Testimony of Gregg Renkes
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Before the House Committee on Natural Resources on
H.R. 6356, "Less Imprecision in Species Treatment (LIST) Act of 2018"; H.R. 6345, "Ensuring Meaningful Petition Outreach While Enhancing Rights of States (EMPOWERS) Act of 2018"; H.R. 6344, "Land Ownership Collaboration Accelerates Life Act (LOCAL) of 2018"; H.R. 6355, "Providing ESA Timing Improvements That Increase Opportunities for Nonlisting (PETITION) Act of 2018"; H.R. 6364, "Localizing Authority of Management Plans (LAMP) Act of 2018"; H.R. 6360, "Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species (PREDICTS) Act of 2018"; H.R. 6346, "Weigh Habitats Offsetting Locational Effects (WHOLE) Act of 2018"; H.R. 6354, "Stop Takings on Reserves Antithetical to Germane Encapsulation (STORAGE) Act of 2018"; and H.R. 3608, "Endangered Species Transparency and Reasonableness Act"

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Introduction

Good afternoon Chairman Bishop, Ranking Member Grijalva, and Members of the Committee. I am Gregg Renkes, Director of the Office of Policy Analysis in the Department of the Interior (Department). I appreciate the opportunity to testify before you today on nine bills to amend the Endangered Species Act of 1973 (ESA). The Administration supports the goals of the ESA to prevent the extinction of species and to foster recovery of species in danger of extinction. We pursue these goals knowing that the Federal government must be a good neighbor and work collaboratively with States and landowners who often bear a disproportionate burden in conserving species protected under the ESA, given that approximately two-thirds of lands in the U.S. are privately owned. That is why the Administration is working diligently to partner with States and landowners and make commonsense improvements to how we administer the ESA, while maintaining our environmental standards and stewardship responsibilities.

Each of the bills being discussed today – H.R. 6356, H.R. 6345, H.R. 6344, H.R. 6355, H.R. 6364, H.R. 6360, H.R. 6346, H.R. 6354, and H.R. 3608– seeks to improve implementation of the ESA. In general, the Administration supports the goals of these bills to improve coordination with, and expand the role of, the States in implementing the ESA, to improve transparency in decision making, to expand tools to encourage voluntary conservation on private lands, and to improve the processes for listing, downlisting, delisting and recovery of species. The Department welcomes the opportunity to work with the Committee to improve the ESA's effectiveness at its primary goals—preventing extinction and recovery—while reducing and avoiding unnecessary burdens.

Background

The ESA is one of our nation's most important wildlife conservation laws. It is implemented jointly by the U.S. Fish and Wildlife Service (Service) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) (together known as "the Services"). The law's stated purpose is to provide a program and means for the conservation of threatened and endangered species and the ecosystems upon which they depend.

When a species is designated as threatened or endangered – or "listed" under the ESA – it is in urgent need of help. The law directs the Services to use the best available scientific and commercial information to determine whether a species needs to be listed, to identify and address the threats to the species, and to facilitate the recovery of the species.

Administration Priorities

The Administration is committed to making the ESA work for the American people. The ESA has had some notable success since its passage over 40 years ago – bald eagles and peregrine falcons, once rare in the lower 48 States, are fully recovered, and we have brought species like the California condor and black-footed ferret back from the very brink of extinction. But as we look at our record of delisting and recovery there is clearly room for improvement. Implementation of the law regularly generates frustration and controversy among private landowners, States, regulated industries, and environmental advocates alike. Some argue that getting species on the list is easier than getting them off. Particularly in western States, the law and certain species have become lightning rods for intense disagreement.

Our commitment to improving implementation of the ESA is reflected in the Administration's Reform Plan and Reorganization Recommendations which includes a proposal to merge the Department of Commerce's NMFS with the Service. This merger would consolidate the administration of the ESA and Marine Mammal Protection Act in one agency and combine the Service's science and management capacity, resulting in more consistent Federal fisheries and wildlife policy and improved service to stakeholders and the public, particularly on infrastructure permitting.

The Department is focused on improving implementation of the ESA and has placed a high priority on regulatory reform. A modern vision of conservation is one that uses cooperative federalism, public-private partnerships, market-based solutions, the best available science, and sensible regulations in order to achieve the greatest good in the longest term. To that end, in July of this year, the Service and NMFS jointly proposed regulations to modify the parameters for federal agency consultation; clarify and improve some of the standards under which listings, delisting, reclassifications, and critical habitat designations are made; and adopt a change in approach to how the Service applies protections to threatened species. These proposed revisions are based on public input, the best available science, and best practices and are intended to improve conservation results and reduce the regulatory burden on the American people.

In addition to pursuing these regulatory revisions, the Department and the Service continue to work to address concerns raised by State and local governments, as well as other stakeholders, through administrative initiatives to improve implementation of the ESA. As part of these efforts, the Service has sought to bring greater transparency and predictability to the listing process, which benefits stakeholders and the public. To achieve this, the Service developed and released a National Listing Workplan, which prioritizes listing and critical habitat decisions over a seven year period. In addition to providing transparency and predictability, the workplan helps the Service and its partners be strategic in delivering conservation on the ground to prevent the need to list species under the ESA. The workplan identifies candidate species and species petitioned for listing and undergoing a 12-month finding.

In a similar vein, late last year, the Service also developed a National Downlisting and Delisting Workplan that outlines upcoming actions addressing five-year status reviews, petitions undergoing a 12-month finding, and proposed rules to downlist and delist species over a three year period. The workplan was developed to provide greater predictability regarding the timing of recovery actions.

The Service also developed the Species Status Assessment (SSA) framework as part of the ongoing effort to improve implementation of the ESA and enhance conservation success. An SSA is a focused, science-based, repeatable, and rigorous assessment of a species' ability to maintain self-sustaining populations over time. The result is a single document that delivers foundational science for informing all ESA decisions, including listing determinations, consultations, grant allocations, permitting, and recovery planning.

When it comes to developing guidance on how to best help listed species achieve recovery, the Service has revised its approach. Informed by the Species Status Assessment, the Services is improving and streamlining the way it develops recovery plans to produce them faster and with more flexibility to adapt to new information or circumstances affecting species.

Additionally, the Service is tackling the backlog of recovery plans, five year status reviews, and delisting and downlisting actions. The Service must manage its multiple responsibilities for recovery planning, recovery actions, delisting and downlisting rulemaking, and five year status reviews concurrently and is working to develop a national multi-year strategy to ensure balance among these responsibilities. In the FY2019 Budget, the Administration proposed modest funding increases to expand the Service's capacity to ensure that recovery plans have objective and measurable recovery criteria and to address five-year status review recommendations.

Finally, the Department and Service are committed to being good partners to the states and working to incorporate that in all they do. In support of that, earlier this month, Secretary Zinke issued a Memorandum to all Bureaus reaffirming the authority of the States to exercise their legal authority to regulate fish and wildlife species on Federal public lands and waters, except as otherwise required by Federal law. The Secretary recognizes that States are good stewards of our natural resources and practice sound management of fish and wildlife while allowing appropriate opportunities for citizens to enjoy public resources.

I offer the following comments on the individual bills under consideration today.

H.R. 6356 – Less Imprecision in Species Treatment (LIST) Act of 2018

The LIST Act would require the Secretary to initiate a delisting rule when a species meets the recovery goals described in an associated recovery plan, or when the Secretary determines that the species is recovered based on available information. It requires a species to be delisted if the Secretary finds that it was listed based on inaccurate, fraudulent, or misrepresentative information. Additionally, it would prevent parties from submitting petitions for a period of ten years if the Secretary determines that they knowingly submitted fraudulent species data. The LIST Act would transform recovery plans from advisory documents, the content of which are not subject to legal challenge, into action-forcing documents. If enacted, recovery plans would

become decision documents and may be subject to legal challenge. The bill would also shield negative petition findings and delisting determinations from public review and comment, and shield a subset of negative findings from judicial review, while retaining those public participation and oversight mechanisms for positive petition findings and listing determinations.

The Department and the Service values science-based decision making and want to ensure that it continues. The Department would welcome the opportunity to work with the Committee on these areas of the bill.

H.R. 6345 – Ensuring Meaningful Petition Outreach While Enhancing Rights of States (EMPOWERS) Act of 2018

The EMPOWERS Act would require petitioners to notify affected States and counties prior to submitting petitions to the Secretary. It would also enable States to advise the Secretary on petitions and require the Secretary to demonstrate that the information provided by a State or county government is incorrect if the Secretary disagrees with a recommendation that the petition is not warranted. The bill would also require the Secretary to provide advance notice to affected States and counties of a proposed regulation, invite recommendations from the State and county governments, and require the Secretary to respond within a certain timeframe if the Secretary disagrees with a not warranted recommendation.

The Department supports advance notification from petitioners to State governments regarding forthcoming petitions as an important means of increasing transparency and raising awareness among affected entities, and recently revised the regulations governing processing of petitions to require such advance notification. The Department welcomes the information, data, and advice provided by State and local governments. The Secretary will continue to make species determinations based on the best available scientific and commercial information. State fish and wildlife agencies are expert agencies in the conservation of fish, wildlife and plants, and the Service makes special effort to obtain information from those agencies and give special consideration to their views. Federal agencies will continue to work with the States and local communities to ensure the best possible science is used for decision making. For wide ranging species, the requirement to provide advance notification and treat information from county governments as the best available science will be procedurally burdensome and problematic. Additionally, requirements and associated deadlines related to proposed regulations in the bill may increase workload for agency staff and may expose the Department to additional litigation risk. We welcome the opportunity to discuss these issues with the Committee.

H.R. 6344 – Land Ownership Collaboration Accelerates Life Act (LOCAL) of 2018

The LOCAL Act would establish new programs administered by the Secretary to incentivize voluntary conservation on private lands. These include incentive payments for short-term conservation agreements for listed species; cost-share payments and incidental take permits for long-term conservation contracts for listed species, candidate species, or species of concern; incentive payments for the preservation of habitat for listed species; and grants for private landowners implementing conservation practices for listed species on their land. It also establishes a habitat conservation planning loan program for State and local governments. The bill also creates an aid program to compensate landowners for the fair market value of a project on their land that would not comply with section 9(a). Additionally, the bill requires the

Secretary to review applications for incidental take permits for private landowners within a certain timeframe.

The Department strongly supports voluntary conservation agreements for species and habitats and recognizes the need for incentives to encourage broad participation. To that end, the Service offers Candidate Conservation Agreements with Assurances (CCAAs), Safe Harbor Agreements (SHAs), and Habitat Conservation Plans (HCPs) to landowners, with the incentive for participation primarily based on regulatory assurances. This bill would direct the Service to offer a variety of new species and habitat conservation programs to landowners, with the primary incentive for participation being financial support. Considering the creation of a significant new financial assistance program requires careful consideration of budgetary impacts to ensure consistency with the Administration's broader fiscal goals. While Federal funding, to the extent that it is available, could provide strong incentives to encourage conservation efforts by additional landowners, we would like to work with the Committee to promote broader participation in CCAAs, SHAs, and HCPs, which all provide regulatory assurances.

In light of the overlap between the provisions of H.R. 6344, H.R. 6360, and H.R. 6364 concerning voluntary conservation agreement vehicles and provisions, we recommend that the Committee work with the Department to reconcile the separate but related provisions in these three bills. We would like to work with the Committee to ensure these programs are structured in a manner consistent with the Administration's proposals to achieve operational efficiencies in similar conservation programs managed by the U.S. Department of Agriculture.

H.R. 6355 -- Providing ESA Timing Improvements That Increase Opportunities for Nonlisting (PETITION) Act of 2018

The PETITION Act would establish a procedure through which the Secretary could declare "petition backlogs" for 90-day and 12-month findings. It would set guidelines and restrictions for the Secretary's work on petitions during a backlog period, and would establish deadlines for completing review of listing and uplisting petitions. Additionally, it shields from judicial review any negative 90-day and 12-month findings for listing or uplisting petitions made due to the expiration of a deadline set in the bill.

The Department appreciates and supports the goals of the PETITION Act to address the workload challenges associated with the petition process. And while we agree with the need to focus efforts on recovery and delisting, we would like to work with the Committee to determine more appropriate deadlines that would not place additional constraints on the work of the agency.

H.R. 6364 -- Localizing Authority of Management Plans (LAMP) Act of 2018

The LAMP Act would authorize the Secretary to delegate to a State the authority to manage listed species in that State. It would also expand the existing authority for the Service to establish cooperative agreements with States to also cover agreements with groups of States, political subdivisions of States, Indian Tribes, local governments, and non-Federal persons.

The Department appreciates and supports the goals of the LAMP Act to expand the role of State, local, and Tribal governments, and individuals in implementing the ESA. The Department

would like to work with the Committee on the practical application of this bill and the implications to the public.

The LAMP Act would re-shape the relationship between the Services and non-Federal parties in conserving species under the ESA. By replacing the permitting authorities of the ESA that underlie existing voluntary conservation agreements with a straight-forward exemption from the take prohibitions under the ESA, we are uncertain how this would affect incidental take permitting and look forward to working with the bill's sponsors to better understand their intent. Additionally, the provisions authorizing the Secretary to delegate ESA authorities to a State are silent with regard to the implementing regulations, policies, and procedural manuals that guide the details of implementing the Act across the country. As written, this language has the potential to authorize variable ESA implementation across the country, with different policies and procedures among States and between States and the Services.

We welcome the opportunity to work with the Committee to further consider this legislation and develop provisions that could ensure consistent implementation among Federal and State agencies, and the States themselves.

H.R. 6360 -- Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species (PREDICTS) Act of 2018

The PREDICTS Act would codify certain Federal regulations that enable the development of HCPs, CCAAs, and SHAs. The bill would also authorize the Secretary to provide grants of up to $10,000 to assist qualifying landowners.

The Department supports the PREDICTS Act, which would codify several important tools we use to incentivize voluntary conservation and provide regulatory predictability to non-federal entities. We would, however, welcome the opportunity to work with the Committee to clarify the approval standard for CCAAs and SHAs to ensure that these plans continue to contribute to species recovery.

H.R. 6346 -- Weigh Habitats Offsetting Locational Effects (WHOLE) Act of 2018

The WHOLE Act would require that when making a determination of whether a Federal action is likely to jeopardize a species, destroy, or adversely modify critical habitat, the Secretary must consider the offsetting effects of all avoidance, minimization, and conservation measures already in place or proposed to be implemented, including habitat conservation measures.

The Department supports the WHOLE Act, which, with one exception, would codify processes already a part of longstanding practice and policy for Federal agency consultation under the ESA. That exception concerns determinations of the effect of Federal actions on designated critical habitat. The legislative language does not limit the offsetting measures to those carried out only within the designated critical habitat. The Department would welcome the opportunity to work with the Committee to improve that language.

H.R. 6354 -- Stop Takings on Reserves Antithetical to Germane Encapsulation (STORAGE) Act of 2018

The STORAGE Act would prohibit the Secretary from designating critical habitat for any area in a water storage reservoir, water diversion structure, canal, or other water storage, diversion, or delivery facility, where habitat is periodically created and destroyed as a result of changes in water levels caused by the operation of such facility.

The Department supports the intent of the STORAGE Act. While it is current Service practice to not designate critical habitat within the operational pool of water storage reservoirs, if species presence is in direct conflict with the purposes of the facility, there are circumstances where operations and maintenance of conveyance facilities is compatible with the function of critical habitat. The Department would appreciate the opportunity to work with the Committee to refine the language in this legislation.

H.R. 3608 -- Endangered Species Transparency and Reasonableness Act

The Endangered Species Transparency and Reasonableness Act would require that data used in species listings be made publicly available and that all data used shall be provided to States in advance of listing determination. It broadens the definition of "best scientific and commercial information available" to include data provided by State, county, and tribal governments. It requires the Secretary to submit a report to Congress and make public any expenditures related to litigation. Additionally, the bill would cap attorney's fees to prevailing parties in ESA citizen suites at $125 per hour, consistent with current Federal law governing other actions against the United States.

The Department has worked to address concerns regarding transparency of the data used to make listing determinations. As in previous testimony by this Administration, the Department would recommend modifying this legislation to require the Service to consider all data submitted by States, tribes, and local governments, rather than automatically deeming that data to be the "best scientific and commercial data available" as currently required in the bill. Defining that term to automatically include data submitted by States, tribes, and counties, without regard to its quality, would be a significant departure from scientific integrity standards.

Also as stated in previous testimony by this Administration, this legislation would in effect limit attorneys' fees for successful citizen plaintiffs in ESA cases against the federal government. The time and cost of litigation is one of the significant challenges we face in implementing the ESA. As currently drafted, it is unclear whether the legislation would require that all prevailing fee awards be paid through annual appropriations, rather than having the option to pay through the Judgment Fund as is the case under current law. The Department would welcome the opportunity to work with the Committee to clarify this aspect of the legislation.

Conclusion

The Department recognizes our shared interest in modernizing the ESA and making it work for wildlife and the American people. We appreciate the Committee's attention to this effort. We support the goals of improving the ESA through cooperative federalism, public-private partnerships, market-based solutions, utilization of the best available science, and effective, sensible regulations. We welcome the opportunity to work with the Committee to address some technical modifications to the proposed legislation. The Department is committed to making the ESA as efficient, predictable and effective as possible in accomplishing its purpose of conserving

threatened and endangered species and protecting the ecosystems upon which they depend. While the ESA has had some success since its passage over 40 years ago, there are greater opportunities ahead. The Department looks forward to working with the Committee to address these and other legislative efforts to improve the ESA.