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I will explore the frustration with the ESA and the impact it has on effective species conservation, jobs, property and multiple use using two species I am very familiar with; Preble's meadow jumping mouse and greater sage-grouse.

Our frustrations with ESA generally fall into three categories, (1) selective use of data and research, (2) ESA decisions driven by litigation and settlements and (3) lack of consideration for public participation and conservation actions:

- In August, you heard from Dr. Ramey about the data requirements of the Act, "the best scientific and commercial data available." ESA decisions are to be made based on the best available data, not outcomes that are founded on data that is unavailable and therefore the outcomes cannot be replicated and the data cannot undergo additional testing through the scientific method.
- Similarly, we see the ever-increasing use of predictive modeling to determine outcomes well into the future; however, the Service never tests these models in a real word situation to determine if the modeled outcomes are accurate. Instead the Service deems them accurate and demands conservation action based on them.
- Selective use of peer and non-peer reviewed literature by agencies (i.e. FWS and BLM). We are told by FWS that all information used in their decision making must be peer reviewed; there is nothing in the Act about only peer reviewed materials being considered. However, in agency decisions we often see select non-peer reviewed materials, including gray literature, being cited alongside peer reviewed works. While data provided by industry is often ignored.
- Moving conservation targets: The mitigation bar is continually being revised as a result of emerging information. We never allow an ESA/conservation decision to play out long enough to see if the findings were correct or if applied mitigations work. Our response is always "the sky is falling and the species is going to blink out" if we do not act immediately. Mother Nature does not react like that.
- Section 4 of the ESA contains timeframes for completing the various statutory phases of species listing. IF the Service actually adhered to these timeframes the vast majority of the litigation could be avoided, it is the slipping of these requirements that provides the opportunity for settlements that leave other interested and potentially affected parties out of the loop.
- Settlements between a plaintiff and the USFWS are generally crafted in a vacuum and targeted toward the outcomes desired by the plaintiff. The potentially affected parties (States, tribes, landowners, business entities, etc.) must be included in these

deliberations. We saw this again last week with the settlement between the Service and the Center for Biological Diversity regarding the Mexican wolf in Arizona and New Mexico.

- Settlements between the Service and plaintiffs, such as that in 2011 with Wild Earth Guardians and Center for Biological Diversity, which requires reconsideration of species listing decisions and specifying the timeframes within which to do so, not only allows the plaintiff to sets the agencies priorities but takes staff away from more pressing issues such as conservation agreements with landowners and States who are trying to work within the Act and associated regulatory system.
- Litigation driven outcomes with decisions being made by individual judges based on information provided by often special interest selected "Experts," during settlement hearings/conferences.
- Local and State conservation efforts are ignored or co-opted by "emerging science," negotiated settlements and litigation. Section 6 of the ESA directs the Service to work with States and to accept applicable and appropriate State conservation programs, among other things.

1. <u>Preble's Meadow Jumping Mouse (PMJM or *Zapus hudsonius preblei*)</u>
   a) 1998 - Listed in Colorado and Wyoming, listing was preceded by significant trapping effort in Colorado but only one trapping event in historical range of the species in Wyoming.
   b) 1999 - a private landowner in SE Wyoming came forward to conduct an extensive trapping program in the historical range and in habitats that were "similar" to those where the subspecies was found in Colorado. Resulting in the capture of 33 individuals, 24 more than the Wyoming historical record.
   c) FWS gathers a "Recovery Planning Team" which meets extensively for the next five years with no measurable outcome.
   d) June 2003 – FWS designates critical habitat in WY and CO for the subspecies.
   e) December 2003 - Dr. Ramey determines the PMJM is not a unique subspecies
   f) December 2003 - State of Wyoming filed their first petition to delist
   g) February 2005 – FWS publishes proposal to delist PMJM in Wyoming
   h) 2006 - Dr. King (USGS) determines the PMJM is a unique subspecies
   i) FWS enters into a hand selected peer review panel process to "evaluate" the genetics work completed by Drs. Ramey and King; FWS "Peer Review" panel is initiated on two occasions.
   j) Sept 2006 (through Oct 2007) – Wyoming files notice of intent to sue FWS over non action on the 2005 petition to delist
   k) 2008 – Delisted in Wyoming
   l) 2009 – petition filed by Center for Native Ecosystems, followed by a court order, to re-instate regulatory protections for PMJM in Wyoming based on issues related to the definition of "significant portion of the range" (SPR).
   m) August 2011 – to comply with the Court Order the PMJM is re-listed in Wyoming based on vacating the FWS policy on SPR
   n) December 2011 – the Service and National Marine Fisheries Service notice of draft policy regarding application of SPR; the Service has yet to finalize the rule defining

this critical piece of the Act, which would allow them to list species only where they are at greatest risk.

o) May 2013 – Again, (from the 2011 settlement agreement) a court ordered date by which to conduct the 5-year status review and (finally) address the two petitions to delist received in 2003 (FR Vol. 78, No. 101, pg. 31680). The status review again re-iterates the lack of risk to the species in Wyoming from oil and gas development, farming and livestock ranching. But stresses the potential impact from human population growth in the four Wyoming counties where PMJM is found, reveling a 13% increase (20,410 people) by 2030 including the concern that Cheyenne might grow by 8,372 soles. The review also discusses the potential negative effects on PMJM habitat from climate change and fire. These out comes are derived through modeling efforts extending out 30 to 50 years and completely ignores the fact that fires and climate change have occurred over the range of the species since it came into existence. Not to mention that population growth of 20,000 persons is minute and will generally not occur within Preble's habitat. Based on these finding the Service determined that that the risk to the species is significant therefore it could not de-list the species in Wyoming.

All this is over a mouse that Gwilym Jones, in his 1981 encyclopedic review of the Genus *Zapus,* states "There is no evidence of any population of *Zapus hudsonius* (ZH) being sufficiently isolated to warrant subspecific status" (Jones 1981). What Dr. Jones points out is that these 14 to 19 "subspecies" of *Zapus hudsoniu*s are really races, not subspecies worthy of ESA protection.

Genetics has a long history of the argument between "Lumpers" (Dr. Ramey) and "Splitters" (Dr. King). ZH is ripe territory for such arguments but so are domestic cats and dogs. Basically, following the same logic used to determine that the PMJM is a unique subspecies, we could also demonstrate that your cat and mine are separate subspecies and one or the other may be worthy of ESA protection. As Dr. Taylor Haynes, so eloquently stated at a Preble's Recovery Team meeting, "A species being rare or uncommon does not equal a species at risk of extinction and ESA protection."

Another important point brought out by Dr. Jones (1981) is that "populations of the progenitors of the (*Zapus*) genus were isolated by the thawing of the glaciers and associated meltwaters with further isolation of groups occurring during periods of environmental drying." So much for the "climate change" we discuss today being a unique event in the history of the earth. Indeed, climate change is one of the natural forces of evolution. Sadly, the Service determined it could not recognize the work of Dr. Jones, or his 569-page dissertation, as it was not "peer reviewed."

This mouse is the perfect example of everything wrong with ESA, initial decisions based on little or no data, private parties have to do the work of the Service to collect the necessary data. The bright spot in the story is that the FWS staff acknowledged the new data and the cooperation of landowners, eventually amending the listing decision based on a petition from the State. Unfortunately, as we see so often, the special interest NGO's don't like sound, on the ground science-based decision making and sued for a re-evaluation of the

delisting; eventually ending with the court ordered listing of a species in an area where no risk to the species has been documented. Special interest driven decisions are the outcome and completely ignore the potential impacts to the very people who have provided habitat for the species while also providing jobs and food for the nation and their families.

2. Sage-grouse:

The greater sage-grouse story in Wyoming generally starts in 1999 when the game and fish departments in States within the range of the species, BLM and USFWS enter into an Memorandum of Understanding to look at the species and what could be done to conserve it. The States were tasked with developing State and local level conservation plans; these were to address conservation taking into consideration local economies, impacts and habitats. This story begins with the threat of the ESA, do something to conserve the species or we will have to list it!

Wyoming completed its statewide plan in 2003 and immediately set about the local planning process. All these workgroups included members from the oil and gas and mining industries, wildlife biologists, private landowners, agriculture, "conservation" NGOs, local government, NRCS, WGFD and the BLM, with the Service in attendance. These planning efforts were completed and evolved into an Executive Order issued by Governor Freudenthal in 2008, with the goal of maintaining or enhancing the sage-grouse population in designated Core Population areas. This EO has been amended twice since 2008 with the latest in 2011 (SWED 2011).

In a 2011 letter to Governor Mead, the USFWS stated it "continues to view implementation of the Executive Order as an adequate mechanism to preclude the need to list this species and if the Executive Order remains a sound policy to manage and protect sage-grouse populations in Wyoming. The Service believes the Executive Order can result in the long-term conservation of the Greater sage-grouse and thus reduce the need to list the species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). If fully implemented, we believe the Executive Order can provide the conservation program necessary to achieve your goal of precluding listing of the Greater sage-grouse in Wyoming."

The BLM Washington Office IM 2012-043 further affirmed the Wyoming Core Population Area Protection process by stating, "The BLM field offices do not need to apply the conservation policies and procedures described in this IM in areas in which (1) a state and/or local regulatory mechanism has been developed for the conservation of the Greater Sage-grouse in coordination and concurrence with the USFWS (including Statewide Executive Order 2011-5, Great Sage-Grouse Core Area Protection; SWED 2011); and (2) the state sage-grouse plan has subsequently been adopted by the BLM through the issuance of state-level BLM IM."

In February 2012 the BLM Wyoming State Office issued IM WY-2102-019, Greater Sage-Grouse Habitat Management Policy on Wyoming BLM Administered Public Lands Including the Federal Mineral Estate. This IM provides guidance to BLM Wyoming field offices regarding management consideration of greater Sage-grouse habitats for proposed

activities until the resource management planning amendments are completed. This IM is consistent with the Washington IM mentioned above and the State Executive Order.

The Wyoming Conservation Strategy, as described in the EO, is premised on the concept of managed development of oil and gas, mining and wind energy in Core Population areas, those areas of the State with the most robust populations of sage-grouse. Approximately 86% of the grouse in the State receive enhanced protection under this program. The Core concept was based in large part on research findings that illustrated that sage-grouse and oil and gas development can and do co-exist (Taylor et al. 2007 and 2011). Publically available Wyoming data was used in this effort to determine under what conditions grouse exhibit a decline or avoid an area. The EO then used other Wyoming based research findings, relative to avoidance of oil and gas operations, and buffered this information to provide an added conservation cushion.

A key component of the Wyoming conservation strategy is the analysis of all projects, that require a state or federal agency permit, proposed within a "Core Population Area." This GIS analysis of disturbance and disruptions (DDCT) evaluates the level of existing and proposed surface disturbance and disruptions (active well sites and or mining locations) within 4-miles of a sage-grouse lek (the definition of the analysis area is more complicated than this). In my experience, these analysis areas can be quite large, for example 55,0000 acres to evaluate the effect of fewer than 10 new well sites. If the proposed project will not exceed the disturbance and disruptions limitations stipulated in the Executive Order the project receives a "concurrence" or "go-ahead" letter from the WGFD. In the event the project analysis reveals that these limitations will, or already are exceeded, the WGFD and the BLM (if involved), work with the proponent to reduce/mitigate impacts to the species. This process needs to be followed for a number of years so we can determine if it works to "maintain or enhance" sage-grouse populations in the State of Wyoming. Only after the program is tracked and the population data analyzed over a good number of years (three year running average as stated in the Wyoming Conservation Strategy) should we make any changes.

All that said, none of this is adequate enough for the "conservation" NGOs who continue to pound the table with new emerging research "demonstrating" that the EO and IMs are not adequate. They continually take their case to US District Court Judge John B. Lynn Winmill, who has mandated BLM consider the National Technical Team (NTT) Report (BLM 2011) in the process of amending 9 BLM Resource Management Plans to more fully address sage-grouse conservation. Similarly, the NGO's have demanded, and BLM capitulated, that a "Recovery Alternative" be considered. Neither of these "conservation" strategies recognizes the valid existing rights of oil and gas lessees, the rights of private landowners, and the resource based economies of the State or the multiple use mandate of the BLM. They certainly do not recognize that in Wyoming oil and gas, agriculture and sage-grouse have co-existed quite nicely for over 100 years.

Long story short, regardless of the broad based public process and cooperation that went into the development of the Wyoming sage-grouse conservation program or the endorsement of the Wyoming concept by USFWS and BLM, the threat of the ESA listing is

constantly hung over the issue and used as a battering ram to force more stringent conservation measures to be implemented.

As with the PMJM, the definition of SPR and a clear policy for its use is of critical importance to the State of Wyoming. Without the ability to identify and provide listing protection to the species in those areas where it is truly at risk due to a lack of conservation effort, Wyoming could end up included in a listing decision because of its strong and stable grouse population and conservation practices. This would effectively punish the State and its citizen partners for their hard work in developing and implementing grouse conservation.

The courts should not control the outcome of the ESA. ESA decisions should rely solely on the best available data not the professional opinion of folks with a conservation bias. Sage-grouse represents one of, if not the largest, voluntary conservation efforts in the history of ESA but this could all be lost if the court and special interest plaintiffs are allowed to direct the outcome. I suspect that if this were to happen the Service would be hard pressed to garner much public support in the future. The Service should acknowledge the tremendous level of public participation and effort that has gone into the range wide conservation of sage-grouse and allow it to play out. The BLM (in the case of sage-grouse) and the Service constantly kowtow to the demands of the litigants who use the courts to move forward their case leaving those that have participated honestly in the regulatory process in the dust.

In closing, I must admit I am not an advocate of opening up the ESA; I have grave concern about the effort being taken over by special interests, just as has occurred with ESA to date. The USFWS must be directed to operate as was originally conceived in the Act; sound science based on the best available data. The ESA contains timeframes for acting on petitions, if the Service were to abide by these constraints there would be little fodder for litigants. And last, in this era of bio-politics, when cohorts of researchers control the published literature and therefore the conservation outcome, any change in the ESA will not affect the apparent lack of scientific integrity. Regardless of the good intentions of this Committee, honesty in the use of the scientific method cannot be legislated.

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