Testimony to the House Committee on Resources Hearing to Amend the Endangered Species Act HR 2829 Mr. Walden and HR 3705 Mr. Pombo Honorable James V. Hansen, Chairman

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My name is Stephen T. Lilburn. I am an environmental planning consultant from San Bernardino, California. I am the president of Lilburn Corporation, a consulting group that specializes in securing land use permits for industry and government. I am also past president and current chair of the environmental committee for a citizens group called Inland Action.

I have been consulting in the areas of environmental regulatory compliance for 24 years. My practice is centered in the area of the National Environmental Protection Act (NEPA), the California Environmental

Quality Act (CEQA), the California Surface Mining and Reclamation Act (SMARA), the Endangered Species Act (ESA or Act) and various state and federal processes. My work is conducted in the western states, principally in California. A resume of my professional experience is attached.

I have been asked to testify on behalf of HR 2829 by Mr. Walden and HR 3705 by Mr. Pombo.

I have reviewed both bills and see both as an attempt to interject scientific peer review into the endangered species listing process. I support both bills in concept.

I would suggest that these advisory committees [(3705) p. 13-23 and (2829) p. 5-21] composed of individuals with biological science expertise, also include those with expertise in spatial distribution (geography), climatology and geomorphology. All these resource areas are critical in the analysis of single and multi-species habitat delineation and threat assessment. Biology is the basis of species protection but habitat management and recovery potential is a much broader issue requiring broader expertise. A review committee should have enough background to question the broadest aspects of species viability and background presentation.

In light of recent 10th circuit court decisions regarding economic effects in California, it may also be appropriate to include an individual with expertise in economics and cost benefit analysis. This may be critical in analyzing the impact of implementation and feasibility of conservation and attempts at recovery.

Many question the need for refinement of the ESA; however, working with the Act on a daily basis it is my opinion that many of the problems associated with its implementation by the U.S. Fish and Wildlife Service (USFWS or Service) is the lack of specific congressional intent within the Act. Unless you want the Service or a court to interpret the Act, Congress should be more specific in their intent and direction.

I have spoken with several of the framers of the original Act and it is clear that it was not initially intended as a tool for land use regulation. Yet that is certainly what it is today. In fact, few had an understanding of the depth and breath of regulation that would evolve with this Act.

A lack of specific congressional intent has led to an Act that is now driven by law suits, judicial interpretation and legal settlements. Listing packages are being processed not by need or scientific justification, but by volume based on settlement agreements dictating a number of listings to be completed within a fixed time frame.

Listings are being processed without knowing the extent of or availability of critical habitat needed for survival. This process can take years after the listing to develop and is itself subject to litigation. Yet you would think that critical habitat for a species survival would be fundamental in the evaluation of a species threat. In addition, listings do not include recovery plans or consider the financial feasibility of their implementation. If we are going to commit to a species protection, can we expect to wait years following its listing to determine a plan for its survival. And typically, no one critically reviews or questions the field data, assumptions, techniques or accuracy of the information presented in these listing applications.

The result in California is that the ESA is being implemented as interpreted by biologists and attorneys at USFWS as directed by courts and settlement agreements. It has turned into the single most complex land use regulatory process in the state of California. More Section 10A (private lands) consultations are conducted annually in California than in all the other states combined by the largest USFWS staff dedicated to this effort in the country. Every consultation, Section 7 or 10, is individually negotiated as interpreted by staff at that time. No two agreements are identical. Although based on biologic intent, the process has affectively become one of the most costly, time consuming and complex real estate transaction processes in the state. All of this without the benefit of a single real estate professional on the part of USFWS.

To refocus on the listing process and the Bill at hand, I know of at least two incidences where emergency listing were initiated with the specific intend of affecting those negotiations in progress. In both cases peer review may have questioned the listing process and its supporting data.

1. Arroyo Southwestern Toad

On December 16, 1994 the USFWS determined the Arroyo Southwestern Road to be endangered. At the time, biologists at USFWS were consulting on a project in the Los Padres National Forest that could impact wetlands habitat associated with the toad. By listing the toad the occupied habitat would be subject to formal consultation and probable conservation. Discussions with biologists following the listing indicated that they believed the toad had been eliminated in most of its historic range and that listing the species would not impact projects much beyond the area in question. Their data indicated their distribution was extremely limited and their survival exceptionally compromised. This of course was not true. Based on subsequent studies, we now know that the toad occupies several river and stream habitats in Orange, San Diego and San Bernardino counties, its historic range. Several state and local projects are now consulting on impacts to this species.

I wonder if forced to discuss the listing package, its assumptions and potential ramification of the decision with a peer review group, the Service would have reacted with the same rush to adopt the listing package. A detailed discussion of the literature and study results appeared four years later as the species recovery plan began to circulate in draft form.

I believe the process of listing without immediate consideration of actual occupied habitat and a strategy for recovery, allows for emergency listing to act as a means of protecting potential habitat. Thus, it transfers the burden of proof of species occupancy to the property owner. A logical conservation strategy but based on time, cost and recovery potential, an unfair burden to the private property owner or public land use authority.

I wonder if objective critical review of the facts would support past listing rational.

2. San Bernardino Kangaroo Rat

The San Bernardino kangaroo rat was emergency listed in January 1998. At the time, USFWS personnel had been in heated negotiations with a land user and property owner to complete consultation on potential impacts to plant species in the upper reaches of the Santa Ana River. As indicated in the listing package and notes of both the USFWS personnel and land users, both sides were extremely frustrated with the state of discussions. The land user's representative, operating under an approved land use permit indicated in a meeting that, if a resolution was not reached soon, several more months, he would proceed with the approved site clearing. Within one week, the rat was emergency listed. The principal rational for listing, threats to take rats by a property owner.

This obviously changed the balance of the discussion throwing leverage back to the USFWS. The area was also the home of the largest federal public works project at the time, the Seven Oaks Dam. Upon publication of the listing, construction at the Dam was halted because several acres of borrow area had yet to be cleared within San Bernardino kangaroo rat habitat. Within 24 hours from initiation, the local USFWS office was able to prepare and approve a biologic opinion for the Dam on the impacts of continuing its construction on San Bernardino kangaroo rat (USFWS Biological Opinion for the Seven Oaks Dam, February 4, 1998). The Biological Opinion determined that the project would remove 70 acres of occupied habitat and issued a take permit. The land user blamed for the threat has negotiated to this day to receive permission to use the property originally in question.

The threatened property, approximately 300 acres, was suspected to be occupied on approximately 60 acres

at the time. Since it was possible to remove 70 acres of occupied habitat without significant impact to the species, it would appear that the emergency was overstated or in-fact non-existent. I wonder if a scientific review panel would have supported this science based listing decision.

The ramifications of the San Bernardino kangaroo rat listing extend even further with the critical habitat currently being considered. It includes the runways, golf course and open space of the former Norton Air Force Base currently under redevelopment. This "historic range" was graded and developed in the 1940's. The open space is currently mowed seasonally to help maintain another sensitive plant species, the Santa Ana woolly star, which thrives there. It is hard to understand how the San Bernardino kangaroo rat will adapt to annual mowing. The scientific justification for including this area in the critical habitat for the San Bernardino kangaroo rat screams for objective review.

I believe that scientific peer review of listing packages should extend to critical habitat designation and recovery plan proposals. Ideally these would all proceed concurrently. In light of the Arizona Cattle Growers Association (ACGA vs. USFWS) decision, it would seem that scientific review of each aspect of the listing and protection would benefit from review both to quality and thoroughness of process and compliance with the intent of the Act. Emphasis should be placed on significance and actual injury to species. The more detail and clarification of congressional intent that can be inserted into the Act the more likely the USFWS will be able to meet that intent and avoid litigation. As I stated earlier – litigation is driving ESA in California and ESA is now the most costly, cumbersome and time consuming land use approval process in the state.

Another issue currently outside the consideration of these two bills but of needed consideration by the Committee, is the economic cost benefit of listing species. This is not to imply that the cost of implementation should out way protection, however it should be a consideration in weighing the viability of protection and recovery and would be useful in identifying funding needs and resources for habitat management. Let me give one example of which I am directly familiar.

The Delhi Sands Flower Loving Fly (DSFLF) was listed in September 1993. The fly lives in remnant sand dunes in and around Colton, California. It is clear that this fly is very rare. Only a few specimens reside in collections and it is rarely seen in the field. At the time of its listing, nothing was known of it larval habits below the sand including its lifespan or emergence sequence. A total population of 300 adults at emergence was estimated. Its historical range was approximately 24,000 acres of what was now urbanized southern California. The most populated habitat was in-fact within the property of an active cement plant.

Upon listing, it was discovered that a newly designed County hospital was being constructed within potentially occupied habitat. This resulted in a consultation with USFWS. The ramifications of this effort where documented in a paper I prepared in 1994 and revised in 1996 for Inland Action. I brought a copy of that paper with me today (Impacts of Mitigation for the Endangered Delhi Sands Flower Loving Fly on the San Bernardino County Medical Center, Inland Action, 1994; revised 1996).

In summary, that consultation resulted in the movement of the hospital footprint 250 feet north, a redesign of the facility and the set aside of 1.92 acres of fly habitat believed to be occupied by eight flies. The cost of this effort in 1994 was $3,310,000 dollars or $413,774 per fly, by 1996 the cost had risen to 3.5 million or $441,000 per fly.

Since the listing, only two private sites within the habitat of the fly have completed consultation with the Service. What concerns me about the DSFLF listing is that if the habitat is looked at from a regional prospective, it becomes apparent that the conditions contributing to the historical habitat no longer occur. Aeolian sand sources upwind of the area are no longer available having been covered by development or mined. Much of the historic habitat has been altered by farming or development. The area is the most heavily urbanized portion of the San Bernardino Valley. Biologists for both the Service and the private

sector will readily admit that the feasibility of successful protection of this species is very doubtful. To date consultation efforts and mitigation expenses for this species probably exceed 100 million dollars including halting a federal enterprise zone funded by $650 million dollars in HUD bonds.

I would like to think that scientific review by an objective, involved oversight committee would have asked hard questions regarding this listing, the impacts of its implementation and the feasibility of its implementation and the potential success of the effort.

The examples I have presented sound outrageous but should not be considered atypical. They are the norm and they are the reason why listing packages proposed under this Act need careful scrutiny before resources, both personnel and financial, are committed.

I support both of these bills as an initial effort to specify the congressional intent expected in the ESA. Critical oversight is long overdue. California is paying the price in untold millions of dollars for this lack of control. I also believe that if, after close scrutiny and critical review of every aspects of a species conditions and circumstances, it is determined to warrant endangered status, that it is then in the national interest to protect the species. Its protection and survival should then be budgeted for at the federal level and a commitment guaranteed. The scientific review panel should determine if the data warrants a national commitment to a species protection.

Thank you for your time and consideration.

Attachments:

Disclosure Form
Resume
San Bernardino kangaroo rat supporting documents
DSFLF support documents