on each of these recommendations.

1. Make species recovery the central focus of the Act

The goal of the Act is to conserve species and the ecosystems upon which they depend. Section 3(3) of the Act defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." In other words, the goal of the Act is to recover species. Implementing that goal has, however, been elusive.

We can make the ESA more effective for species and less onerous for landowners by ensuring that federal agencies do their part to promote species recovery. That

means making sure that federal agencies are held to a high standard. If federal agencies are allowed to do things that make recovery less likely to occur, that push recovery off into the distant future, or that increase the cost of recovery, not only will species conservation suffer but the regulation of private landowners and others will almost certainly increase. Yet, federal agencies have been allowed to do exactly that.

Section 7 of the Act requires all federal agencies to consult with the Secretary of the Interior or Commerce to insure that their actions are not likely to jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat. However, there is no statutory definition of jeopardy in current law. The only definition of jeopardy is regulatory and several courts have now found that definition invalid because it ignores the effects of an action on species recovery.

As federal agencies have ignored the effects of their actions on recovery of species, recovery has become an ever more distant goal. Consequently, the burden on private landowners to make up for what the federal agencies have not done has grown ever greater. If you really want to make the Act more effective at recovering species and less burdensome for private landowners, you can do that in one simple step: define jeopardy in the Act so that agencies insure that their actions will not make it less likely that a species will recover or significantly delay or increase the cost of recovery.

The goal of recovering species and, therefore, the definition of jeopardy, should be clear and unambiguous, without any qualifications such as "in the long-term." The addition of that phrase creates a serious risk that actions that have substantial adverse impacts on a species, but are of short duration, may not be seen as jeopardizing the continued existence of the species. By adopting an unambiguous definition of jeopardy, Congress will make clear that the central goal of the Act is to recover species and that section 7 consultations on federal agency actions must assess whether the actions are likely to impair recovery.

2. Properly protect and manage habitat that is needed for species recovery

Since species recovery is the central goal of the Act, the key step in achieving that goal is properly protecting and managing habitat necessary for species recovery. Accordingly, the Act should make clear that the habitat necessary for recovery needs to be identified and protected. The recovery plan is the logical and appropriate place to achieve this.

Section 4(f) of the Act requires the Secretary to develop and implement recovery plans. In order to make these plans truly effective in achieving species recovery, several changes should be made. First, there should be a deadline for developing recovery plans, perhaps 36 months from the date a species is listed. Second, specific areas of land or water that are of particular value to the conservation of the species and that are likely to require management or protection in order to accomplish the goals of the recovery plan should be identified. Third, there should be a clear requirement that, in considering whether a federal agency action is likely to jeopardize a listed species, the effects of the action on the habitat identified in the recovery plan must be considered.

Adoption of these measures, in combination with a clear statutory definition of jeopardy tied to a recovery standard, could eliminate the need for designation of critical habitat. If such measures were adopted, designated critical habitat should be treated as habitat necessary for recovery in the interim while habitat necessary for recovery is identified,.

3. Enhance the science underlying species conservation

There has been much debate over the quality of science underlying endangered species conservation decisions. Unfortunately, most of the proposals to address this, including H.R. 3824, have focused on restricting the types of data that can be considered or requiring time-consuming and cumbersome peer-review of virtually all conservation decisions. Rather than throwing more roadblocks in the way of consideration of the best available science, as the Act requires, you should increase the scientific capacity of the FWS and NMFS by creating for each of them a science advisory board modeled after the very successful science advisory board of the EPA. In that manner, rather than having Congress tell these agencies how they should do science—Congress can give them the benefit of useful input from scientifically qualified authorities.

4. Promote greater partnerships with the states

An important way to strengthen the Act is to take full advantage of the experience, expertise, and other strengths of state fish and wildlife and conservation agencies. The role of the states in the conservation of imperiled species should be strengthened and improved by fostering a stronger partnership between the states

and the federal government. Currently, section 6 of the Act calls generally for cooperation between state and federal governments, but specifically addresses only the acquisition and management of land. Section 6 should be amended to specify that there be consultation with the State agencies concerned regarding revisions of the list of endangered species and threatened species, development and implementation of recovery plans, acquisition of lands, waters, or interests therein, issuance of permits, and measures to direct attention and resources to species before they become endangered or threatened.

As a further step in this direction, section 6 should be amended to replace the current system of "full authorities" and "limited authorities" cooperative agreements, with a simpler and more meaningful approach. States should have the flexibility to enter into cooperative agreements covering as many—or as few—species as the states choose. For each species covered by a proposed agreement, the state must demonstrate that it has an "adequate and active conservation program" that includes scientific resource management of such species and that is consistent with the purposes and policies of the Endangered Species Act. The allocation of federal funds to the states in support of their programs should be based on a somewhat shorter, but more meaningful set of criteria. First among these is the number of species to which the cooperative agreement applies. In addition, strong enforcement provisions, species recovery requirements, and adequate funding and staffing to implement state endangered species programs should be considered.

5. Provide incentives for conservation on private lands

Most private landowners are good stewards of their land. The Act should encourage this conduct by providing financial and regulatory incentives for conservation. Using existing programs, such as the Partners for Fish and Wildlife program and Farm Bill conservation programs to contribute to the conservation of endangered species should be encouraged. Providing landowners with safe-harbor assurances for their voluntary actions promoting species conservation should likewise be encouraged. Establishing a program to provide financial assistance for the implementation of conservation measures under safe harbor agreements would also encourage the broader use of such agreements.

6. Significantly increase funding for the Act

Everyone knows the U.S. Fish and Wildlife Service and NOAA are chronically under funded to carry out their responsibilities under the Endangered Species Act. Interestingly, it would not take much to change that. Devoting a mere fraction of the money the government spends on roads, mines, timber hauls and other "habitat-busting" projects instead to endangered species conservation would pay dramatic dividends, both for species conservation and for the regulated community waiting for decisions on permits and plans.

CONCLUSION

When Congress adopted the Endangered Species Act more than thirty years ago, it made a commitment to future generations to protect and restore endangered species and their habitat. As this Committee considers changes to the Act, you should ask yourselves whether you are keeping that commitment. H.R. 3824 reneges on that commitment by undermining the Endangered Species Act's effectiveness at recovering threatened and endangered species. The changes I have outlined today would make the Act more effective in conserving species and, in so doing, keep the Endangered Species Act's commitment to our children, grandchildren, and generations to come.

Thank you for considering my testimony. I'll be happy to answer questions.

The CHAIRMAN. Thank you.

Mr. Burling.

STATEMENT OF JAMES S. BURLING, PRINCIPAL ATTORNEY, PROPERTY RIGHTS SECTION, PACIFIC LEGAL FOUNDATION

Mr. BURLING. Thank you, Mr. Chairman, members of the Committee for this opportunity to talk about the Threatened and Endangered Species Recovery Act of 2005.

The Endangered Species Act up to date has shown much promise that has not been fulfilled. Over 1,300 species have been listed, 10 recovered. What we have seen from the Endangered Species Act is

an intrusion by the Federal Government into the minutia of local decisionmaking on how people can use their own land. It has led to a decimation of certain resource industries and a perception from the public that the Act is clearly flawed.

If landowners are made part of the process of species recovery, we can go a long way; 75 percent of all listed species have habitat on private property. Private property owners and private water owners really can make a difference in converting—in the conversion of these landowners from antagonists into allies for conservation.

One of the problems that we have now that is addressed in this bill is landowners having an inability to learn from the Fish and Wildlife Service and the Federal Government what they can and cannot do with their land. Landowners have a Hobson's choice: If they have property that may be a habitat for an endangered species and they choose to use that property, they can go to jail. If instead they want to go to the Federal Government and say, is my use of this property going to impact and violate the Endangered Species Act, they don't get an answer. They are told, perhaps you can go through a habitat conservation plan costing tens of thousands of dollars.

We represented a gentleman, Robert Morris, who had wanted to cut five trees on his property. The trees provided shade for riparian habitat. He was told that if he cut the trees, he may end up violating the ESA, but he was not told definitely that he would. And he was never able to get a final determination from the government, therefore never able to go to court to seek compensation. We have many other examples like that.

Mr. BURLING. This determination allows landowners to put their proposal forth to the government asking, is this going to violate the Act or not?

It does have limitations on the amount of information requests right now that the Federal Government can ask a landowner to provide. I have litigated too many cases where landowners have had endless times of going back and asking for more and more and more and more information, at tens and tens of thousands of dollars of costs, achieving nothing but delay and robbing the bank account of the landowner.

Under this provision, if you had a timber harvest owner, like Mr. Morris, he could find out definitely whether cutting his five trees is going to violate the Act. If it is, then they move on the aid package after that. But it does take the landowner out of eternal limbo.

Section 14 provides a much needed grants and aids provision. It can, for example, help provide develop new forestry techniques, new farming techniques, new mining reclamation techniques and new water utilization processes that would help protect an endangered species. And grants can certainly go a long way to helping that.

The aid provision will provide aid to compensate landowners for the fair market value of the forgone use. I see that particular language as being a limitation on the government's liability because we are talking about, say, in the case in Mr. Morris, we are talking about compensation for the inability to cut those five trees, not for the full fair market value of the property, but for those five trees.

Say hypothetically that these trees could not be cut because it was a spotted owl habitat. It may be that the Fish and Wildlife Service may think that the spotted owl may not be there in several years; time limitations could be put on the process of compensation. That is why I believe this Act has 180 days that the landowner would negotiate with the Secretary over the particular details.

Now, there are provisions that say, if you want to do a nuisance, say that if a landowner wanted to build in a riparian habitat and the State's law of nuisance and the public trust document prohibited that, that landowner would not be entitled to aid. On the other hand, if a landowner wanted to put property to a use that is prohibited by State or local zoning or that is prohibited, for example, from the provisions of a habitat conservation plan, then taking into account fair market value of the property, the fair market value would reflect the fact that you can't use this property for particular ways and a particular manner, and the fair market value is discounted.

In litigation dealing with fair market value that the Federal Government has had for many, many years, we know that the fair market value is what a willing seller will pay to a willing buyer for property. That would not include putting a skyscraper in a corn field. But it would perhaps include cutting down some trees on the property as part of a lawful timber harvest program. Thank you.

[The prepared statement of Mr. Burling follows:]

Statement of James S. Burling, Principal Attorney, Property Rights Section, Pacific Legal Foundation

Mr. Chairman, members of the committee, on behalf of Pacific Legal Foundation (PLF), I thank you for this opportunity to comment on the proposed Threatened and Endangered Species Recovery Act of 2005.

In its 32 years of existence, the Endangered Species Act (ESA) has had little success at achieving its potential of conserving and recovering species. Unfortunately, it has been more successful at creating deep divisions between landowners and federal regulators. Of the 1,300 species listed under the Act, only 10 domestic species have been recovered and delisted and the relationship between the ESA and those recoveries is doubtful, at best. From the countless battles over various land uses across the nation, to the intrusion of the federal government into the minutiae of local land use decision-making, to the decimation of certain natural resource industries, and to the widespread public perception that the ESA is severely flawed and broken, the ESA has done far more to make life miserable for humans than it has for meeting its goals of the conservation and recovery of threatened and endangered species.

Approximately 75% of all listed species have habitat on private property. See Accounting for Species: The True Cost of the Endangered Species Act, Randy T. Simmons and Kimberly Frost, at page v, available at: http://www.perc.org/publications/articles/esa—costs.php. It makes little sense to perpetuate a program that provides terrible disincentives for landowners who may have habitat for listed species. Such disincentives will do little to conserve and recover species; instead they will continue to create resentment and impede the conservation and recovery of listed species that live on nonfederal property.

Sections of the proposed Threatened and Endangered Species Recovery Act of 2005 may, for the first time in 32 years, change these dynamics and convert landowners into willing and powerful allies of those seeking to conserve and recover threatened and endangered species. By fostering cooperation between landowners and the federal government, this proposal has the potential of increasing substantially the effectiveness of the ESA. By transforming the relationship between landowners and the federal government from antagonists to partners in conservation and recovery, this proposal will serve to harness the entrepreneurial spirit of the landowner in America's quest to conserve its threatened and endangered flora and fauna.

These comments will focus primarily upon the three sections that have the most potential of transforming the Act into a vehicle for species recovery, specifically portions of Section 13(d) (Written Determination of Compliance), Section 14 (Private Property Conservation fund), and Section 12 (Species Recovery Agreements).

Section 13(d): Written Determination of Compliance

One of the most vexing problems for landowners under the current statute is their inability to determine whether an activity will actually impact a species in violation of the ESA. This has put landowners to a very uncomfortable choice: they can either attempt to use their property—and run the risk of violating the ESA with its attendant penalties, or expend substantial resources to participate in a Habitat Conservation Plan (HCP) or, if appropriate, an Incidental Take Permit or Statement (ITP). Unfortunately, for the small landowner seeking only a modest use of his property, the costs of such an HCP or ITP may exceed the value of the project or even the property. For example, PLF represented a landowner, Robert Morris, who sought to cut five trees on his property near Philipsville, California—where removal of the five trees was a permitted use under state law and the only economic value of the property. When the National Marine Fisheries Service indicated that the cutting of these trees might violate the Endangered Species Act by removing shade from the aquatic habitat for endangered salmon, his only option was to seek an HCP—at an estimated cost that exceeded the value of the trees.

Similarly, John Taylor owned property near the Mason Neck Wildlife Refuge near nesting habitat for bald eagles. When Mr. Taylor sought to build a modular home to make life easier for his elderly and disabled wife, the United States Fish and Wildlife Service refused to give him permission unless he agreed to conditions that were beyond his means and control. What is worse, the service refused for years to provide a final and appealable denial. Section 15 would entitle persons in conditions similar to Mr. Taylor to obtain a final determination as to whether a proposed use will violate Section 9(a).

Landowners need a meaningful way to determine whether a particular activity on their property will or will not violate the ESA before they are required to go through the time and expense of seeking an HCP or ITP. Section 13(d) provides such a mechanism. It adds a new subsection 10(k) to 16 U.S.C. § 1539. Landowners have the option of applying to the Secretary for a written determination as to whether a particular activity will be in compliance with the ESA. To obtain a determination, landowners must submit a written description of the activity (including the nature, specific location, and duration), a description of any incidental take that the requestor reasonably expects to occur as a result of the proposed action, and any other information the requestor chooses to include. Upon receipt of a submission with the required information, the Secretary shall, within 90 days, provide the requestor with a written determination of whether the proposed use will comply with section 9(a) of the ESA. Requiring the Secretary to adhere to a timetable is especially important so that landowners will not face endless delay—delay that otherwise could last for years. Because landowners often face severe time constraints that are not faced by regulatory agencies, requiring the Secretary to make a determination within 90 days is very sensible.

Under this provision, it is anticipated that the following scenarios may occur:

- A landowner who seeks to cut trees on a certain portion of his property during a certain period of time may request a determination as to whether the activity will violate Section 9(a). By examining the information submitted by the requestor, and any other available information, the Secretary will be able to inform the landowner whether the proposed activity will comply with Section 9(a).
- (It is anticipated that if a landowner obtains a certification under this section that a proposed use will not violate Section 9(a), that the certification may be limited for the reasonable duration of the project and be subject to revocation if there is an unanticipated change of circumstances).
- If the Secretary in the above scenario determines that there is not adequate time to make the necessary determination, the requestor and the Secretary may agree to an extension of the time in which a determination may be made. This may be important when the Secretary requires more time to examine the range and existence of a particular species—such as when seasonal conditions require more time for a full evaluation by the Secretary.

With this provision, landowners will no longer be kept in eternal limbo, afraid to act and unable to afford a way of determining whether their activities will, in fact, violate the ESA.

Section 14: Private Property Conservation

The next most significant provision of the proposal is Section 14, Private Property Conservation. This section, through Grants and Aid, will foster collaborative efforts between landowners and the Federal Government.

Section 14 amends Section 13(a) and establishes that the Secretary may provide conservation grants to promote the "voluntary conservation of endangered and threatened species by the owners of private property." Amended Section 13(b) requires that grants, among other things, "must be designed to directly contribute to the conservation of an endangered species or threatened species by increasing the species numbers and distribution." In addition, amended Subsection 13(c)(i) gives the highest priority to grants that "promote the conservation of endangered species or threatened species while making economically beneficial and productive use of the nonfederal property on which the conservation activities are conducted." This is especially important, because if landowners are able to make economically beneficial use of their property while at the same time conserving a threatened or endangered species, the antagonism that currently may exist between some landowners and the federal government may be ameliorated. Through the HCP process and other cooperative ventures, landowners have demonstrated their ability and willingness to manage their land uses for species conservation and recovery, especially where compensation and regulatory certainty are provided. This reform may further encourage landowners. For example:

- Grants may be used to develop forestry techniques that preserve habitat while allowing economically productive timber management activities.
- Grants may help develop farming techniques that better allow a coexistence between threatened and endangered species and farming.
- Grants may help provide ways of addressing mining activities in areas that are the habitat for threatened and endangered species so that mining activities will enhance species habitat through innovative mining and reclamation techniques.

Amended subsection 13(d) creates a program that provides relief to landowners who have been unable to receive a determination under Section 14(d) (amended subsection 10(k)) that a proposed activity will not violate Section 9(a) and converts those landowners into partners for conservation and recovery. If a landowner agrees to forego the use of his property that would result in a violation of Section 9(a), the landowner will be entitled to aid equivalent to the fair market value of the foregone use. In this way, landowners will no longer be forced to bear the entire cost of the preservation of a threatened or endangered species when the conditions that have led to the precarious state of the species are not the result of activities of the landowner. It is important to note that amended Subsection 13 (d)(3) makes it clear that if the Secretary can determine that the proposed use would constitute a nuisance under a state's long-standing law of property, then the landowner will not be eligible for aid. Thus,

- If a landowner proposes to destroy riparian habitat in a manner that is prohibited by a state's law of nuisance and public-trust doctrine, then the landowner will not be entitled to aid.
- If a landowner seeks to develop property on a steep hillside in a manner that constitutes a nuisance under State law, the landowner will not be entitled to aid.
- But if a landowner seeks to put his property to a traditional lawful use, such as placing a home on a lot in a residential subdivision, or engaging in normal farming activities, the landowner will be entitled to aid if the owner decides to forego the use because the Secretary is unable to provide assurance with a determination letter that the use will not violate section 9(a).

Amended Subsection 13(f) provides that the landowner has the duty of establishing, in the first instance, what the fair market value of the foregone use is. The Secretary may rebut this value. Under well-established federal precedent, fair market value is defined as "what a willing buyer would pay in cash to a willing seller." See e.g. United States v. 564.54 Acres of Land, 441 U.S. 506 (1979). This means what knowledgeable buyers will pay voluntarily for property based on its existing uses and those uses that are reasonably foreseeable in the future. This will not include purely speculative uses that have no basis under current market conditions. Likewise, the existence of state and local regulations is relevant to a determination of fair market value. The government is adept at utilizing appraisers and other experts to help determine the fair market value in cases where it condemns nonfederal property and it is anticipated that the Secretary may utilize similar means when disagreements over the fair market value may arise. Thus,

- A landowner who proposes to engage in a timber harvest in accordance with state and local law will be able to claim reasonably that the fair market value

of the use is the reasonably anticipated profit from the harvest after all expenses are accounted for.

- If a landowner seeks to develop land in a manner that is prohibited by the zoning laws of a local municipality, then that prohibition will affect the determination of fair market value.
- If a landowner seeks to harvest timber in a manner prohibited by a State's forestry laws, then that prohibition will affect the determination of fair market value.
- If a landowner seeks to fill tidal wetlands that are protected by a State's public trust doctrine, the prohibition will affect the determination of fair market value.
- A landowner who proposes to build a single-family home in accordance with state and local law, will be able to claim that the fair market value of that use is the value attributed to a lot by virtue of the ability to build that single-family home. The landowner may not claim that the value of the foregone use includes uses not allowed by state or local law, such as housing that exceeds local density requirements when there is no reasonable chance of obtaining a variance.
- A landowner who proposes to build a skyscraper in a corn field (assuming such were allowed by local law) will not be able to claim that fair market value of the use includes such an unrealistic and speculative project.
- The Secretary will be able to rebut a suggestion from a landowner who claims that the fair market value is anything other than what a willing buyer will pay to an unrelated willing seller in the open market.
- A landowner who does not employ the services of a licensed appraiser operating under the Uniform Standards of Professional Appraisal Practice (USPAP) will, in all likelihood, be rebutted by the Secretary when she presents evidence from an appraiser that meets the USPAP requirements.
- A landowner who has already agreed to set aside land under an HCP, will not be eligible for aid for foregoing a use on the land previously set aside because any enforceable agreement to set the subject land aside will be accounted for in the fair market value.
- A landowner seeking aid for foregoing a frivolous use will not gain by this provision as the time and costs of proceeding with administrative process and then gathering adequate evidence of fair market value will likely exceed any aid available for the frivolous use.
- A landowner who deliberately falsifies data or an estimation of fair market value would be engaging in fraud, actionable under federal law.

Section 10(c): Species Recovery Agreements and Species Conservation Contracts

Section 10(c) amends Section 5 (16 U.S.C. § 1534) and provides for voluntary species recovery agreements and species conservation agreements. These species recovery agreements of not less than 5 years will allow landowners to voluntarily work to protect and restore habitat, contribute to the conservation of listed species, and implement a management plan. In exchange for these agreements, the Secretary will make annual payments or provide other compensation. This section will, therefore, enlist the support and cooperation of landowners by making them active partners in the recovery of listed species.

In addition to species recovery agreements, section 12 also provides for species conservation agreements. This will promote landowners' use of conservation practices for the conservation of species and their habitat. Landowners who enter into long term contracts of 30 years will be entitled to contract payments equal to the actual costs of the conservation practices; landowners who enter into shorter contracts of 20 or 10 years will be entitled to 80% and 60% of the costs, respectively. This provision will encourage landowners to enter into long-term agreements for the long-term conservation of listed species, but it may discourage shorter-term agreements even if they will help conserve the species and it may, therefore, discourage some landowners altogether from entering into agreements.

It is important to stress that these contracts and agreements will be voluntary. New Subsection 5(l)(2)(A) provides, in part, that the Secretary "may not require a person to enter into an agreement under this subsection as a term or condition of any right, privilege, or benefit." By making these agreements strictly voluntary, landowners are much more likely to be enthusiastic and willing partners of the recovery and conservation efforts promoted by this Act.

Other Provisions:

Critical Habitat: Section 5 repeals existing provisions providing for the designation of critical habitat. Despite inflated claims of certain professional critical habitat litigation mills, there is no evidence that the designation of any critical habitat has

contributed to the recovery of any threatened or endangered species. Of the 15 species determined to have recovered, only two had a designation of critical habitat and there is no showing that the critical habitat designation had anything to do with that recovery. Critical habitat designations have been beset with agency failures—failures both to meet deadlines for designating critical habitat and failures to perform adequate analyses—especially economic analyses—prior to a critical habitat designation. The entire management agenda of the critical habitat program is being driven by court decisions that have nothing to do with weighing whether critical habitat designations do any good at all for any species.

When the Fish and Wildlife Service designated over 400,000 acres of critical habitat for the Alameda whipsnake in four California counties, in response to a court challenge, the Agency openly acknowledged it included areas that were not essential to the conservation of the species:

> We recognize that not all parcels within the proposed critical habitat designation will contain the primary constituent elements needed by the whipsnake. Given the short period of time in which we were required to complete this proposed rule, and the lack of fine scale mapping data, we were unable to map critical habitat in sufficient detail to exclude such areas.

65 Fed. Reg. 58933, 58944 (October 3, 2000).

The deficiencies did not stop there, however. The Agency also failed to adequately consider the economic impacts of the critical habitat designation. Although the critical habitat included highly populated areas of the State of California in the midst of a housing shortage, and costs associated with critical habitat were estimated at $100 million for the University of California, and a like amount for the mining industry, and state and local agencies identified severe limits that would flow from critical habitat affecting fire and flood protection activities, the Service concluded the designation of critical habitat for the Alameda whipsnake would have no significant economic effect.

In response, Pacific Legal Foundation attorneys, representing home builders, small businesses and local landowners, challenged the critical habitat designation in court. In Home Builders Association of Northern California v. United States Fish and Wildlife Service, 268 F. Supp. 2d. 1197 (E.D. Cal. 2003), a federal court invalidated the critical habitat designation for the Alameda whipsnake and remanded the matter to the agency to redesignate the critical habitat and redo the economic analysis.

This has lead to further litigation. Recently, Pacific Legal Foundation attorneys filed suits in federal court challenging the critical habitat designations of 42 species in 42 counties of the State of California, covering almost 1.5 million acres. Each of these designations was promulgated as a result of a court action and suffers from the same deficiencies as the critical habitat for the Alameda whipsnake—the designations are over broad and the economic analyses are inadequate.

Thus, the ESA critical habitat requirement is, at best, inefficient, and, at worst, wasteful, on two fronts. First, according to the very agency tasked with the responsibility for protecting listed species, the designation of critical habitat provides no meaningful protection to the species beyond the protections already provided by other provisions of the Act, such as the Section 9 take provision which prohibits anyone from harming a listed species. This was also the conclusion of the district court in Home Builders. While the environmental intervenors argued that the invalid critical habitat designation should be left in place for the protection of the Alameda whipsnake, the court found no evidence that setting aside the critical habitat would have any harmful effect on the species.

And, second, the critical habitat requirement breeds endless litigation that diverts limited resources from true conservation efforts.

What critical habitat designations have done is make the use of millions of acres of nonfederal land especially difficult, with landowners facing severe risks if they move forward with projects or even if they merely continue a traditional use of their land.

Best Scientific Data: Section 3(a) defines "best available scientific data" to be the data the Secretary deems most accurate, reliable, and relevant. Moreover, this data will be made public for review by affected members of the public. There have been too many instances where data relied upon by the agency has proven to be unreliable and, remarkably, unavailable to the public for review. For example, in the listing of the California gnatcatcher, the determination that the California gnatcatcher was a separate species from the common Mexican gnatcatcher was a scientifically controversial decision—and one for which the underlying data was unavailable for public review.

At present, both the implementing agencies and the courts have interpreted "best available" to mean any evidence whatsoever. This has resulted in unnecessary listings and overly broad "critical habitat" designations. For example, in a July 15, 1998, study entitled Babbitt's Big Mistake, the National Wilderness Institute documented the following.

> Historically data error has been the most common actual reason for a species to be removed from the endangered species list. Species officially removed because of data error include: the Mexican duck, Santa Barbara song sparrow, Pine Barrens tree frog, Indian flap-shelled turtle, Bahama swallowtail butterfly, purple-spined hedgehog cactus, Tumamock globeberry, spineless hedgehog cactus, McKittrick pennyroyal and cuneate bidens. While officially termed "recovered", the Rydberg milk-vetch and three birds species from Palau owe their delisting to data error (see Delisted Species Wrongly Termed Recovered by FWS, p. 16). Many other currently listed species have been determined to by substantially more numerous and to occupy a much larger habitat than believed at the time of listing (see Environment International, Conservation Under the Endangered Species Act, 1997).

Publications, Studies, Reports, Legislative Briefs at http://www.nwi.org.

"Best available" data is often not peer reviewed. Currently, the agencies use peer review on an informal, ad hoc basis. This has proven inadequate as events in the Klamath area have shown. In 2001, the Biological Opinion for the Klamath Project concluded that any water diversions for irrigation purposes would jeopardize listed salmon and sucker fish, although numerous claims were made that the Biological Opinion ignored more reliable data that showed that water diversions would not jeopardize the fish. Based on this conclusion, the Bureau of Reclamation prohibited all water diversions from the Klamath Project to Klamath area farmers who depend on irrigation water from the project. A firestorm of protests followed calling on the Administration to take a closer look at the data for 2002. In response, the Administration subjected the data to "peer review" by the National Academy of Sciences. An expert scientific committee of that body subsequently determined that the 2001 Biological Opinion was faulty because the "best scientific and commercial data" showed that water diversions for irrigation would not jeopardize the listed fish.

The proposed reform requires that the Secretary promulgate regulations that will "establish criteria that must be met to determine which data constitute the best available scientific data." This should help establish minimal standards of reliability for scientific data relied upon by the agencies.

Better Supported Listing Decisions: Section 4 requires that the "best available scientific data" be used in listing decisions. Factors to be considered include the inadequacy of existing regulatory mechanisms. It is hoped that this will include private conservation efforts. This provision also refers to "other natural or manmade factors." Here, it is hoped that the existence of hatcheries and similar programs will be taken into account. One of the problems with some of the salmon listings in the Pacific Northwest is that they failed to include the populations of hatchery salmon. This provision does require that the use of "distinct population segments" be used "only sparingly." It is hoped that the Secretary will abide by the spirit of this guideline; otherwise it may not be terribly meaningful and the specter of listing genetically identical populations (for example, a wild salmon that coexists with hatchery salmon) will continue.

This section also requires that the Secretary conduct, at least once every five years, a review of listed species "based on the information collected for the biennial reports to Congress." The data in these reports, however, can be weak and subjective. It may be more efficacious not to limit the reviews to this data.

Posting of Data: Section 6 requires that data supporting a petition to list a species must be provided to the Secretary and must be posted for public review on the internet. This will avoid the perception that some listing decisions have been based on a paucity of reliable evidence. Advocates of listing a particular species should welcome the opportunity for a full public review and discussion of the data upon which listing petitions are based.

Jeopardy: Section 3(c) revises the definition of the term "jeopardize the continued existence" to include an agency action that "would be expected to significantly impede, directly or indirectly, the conservation in the long-term of species in the wild." This new definition is not an improvement from the plain language of the term "jeopardize the continued existence" and may make it more difficult for agencies to move forward with needed projects.

In conclusion, this proposal will go a long way to increase the effectiveness of this nation's efforts to conserve and recover threatened and endangered species by

harnessing the cooperation and ingenuity of America's landowners. Thank you for this opportunity to share my views with this Committee.

The CHAIRMAN. I thank the gentleman.

I thank the panel.

I think we are in recess. But we will go ahead and start the questions until they figure out what they are doing.

Well, we will go the round of questions. And I thank the panel for their testimony. I am going to begin with Ms. Clark, and I want to talk to you about habitat and try to understand—I want to try to understand exactly where it is you are coming from. And we have been through this before and as an Administration—when you were in the Administration, I know you have gone through all this, but when you were in the Administration and had actual oversight on this, it was your determination the critical habitat has turned our priorities upside-down; species that are in need of protection are having to be ignored. This is a biological disaster. In 25 years of implementing the ESA, we have found that designation of official critical habitat provided little additional protection to most listed species while consumed significant amounts of scarce conservation resources. These lawsuits, forcing the service to designate critical habitat, necessitate the diversion of scarce Federal resources from imperiled but unlisted species which do not yet benefit from the protections of the ESA.

I understand in your testimony what you are trying to get at in terms of the recovery habitat. I don't understand why you tie that to maintaining the current critical habitat process if the current critical habitat process is so broken and does little or nothing to recover species. Why are you trying to tie getting rid of a broken part of the law to something else?

Ms. CLARK. You're right, Mr. Chairman, we have gone around on this issue, and I am happy to continue to talk about it because it is the heart of the Endangered Species Act. As I have said many times, it really doesn't matter what you do for species if you don't take care of their habitat.

And at the same time, it is, I think, illogical and irresponsible to throw out any habitat protection system, even one that can be made to work better if there is not something that supplements and does a better job. And this bill does not do that.

The current elimination of habitat, without providing another effective means of designating habitat or articulating habitat necessary for species recovery, will only compromise species that are already in precarious states even more.

I did lay out in my testimony, as well as in my oral statement, what I would hope would be a discussion topic of a way to achieve, I think, a mechanism, a system that habitat can be protected, that species can be recovered, that clear, unambiguous standards for whether or not recovery would be impaired would be able to be implemented by biologists across the country. And I am happy to discuss that at greater length.

The CHAIRMAN. Well, as I said, I understand what you're trying to get at in terms of recovery habitat. And we have, I think, we fundamentally have a disagreement about what the bill language actually does and what we are able to achieve on that. Because our

focus from the very beginning, you and I have had this discussion for a number of years, is that we should be focusing on recovery and not just on land use.

Ms. CLARK. I agree.

The CHAIRMAN. And that is where we failed in the current implementation of the law is that the focus has shifted into land use, and we have forgotten about recovery. And we are trying to go back to putting the focus on recovery. That is something that you advocated while you were at the Department of the Interior. It is something that we tried to reflect in this bill.

Much of what we have been able to come up with was a direct result of the discussions that we have had over the last several months. There are differences. There are things that you and I may never agree on. But when it comes right down to the essence of what we are trying to do, I think we are in agreement. I think there is just a disagreement in terms of what whether or not the language that is in the bill actually achieves what we are both saying we want to do.

Ms. CLARK. I would agree, Mr. Chairman, that I believe very much in your statements that you want to promote an Endangered Species Act that does a better job recovering species. And I have said that, whether I was a biologist with the service, the director of the agency or now Defenders of Wildlife, the bill in its current form, I believe very strongly, will not achieve either biologically or from an implementation standpoint the objectives you're trying to achieve. But I would be happy to continue to have this dialog with you and try to work through it.

You can't substitute a mechanism that is currently a regulatory mechanism that requires agencies to evaluate the impacts on designated habitat with something that is nonbinding, that is nonregulatory, with a confusing definition of jeopardy and words like, what is it, areas of special value. Trust me, when you're implementing this law across the country in field stations across the country, you want consistency. You want—we talked—you talked in the panel before about the important need for clear, unambiguous guidance.

I would find it very difficult to translate the language in this bill into guidance that would provide for consistent implementation in the field of the Fish and Wildlife Service. That, combined with definitional problems and substantive implementation issues that make this discretionary, I think sends the whole notion of habitat protection spiraling backwards that would then compromise recover.

The CHAIRMAN. I realize my time has expired, and I am going to have to yield. But I would remind you, when you were responsible for administering this law, you said the current critical habitat system was broken. It didn't work. It didn't provide protection, additional protection for species. And now, you come before us and say, oh, we can't mess with it because it works so great. It can't be—there is no consistency in that.

I realize we have a difference in what the effect is of this bill if it were to become law, and that we can continue to work on. But I think we agree the current critical habitat and the way it is being implemented does little or no good in terms of recovering species.

That was your conclusion when you were at the Department of the Interior. That is the current Administration's conclusion that is responsible for administering this law; the current critical habitat system does not work.

Ms. CLARK. The current critical habitat system really can be made to work better, I agree. And yes——

The CHAIRMAN. Using your words. It doesn't work.

Ms. CLARK. It needs to work better. But that is different—you're taking isolated responses that I have made in quotes that I keep seeing on both sides of me or that I had—I made in response to having to lead an agency out of a zeroing out of the listing budget by Congress when I made a conscious decision that providing species in need of protection, the protection of the Act, was more important than dealing with critical habitat. We worked in the last Administration to—with this Congress, in fact, with the late Senator John Chafee to try to address the necessary changes to critical habitat to make it more effective for recovery. So, yes, I stand behind the comments that I have made and the comments I continue to make.

All I am suggesting is that this bill does not—does not achieve anything to advance the need for habitat for species for recovery.

The CHAIRMAN. I put your quotes up there. But I could just have easily put up the quotes from Secretary Babbitt, who said basically the same thing on a number of occasions, quotes from judges that have found in different cases, on times that you were sued, at the Department of the Interior, saying the current critical habitat system doesn't work.

What we are trying to do is trying to fix that and make it work better, as you say.

I am going to recognize Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman, I want to follow on.

I would hope that we would use Ms. Clark's statements and her candor as the means by which—and this is what I assumed was going on in these negotiations—was that there is recognition that the current critical habitat arrangement doesn't work for a whole host of reasons, one the expenditure of public resources and whether or not there is marginal protection provided to the species.

And that is what we were setting out to do—and I thought in the negotiations, that is what you were setting out to do. So I would hate to have her candor be used as a weapon against her when, in fact, that is what opened the door for many of us to rethink this process.

And I want to, one, thank her for having the courage to step forward to participate in those negotiations because there is many, I recognize, in the environmental community that aren't happy that those negotiations took place. There is many in the environmental community that think the answer is just no to any change. And I think that is a problem.

So for you in, you know, the Defenders and the EDF and World Wildlife Fund, I appreciate the time and effort. I guess, when I sit here and having listened to how this is proceeding and when I listened to how you two talk here, we were so close on the intent, but we still seem to be very far apart on the solution here. And I thought what part of this negotiation was about was the idea that

we were going to move away from these big blanket designations of critical habitat, 4 million acres, 3 million, whatever it is, and we were going to move to a designed recovery habitat with very strong standards about jeopardy, and we would, in fact, be able to tailor make the necessary habitat for the recovery of that species.

And that sounds—when I explain that in the developing communities or I explain that to my cities and counties, they say that makes so much more sense, and we have been around this—I want to get credit for other things that States have done, that park districts have done in a credit and debit system in this operation. But this really held out the hope. And so I would just like, if I might, to have you once again explain what you were trying to—your offer that was made and what you were trying to do in refining and make more workable the critical habitat, recovery habitat—I think they are becoming interchangeable—so a habitat system that works for the recovery of the species.

Ms. CLARK. OK, I will try to do that.

The important focus is, the central tenet of the law should be recovery. I don't hear anyone disagreeing with that. So how do we do a better job of recovering species? If you accept the importance of habitat in recovering species and you accept the importance of developing a recovery plan that is biologically, scientifically driven with stakeholder involvement, it seems to me that—one of the frustrations with the current critical habitat mechanism is the timing.

Current law requires you to designate habitat concurrent with listing it and allows that 1-year kickout if you need more time to determine it. Very frustrating, very difficult because there is so little known other than the threats of the status of the species.

Mr. MILLER. You basically make an uninformed decision.

Ms. CLARK. Exactly.

Mr. MILLER. And that is why you get sued.

Ms. CLARK. It frustrates the regulatory community. It frustrates the environmental community, and sometimes, it is questionable for the species potentially. So for years, there has been a lot of discussion and I believe agreement of moving the identification of habitat to the recovery planning process. And everybody agrees on that part.

So to current critical habitat, which is—has force of law, is regulatory and binding, and it allows for agency actions to be reviewed to evaluate their impact on habitat, that notion was to be lifted and moved into the recovery planning process. And so to have recovery plans that have a deadline for completion—and we have said, something more like 36 months just because of the magnitude of time and engagement to get one of these accomplished—so to develop a recovery plan that has the habitat necessary for recovery be defined and described in a recovery plan, biologically, to have an unambiguous definition of jeopardy that clearly, makes it clear that any action that impairs recovery would also jeopardize the continued existence of the endangered or threatened species and a clear direction that agencies examine the impact of their actions on habitat necessary for recovery in determining whether there is jeopardy. So you link it all together.

You have identification of habitat shifted to recovery. You have a clear definition of jeopardy that is recovery based, and you have

agency actions—and rightfully so—Federal agency actions evaluated against that recovery plan and against the habitat that is identified for jeopardy.

Mr. MILLER. You are running out of time here. But that offer, that consideration by you and others who you are representing is a dramatic departure from existing law.

Ms. CLARK. It is a very dramatic departure.

Mr. MILLER. In the sense, one that is based on a great deal more information when the Secretary would make that determination as to the applicability of that habitat to that recovery plan.

Ms. CLARK. Yes.

Mr. MILLER. Today, they just throw a blanket out because they throw the blanket further and further trying to avoid a lawsuit, and you end up getting sued anyway.

Ms. CLARK. What you often have now is a designation of court order critical habitat absent a recovery plan and absent the biological underpinnings of what would inform the identification of habitat.

Mr. MILLER. So you end up with a huge number of landowners, be they public or private, who now have questions raised about what they can or cannot do on their land, whether it is or is not going to be habitat, and that determination is all kicked down the road later on as you start to weed out what is necessary or not necessary.

Ms. CLARK. Because you're informed by a scientific-based recovery planning process. Yes.

Mr. MILLER. Well, I don't know——

The CHAIRMAN. It sounds like we are all in agreement here.

Mr. MILLER. That is my point. You know, before, that is my point, is that is the result I think that we want. I am sure you will have different bells and whistles on it than I would put on it. But the fact of the matter is, that is the targeted approach that I think people want to take as opposed to what happens today.

But to take what happens today, the fact that Ms. Clark disagrees with it, I disagree with it, you disagree with it, to take that and say, well, then we are going to go—which I think is a mistake here in terms of the ambiguity in this and the unenforceability of it—I just would like to, before you two split the ways here, I would think there is a chance to have a second conversation about whether that is doable because I think some of us are willing to burn a fair amount of credit to achieve that result because I think it works both for the species, and I think it works from the economic point of view that we also have to consider.

Mr. CARDOZA. Mr. Chairman, I know Mr. Miller is out of time, but if you would yield for a second, I have a point on this matter that I think is important.

The CHAIRMAN. Go ahead.

Mr. CARDOZA. Thank you for your indulgence. I think one of the things that I am fearful of here—and I think Mr. Miller has really tried to move the effort forward with his last statement, because I do think we have gotten the admission that the critical habitat designation is currently broken. That is a fundamental thing to understand and to come to some kind of agreement on.

And the question is how we wordsmith the fix, in my opinion. And what has transpired in the paper—and I understand, for negotiation reasons, some of this rhetoric gets overly heated—but what we are trying to do here is not devastate the Endangered Species Act. It is to try to fix it and make it workable. And if we can now take what Mr. Miller was just saying and add the fact that what we are trying to do—and hopefully someone is listening out there—that we are not trying to destroy the Act but actually make it workable to do what it was set out to do, then we can start engaging in the discussion of the wordsmithing. The wordsmithing is not going to be easy. But as the process moves forward, I think that this Committee and this Chairman and the others that are working on it, this effort, can in fact, do the right thing, for once, in this Congress.

We may not all be in total agreement, but certainly, we can move this in a very positive way if we have that spirit.

The CHAIRMAN. Thank you.

Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I would just like to thank you in particular for moving this bill to a point where we are nitpicking over the way we go forward as opposed to the need to go forward. I think that is a remarkable success. And I commend you. And I don't particularly have any questions, but if the Chairman would like to continue questioning, I would be happy to yield time to him. Otherwise, I yield back. Thank you.

The CHAIRMAN. I recognize Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman.

In response to the concerns I raised earlier, I believe that Mr. Burling was addressing those. I am a bit puzzled—and perhaps since I am not a lawyer, perhaps I am at a disadvantage in this context—but back to page 57, line 15, in an amount, no less than the fair market value. So I guess that means the Secretary could actually pay more for the use that was proposed by the property owner.

Now, as I understood the gentleman's testimony as saying, if someone was proposing to build a house and the building of that house would require the removal of trees which currently is, say, prohibited because perhaps they are bald eagle nesting trees that the only compensation would go to the value of those trees, not the loss of the use of that property for building the house; it seems to me that is contradicted by the language here. But you went on—and this is sort of a long question. But you went on to say, you qualified your interpretation saying it had to do with nuisance statutes. So I don't know. I just don't follow that.

So you're saying that all this would do is allow, if I owned a piece of property, I had five really tall trees configured in an area where I wanted to build a house that happened to be bald eagle nesting or other endangered species that all I could—and I proposed to build a house there and cut the trees, I could only be compensated for the value of the trees, not for the loss of the use of the property for building the house or not for the value of the house that I would have built or, if the house was to be a rental house, not for the value of the rent that I would have accrued from the rental house

or, if it were to be a resort, not from the loss of profit that I would make from the resort on that property, only for the value of the trees? Is that what you're saying?

Mr. BURLING. No. So I do need to clarify my statements. If the landowner only sought to cut down the five trees, as Mr. Morris did, that would be how the compensation would be calculated. If a landowner, though, wanted to build a home and the restriction on the home was because of the trees that had to be cut down, and the first part of the equation is, is that particular use a nuisance or not? If it is not a nuisance under State Law, then——

Mr. DEFAZIO. Can you go to nuisance? In my State, if you own forest land and you receive a subsidy from the taxpayers of the State, that is, you pay very low property taxes, you're prohibited generally from siting a dwelling or other thing on that property, permanent dwelling other than something appurtenant to the forest use, would that be covered by nuisance law?

Mr. BURLING. No that is not a nuisance. That is a statutory restriction on the use of the property.

Mr. DEFAZIO. So this would waive State statutory restrictions?

Mr. BURLING. No, it would not. If I may try to continue to get to the rest of your question. If the restriction is based on State law or regulatory restriction, then you look at what the fair market value of that particular use is with those State or local restrictions in place, in which case the fair market value would be approximately zero if you're absolutely prohibited under State law of putting the property to the use——

Mr. DEFAZIO. Could you point to me where it says that? Because there is a bone of contention here.

Mr. BURLING. Because it talks about the fair market value of the forgone use, page 59.

Mr. DEFAZIO. The use that was proposed.

Mr. BURLING. That is correct.

Mr. DEFAZIO. I don't see anywhere that says that use had to be compliant with State law. It says, below the nuisance. This is the hang-up for people who aren't lawyers here, you know.

Mr. BURLING. Well, interpreting fair market value, the courts say that is what a willing seller will pay to a willing buyer for the use of the property.

And if the particular use is prohibited, you are not going to find a willing buyer buying property from a willing seller. And in that case, courts are going to find the fair market value and the Secretary certainly ought to say the fair market value of this particular use that is a prohibited use is nothing. Now, there is lots of litigation out there about how you determine fair market value of regulated property.

Mr. DEFAZIO. So this would put a lot of lawyers to work. Couldn't we be more specific in this area? What would be—if your interpretation is correct, couldn't we have another section that would say the use must be allowed under State law?

Mr. BURLING. If you want to put something like that in there, that makes sense only insofar as State law—we're not talking about the particular State law that it dictated by the Endangered Species Act. As you may know, the Endangered Species Act, when it finds that there is a—under the Endangered Species Act, if a

State law fails to adequately take care of protecting endangered species, States are encouraged to amend their laws and fix their laws to that effect. So just so long as you make it clear, this is not law dictated by the Endangered Species Act itself or where the States have a great deal of incentive to do that, I think it does make some kind of sense to make sure that landowners are not going to be compensated by the Federal Government for something that the local governments are not allowing them to do in the first place.

That is the beef that the landowners may have with the local Government, but we don't have to talk about that here at this time.

The CHAIRMAN. Would the gentleman yield for just a second on that point?

Mr. DEFAZIO. Yes.

The CHAIRMAN. I guess the question is, you want the property owner to be compensated for what they are actually losing.

Mr. BURLING. Correct.

The CHAIRMAN. And if somebody came in and said, I have agriculture land, I don't have water available for development, it is not zoned by the county or the city for development, but I had planned on some day building luxury condominiums here; would that be part of the equation here or would it just be what they are actually losing?

Mr. BURLING. Standard appraisal practice does not make that part of the equation. A highly speculative use that is not grounded in the State proper law, State laws, is not going to be part of that use. If you can't farm that property because you may be endangering a rodent and you traditionally farmed that property, that is where we can start talking about compensation, not luxury condominiums where it simply cannot be done feasibly because of the lack of water, in your example, and the violation of State law.

Mr. DEFAZIO. Reclaiming my time on that then. Following that discussion, I just don't think that the language in the bill quite takes us there because the Secretary is prohibited from asking for additional information. If I didn't volunteer the information and nowhere here does it say I must provide, you know, information to the Secretary saying that my proposed use is compliant with State laws that weren't coerced by the Endangered Species Act, and I, you know, and the Secretary can't ask for additional information, must make a decision, then, you know, it seems to me that putting in further proscription, prescription, whatever, here, regarding State law, would be useful, beneficial and I think is somewhat agreed upon, because I just have a real hang-up on it because when I look at the fair market value section on page 59, forgone, including business, when forgone following a written determination under 10K, the proposed use would violate Section 9(a), the property owner shall establish the fair market value. Property owner. Not an appraisal. Not lawyers determining whether or not it's an allowable use and says a fair market value shall be considered a rebuttal presumption. I am not a lawyer, but I think that means, pay me.

Ambiguities regarding the fair market value shall be resolved in favor of the property owner, ambiguity. I just don't get that kind of protection in there that you are telling me is there. And I don't

know why we could explicitly state it if that is a consensus agreement.

Mr. BURLING. In normal circumstances, when the government becomes liable to pay a landowner for property, usually in condemnation context, the government will utilize an appraiser. And it is the job of the appraiser to look up all the issues dealing with the property, local zoning. And there are 180 days for the landowner and the property owner to negotiate for that.

If the Secretary did not utilize an appraiser in these negotiations to determine the fair market value of the property, I think it would be malfeasance on the part of the Secretary.

Mr. DEFAZIO. But it says the Secretary can't ask for additional information. It doesn't say the Secretary shall have the property appraised. You're saying this is custom and practice, but it says here: The property owner shall establish the fair market value, and it should be considered rebuttable presumption. Ambiguities shall be resolved in favor of the property owner. Where is the room for the assessor and the appraiser?

Mr. BURLING. What I see this process doing, if I could just walk you through it.

Mr. DEFAZIO. You're creating something here a lot of lawyers are going to get rich on.

The CHAIRMAN. The gentleman's time has expired. And I fully understand what some of the confusion is on this provision. And I think that by the time we mark this bill up, we can take away a lot of what that confusion is because the gentleman from Oregon has some legitimate concerns and points that I think need to be tightened up in the language.

Mr. DEFAZIO. Thank you.

The CHAIRMAN. We are called to vote. We have three votes. The Committee is temporarily recessed while we go vote. And then we will return for questions. So I would encourage the members to please return after the series of votes.

[Recess.]

The CHAIRMAN. We are going to restart the hearing. If I could have the witnesses back at the witness table.

We are going to begin with Mr. Walden, which is I believe where we left off. I apologize to our panel for the delay.

Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman.

I want to pick up where we left off before we had to go vote on the Floor of the House. We were talking about the portion of the bill that deals with compensation for private landowners whose value of their property is somehow encumbered or reduced because of an Endangered Species Act listing. And it appears to me there are ways we can clarify and tighten up what is here so that the taxpayers aren't being handed a blank check to sign. Is that how you see it? I mean, do you think we can get there in this piece?

Mr. BURLING. Absolutely.

Mr. WALDEN. I want to ask each of you that question. When it comes to this issue of compensation for reduction of use of the property owner, is that something we can, you think, get to language that works that is fair to both sides?

Mr. BURLING. I think it will be very simple to do that. If we are worried about the blank check problem, I think language dealing with selection of appraisers to make sure appraisers, licensed appraisers under the laws of the State, using appropriate standards, language like that should help. If you're worried about the particular use being lawful in a State, I think that is easy enough to put that in: This is a use lawful under the State and local regulation. These are hardly insurmountable issues.

What I am happy to hear is there seems to be—and I can't speak for Congress of course—there seems to be consensus that landowners must be made part of the equation and allies to conservation rather than antagonists to it.

Mr. WALDEN. Ms. Clark, can you address the same questions and issue.

Ms. CLARK. I will try, although I am not an attorney. I am really concerned that this compensation provision will create a kind of a terrible precedent.

That said, there are some other concerns. There are already procedures in place in the Endangered Species Act for developers to obtain permits under either the Federal agency section 7 consultation of the section 10 HCP permit program.

The compensation program, as I read it, as we read it in this bill, would eliminate the need to get a permit and any incentives for developers or companies to mitigate the impact on endangered or threatened species. So that is a significant concern.

And also, it would potentially result in a financial windfall for unscrupulous developers to then get this rotating financial payment for proposed activities because of the way it is set up. Nobody—you know, we asked in the original panel where this money would come from. It certainly isn't coming out of the Fish and Wildlife Service budget because they are already overtaxed. But the additional outcome that is not clear to me from the way that this compensation provision is constructed is that there would be no incentive for developers today to participate in a conservation plan or more incentive-based programs.

Mr. WALDEN. Actually, there is a grant program in this legislation to encourage that, and we deal with the no-surprise policy and some of those incentives.

I want to get back to a core issue. Do you think then that private property owners should not receive compensation in any case when they lose their ability to use their private property or portion thereof? Is that your view then that we should never compensate?

Ms. CLARK. There are mechanisms in the law today to allow for landowners to comply with the law and for landowners to move forward with their investment.

Mr. WALDEN. What if you come in, though, and say you can't farm anymore on your property because of some examples we have heard about?

Ms. CLARK. Well, to my knowledge, if you look at the consultation records of the Fish and Wildlife Service or the section 10 records, less than 1 percent of proposed actions have ever been stopped in their tracks.

Mr. WALDEN. So then we are not talking about a big problem out there when it comes to the compensation side.

Ms. CLARK. No, because there are mechanisms within the law to allow, once minimization and mitigation has occurred, for these actions to go forward.

Mr. WALDEN. Then the bill shouldn't be that big when it comes to compensating private property owners.

Ms. CLARK. Well, but the way this is constructed, it provides a work-around or a shunt around the necessary requirement to avail themselves of the current permitting procedures under sections 7 and 10 and the current requirement to minimize and mitigate the impact of their activities. And it allows, in fact, a direct drive, the way that we read it, to be compensated for proposed speculative activities.

Mr. WALDEN. Mr. Burling, do you read it that way?

Mr. BURLING. No, I don't because, right now, for landowners of ordinary means and ordinary ability, these HCP programs and the compensable taking permit programs simply do not work. They may be fine for the large developers and the people with means, but for the ordinary farmer, the ordinary landowner, fine, see if you can cut a few trees. The system we have does not work.

Mr. WALDEN. And if I may, Mr. Chairman, Mr. Taylor, can you comment on this discussion since I have not heard from you on it?

Mr. TAYLOR. Very briefly, Congressman. I am not a lawyer, but our association has an established position on compensable taking. This provision of the law is inconsistent with that, and therefore we do not support the compensable taking.

Mr. WALDEN. And what is the position of your organization? That never should there be compensable taking?

Mr. TAYLOR. Paraphrasing, since I don't have it in front of me, but our position is essentially that the compensation of the private property protections under the takings clause of the constitution with respect to compensation for taking should remain the province of the courts.

Mr. WALDEN. I don't understand what that means.

Mr. TAYLOR. Well, again, I am not an attorney. Our position——

Mr. WALDEN. But you're representing, from your association, I am trying to understand what your association—just leave it to the Courts to decide irrespective of these laws?

Mr. TAYLOR. The mechanism available for property owners who feel aggrieved against compensation is largely and should remain largely the province of the courts. That is the position of our association.

Mr. WALDEN. I appreciate knowing that. Given the Supreme Court's most recent decision regarding private property rights, I respectfully would disagree because the court has gone way off where a layman would go in terms of reading the constitution. But my time has expired.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Inslee.

Mr. INSLEE. I wanted to ask about one of the great concerns I have about the bill is the loss of the critical area designation and essentially a very strong, enforceable statutory protection for the habitat that needs to be protected. And I am sensitive to the argument that suggested that there might be a better time to do that,

namely in the recovery process, rather than right at the listing process, because we might have more science at that point; we can more carefully define where that is.

The bill, if I can find the language here, essentially doesn't have any language that I can find talking about critical areas or critical habitat. It does have a provision on page 21 that, as part of the recovery plan, requires an identification of those specific areas that have special value to the conservation of the species.

Now, my reading of that—this is page 21, lines 4 through 6, my reading of that, when it talks about lands of special value, to me is a significant diminution of—compared to lands of critical value or critical habitat. And the reason I say that is, when I read that language, to me it means, well, we are not going to take care of the ordinary needs of breeding and feeding and moving around; we are just going to care about the special areas where I guess the animals have their Christmas parties or something, something that is ultimately special, not normally what they do to procreate and live.

And to me, that is a significant lesser protection of really what is critical habitat for the survival of the species than would be in existing law. And I just wonder, any of the panelists have any comment about that concern?

Ms. CLARK. Yes. I do. And I share your concern. The current bill identification of the special area or specific areas is not the same as what I was talking about previously, identification of areas necessary for recovery. So there is a difference in that, if you were to describe in the recovery plan the areas necessary for recovery and then allow decisions being made under the Endangered Species Act to use that as a foundation for making jeopardy decisions or jeopardy determinations with an unambiguous jeopardy definition that addresses recovery impairment, then I think you make the full circle. And just to be clear, we object to eliminating the current construct of critical habitat without an adequate replacement that would support the advancement of recovery. And I have tried to be clear that the construct in the current bill we believe does not do that.

Mr. BURLING. I see this proposal of taking the emphasis away from broad multi-million acre areas of critical habitat and focusing recovery plans on these areas of special value of conservation to the species, I see it focusing the efforts of the regulatory agencies more than what we have now. What we have now is a program that is not working. It is like the doctor giving medicine to a patient. It is not curing the disease, and it is causing a terrible reaction in a patient. This is a more targeted medicine, an alternative medicine that I think has potential of doing far more for species than what we currently have as critical habitat.

Mr. INSLEE. Couldn't we—if that is the goal, couldn't we use the same language that we did in critical habitat to say that is what we are getting at, making sure that we preserve the land that is critical to their continuation as a species, not this, quote, special, close quote—I don't know what special means—couldn't—why would we not use that same language with its known recognized, codified and now litigated, on numerous occasions, definitions? Why

wouldn't we use that same language if we wanted to have the same level of protection?

Mr. BURLING. I think the current definition of critical habitat is not working. It is beset by litigation on both sides. We have a number of lawsuits saying the critical habitat doesn't adequately look at economic impacts. The Center For Biological Diversity has a number of their own lawsuits.

It is not working.

Mr. INSLEE. I would agree it is not working. One of the reasons is that the person charged by the President of the United States for enforcing this a year ago told us he was going to do something that is necessary to help solve this problem and today told us he just doesn't think that is important any more. And there are problems, but one of the difficulties I have is with the executive branch currently and with Congress for not funding the efforts to do that.

And I want to ask Ms. Clark, if I can, about these funding issues. My perception about difficulties in the enforcement of this Act, both from the ability of recovery of the species, sort of the environmental side of the coin, and from the certainty of the landowner, so that the landowner has certainty and foreknowledge about what is allowed and what is not, both of those are severely damaged by Congress's failure to give the administrative agencies the ability to conduct a scientific research and go through the decisionmaking process in a timely fashion that will allow this to work. And that is a major problem that we now have.

Is that a fair statement? If you can just comment on it.

Ms. CLARK. That is a fair statement. In fact, it is quite true and has been for a number of years. The lack of resources is a significant if not an overwhelming factor in the responsiveness of the Federal agencies charged with overseeing the law, the Fish and Wildlife Service and National Fishery Service. It has hampered their ability to conduct the necessary scientific reviews to make the decisions on whether or not a species should be protected by the law. It is the listing backlog you have heard referred to. It clearly compromises and has restricted responsiveness to a public awaiting outcomes on decisions, on activities under either the Federal agency consultation provision or the private landowner section 10 provision. But at least as importantly, it has seriously compromised the ability of the agency to do their part in accelerating or moving species through the spectrum from critically endangered toward recovery because there is just no money in the program to invest in the strategies and the activities to support recovery efforts.

Mr. INSLEE. When I was listening to Judge Manson talk, I was alerted to the fact that when an otter in the Aleutian Islands was considered for listing, at the time, there were 257 other species awaiting ESA protections. Even though the report was finished in 2002, the recommendation that the sea otters be listed, Judge Manson sat on it for 15 months while the otters declined, and 257 other species were not listed.

Is it a fair statement that, unless Congress funds the ability to make these decisions, that even if we made changes to this Act, we would still experience enormous failure in recovery to the species and enormous frustration to landowners because of the uncertainty in this process?

Ms. CLARK. Regardless of what kind of amendments or what kind of Endangered Species Act results from any debate, if you don't fuel it and if you don't give it the necessary resources to be implemented, it hardly matters what is written on the paper.

It is extremely frustrating. Speaking only for the Fish and Wildlife Service, when I was there, I spent a lot of time in that agency, and there are incredibly dedicated professional biologists that are trying to do their job. They just aren't resourced, or they don't exist. The West Coast is probably—is significantly better staffed than anywhere else in the country, and they fall way behind. It is—they are falling behind statutorily mandated deadlines, not because of lack of responsiveness but because the resources to conduct the activities have never been financed.

Mr. INSLEE. Now my reading of this Act is that I don't believe, in real life, it would help solve that problem. There is nothing in this Act that I think would help solve these chronic problems of underfunding these agencies in dealing with this process. In fact, I think it will even get worse because, frankly, if a landowner's request is immediately approved in 90 days, if there is no action on it, you actually remove some of the political force to get Congress to fund these agencies so they can make timely decisions for the benefit of landowners.

My perception is, if anything, if these amendments change, we will have less of an ability to get these agencies funded. What is your thinking about that?

Ms. CLARK. It is certainly possible, and just to be clear, this 90 day, if the service does not respond in 90 days, the activity can go forward, is especially troublesome. And I know the question was asked a number of times, well, if it is not 90 days, what should it be? Should it be 120 days, 180 days? Just to be clear, it is not the number of days. It is the fact that the kickout default for nonresponse is an activity that could eliminate significant populations, or significant habitats could go forward unreviewed. And the reason that will occur is because of lack of resources.

One of the things I just want to make sure, particularly with Gary sitting next to me, I think I do think that there has been a lot of discussion and a lot of debate rightfully so about enhancing the role of States.

The States have tremendous expertise and tremendous capability, and as we go through this review of the Endangered Species Act, it makes clear sense and it is, in fact, appropriate. It should not be just Fish and Wildlife Service that should be stepping forward. Other Federal agencies really do need to step to the plate. And by eroding some of the provisions and consultation, it creates an ability for other Federal agencies to disregard their affirmative responsibilities, and the opportunity to enhance the role of States needs to be carefully looked at because they are right there on the ground and can do a terrific—an important job. And they need to be resourced as well.

The CHAIRMAN. Your time has expired.

Mr. INSLEE. You have been very gracious. Will you allow me one more short question?

The CHAIRMAN. If it is a short one, yes.

Mr. INSLEE. Mr. Burling, this 90-day issue, the idea is, if the government doesn't act within 90 days, the landowner is allowed to go ahead with this procedure on the assumption that if the government doesn't come through in a timely fashion, it happens. Should that be a similar situation for a listing if a citizen petitions for a listing and the government fails to act within 90 days or whatever number we pick, that it becomes listed? Should we take a similar approach?

Mr. BURLING. The 90 days in this provision is to prevent landowners from bearing the excessive cost of the eternal delay that happens. If we're talking about when you're going to list a species that is also going to have a substantial impact for a long, long time on landowners, I think it makes sense to be more deliberate in how you do that; 90 days is far too short a time to have some sort of cutoff, of course, for determining whether or not you have a listing of a species. That takes far longer than simply looking at a proposal, whether you want to build homes on property or cut trees or some such thing. That should not take very long at all; 90 days is a nice amount. That can be changed one way or the other. But I think we are really dealing with a completely different level of analysis, compared to the listing of a species versus approving a use of property.

Mr. INSLEE. Thank you, thank you very much, Mr. Chairman, for your courtesy.

The CHAIRMAN. Mr. Udall.

Mr. UDALL OF NEW MEXICO. Thank you very much.

Ms. Clark, under section 13, it requires the Secretary to give private property owners an answer within 90 days. This is following up on what Jay just asked here regarding whether their proposed development would comply with section 9 of the ESA. Does it make any difference if we change that 90 days to 188, 180 days or some other—let's just pick 180 days. Does it make any difference in your mind?

Ms. CLARK. You can pick 180 or 280 days. But if you don't provide the resources for the agency to be able to be responsive to make the decision or to evaluate it, it is irrelevant. Because it is not a lack of desire of the Fish and Wildlife Service to be responsive to a request. It is the lack of resources in the agency to be able to be responsive.

Mr. UDALL OF NEW MEXICO. Thank you.

Ms. Clark, you said earlier, it doesn't matter—I think this was in your testimony—it doesn't matter what you do for species if you don't protect their habitat. And I would like to ask the panel to just give us their big picture look in terms of habitat and what is happening.

You know, Mr. Inslee mentioned in his testimony this idea that we have had five massive extinctions in the history of the Earth. And the current one we are undergoing with extinction of species, we have had experts before this Committee who have talked about its being man-caused and that that is the driving force.

So I wonder if each of you could just give me your big-picture look in terms of what is happening to habitat at this particular point in time? How much are we losing? What kinds of impacts is that having?

Mr. BURLING. We are losing habitat. It is having an undeniable impact on species in this country. A solution, though, when you look at the fact that 75 percent of these species exist on private land, is to enlist the landowners in helping solve the problems rather than having them butt heads as we have for so long.

I would hope that with the landowners behind preserving and protecting and conserving and restoring and recovering endangered species that we can really take care of the problem in the ways that we have not been able to do in the past 32 years.

Mr. UDALL OF NEW MEXICO. Ms. Clark?

Ms. CLARK. It is common scientific knowledge, or representation, that loss of habitat is the single leading cause of species decline and endangerment in this country. If it is not direct loss, then it is habitat fragmentation or the transition of habitat and the overriding impact of invasive species that is shaping and changing the landscape today.

To recover species or to have a sustainable natural resources legacy or to have a manageable landscape in this country we have to figure out how to deal with habitat and habitat sustainability. And I do agree, providing incentives and enlisting the support and knowledge of the States, enlisting private landowners who do own a significant amount of this habitat, to protect species is appropriate and important.

Also, putting—asking the Federal agencies to step up. The Federal Government does oversee a significant land base in this country and having the Federal agencies step up to do their part for species management and species maintenance is a big part of this equation.

Mr. UDALL OF NEW MEXICO. Mr. Taylor, do you have anything to add?

Mr. TAYLOR. Just a couple of observations, Congressman.

First of all, I certainly would affiliate myself with the remarks from my colleagues. Those are all very accurate. I do think that there are a number of other Federal, State and local laws, that government simply needs to do a better job of coordinating the implementation of those laws and give focus to the integration of how they affect the quality of our life; and that includes the habitat that may or may not be impacted for fish and wildlife resources.

Mr. UDALL OF NEW MEXICO. Ms. Clark, could you just take a minute and talk about your predation program, the one that——

Ms. CLARK. Compensation, great word to use, the compensation program.

Defenders of Wildlife, a number of years ago instituted, with support from the community, a program—two programs. One is our Predator Compensation Program which, in essence, does provide financial payment for livestock that are taken, as a result of direct knowledge, by predators—wolves, grizzly bears.

We also have a program, our Proactive Program, that provides financial support for private landowners, ranchers, farmers, to implement proactive measures to manage for potential conflicts between listed endangered species predators—wolves, grizzly bears—and their ranching livelihood.

Mr. UDALL OF NEW MEXICO. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Abercrombie, do you have questions?

Mr. ABERCROMBIE. Yes, please. Thanks, Mr. Chairman.

Now, I realize that the time is short that you have had to look at this, although apparently at least one of you has been involved in some of the what are called "negotiations," these discussions. In some respects, if someone was looking in from the outside at this, reporters, say, who are going to transpose this into the public mind, what they are going to get is, you know, press releases with purple language and apocalyptic pronouncements and ideological claptrap of one kind or another that comes out there at the margins.

What we don't need in order to pass legislation is a lot of lectures about what we should do or not do. What we need is language.

Now, do you have—I realize you don't have it today, this is especially pertinent where, I think—Mr. Taylor, you know, representing the organization that you do—I have gone through your testimony here, admittedly at a surface level, but there is nothing specific here about the areas that I think, if we can resolve, we can get this bill passed.

The question of—give me 2 seconds here—the taking threatened species; let me give you a quick example. I do think there needs to be specific—species-specific regulations about it. You're dealing with a loggerhead turtle; you're not dealing with a lynx or a bobcat. You're dealing with an entirely different context and circumstance. And I think the Chairman is trying to address in this bill, is my reading of it, How do we deal with these things?

Now, if the language that helps us to deal with that helps us to fix what is admitted by everybody is a bill which needs revision or is a law which needs revision, we need to have specific language from you as to how to accomplish that.

On separate regulation for threatened species, we need, based on their vulnerability, for example; that is a word—I don't know if you can translate that into law.

Mr. Burling is over here representing a law firm. I see he has a very extensive thing on property rights. I am sure they could twist and turn everything I am saying upside down and make us all look like fools. Of course, that is not their purpose. And their desire there is to give us enlightenment and perspective and depth of analysis.

But from the point of view of legislation, we have to have language that will stand up to the intent and purpose of the Congress. And in this instance, I am just giving you an example, threatened species, I think we need to base it on what—on the vulnerability. The loggerhead turtle, because of the context within which we deal with it, is a hell of a lot more threatened, I guarantee you, than some other species who may be less threatened simply because they are harder to get at. That kind of thing.

Second thing, the critical habitat that is going to go on at length here—how we define it and how we deal with it—we have to get rid of these lawsuits because there is no recovery going on. Again, I think that is what everybody has admitted, that is what the Chairman's object is here, to deal with this thing. Everybody on this panel and the previous panels has indicated, that is what they want to get done.

We need specific language to do that, because I will tell you I have a tough time trying to differentiate—and I am quoting—likely to reduce the survival and recovery of the listed species, unquote and quote, actions that reasonably would be expected to significantly impede directly or indirectly the conservation in the long term of the species in the wild.

Now, from my point of view as a legislator, just reading that, I think they are both aiming in the same direction. But there may be people out there that are able to say, Well, that moron can't see what the word "impede" actually means, especially because you can go over 100 years of settled law or something like that. That is what I am driving at.

If this language is no good, describing it in hyperbole as totally destructive of the environmental impact act—the Endangered Species Act—doesn't solve anything. We need to have specifics as to why that language is not adequate to the task and what you would do to improve it.

And finally, on the written determinations and the question of surveys, whether or not 90 days is enough time, I don't know if you can get a car loan in 90 days, so it is not—I am not quite sure that that is—and surveys and what constitutes best science as opposed to all science; and again I am still not clear as to what fair market value is of the forgone use.

I think I know. And I appreciate the discussion you had, Mr. Burling, with Mr. DeFazio on that. Because I am sure all of us could go off into a whole series of examples which may or not bear any relation to reality, which then can be picked up by the press especially and become a template for the average person's understanding of what we are trying to do here.

So we need specifics in those areas. And if that happens and—and then the last thing about funds. We need some suggestions about alternative funding. I have already said something like bonds. We could do something with bonds, maybe do tax credits. It doesn't necessarily have to come out of the general fund made available to the Department of the Interior. There are all kinds of ways to deal with that funding issue.

And I think we are in general agreement here that we want to see some kind of compensation. I want to see it from the point of view of getting rid of the lawsuits and getting people to get more of that willing seller/willing buyer thing that I think has been pretty successful.

The reason I went on at such length in this dissertation is, if we could hit these three areas—the threatened species and those definitions, the critical habitat and the compensation area—and we get some definitions and some suggested language, I think we can do this. And I think we have to do it.

And I think there are a lot of members here, and I am going to say in conclusion, Mr. Chairman, I want to help you get this done. I, for one, and I am sure—now, I am not speaking for other people, but I am sure my views represent the views of a hell of a lot of members on this side of the dais here, that we want to help you get this done.

My only thought is, it may take us a little bit more time; maybe we need a little bit of breathing room to pull this off. But I think

we can do it, and I pledge myself to try and help you do that, and I ask you folks and anybody else who has an interest.

It doesn't do any good to throw brickbats, and I am not saying you are; but I am just saying that some of the stuff we have been handed out in the hall and all that. I don't want to see that crap. I don't pay any attention to that stuff. What I pay attention to is what can help us get the legislative job done. And if you can help us with that, help the Chairman, I guarantee there are a whole lot of members in here that will try to push this through in a way that will accomplish the goals that everybody stated they want to see accomplished.

Thank you.

The CHAIRMAN. Thank you, Mr. Abercrombie.

Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman. Thank you for your patience and thank you for extending the time for us, and I will try to be quick.

Mr. Taylor, is it in your statement—and, Jaime, maybe you can comment on this—but in your statement, on page 5, you say that—you note concern on the bill, that it appears to provide an opportunity for the service to bypass State fish and wildlife agencies—there on the bottom of that page in the recovery plan authorized. Don't we do that now, currently, under existing law?

Mr. TAYLOR. Don't we do what, Congressman?

Mr. MILLER. Don't we consider State wildlife agencies when we are putting together these recovery plans and proposals?

Mr. TAYLOR. Inconsistently. I think you heard Secretary Manson observe that in some regions the States are consulted; in others, they are not. I mean, our——

Mr. MILLER. So—it is not a requirement under current law, so you are not talking about this law taking away a right? You would like to see what you have now expanded in some fashion?

Mr. TAYLOR. Our proposal and our suggestion is that the States have expertise that they can contribute significantly to the drafting and the implementation of recovery plans, and that the law needs to insinuate the role of the States throughout that entire process so that expertise can be taken advantage of.

And it appeared to us, in authorizing the agreement between private landowners and the Fish and Wildlife Service, that at least it was silent on the role of the States.

Along those same lines, there does not appear to be any opportunity in here for the States to take a more prominent role in drafting and implementing recovery plans. That is one of the two areas, in particular, that the States have the most interest in, contributing to informed decisionmaking on the front end of the Act with respect to making decisions on listing petitions and then in implementing—in designing and implementing recovery efforts for the listed species.

Mr. MILLER. Let me just—I don't mean to make your answer incomplete. I am very mindful of the time, because the Chairman has been sitting here.

Ms. Clark, would you care to comment on that? I guess I just——

The CHAIRMAN. If you would yield for just a second and I want to go back to Mr. Taylor, a listing decision should be based on

science. It is either endangered or it is not. There is no role—in my mind, there is no role for the State to play in whether or not a species is endangered. There's a role for the State to play in gathering information and providing and working with Fish and Wildlife to determine whether or not a species is endangered, but the ultimate decision is a scientific decision. It is not a negotiation.

Mr. TAYLOR. I think we are saying the same thing, Mr. Chairman.

The CHAIRMAN. I just wanted to make sure, because I think we are on the same page in that.

Mr. TAYLOR. We are not suggesting that the decision to list be based on anything other than science. What we are suggesting is that since States have expertise on many of these species and since much of the data that the Fish and Wildlife Service uses in deciding whether a species qualifies for listing or not are generated by the State fish and wildlife agencies that the statute should recognize the expertise and the authority of the States and the contributions that they can make to the listing process.

We aren't suggesting at all that the decision be based on anything other than science.

Mr. MILLER. The Chairman's reading of the bill is, there is nothing that precludes that from happening, contributing to the decisions.

The CHAIRMAN. There is nothing——

Mr. MILLER. The decision is the decision the Secretary would make based upon science, but there is nothing prohibiting them from contributing that information or what have you in the bill.

The CHAIRMAN. Correct. But what Mr. Taylor is asking for is certainty that the States will be brought into the process. So if you have a species being listed in one State, that their fish and game or fish and wildlife agency participate in that process, so that the Secretary is not making a decision, as we have seen in California, with him listing a species where they didn't consult with the State, and a species ended up being listed.

Mr. TAYLOR. In the other context to remember, Mr. Chairman and Congressman Miller, is that many of these species, before they are listed, are under the exclusive jurisdiction of the States; and so the authority that exists within the State fish and wildlife agencies to ensure the sustainability of the species needs to be appropriately recognized and utilized in decisions that the Secretary would make with respect to the status of those species. It simply is good government, and it is taking advantage of expertise that exists already on the ground.

Mr. MILLER. If I can just ask Ms. Clark if she cares to comment on this. I thought maybe there was more of this done, or am I misunderstanding what is going on here?

Ms. CLARK. I believe it is fair to suggest or to say that it is probably being inconsistently applied across the country. And I actually do think that section 6 can and should be amended, that is, the cooperation with the State section, should be amended to more overtly and more obviously state the expected requirements and responsibilities of collaboration and coordination with the States that have the expertise, the political will and the financial resources to step up on everything from providing science information

for the Secretary to determine whether or not a species should be listed to the issuance of a permit to the development and implementation of recovery plans.

It can be—there is internal policy in the Fish and Wildlife Service that is apparently being inconsistently applied. So to make amendments to the law to make it more affirmative and more transparent, I think would be valuable.

Mr. MILLER. Thank you.

Thank you, Mr. Chairman.

Thank you very much for your time and hanging out here after the votes.

The CHAIRMAN. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. I am glad we are into this topic, because I remember we had a discussion about the lynx habitat, designation of critical habitat in the Northwest. And it has been a couple of years, so don't hold me to this specifically, but it seems to me I had heard from my own State of Oregon, from their wildlife and fisheries service that they have done a lot of research back in the history of Oregon and seen like maybe two lynx or something they thought were passing through and yet there was the declaration of an enormous region of the State for habitat.

And it struck me then that we probably don't do as good a job at the Federal level of involving those State agencies in the processes back here, and there needs to be that formal ability for States to weigh in. Because we have some extraordinarily talented people, as you said, Mr. Taylor, on the ground doing this before we ever show up on the scene at the Federal level. It is your prerogative first.

So that was one of the things I am hoping, in the way this is crafted in the bill, will result in a real formal process. And I guess that has been my whole issue with science is, you know, we require rigorous review for publication in a professional journal. We require peer review, and I think it is the Clean Water Act, No Child Left Behind Act has peer review requirements. This is sort of a standard we find throughout medical research, other scientific research and decisions in the government, and I have never understood why it was lacking here as a requirement. I am aware the agencies can go ahead and ask peer review, but we don't do that.

So do any of you have any problems with the science piece of this proposal?

Mr. TAYLOR. Well, I would just suggest that a very readily available body of expertise exists in the State fish and wildlife agencies to act as kind of a first level of peer review. And we made some recommendations and suggestions in our statement that would allow the Secretary to utilize the expertise of the States.

I made reference to a recent court decision that basically directed the Fish and Wildlife Service that they could not use data collected by the State fish and wildlife agency with respect to a listing decision—petition, a listing petition decision, but they had to restrict the universe of information that they considered in assessing the merits of the listing petition to only the information that was submitted within the petition. And the Fish and Wildlife Service went to the State fish and wildlife, agency which had good

information on the species, but the courts basically said, you can't do that.

So we would suggest that there needs to be some remedy that——

Mr. WALDEN. But in this draft, in this bill, there is an opportunity to weigh in with the Secretary when the Secretary promulgates rules regarding the scientific criteria because the Secretary is directed a year after passage to promulgate those, rules and in that process, you would be able to try to influence the Secretary to try and include——

Mr. TAYLOR. Correct. But we would argue that the States, with the authorities that they have for these species, need to be given statutory deference from nongovernmental organizations or private individuals, because these are species that are—whose fate is being considered, over which the States have jurisdictional authority.

And as I observed, Congress has repeatedly, in Federal public lands statutes and the Endangered Species Act and in other laws, recognized that within their borders that the States have principal jurisdiction over fish and wildlife. And we are simply suggesting that the States provide a great opportunity to provide that level of expertise for the Secretary in the decisionmaking process. And we have never suggested that the final decisionmaking authority should be taken from the Secretary, but that States should inform that decision with much greater weight than the Secretary gives to it now, Congressman.

Mr. WALDEN. All right.

Mr. Burling, do you want to comment on that science piece of this?

Mr. BURLING. The science piece, I think, is a vast improvement over what we have now. We have a lot of very questionable nonpeer-reviewed science reports written by graduate students that make it into the listing process.

We can appreciate their concern and care about this, but it is really time that we do put this sort of science to a level of scrutiny that we have in every other area. I am not a biologist, but before I became a lawyer, I was a geologist; and I am aware it is quite easy to come up with random data points and make incorrect conclusions.

You need to have the peer review. We need to have a hard look at all the science. We have enough species that have been listed by accident. We have enough controversial listings that to have the data out there and all the data available, we will not end up with a situation like with the gnatcatcher where some of the raw data was never available for the evaluation of that listing, which was quite controversial. I think that by putting the data out in the light of day for everybody to see is really going to help.

Mr. WALDEN. This is a sunshine law change as much as anything, to put it all out there on the Internet, available to the public regardless of whether you live in Pendleton, Oregon, or Portland, Maine, to see. I think it is important, so—I realize my time has expired. I don't know if Ms. Clark wanted to respond to that.

Ms. CLARK. Yes, I would.

Clearly, the need to have consistent and transparent decisionmaking on all aspects of the Endangered Species Act is important.

I do have some concerns about this and let me just share them, because I think they are resolvable, at least I hope they would be. While peer review—as I read this, while peer review and empirical data are important parts of science and important considerations, to restrict what kinds of scientific data can be used ignores what I consider to be important principles of conservation, biology, population modeling, population viability analysis, projections that are commonly accepted scientific National Academy principles, so that one might need some clarity.

Also, I just want to ensure that there is a recognition that all of the additional restrictions and requirements add time to the process of decisionmaking, as well as financial costs; and so that would have to be accommodated as well.

But the thing, the issue that does concern me—I am not sure if it is intended or not—in here where you talk about not less than a year after the date, the Secretary shall issue regulations to establish the criteria.

I am concerned, to be blunt about it, that it punts the decision and a clarification that I believe should be made by Congress to the political whims of an Administration that can change regulation from Administration to Administration. And so, if you want clarity——

Mr. WALDEN. I figured the last thing people wanted was a bunch of politicians sitting around and deciding what science is.

Ms. CLARK. But you have already gone down that road by deciding what kinds of science determinations and evaluations and mechanisms should take precedence. But to allow the determination of what constitutes best available science to the political whims of the Administration could be problematic.

Mr. WALDEN. All right. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Udall.

Mr. UDALL OF NEW MEXICO. May I follow up on this a minute here?

On this issue of listing in the science behind listings, there was a field hearing by Mr. Walden, I think, out in—September 9, 2004, out in Arizona, in the Southwest; and they answered your questions, or questions that were put in by the Committee, on thoughts on peer review. And they said specifically that Fish and Wildlife Service's established policy is to solicit the opinion of three independent specialists for all listing proposals and critical habitat designations. Similarly, the Fish and Wildlife Service has a policy to solicit independent peer review during the development of recovery plans.

So it is clear that there is a solid, strong peer review process in place; and in fact, in 2003, the GAO was asked to look at that process. And they said—and this is just a short little quote—but, "Experts and others have found most of the Service's listing decisions to be scientifically supported, the courts have overturned few listing decisions on the basis of inadequate science, and the Service has delisted few species on the basis of new information, suggesting that protection under the Act was not originally warranted."

So I think we—I think we have a system in place that has been functioning, and as far as court review and all of that, it hasn't shown up any deficits.

And I would be happy to yield.

Mr. WALDEN. Thank you. As I recall a hearing we had here, Judge Manson testified that it has only been in the last few years that a requirement has been in place for peer review at Fish and Wildlife.

Mr. UDALL OF NEW MEXICO. I believe since 1994.

Ms. CLARK. Correct. It was put in place in 1994.

Mr. WALDEN. And my point was that was put in place by regulation, not by statute.

Ms. CLARK. It was put in place by policy that was——

Mr. WALDEN. So even less than regulation.

Ms. CLARK. Right, in Federal Register policy pronouncements.

Mr. WALDEN. My point was, OK, that is great, but it could change any time. And if it is there and it is good, then why not put it in the statute?

Ms. CLARK. I would agree. If you took the 1994 policy and translated it into statutory language that would be an appropriate enhancement of scientific decisionmaking.

Mr. UDALL OF NEW MEXICO. I will offer it as a amendment tomorrow if you would support me.

Mr. WALDEN. I haven't read the 1994 language, so obviously you two have, or you wrote it, so——

My point was, if you recall, we had the argument against peer review; it would be too costly and too burdensome. And then I hear from Judge Manson and others that we are already doing that. Then it can't be too costly and burdensome, if you are already doing it and it works wonderfully; you can't have it both ways.

Ms. CLARK. But the peer review process that is currently undertaken is incorporated into the timeframe of statutory decisionmaking, and it is incorporated into the timeframe of the Agency.

Mr. WALDEN. But it failed in the case at Klamath because those decisions had not been peer reviewed in the data. And when the National Academy did do the peer review—you have read the report, I'm sure—it came back and said historical data don't support the decisions, the two principal decisions.

Ms. CLARK. Right. You could have had more data. You could have had support.

Mr. WALDEN. That is not what it said. They always say, you can have more data, but it said the 10-year history of the data doesn't support conclusions made by the decisionmakers. That is what the National Academy said.

But I am on Mr. Udall's time. He has been very gracious. Thank you.

Mr. UDALL OF NEW MEXICO. I hope you will get some more time and give me some. I want to ask Ms. Clark a question on her service.

I see in your bio here you have served in the Department of the Army as a fish and wildlife administrator and also the natural resources cultural program manager at the National Bureau. I have been impressed in this Committee, when the military generals and others come before us that they really—they get the Endangered

Species Act, and they are very decisive in terms of moving on those issues.

And I am just wondering, because of your—I know it was a while ago, your service there, what is it that allows them to proceed with such aggressiveness and get things done?

Ms. CLARK. I just want to clarify, I was not in the military; I was a civilian. But I grew up in the military as well.

The Department of Defense has an incredibly impressive land base, and it is very geographically diverse. I believe what allows them to do such a great job of managing their lands is, they get land sustainability. They know they are not going to get more lands to train on because we are fast running out of vast expanses of lands to support things like expanding military weaponry needs and battlefield readiness conditions. And so they take care of what they have.

And recognizing the importance of and the role that endangered species conservation plays, too, they recognize the importance and connection between endangered species and habitat conservation. And what is happening to these military lands, whether it is an Aberdeen Proving Ground on Chesapeake Bay or Camp Pendleton on the coast of California, it is fast becoming one of the greatest remaining green spaces. And the military is doing their best to try to manage for land sustainability, to support their mission readiness needs with the needs for conserving species, because they realize they are very integrated.

And they also can put their money where their mouth is because they are amazingly well resourced.

Mr. UDALL OF NEW MEXICO. I may have inartfully asked that. You were an administrator, a fish and wildlife administrator with the Department of Army.

Mr. Chairman, I would just also renew my request that we let the Administration weigh in on this bill and take positions on every provision before we actually mark it up.

So thank you.

The CHAIRMAN. I will take that request under submission. I realize that the gentleman bases his votes on what the Administration wants to do, so——

Mr. UDALL OF NEW MEXICO. Mr. Chairman, it would just be enormously helpful to me to hear from Mr. Manson, Judge Manson or others, with clarity.

The CHAIRMAN. Mr. Abercrombie, you had an additional question you wanted to ask.

Mr. ABERCROMBIE. Yes.

When I mentioned before to the three of you, some of the language, changes that would take place, and I just suggested those were areas where we needed some specificity, if you thought it would change for the better what we want to accomplish.

But can I ask you just on the surface now—not to hold you to account forever and a day. Let me ask you Mr. Burling, for example, an amount equal to the fair market value the forgone use of the affected portion of private property, including business losses, how does that differentiate from—how would that help prevent the lawsuits and so on from going forward? Which I presume is the fundamental reason for putting this in here, to try and end that.

Do you think the Pacific Legal Foundation would have to search for work if this language passed?

Mr. BURLING. Sadly, no, because there are enough State and local agencies that give us all the work we need and, I am sure, a few remaining Federal agencies as well. I think the language in here is attempting to reach a level that narrows the compensation available to the landowner for the forgone use only, and a lawful use at that.

Mr. ABERCROMBIE. Again, not to cut you off, because of the time factor, Mr. Manson, and the under Secretary indicated that the plain meaning of the phrase, forgone use, is well established in law—well understood; I don't know whether it's well established or not.

Mr. BURLING. Yes, I do believe——

Mr. ABERCROMBIE. Do you believe this language, as written, could be seen as the plain meaning if it did come to an argument in court about whether this is constitutional, or whatever it is; that this is written in such a way that plain meaning would aid and assist the court in coming to a quick decision?

Mr. BURLING. It is an argument I would be happy to make in a court.

Mr. ABERCROMBIE. Can you indicate to me from the point of view of the—I am trying to remember what you're—of the Defenders of Wildlife, the difference? How do you see the difference of likely reduced survival and recovery of listed species as opposed to the actions that reasonably would be expected, et cetera, et cetera; because if I am to listen to people in the hallway, for example, that means that throats are going to be cut and people shoved over cliffs and all the rest, and I don't believe it.

Ms. CLARK. Well, Congressman, I think what is important is, you take the shift in cumulative effects. It is not only the definition of jeopardy, but it is what happens to habitat, the definition of jeopardizing continued existence that is amended in this bill.

We do have some concern with the terminology ''near term.'' we had it during the time of providing technical assistance to Mr.——

Mr. ABERCROMBIE. But you don't think this language advances the question of trying to actually get to a recovery plan in critical habitat designated and carried through on?

Ms. CLARK. I think that the definition of ''jeopardy'' can be made more clear, so that the prong—that prong matched up with recovery plans that articulate habitat, matched up with the requirement that actions undertaken be evaluated per the habitat described in the recovery plans—would advance the recovery.

This complements what is in—this current bill does not do that, but I believe it can be made to work.

Mr. ABERCROMBIE. Is this language close to it?

Ms. CLARK. Yes, it is close.

Mr. ABERCROMBIE. Do you have a—again, I realize it is—not that it has to be definitive, but is there some suggestion, even right now as you look at it, where you see it is inadequate so you can explain it to a layman's ears?

Ms. CLARK. Actions that would impair the recovery—I would have to work with it, but I could work with it. The actions that would impair the ability of a species to recover, impaired recovery;

we can certainly provide that language, because that is what I believe is trying to be achieved here.

Mr. ABERCROMBIE. OK.

And last, Mr. Taylor, on the question of science—because that came up, and I realize what you're saying there—if you are in the State of Hawaii, our local land and natural resources, it is instructed by law to collect all kinds of data on invasive species, for example, with—I think a lot of times, ''endangered species,'' we tend to think about animals. But we have a lot of endangered species that are in the category of specific flowers and vines and growth of one kind or another, peculiar to Hawaii simply because of its geographic location.

Or we have a threatened species like the loggerhead turtle that are peculiar to our area of the world or out in northwestern Hawaiian Islands that we are trying to get into sanctuary stage—status right now.

So how—do you have suggestions right now, even though you haven't had a lot of time to look at the bill, where the question of science could be improved in a way that accomplishes what I know the Chairman's intent is, to make the question of science more discernible to others who now question whether it is adequate under the revision of the law that he proposes?

Mr. TAYLOR. Congressman, let me make a couple of observations.

First of all, I think the call for the best available science is good and necessary. We ought to do everything we can to collect all the available information that exists on a species in order to make more informed decisions.

With respect to standards, I understand we need standards against which to assess that. But it has been our observation that whether Congress promulgates standards or the executive branch promulgates standards, it is going to invite litigation.

Mr. ABERCROMBIE. It is inviting it now. What the Chairman is trying to do is, introduce language that will help to alleviate that. And when I am asking if the reaction to his work is going to be, Well, this won't do it, well, it is not doing it now.

So I am saying, do you have even an immediate reaction, some suggestions?

Mr. TAYLOR. What we suggest is that the State fish and wildlife agencies be put in a position of being——

Mr. ABERCROMBIE. To contribute their data.

Mr. TAYLOR. No. Give them the responsibility to assess the merits of the listing proposal and the listing decision, and to make——

Mr. ABERCROMBIE. Is a record of empirical data available to them, based on the empirical data and other analysis that might already be available to them?

Mr. TAYLOR. Correct. And then they make a recommendation to the Secretary.

The Secretary, we would suggest that recommendation from the States would carry a rebuttable presumption in favor of that recommendation, unless the Secretary convened a peer review panel to overturn that.

So that is what we suggest, that there be a hierarchy of consideration of the assessment of information, at which level the States would be given a principal role to play in making a recommenda-

tion to the Secretary, which the Secretary can overturn—the State's recommendation.

Mr. ABERCROMBIE. The reason you are making this recommendation is that your testimony is—as I understand it, there is a wealth of material out there already, much of it already collected, collated and understood, that could be useful and very helpful in coming to a timely decision.

Mr. TAYLOR. And much of those data, you know, are used by the Fish and Wildlife Service already, not in making listing decisions; but you know well, the individual who collects the data is in the best position to interpret it. So just asking the States to do a data dump on all the information they have to the Federal regulatory agency that then interprets the data isn't making the most informed decision.

Mr. ABERCROMBIE. I understand. The analysis they would have available or they could make available as a result of their experience.

Now, the bottom line for me there is, I agree with that, and I don't think—I doubt there are too many people here on the Committee who would dispute that to any degree. But we will need to get suggested language for that fairly quickly, if you could get to work on it.

Mr. TAYLOR. I can send that to the Committee staff, Congressman.

Mr. ABERCROMBIE. Thank you very much.

So again, Mr. Chairman, I think you are going to find a lot of support for what you want to accomplish here. But I do think probably we are going to need a little bit more breathing room.

The CHAIRMAN. Well, tell the gentleman that I appreciate his words and the work that he has put into this.

Most of these issues that have come up are issues that we talked about as we tried to negotiate a bill on this. Much of what Ms. Clark talks about are issues that we have covered and, I think, in all fairness, when we got to the point of not reaching a final agreement on the bill, but being in agreement on the bulk of the issues—when I introduced the bill, I didn't drop out all of the things that I agreed to that I really didn't like; I left them in.

Mr. ABERCROMBIE. That is because you're a legislator, not a theologian.

The CHAIRMAN. Much of the criticism we have heard on the bill is from people who accepted things and agreed to things that they didn't like completely in the bill. And as you know all too well, the art of legislating involves a lot of compromise. And what you see in front of you is a bill that is not my bill; it is a big compromise from what I wanted.

But I believe it improves the law to the point where the focus does shift to recovery. We do a better job—as a result, we do a better job of recovering species, and in the end, private property owners are protected, which was my goal when I went into this.

We are going to get called to a series of votes in a few minutes. I did want to follow up on a couple of issues that did come up.

Specifically, and I start with Ms. Clark, in this whole issue of the 90-day letter and I don't—in my opinion, I don't think 90 days is a magical number, but it is more to the issue, do you believe that

a property owner should have—be able to have some kind of date certain to tell Fish and Wildlife, tell me "yes" or "no"?

Ms. CLARK. A landowner should have a reasonable belief that they will get a response from the Fish and Wildlife Service in a reasonable amount of time. But the Fish and Wildlife Service has to be resourced to be able to respond in a reasonable amount of time.

The CHAIRMAN. If the rest of the bill goes into effect and we stop having Fish and Wildlife defending themselves on lawsuits, maybe they will have more money and more time to respond to property owners. So it shouldn't be an issue.

So I think—and I am going to turn to Mr. Burling on this—in respect to that provision, I believe it is critical to protect property owners, that they have some kind of date certain, that they have some time clock—and, to me, it really doesn't matter how many days it is. But by some drop-dead date, Fish and Wildlife has to say "yes" or "no" and allow them the opportunity to move on from there, instead of keeping them in limbo forever.

Mr. BURLING. I could not agree with you more.

I have had so many landowners over the years tell me, My property is in critical habitat. They tell me, If I move, I might go to jail, but they won't tell me that I can't do anything with my property; they won't give me that letter.

So you sue the Fish and Wildlife Service, arguing that your property has been taken and you lose every time because you have no final decision from the Agency.

We want a "yes" or "no" decision from the Agency for landowners within a reasonable period of time so they know what they can do with their property and so they can move forward with their lives.

The CHAIRMAN. OK. Now let me ask you this question dealing with compensation.

A property owner lives in a region of the country where they have an HCP, an established HCP that Fish and Wildlife has signed off on. They get to the point where they want an answer from Fish and Wildlife. Fish and Wildlife gives them their answer. The answer is, Yes, you may proceed, but you have to pay into the HCP to mitigate any impact you have.

If that is the case, and they then turn around and say, OK, we want to be compensated, under those circumstances, would the maximum that they could be compensated for whatever they were required to pay into the HCP?

Mr. BURLING. I think the way this bill is structured, a landowner would have the option of turning down the HCP for one thing, saying the costs being imposed are too great.

If that is not going to work, then perhaps the landowner and the Secretary can enter into those negotiations in the period of time to work out payment for that mitigation.

The question comes down to, why should landowners necessarily have to pay costs that are far in excess of the project or far in excess of what the landowners are actually responsible for? I believe that the provisions that we have in this bill right now give landowners the choice.

The CHAIRMAN. And if the Secretary were to answer, Yes, you can proceed, you don't have an impact, then would it not—would

you not conclude from that that they—because they don't have an impact, they should not have had to mitigate to begin with?

Mr. BURLING. Absolutely. If you do not have an impact and you're allowed to proceed, then the regulations may have been overbroad.

One of the problems we see with some HCPs is that they seem to be mechanisms of a funding source, a cash cow, where landowners are the cash cow providing these mitigation measures that are not necessarily relating to impacts caused by the landowners in a particular case. They just happen to be in the wrong place at the wrong time.

The CHAIRMAN. Finally, on compensation in general, it is quite well established in law that if you're a property owner, and the Federal Government in the highway bill decides that they are going to build a new freeway across your property, that they have to pay you for the land they are taking for that freeway. Even if it does enhance the value of your property, you are still compensated for the land that is taken if they take it for a military base, a post office, a park, a school, what have you. Because that is a public use, a public good, we have established in law that you should be compensated if they take your land.

Mr. BURLING. Correct.

The CHAIRMAN. Under the Endangered Species Act, if they come to you and say, you have 1,000 acres, you can use 800 of it, but 200 of it you can't use, we hear the argument that you shouldn't be compensated for that.

Why is that?

Mr. BURLING. Under current law, which I believe is flawed in the courts, if you are allowed to use some of your property, therefore, courts conclude that you have not lost all value of your land, and you're not entitled to compensation.

The CHAIRMAN. Let me bring you back to the highway example. They are not taking all of your land; you're left with part of your land.

Mr. BURLING. The law is terribly inconsistent, and it is a problem with the law. It is a rule that the more you own, the more the government can steal without paying for it. That is why I think moving on to an aid program that we have here relieves the government of being the guilty party by bringing landowners into cooperation rather than antagonism.

The CHAIRMAN. Ms. Clark, I would like you to respond to that, if at all possible, because this is what I feel is one of the terrible inconsistencies in Federal law regarding private property and private property rights.

In some cases, if we determine it is a public good, public use, a societal wish, we pay for it. And in other cases, we don't. And when it comes to the case of the Endangered Species Act, we have spent years debating this, if they are going to take property—if you're told you can't use 20 percent of your property, why should you not be compensated for what you're losing?

Ms. CLARK. My understanding of all this is that you know the fifth amendment provides compensation for a taking when that has been declared. And so our position is, there is not an additional need.

You know, I have listened to this for the bulk of the day, and I am happy to kind of engage in this dialog, but there are mechanisms in the law to provide for the livelihoods of applicants and private landowners to move forward with their intended projects.

The construct of compensation in this bill seems to me to be escape hatches and ways to work around current procedural mechanisms for advancing projects.

The CHAIRMAN. Well, in my mind, it has little or nothing to do with advancing projects. It has a lot to do with a rancher or a farmer who is out there, who all of a sudden is told that their habitat is a potential habitat for species, and they are not allowed to use their property any more.

Mr. ABERCROMBIE. Would the gentleman yield?

The CHAIRMAN. Yes.

Mr. ABERCROMBIE. This is really crucial. I want to really understand this, because the whole object here is to get these folks to cooperate. I spent the last 16 years here in this Committee working very diligently to support legislation that would encourage what is called the "willing seller/willing buyer" concept.

And I work closely with—we have land, legacy land foundations out in Hawaii and other foundations that work to buy land for conservation purposes, and that has been very successful. You know, money is the way.

Now, I am not sure what you mean, Ms. Clark. I really don't quite understand what you said. Procedural mechanisms are something—I am not interested in procedural mechanisms; I am interested in avoiding them. If there are ways to do this—tax credits, bonds, a special fund set up where you take a certain percentage of revenue or something that comes in and put it into a compensation fund—there are a whole bunch of ways to do this that I have done in my own legislative career. Mr. Miller is not the only one with 31 years; this is my 31st year of public service. And I have been involved in a whole spectrum of methodologies for getting funds together, and compensation to try to move projects along.

I want to see these species protected and recovered. I am not interested in trying to see how much of the fuzz of a peach I can shave off of somebody's compensation in order to accomplish that.

The CHAIRMAN. Reclaiming my time, I think that's really at the heart of what this is all about. I mean, we may just be at ideological opposite ends on this issue, but I firmly believe——

Mr. ABERCROMBIE. I don't want to see the bill get held up on this.

The CHAIRMAN. No, neither do I, and it won't. The bill will end up passing on this. And I think because of the—partly because of recent court decisions, it strengthens this whole position.

But I will—I am willing to do whatever we can to put the focus on recovery and do what we can to recover these species as long as my property owners are protected, as long as I don't have a farmer coming in to me again saying, I can't use my property because of this.

I just had Fish and Wildlife out on my property and they told me I can't disk between the vineyard rows because of its impact on an endangered species. I've had Fish and Wildlife come out and tell me that I can't clean my ditch because of its impact on an

endangered species. I mean, all of these things over and over and over again that you've heard and I've heard and everybody on this Committee has heard.

Some of the biggest critics of this bill are the first ones to come to me and say, You've got to do something about this because of what it's doing to my constituents. And we have to do something to protect those property owners. That does not preclude us from focusing on recovery and recovering species.

You can't be so wed to a broken law that you're unwilling to fix it. And the biggest critics of this bill so far—and the stuff that I've seen passed out, quite frankly, is garbage. We can do a better job. We can do a better job of recovering species and protecting property owners, a matter that—you know it and I know it. If you don't pull in property private owners to be part of the solution, it will never work. That's what we have to do. And the only way you pull them in is if they're protected; that's the bottom line on this.

Mr. ABERCROMBIE. I know we've got to go and vote, but may I make this suggestion to you folks—and other people may be listening out there. This bill is going to pass. Now the question is, is it going to pass with taking up the Chairman's offer, saying he's wide open on this question of—questions of how we define a critical habitat and how to get to recovery? If you've got a better idea—believe me, I know him very well—he'll grab it and run with it.

We're all politicians here. We can all take credit for stuff we didn't do, so that's not the problem, but—and give up on this property compensation bit. If somebody's got a better suggestion for him, give it to him. But that's going to pass, and that's got the overwhelming majority of support, I think, on both sides here.

That's going to happen, so we need to get off of that and take advantage of the opportunity and the offer to try and tighten up the language in these other areas in a way that will accomplish what everybody says they want to do. Now, if we do that, I think we can get this ball not only down the field, but over the goal line.

The CHAIRMAN. Thank you. I am going to have to dismiss this panel. I'm not going to make you guys hang around. We have a series of votes on the Floor. Thank you very much for your patience and for answering all our questions.

The hearing is adjourned.

[Whereupon, at 3:42 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

[The prepared statement of Mr. Grijalva follows:]

Statement of The Honorable Raúl M. Grijalva, a Representative in Congress from the State of Arizona

Thank you, Mr. Chairman. I welcome the opportunity to hear from our witnesses today, however, I question whether it is appropriate at this time to focus on this legislation.

In the face of one of the worst environmental disasters our country has ever seen, we have a role in examining the consequences of Hurricane Katrina. Damage to fisheries, wetlands, and wildlife refuges, along with other issues under our jurisdiction, merit discussion and oversight within this Committee.

As for the legislation itself, having at this point absorbed some of the main points, I am disturbed at what is being proposed here. It should be clear to anyone reading this legislation, as it is clear to me, that this bill is designed to exterminate the Endangered Species Act, not reform it.

Instead of working toward improving the recovery of endangered species, this bill will set up impossible hurdles for the agencies charged with protecting our nation's wildlife. Critical habitat, which is necessary for any species to survive, would be deleted from the Act. Recovery plans would not be binding. The Secretary would not be able to adequately determine if a species deserved listing in the first place because the scientific data she could use would be severely limited. The Act would no longer afford any protection to threatened species, thereby ensuring that they become endangered in short shrift.

This bill would take away a critical safety net for endangered wildlife, while seriously enriching developers and others in the process. Provisions within this bill could literally end up costing taxpayers billions of dollars in a new entitlement scheme that would pay landowners who claim to be impacted by Endangered Species regardless of whether they really are, and without requiring any measures to conserve species on private land.

This bill would make it impossible and too expensive to enforce any measures to protect species. Had this been the law of the land for the last 30 years, in all likelihood, the Bald Eagle would no longer be with us. The gray wolf, the manatee and numerous other species would likely be long gone.

So, while I look forward to hearing the testimony today, I must express my serious reservations about this bill and the negative impacts it could have on our nation's wildlife. I sincerely hope we can refocus this debate where many agree we could use improvement, that is, improving the funding for the agencies so that they can implement the Act as originally intended and improving incentives for landowners to conserve habitat for species.

Thank you.

[The prepared statement of Ms. McMorris follows:]

Statement of The Honorable Cathy McMorris, a Representative in Congress from the State of Washington

Thank you, Mr. Chairman.

The Threatened and Endangered Species Act will restore common sense solutions to the Endangered Species Act. This legislation will help facilitate the relationship between protecting endangered species and our natural resources and land.

We have seen firsthand the impact that the Endangered Species Act has had in Eastern Washington. One example is the impact on our river system in the Pacific Northwest. The manager of the Port of Clarkston, Rick Davis, gave a startling example when he compared the Columbia/Snake river system to Interstate 5—no one would ever consider shutting down I-5, yet we have proposals before us that would shut down the Columbia/Snake river system, the results of which would destroy our way of life that is dependent upon the river.

We all share a desire and recognize the importance of protecting our salmon populations. The Pacific Northwest has invested billions of dollars (much of it coming from the pockets of rate payers) to preserve and increase our salmon runs. Any new solution must take into account salmon protection and recovery but we must not do it on the backs of our natural resource industries. Breaching or removing our dams is not an option. The river systems throughout the Northwest are a critical part of our region's economy and should be used for transportation, irrigation and recreation.

While we use the river system in different ways, we all share a common goal to solve our decades old problem of protecting endangered species while maintaining the value of our river system. In fact President Bush at Ice Harbor Dam said it well in August 2003 when he stated: "The Washington way of life depends, and always will depend, on the wise protection of the natural environment. It's been a part of your past; it's going to be an important part of the future of this state—and our country, for that matter. And a vital part of the natural environment is the Pacific salmon."

We have created an adversarial relationship with the people who are most critical to the goal of saving the endangered species: America's farmers, ranchers and private property owners. Ninety percent of endangered species have habitat on private land. We must change our disincentives into real incentives so that we can begin recovering species.

This bill will help us move away from litigation, lawsuits and punitive settlements, and allow us to better recover species by providing incentives, employing peer-review standards data based on objective scientific practices, and compensation of private property owners for lost use of land.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pallone follows:]

Statement of The Honorable Frank Pallone, a Representative in Congress from the State of New Jersey

I must say I have to seriously question the timing and appropriateness of considering a bill that would cut the heart out of one of our nation's major environmental protection laws in the wake of one of the worst human environmental tragedies in history.

It has been little more than three weeks since Hurricane Katrina's landfall in the Gulf region resulted in perhaps the most devastating natural disaster our nation has ever seen.

The environmental toll of this tragedy, especially in New Orleans and the Mississippi Delta region, is no less serious. The flooding in New Orleans turned the city into a toxic, contaminated stew. The storm caused multiple oil spills, devastated wildlife refuges, and resulted in heavy damage to wetlands. Katrina also wiped virtually all of the fishing industry in the Gulf.

The hurricane raised all sorts of questions that this Committee should be considering carefully. What should we be doing to rebuild the fishing industry and help those who lost their jobs? How should we reexamine our coastal policies to mitigate the effects of future disasters like this one? How have sensitive fish and wildlife populations been affected?

That is what the Committee should be considering in the wake of one of the worst environmental disasters in our nation's history, not a special-interest bill that guts a critical environmental safety net.

I want us to be clear what exactly we are talking about here today. We're not talking about trying to improve the rate at which we recover endangered species.

Instead, we're talking about a bill that is written to gut many of the critical protections in the Endangered Species Act for the benefit of developers and other special interest groups.

I am especially concerned that this bill contains a provision that would effectively result in a massive giveaway of taxpayer dollars to corporate developers whose projects may be affected by the Endangered Species Act.

Under this legislation, if the Fish and Wildlife Service or the National Marine Fisheries Service determines that a developer's proposal would violate the Endangered Species Act and harm protected habitat, the Service would have to pay the developer for lost profits on any part of the proposed project that cannot be completed.

This opens the door to incredible giveaways to developers coming straight out of taxpayers' pockets—especially since the affected party would determine the value of lost profits. Moreover, it would devastate the budgets of the very agencies that we are relying on to protect and recover species.

The developer giveaway provision is just one example of how this bill does effectively the opposite of what it is intended to do and devastates not only the letter but also the spirit of the Endangered Species Act.

Supporters of this bill like to point out the relatively small number of endangered species that have been recovered to healthy populations since the passage of the Act. It is more appropriate, however, to note that 99% of the species listed since 1973 are still with us today—a pretty good success rate.

Mr. Chairman, in my district people are appalled to hear that Washington politicians are trying to give taxpayer money away to big developers at the expense of endangered species. I share their feelings, and I urge my colleagues not only to oppose this legislation but also to have the Committee examine the serious problems in the fishing industry and the environment in the Gulf region.

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