STATEMENT OF
GARY FRAZER, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES
U.S. FISH AND WILDLIFE SERVICE WITHIN THE DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE ON
H.R. 1314, A BILL TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO ESTABLISH A PROCEDURE FOR APPROVAL OF CERTAIN SETTLEMENTS, H.R.1927, THE MORE WATER AND SECURITY FOR CALIFORNIANS ACT, H.R.4256, THE ENDANGERED SPECIES IMPROVEMENT ACT OF 2014, H.R.4284, THE ESA IMPROVEMENT ACT OF 2014, H.R.4319, THE COMMON SENSE IN SPECIES PROTECTION ACT OF 2014, AND H.R.4866, THE LESSER PRAIRIE CHICKEN VOLUNTARY RECOVERY ACT OF 2014

September 9, 2014

Chairman Hastings, Ranking Member DeFazio, and Members of the Committee, I am Gary Frazer, Assistant Director for the U.S. Fish and Wildlife Service's Ecological Services program within the Department of the Interior (Department). I appreciate the opportunity to testify before you today regarding six bills to amend the Endangered Species Act of 1973, as amended (ESA). While the Department does not support the six bills as written, we welcome the opportunity to work with the Committee on efforts to improve the implementation of the Endangered Species Act.

Overview

In the forty years since it was passed, the ESA has prevented the extinction of hundreds of species and promoted the recovery of many others, including gray wolves in the Northern Rocky Mountains and the Western Great Lakes. The first fish to be proposed for delisting due to recovery, the Oregon Chub, is native to rivers and streams in the State of Oregon. The recovery of the Oregon chub is noteworthy because it is attributable in significant part to the cooperation of private landowners who entered into voluntary conservation agreements to manage their lands in ways that would be helpful to this rare fish. In May 2013, the Service announced the first invertebrate to be recovered: the Magazine Mountain Shagreen, found in the Arkansas' Ozarks. This great conservation work has helped to achieve Congress's call to preserve the nation's natural resource heritage, and it has happened alongside robust and sustained economic development.

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

When we settle a deadline case, we agree on a schedule for taking an action that is already required by the ESA. We do not give away our discretion to decide the substantive outcome of

those actions, and the notice and comment and other public participation provisions of the ESA and the Administrative Procedure Act still apply.

The Multidistrict Litigation Settlement Agreement (MDL), likely the subject of H.R. 1314, has served to reduce deadline litigation by almost 96 percent. Through the agreement, the plaintiffs have agreed to substantially limit or eliminate their deadline litigation. This reduction has allowed the Service to use our objective, biologically-based priority system to establish our work priorities, rather than have our priorities overridden by litigation seeking to advance plaintiffs' priorities.

Since the MDL settlement, the Service has used existing tools such as the Candidate Conservation Agreement with Assurances (CCAA) and others to engage landowners and other partners to advance the conservation of species. In fact, three proposals for listing have been withdrawn and more than 20 species, identified as candidates in 2010 and covered under the MDL settlement agreements, have been found to not warrant protections under the Act.

In October 2013, the Service withdrew its proposal to list the Coral Pink Sand Dunes tiger beetle, another species covered under the MDL settlement agreements that is found in Kanab, Utah. The Service was able to withdraw its proposal based on an amendment to an existing conservation agreement that sufficiently addressed the threats to the beetle by enlarging an existing conservation area, and targeting additional areas of habitat for protection. This was a joint effort among the Bureau of Land Management, Utah Department of Natural Resources, Kane County and FWS.

Last month, the Service announced its determination that listing the Montana population of Arctic grayling was not warranted. The grayling was another species covered under the MDL settlement agreements. Private landowners in the Big Hole and Centennial valleys in Montana worked through a voluntary CCAA to achieve significant conservation of grayling within its range. Since 2006, over 250 conservation projects have been implemented under the CCAA to conserve Arctic grayling and its habitat. Habitat quality has improved and grayling populations have more than doubled since the CCAA began in 2006. The cooperation between the federal and state partners serves as a model for voluntary conservation across the country.

The Endangered Species Act provides great flexibility for landowners, states and counties to work with the Fish and Wildlife Service on voluntary agreements to protect habitat and conserve imperiled species. Through Safe Harbor Agreements, Candidate Conservation Agreements, Habitat Conservation Plans, Experimental Population authority, and the ability to modify the prohibitions on take of endangered species in Section 9 by crafting special rules for threatened species under Section 4 (d), the Act allows and encourages creative, collaborative, voluntary practices that can align landowner objectives with conservation goals.

H.R.1314 - To amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements

H.R. 1314 would amend the ESA to require the Service to publish all complaints received pursuant to the ESA within thirty days of being served in order to provide notice to all affected

parties. Those affected parties would then have a reasonable period to move to intervene, during which time parties would be prohibited from moving for entry of a consent decree or to dismiss the case pursuant to a settlement agreement. The bill would create a rebuttable presumption that any affected party moving for intervention would not be adequately represented by the existing parties. If the court grants a motion to intervene, the bill requires the court to refer the case to mediation or a magistrate judge for settlement discussions including any intervenors. Finally, the bill revises the attorneys' fees provision, effectively prohibiting the payment of attorneys' fees to plaintiffs in any case that settles and adds a new provision that requires each state and county where the species at issue occurs to approve of the settlement.

The great majority of ESA litigation brought against the Service is to enforce compliance with the mandatory deadlines for action set forth under the Act. When the Service settles a deadline case, it is because we lack a viable defense, and we agree to a schedule for taking an action that is already required by the ESA on terms more favorable to the Government than what we might expect from a court if the case went to trial. We do not give away our discretion to decide the substantive outcome of those actions, and the notice and comment and other public participation provisions of the ESA and the Administrative Procedure Act still apply to the process for making those decisions. In short, so long as the Act imposes mandatory deadlines for taking action that exceed the capability of the Service to meet within the resources we have available, it is important that we retain the ability to settle deadline litigation on favorable terms and reduced cost to the Government.

If this bill were to be enacted, the prohibition against the award of reasonable attorney fees and the requirement that each State and County within the range of the species must approve any settlement will make it highly unlikely that any plaintiff will agree to settle a case. Instead, plaintiffs would likely press the courts for summary judgment, seeking a remedy that may be far less favorable for the Service and forcing the Government to incur litigation costs far in excess of the reasonable attorney fees associated with a settlement agreement. When deadline cases have been litigated in the past, courts have frequently imposed very short deadlines. Therefore, removing the incentive for settlement is likely to accelerate the timing of listing determinations and other actions required by deadline, thereby reducing the opportunity for interested parties to participate in the decision-making process. In addition, the necessity of fully litigating each case would greatly increase the administrative burdens and costs borne by the Service and the courts, with no offsetting benefit.

The Department opposes H.R. 1314 because it will greatly diminish the opportunity to settle deadline lawsuits brought under the ESA, where it is usually in the interests of the Government and taxpayer to do so.

H.R.1927 - More Water and Security for Californians Act

The *More Water and Security for Californians Act*, HR 1927, is aimed at minimizing the extent to which California's water supplies are impacted by requirements for fish under the Endangered Species Act (ESA; 16 U.S.C. 1531 et seq.). The bill addresses operation of the State Water Project (SWP) and Central Valley Project (CVP), collectively referred to as the "Projects," and applies to biological opinions associated with the projects under the ESA. The bill states that all

requirements of the ESA relating to operation of the projects are "deemed satisfied" if reasonable and prudent alternatives (RPAs) from the biological opinions are implemented, additional actions are implemented and as long as state requirements for water quality are met. The bill favors specific operational regimes described in the biological opinions, and is aimed at preventing any interpretation of the biological opinions that would curtail water exports via the state and federal pumping plants in the southern end of the Sacramento-San Joaquin Bay-Delta.

The bill's other major provisions authorize a fish hatchery program for delta smelt; a habitat program that includes fish passage projects in and above the Bay-Delta; and the installation of a barrier within the delta aimed at protecting migrating Chinook salmon and other listed fish from influence of the export pumps. No new funding is authorized or appropriated by the bill. While drought is not referenced in the language of this bill, it is clear that any water supply impacts associated with the ESA are more conspicuous because of the drought's effects on water supplies this year in California. In this third year of drought, all uses of state and federal project water – including the environment – are severely impacted. But while media coverage and editorializing might argue otherwise, the central reason for reduced water supplies in California this year stems from drought, not the implementation of the ESA. It is true that the implementation of the ESA necessarily entails some choices, and requires the dedication of water that in some cases cannot be recovered. But it is not clear that the language of HR 1927, if enacted, would meaningfully change the water supply allocations made by the projects in drought years like 2014.

The Department does not support HR 1927 because it would limit the scope of actions the agencies can take, consistent with the best available science, for operating the state and federal projects in a way that is protective of endangered species. The bill sets an unfavorable precedent of layering a general Congressional policy goal over the top of carefully crafted actions that were developed to comply with the law for the protection of listed fish while still allowing water deliveries to continue. In addition, a section of this bill conflicts with longstanding Reclamation law, specifically Section 8 of the Reclamation Act of 1902. The bill could further complicate project operations in years of drought since many of its provisions, such as the reverse-flow language in Section XX(b)(2), which would potentially interfere with actions necessitated by the specific hydrology of a given year. The Department's views on HR 1927 are directly informed by the actions that are being taken to address drought, actions promoting sound water management consistent with existing laws, including the ESA, which lead us to the conclusion that these coordinated actions are better able than the measures described in the bill in providing the operational flexibility to maximize the delivery of the limited water supplies available during dry years.

We share the goals of the bill's sponsor to secure California's water supplies, but do not believe the approach embodied in HR 1927 advances that objective.

H.R.4256 - Endangered Species Improvement Act of 2014

The *Endangered Species Improvement Act of 2014*, H.R. 4256, would amend the ESA to direct the Secretary of the Interior, to count all of the species without regard to whether it is found on

state, private, or tribal lands as determined by the state, for the purposes of whether or not to list a species as threatened or endangered.

For the purpose of determining whether a species should be listed as threatened or endangered, the Service must consider both the status of the species, for which population size is an important consideration, and the threats to that species using the factors set forth in the statute. The Service always counts all individuals for the purpose of estimating population size, but in some circumstances may not credit all individuals as contributing to a secure population that is not at risk of extinction.

The Department has concerns about H.R. 4256 as currently drafted but would be happy to work with the Committee to discuss how the objectives of the bill can be achieved without compromising the listing determination process set forth in the Act.

H.R.4284 - ESA Improvement Act of 2014

The ESA Improvement Act of 2014, H.R. 4284, would amend the ESA to further engage states in the conservation of threatened and endangered species. The bill would establish a process by which any population of a species in a State would be precluded from listing as a threatened or endangered species listing if the Secretary has approved a State Protective Action (SPA) for that population.

The bill would require the Secretary to provide the State with at least 90 days advanced notice of a proposed listing rule together with "criteria for approval" of a SPA. Within 45 days of submission of a SPA, the Secretary would have to approve the plan if it meets the criteria. If it does not meet the criteria, the Secretary would provide written comment explaining the disapproval; provide 45 additional days for a resubmission; and make a final approval determination within 30 days thereafter. Upon final approval of a SPA, the Secretary would be precluded from listing the population(s) in the state(s) covered by an approved SPA.

The bill would require the Secretary to review SPAs every five years, and would give the Secretary the authority to revoke the approval if the State has failed to implement the Action or if the Action "has failed to make measurable progress toward achieving the recovery criteria for the population." The bill states that revocation of approval may not occur any sooner than five years after the approval. Once approval is revoked, the Secretary may propose adding the species to the list. The Secretary would also be empowered to "terminate" the Plan if the recovery criteria for the population have been achieved. The bill also states that SPAs would be treated as cooperative agreements for the purposes of Federal grants.

While we support the intent of the bill to provide additional incentives for States to develop and implement conservation plans for candidate species to avoid the need for listing under the ESA, but have concerns with H.R. 4284 in its current form. Most significant among our concerns is that: (1) it establishes a process to exclude all or part of a population from listing without opportunity for public comment on the criteria for approval of a plan and merits of the SPA submitted by the State(s) for approval, and (2) it precludes ESA protection for a covered population for at least 5 years even if a State fails to implement an approved SPA.

However, the Department strongly supports the intent of the bill to encourage States to proactively develop and implement conservation actions for candidate and at risk species so that protection under the ESA in not necessary. To this end, we would like to work with the Committee to further explore options that would engage states early in an effort to conserve species and their habitat before a listing under the ESA is required.

H.R.4319 - Common Sense in Species Protection Act of 2014

The *Common Sense in Species Protection Act of* 2014, H.R. 4319, would amend section 4(b)(2) of the ESA to make it mandatory that the Secretary exclude any area from the designation of critical habitat if she determines that the benefits of exclusion outweigh the benefits of inclusion. The bill would also establish, in statute, the requirement to publish a draft economic analysis at the time of a critical habitat proposal. We note that the Services issued a final rule on August 28, 2013 (78 FR 53058) that requires draft economic analyses to be issued concurrently with the proposed rule to designate critical habitat and codifies the practice of evaluating the incremental economic effects that are solely the result of the designation of critical habitat.

In general, the Service agrees that areas should be excluded when the benefits of exclusion outweigh the benefits of inclusion, and we give careful consideration to the appropriate use of this discretionary authority when we designate critical habitat. However, the requirement that exclusions be mandatory, as opposed to discretionary, actions will greatly increase the litigation risks for critical habitat designations and will likely result in a greatly increased amount of litigation challenging the Secretary's decisions on whether to exclude areas from a designation. It is often not possible to fully quantify the benefits of either exclusion or inclusion and the Service must use judgment, informed by many years of experience in making critical habitat determinations, as to whether the benefits of exclusion outweigh the benefits of inclusion or not. In the past when litigants have challenged the Secretary's decision to exclude an area under Section 4(b)(2), courts have consistently noted the discretion given to the Secretary under ESA and upheld the Secretary's decision.

The Department opposes H.R. 4319 because, by making the exclusion process under Section 4(b)(2) mandatory as opposed to discretionary, it will greatly increase the litigation exposure of the Government for critical habitat designations.

H.R.4866 - Lesser Prairie Chicken Voluntary Recovery Act of 2014

The *Lesser Prairie Chicken Voluntary Recovery Act of 2014*, H.R. 4866, would reverse the Department of the Interior's listing of the lesser prairie chicken as a threatened species under the ESA until January 31, 2020, and prevent listing of the species after that date unless it is determined that implementation of the Western Association of Fish and Wildlife Agencies' (WAFWA) Lesser Prairie-Chicken Range-Wide Conservation Plan has not achieved its conservation goals.

The Department strongly opposes H.R. 4866. The Service carried out its responsibilities and made a science-based listing determination in accordance with the Act. The final listing

determination for the lesser prairie-chicken as a threatened species came with a 4(d) rule that establishes that landowners and businesses enrolled and participating in the Range-Wide Conservation Plan are not subject to further regulation under the Act. A Congressional override of this lawful and proper listing determination would severely undermine effective, science-based implementation of the Act.

Conclusion

America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. The Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.