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Oversight Hearing before the
Committee on Natural Resources
U.S. House of Representatives

On "The Endangered Species Act:
How Litigation Is Costing Jobs and Impeding True Recovery Efforts"

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I appreciate your invitation to testify today. I am a law professor at the University of California, Hastings College of the Law (on leave this semester as a visiting professor at Harvard Law School). I appear today as a private citizen, expressing my own views.

I have dealt with the Endangered Species Act in a variety of settings in and out of government practically since it was enacted. During almost a dozen years of government service, I helped administer the statute and advised agencies regarding compliance. Many times I helped defend government agencies who were being sued for violating the Act. I have also taught the Endangered Species Act to many law students in dozens of courses over the years, and have written about it in two law casebooks I co-author (dealing with water law and with public lands & resources law) as well as in articles and book chapters.

I believe, based on this extensive experience, I am well-qualified to comment on how the Act has worked in practice, and the role litigation has played in its administration.

The Endangered Species Act has a clear and overriding purpose -- to protect the diversity of life on earth, in the tradition of Noah and the Ark. Its objective is important. Famed naturalist E.O. Wilson has said that to fail to take strong action to stem the loss of species diversity would be the "folly" our descendants are "least likely to forgive."

Nature's loss is our own. Preserving as much of creation as possible has a moral dimension, but it is also very much in our self-interest, more narrowly defined. Economists put the value of "ecosystem services" -- the many ways that the natural world and its biodiversity support and protect the quality of human life on earth, from providing medicines and foodstuffs to pollinating crops to cleansing water -– in the trillions of dollars.

The title of today's hearing, I respectfully submit, paints a very misleading picture about the Endangered Species Act. It implies that litigation is a dominant part of the Act's implementation, that it is costly to the economy, and that it, and the Act itself, are ineffective at protecting species. Each of these implications is, based on my experience working with the Act, erroneous.

The media and the public love a good fight. A small number of high-profile court cases garner a lot of attention and fuel the impression that the Act is all about litigation.

In my experience, the truth is otherwise. Across the nation, in countless settings, the Endangered Species Act is being successfully implemented with only rare resort to the courts. While the Act puts endangered species concerns squarely on the table when decisions about projects that could affect them are made, in the vast majority of situations, those concerns are accommodated with modest adjustments, little disruption, and no litigation. Of the many thousands of formal and informal "consultations" – the Act's central procedural requirement - that take place every year, almost all either allow the project to proceed with little change (because it has been planned with the Act in view), or result in modest changes. Often these changes make projects better, from an economic as well as environmental perspective, Only a relative handful are ever challenged in court. As this suggests, with nearly forty years of operation, the Endangered Species Act has become embedded in project planning and resource management, and that is a good thing.

In almost all of the court cases brought under the Endangered Species Act, the government is the principal defendant, charged with inadequately complying with the Act. The opportunity to challenge the government is as available to those who think the government is over-regulating, as it is to those who think the government is under-regulating. Litigation, in other words, gives all sides equal opportunity to persuade a neutral decision-maker – a court – that the government is not doing its job.

In my experience, about as many Endangered Species Act cases are brought by those claiming over-regulation as by those claiming under-regulation. Furthermore, my fairly regular canvass of court opinions persuades me that those claiming over-regulation win just about as often as those claiming under-regulation.

Most of the time, though, the government wins. And that is, I believe, as it should be. In my experience, the executive branch usually does a reasonably conscientious job implementing the Act, and deserves and usually receives some deference from the courts.

But not always. And that, too, is as it should be. We live in an imperfect world where, for a variety of reasons, government sometimes makes mistakes. So the availability of judicial review is a good thing, giving all sides – those who want more regulation and those who want less --a tool to make sure the executive branch is faithfully implementing the laws that Congress enacts. The American people have long been united on the value of judicial review, for litigation challenging government policy and performance has been a standard feature of American life almost since the beginning of the Republic. Our founders, by creating an independent judicial branch, understood the need to provide a check to hold other branches of government accountable.

Next, I will address the contention that Endangered Species Act regulation costs many jobs and wreaks economic havoc. Here too, a handful of high-profile court injunctions have tended to grab attention and skew public perception. But headlines should not obscure the truth, which is

that many times the Endangered Species Act has protected economic health and saved jobs. Indeed, from a larger perspective and longer view, that is more often the result than not.

Here is a concrete example. The Edwards Aquifer in Texas, a large groundwater basin in the south-central part of the state, is a vital regional water supply for farms, industries and municipalities. One of the latter is San Antonio, the nation's seventh largest city, and one of the largest cities in the world solely dependent on groundwater.

Being so important to the health, welfare and economic livelihood of such a large population, one might expect that Texas would have been carefully managing the Edwards. Not so. Until the Endangered Species Act was brought to bear, Texas did just the opposite. It treated the Edwards Aquifer like a big soda, in which anyone could insert a straw and suck out unlimited quantities of water. If your straw was big enough, everyone else might suck air.

Texas law purported to give landowners "property rights" in the Edwards (and other aquifers in the state), through the so-called "capture" doctrine. But these so-called "property rights" were hollow – they did not give their "owners" any ability to prevent others with bigger pumps and deeper wells from taking "their" water. The ugly truth was, the Texas capture doctrine gave landowners no real property rights at all in the water in the aquifer. Instead, it created a perfectly legal race to the bottom of the aquifer. (A Texas water lawyer once told me how, after he explained Texas groundwater law to his client, a large landowner and former prominent state politician, the client said, "Gee, I was all for the capture doctrine, until I understood it!")

The capture doctrine had a predictable result: The Edwards Aquifer was in big trouble. And so was San Antonio and the regional economy. Many thousands of jobs were at risk.

Enter the Endangered Species Act. By a quirk of fate, the Edwards Aquifer fed some springs. Rare species of fish, found nowhere else, were living in waters fed by those springs. The race to the bottom of the aquifer threatened to dry up the springs, which would have wiped out the species.

Now perhaps only a few people would have genuinely grieved if these obscure species were erased from the face of the earth. They had no known value in the commercial marketplace. Their going extinct might have had no more impact than the popping of a single tiny rivet on the wing of a giant commercial airliner.

But the more rivets that pop, the more danger to the plane. If the springs and the species died, how far behind might be the institutions and economy and culture and jobs that also depended on the Edwards Aquifer?

Joseph Wood Krutch once wrote that "it is not a sentimental but a grimly literal fact that, unless we share the planet with creatures other than ourselves, we shall not be able to live on it for long." It was that "grimly literal" fact led the Congress in 1973 to enact the Endangered Species Act (without almost no dissenting votes), and led President Nixon to proudly sign it into law

with the words, “[n]othing is more priceless and more worthy of preservation” than the “rich array” of life on earth.

The U.S. Fish & Wildlife Service added the obscure species dependent on the Edwards Aquifer to the endangered species list, and the machinery of the Endangered Species Act was brought to bear on the problem.

After years of litigation and negotiation, the state of Texas created a management authority and gave it marching orders to safeguard the aquifer for the long term. This put the region’s water supply, and the jobs and economic activity dependent on it, on a much sounder footing for the long term.

Was the road to a resolution at Edwards bumpy? Yes. Was there headline-grabbing litigation and controversy? Yes. Are some people unhappy about the management scheme the legislature devised? Yes. Is the problem completely solved? No.

But there is no denying that the economically vital Edwards Aquifer is being much better taken care of, and is much more likely to sustain the regional economy over the longer term, than it was before the Endangered Species Act - and litigation to enforce it – entered the picture. This is, to my mind, a clear example where the Endangered Species Act protected jobs, economic livelihood and human health of a large region. It is scarcely the only example.

The Endangered Species Act has also been successful at its most immediate task, saving species from extinction and recovering them. One of the problematic aspects of how the Act is administered is that species tend not to be listed and brought under the Act’s protective umbrella until they are in dire peril of blinking out. This gives the Act a kind of desperate, emergency-room focus, and means that by the time a species is listed, it may be so far gone that recovering it to a healthy population may take many years. For this reason, the Act’s success cannot be measured by recovery in the short term.

Happily, over the last couple of decades, steps have been taken administratively to allow the needs of species declining toward listing to be met before they get to the emergency room. In fact, a substantial consensus has emerged among states, major players in the regulated community, federal agencies and others to support such efforts, through such devices as habitat conservation plans that deal with unlisted species that are likely candidates for future listing if nothing is done, as well as listed species. Focusing on ways to promote these positive developments is, in my judgment, a far more productive exercise for helping species, and those at risk of being regulated by the Act, than focusing on the role of litigation in the Act’s administration.

Finally, another very useful step to take in the short run is to provide the federal agencies more funding to administer the Act. Chronic under-funding has helped engender the kind of emergency-room-triage atmosphere that makes things more, not less, difficult for those who are regulated by the Act. Relatively small amounts of money, in the tens of millions of dollars, could make the Act work measurably better for them, and everybody else.

Thank you for the opportunity to testify.  I am of course happy to answer questions.