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Testimony on "Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools"

Committee on Natural Resources
U.S. House of Representatives
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Thank you for the opportunity to testify. Holsinger Law, LLC is a small, Denver-based law firm that specializes in lands, wildlife and water law. I am testifying as the manager of Holsinger Law, LLC. In that capacity, I can attest to the impacts the Endangered Species Act (ESA) has had on many of our clients such as individual landowners, agricultural entities, water providers and energy producers.

I. Drowning in Petitions and Flooding with Lawsuits

Over the past several years, a small cadre of environmental groups has buried the U.S. Fish and Wildlife Service (FWS) with listing petitions under the ESA. WildEarth Guardians alone has petitioned to list more than 681 plant and animal species.

Such efforts could blanket the West with ESA listings. A single listing could have dramatic impacts to the regulated community: agriculture, water, utilities, industry and others. Federal agencies impose onerous restrictions even for candidate and special status species such as greater sage grouse.

Listings and litigation are unlikely to go away. According to the Western Legacy Alliance, from 2000 to 2009 the Center for Biological Diversity (CBD) filed 409 lawsuits; followed by 180 lawsuits filed by WildEarth Guardians (WEG) and 91 filed by Western Watersheds Project, among many others. These activist groups can collect millions in taxpayer-funded attorney fees from procedural victories or even settlement agreements with the United States.

Accordingly to our research, from 1999 to 2012, CBD has been a party to a staggering 835 lawsuits! WEG has been a party to 145 lawsuits (123 of which it initiated) between 2008 and 2011. Of the WEG cases, 95% have been brought against the federal government. In 2010, WEG filed more than one new lawsuit per week. Most of these have been brought against the U.S. Department of the Interior (DOI). Most have raised claims related to the ESA.

CBD and WEG entered into settlement agreements with DOI In May and July of 2011 over petitions to list over 775 species under the ESA through a myriad of lawsuits and petitions. Currently, there are 1,1,38 species listed under the ESA. How can the FWS process these petitions while adhering to the "best available science" standard under the ESA?

These groups collected over $125,000 in taxpayer-funded attorney fees as a result. Despite the settlement agreements, CBD has boasted of filing new ESA petitions and lawsuits as recently as June 8 and June 11, 2012.

II. The ESA Stands in the Way of Good Conservation Efforts

Because the regulatory straightjacket of the ESA creates a disincentive to landowners, listing often stands in the way of good conservation work. Even the FWS expressed that it "supports voluntary conservation as the most effective method to protect species and their habitats." *See* 70 Fed. Reg. 2245. And the FWS does "recognize that listing may affect local planning efforts, due to its effect on voluntary conservation efforts." *Id.* at 2246.

Listings often restrict the ability to manage for species and could even result in harm to the species. *See* Amara Brook, Michaela Zint, Raymond De Young, *Landowners' Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation*, 17 Conservation Biology 1473, 1638 (Dec. 2003) (Where an extensive survey of landowners showed that many managed their land so as to avoid the presence of a listed species). Many landowners managed their forest lands to avoid the nesting of federally-listed red-cockaded woodpeckers. For example:

> Ben Cone of North Carolina managed 7,200 acres of timberland with 70-80 year harvest rotations, small cuts, and controlled burns, which . . . created habitat for the red-cockaded woodpecker. When the endangered woodpecker took up residence on Cone's land, more than 1,500 acres were placed under the control of the U.S. Fish and Wildlife Service (see Stroup 1997). In response, Cone began a harvest rotation of 40 years on the rest of his land in order to eliminate the mature pines favored by the woodpecker and also remove any possibility that the federal government would take control of his remaining land.
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> Ben Cone's experience is not an isolated incident, as a study by economists Dean Lueck and Jeffrey Michael (1999) confirms. Using data from hundreds of forest plots in North Carolina, they found that the more red-cockaded woodpeckers in the vicinity, the more likely the landowners were to harvest younger trees. . . . (Lueck and Michael 1999, 36). The landowners' incentive for using this shorter rotation was to ensure the birds did not move onto their property, possibly leading to land-use restrictions. Clearly, the ESA is creating perverse incentives. Holly Lippke Fretwell, Forests: Do we get what we pay for? Available at http://www.perc.org/publications/landreports/report2.php#tale.

According to Bureau of Land Management (BLM) and U.S. Forest Service officials, the ESA creates " . . . a complex maze of processes and procedures, which field biologists and managers must attempt to negotiate on a daily basis in order to implement on-the-ground projects." USFS and BLM, Improving the Efficiency and Effectiveness of the Endangered Species Act, (Dec. 15, 2003). In regards to the peregrine falcon, leading experts concluded, "despite having the authority for implementing the ESA, and a number of their biologists contributing importantly to the recovery program, as an agency the FWS had a limited role, and its law enforcement division, which was in charge of issuing permits as well as enforcing regulation, was regularly an obstacle to recovery actions." (Burnham and Cade 2003b) (emphasis added).

III. Greater Sage Grouse: Are BLM Lands Closed for Business?

Federal lands comprise over one-third of the State of Colorado. Over 8 million acres are managed by the BLM. While Congress has mandated that these lands be managed for multiple uses, the BLM is issuing new draft Resource Management Plan (RMPs) that signal BLM lands could be closed for business. New restrictions for sage grouse and other sensitive species could threaten scores of communities in the West.

RMPs guide and define management actions, future land use decisions and project-specific analyses on some 250 million acres of BLM lands in the West. BLM justifies the significant revisions to its existing RMPs due to "new issues and higher levels of controversy" since the original plans were prepared. More than 15 RMPs are currently under revision in Alaska, Arizona, California, Colorado, Idaho, Nevada and Wyoming.

In Colorado, BLM has issued new drafts for its Colorado River Valley and Kremmling Field Offices. Some of these RMPs approach 2,000 pages with 50 pages of new restrictions and 5 pages of acronyms and abbreviations.

The drafts would include: less land available for mineral leasing; significantly increased buffers around sage grouse habitat; de facto wilderness; significantly increased buffers around raptors and eagles; new restrictions for prairie dogs, amphibians, fish and recreation; buffers around streams and water supplies; timing limitations for stream crossings; new cultural restrictions and tribal consultation requirements; onerous air quality standards and severe restrictions on mechanized travel and right-of-ways.

Some BLM wildlife restrictions go far beyond the legal standards required. For example, there are now restrictions for sensitive fish species that occur only downstream and outside of the planning areas. Timing limitations for in-channel work (ie road crossings, pipelines or culverts) are proposed for "native fish" and "important sport fish." BLM intends to "designate" lands with wilderness characteristics and, much like EPA's controversial guidance on wetlands, proposes to regulate activities in and around riparian areas and even intermittent streams.

Even more disturbing are BLM's proposed restrictions on access to public lands. BLM now mandates areas open to cross-country travel or "Open to Existing Routes" should instead be "Limited to Designated Routes." This simple change places millions of acres off limits to mechanized travel. For example, in the Kremmling draft, BLM cross-country travel would be slashed from 307,300 acres to only 200 acres. Thousands of acres would also be designated Right-of-way Avoidance Areas and Right-of-way Exclusion Areas. No Surface Occupancy stipulations would increase tenfold and Controlled Surface Use constraints would double.

Citing impacts from agriculture and energy development, environmental groups have been pushing to list the sage grouse under the ESA for years. Despite over 300 documented conservation efforts in place, DOI determined listing the greater sage grouse was warranted but precluded in 2010. Ironically, in some of the RMPs, BLM recognizes that sagebrush habitat is largely intact and that there is little threat of fragmentation. They also recognize significant increases in moose, antelope, mule deer and elk populations since the last RMP revisions. Adding fuel to the fire, the BLM, and several other federal agencies, are now intruding on Colorado and proposing to regulate oil and gas despite decades of successful state regulation.

The draft RMPs are incredibly complex and onerous. In some cases, they lack significant information and failed to include key documents, descriptions and data necessary for informed public review and comment. Where BLM analyzed economics, its figures were inconsistent and contradictory. As a result, BLM has created a jigsaw puzzle of conflicting regulations and contradictory assumptions. The underlying theme implies BLM lands will be closed for business due to sage grouse and other issues.

IV. Opportunities for Mitigation and Wildlife Protection

For listed species, activities that require federal permits, licenses or authorizations require consultation with the U.S. Fish and Wildlife Service (Service) under Section 7 of the ESA. This can result in significant delays and costly project modifications. For example, surveys may be required for some listed species that are not present for significant months out of the year. And existing federal permits, licenses or authorizations could be subject to reinitiation of consultation upon new listings or information. Finally, some actions on public or private lands could be construed to "take" listed species or their habitat under Section 9 of the ESA. Violations of the ESA are subject to substantial civil and criminal penalties.

A common thread in dealing with these issues is the need to mitigate impacts for regulatory compliance. But, incredibly, agencies like the BLM are requiring permitting and red-tape even for projects that improve or enhance habitat. National Environmental Policy Act (NEPA) compliance, along with the ESA, is stifling conservation work.

But there are opportunities for improvement. For example, Partners for Western Conservation (Partners) is a 501(c)(3) designed to facilitate on-the-ground conservation

work. It was established by the Colorado Cattlemen's Association, Environmental Defense and industry representatives.

Private landowners contribute up to 95% of the habitat for listed and at-risk species. With close ties to statewide agricultural organizations, environmental groups and natural resource agencies, Partners could help bridge the gap between the needs of the regulated community and the restoration, improvement and protection of valuable wildlife habitat on public and private lands. Companies or entities that need mitigation could solicit, and choose from, proposals from landowners to do real, on-the-ground conservation work. Besides introducing competition, and reduced costs, Partners could facilitate contracts between the regulated and the applicable landowner as well as quantification and monitoring of habitat benefits.

The system could work much like wetlands banking. Wetlands banking has become so successful that the Army Corps of Engineers now urges the regulated look first to wetlands banks to mitigate impacts. Wildlife credits or habitat banking through entities like Partners could eventually help break the cycle of listings and litigation in favor of real, quantifiable conservation work that benefits landowners, the regulated and the environment. But until Congress directs the agencies to refocus away from red-tape and simply saying "no," there is little incentive for such proactive habitat work.

V. Conclusion

Now is hardly the time for "business as usual" under the ESA. Scarce resources are being wasted on litigation driven by a handful of activist groups with little or no real conservation benefits. People and wildlife would benefit from improvements to the ESA, NEPA and other federal laws. Congress and the Administration should be working to reduce frivolous litigation, streamline permitting to promote on-the-ground conservation efforts, alleviate economic burdens and promote jobs. Thank you again for the opportunity to testify.

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Kent Holsinger is the managing partner of Holsinger Law, LLC. Kent has been recognized for his work on ESA issues by the Wall Street Journal, the Washington Times and CNN.com, among many others. He currently represents a broad array of clients in complex ESA, NEPA, water and land use issues.