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Hearing on the Threatened and Endangered Species Recovery Act of 2005
House Resources Committee

Statement by

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Mr. Chairman, members of the committee, on behalf of Pacific Legal Foundation (PLF), I thank you for this opportunity to comment on the proposed Threatened and Endangered Species Recovery Act of 2005.

In its 32 years of existence, the Endangered Species Act (ESA) has had little success at achieving its potential of conserving and recovering species. Unfortunately, it has been more successful at creating deep divisions between landowners and federal regulators. Of the 1,300 species listed under the act, only 10 domestic species have been recovered and delisted and the relationship between the ESA and those recoveries is doubtful, at best. From the countless battles over various land uses across the nation, to the intrusion of the federal government into the minutiae of local land use decision-making, to the decimation of certain natural resource industries, and to the widespread public perception that the ESA is severely flawed and broken, the ESA has done far more to make life miserable for humans than it has for meeting its goals of the conservation and recovery of threatened and endangered species.

Approximately 75% of all listed species have habitat on private property. See Accounting for Species: The True Cost of the Endangered Species Act, Randy T. Simmons & Kimberly Frost, at page v, available at: http://www.perc.org/publications/articles/esa_costs.php. It makes little sense to perpetuate a program that provides terrible disincentives for landowners who may have habitat for listed species. Such disincentives will do little to conserve and recover species; instead they will continue to create resentment and impede the conservation and recovery of listed species that live on nonfederal property.

Sections of the proposed Threatened and Endangered Species Recovery Act of 2005 may, for the first time in 32 years, change these dynamics and convert landowners into willing and powerful allies of those seeking to conserve and recover threatened and endangered species. By fostering cooperation between landowners and the federal government, this proposal has the potential of increasing substantially the effectiveness of the ESA. By transforming the relationship between landowners and the federal government from antagonists to partners in conservation and recovery, this proposal will serve to harness the entrepreneurial spirit of the landowner in America's quest to conserve its threatened and endangered flora and fauna.

These comments will focus primarily upon the three sections that have the most potential of transforming the Act into a vehicle for species recovery, specifically portions of Section 13(d) (Written Determination of Compliance), Section 14 (Private Property Conservation fund), and Section 12 (Species Recovery Agreements).

Section 13(d): Written Determination of Compliance

One of the most vexing problems for landowners under the current statute is their inability to determine whether an activity will actually impact a species in violation of the ESA. This has put landowners to a very uncomfortable choice: they can either attempt to use their property–and run the risk of violating the ESA with its attendant penalties, or expend substantial resources to participate in a Habitat Conservation Plan (HCP) or, if appropriate, an Incidental Take Permit or Statement (ITP). Unfortunately, for the small landowner seeking only a modest use of his property, the costs of such an HCP or ITP may exceed the value of the project or even the property. For example, PLF represented a landowner, Robert Morris, who sought to cut five trees on his property near Philipsville, California—where removal of the five trees was a permitted use under state law and the only economic value of the property. When the National Marine Fisheries Service indicated that the cutting of these trees might violate the Endangered Species Act by removing shade from the aquatic habitat for endangered salmon, his only option was to seek an HCP—at an estimated cost that exceeded the value of the trees.

Similarly, John Taylor owned property near the Mason Neck Wildlife Refuge near nesting habitat for bald eagles. When Mr. Taylor sought to build a modular home to make life easier for his elderly and disabled wife, the United States Fish and

Wildlife Service refused to give him permission unless he agreed to conditions that were beyond his means and control. What is worse, the service refused for years to provide a final and appealable denial. Section 15 would entitle persons in conditions similar to Mr. Taylor to obtain a final determination as to whether a proposed use will violate Section 9(a).

Landowners need a meaningful way to determine whether a particular activity on their property will or will not violate the ESA before they are required to go through the time and expense of seeking an HCP or ITP. Section 13(d) provides such a mechanism. It adds a new subsection 10(k) to 16 U.S.C. § 1539. Landowners have the option of applying to the Secretary for a written determination as to whether a particular activity will be in compliance with the ESA. To obtain a determination, landowners must submit a written description of the activity (including the nature, specific location, and duration), a description of any incidental take that the requestor reasonably expects to occur as a result of the proposed action, and any other information the requestor chooses to include. Upon receipt of a submission with the required information, the Secretary shall, within 90 days, provide the requestor with a written determination of whether the proposed use will comply with section 9(a) of the ESA. Requiring the Secretary to adhere to a timetable is especially important so that landowners will not face endless delay—delay that otherwise could last for years. Because landowners often face severe time constraints that are not faced by regulatory agencies, requiring the Secretary to make a determination within 90 days is very sensible.

Under this provision, it is anticipated that the following scenarios may occur:

• A landowner who seeks to cut trees on a certain portion of his property during a certain period of time may request a determination as to whether the activity will violate Section 9(a). By examining the information submitted by the requestor, and any other available information, the Secretary will be able to inform the landowner whether the proposed activity will comply with Section 9(a).

• (It is anticipated that if a landowner obtains a certification under this section that a proposed use will not violate Section 9 (a), that the certification may be limited for the reasonable duration of the project and be subject to revocation if there is an unanticipated change of circumstances).

• If the Secretary in the above scenario determines that there is not adequate time to make the necessary determination, the requestor and the Secretary may agree to an extension of the time in which a determination may be made. This may be important when the Secretary requires more time to examine the range and existence of a particular species—such as when seasonal conditions require more time for a full evaluation by the Secretary.

With this provision, landowners will no longer be kept in eternal limbo, afraid to act and unable to afford a way of determining whether their activities will, in fact, violate the ESA.

Section 14: Private Property Conservation

The next most significant provision of the proposal is Section 14, Private Property Conservation. This section, through Grants and Aid, will foster collaborative efforts between landowners and the Federal Government.

Section 14 amends Section 13(a) and establishes that the Secretary may provide conservation grants to promote the "voluntary conservation of endangered and threatened species by the owners of private property." Amended Section 13 (b) requires that grants, among other things, "must be designed to directly contribute to the conservation of an endangered species or threatened species by increasing the species numbers and distribution." In addition, amended Subsection 13(c)(i) gives the highest priority to grants that "promote the conservation of endangered species or threatened species while making economically beneficial and productive use of the nonfederal property on which the conservation activities are conducted." This is especially important, because if landowners are able to make economically beneficial use of their property while at the same time conserving a threatened or endangered species, the antagonism that currently may exist between some landowners and the federal government may be ameliorated. Through the HCP process and other cooperative ventures, landowners have demonstrated their ability and willingness to manage their land uses for species conservation and recovery, especially where compensation and regulatory certainty are provided. This reform may further encourage landowners. For example:

• Grants may be used to develop forestry techniques that preserve habitat while allowing economically productive timber management activities.

• Grants may help develop farming techniques that better allow a coexistence between threatened and endangered species and farming.

• Grants may help provide ways of addressing mining activities in areas that are the habitat for threatened and

endangered species so that mining activities will enhance species habitat through innovative mining and reclamation techniques.

Amended subsection 13(d) creates a program that provides relief to landowners who have been unable to receive a determination under Section 14(d) (amended subsection 10(k)) that a proposed activity will not violate Section 9(a) and converts those landowners into partners for conservation and recovery. If a landowner agrees to forego the use of his property that would result in a violation of Section 9(a), the landowner will be entitled to aid equivalent to the fair market value of the foregone use. In this way, landowners will no longer be forced to bear the entire cost of the preservation of a threatened or endangered species when the conditions that have led to the precarious state of the species are not the result of activities of the landowner. It is important to note that amended Subsection 13 (d)(3) makes it clear that if the Secretary can determine that the proposed use would constitute a nuisance under a state's long-standing law of property, then the landowner will not be eligible for aid. Thus,

• If a landowner proposes to destroy riparian habitat in a manner that is prohibited by a state's law of nuisance and public-trust doctrine, then the landowner will not be entitled to aid.

• If a landowner seeks to develop property on a steep hillside in a manner that constitutes a nuisance under State law, the landowner will not be entitled to aid.

• But if a landowner seeks to put his property to a traditional lawful use, such as placing a home on a lot in a residential subdivision, or engaging in normal farming activities, the landowner will be entitled to aid if the owner decides to forego the use because the Secretary is unable to provide assurance with a determination letter that the use will not violate section 9(a).

Amended Subsection 13(f) provides that the landowner has the duty of establishing, in the first instance, what the fair market value of the foregone use is. The Secretary may rebut this value. Under well-established federal precedent, fair market value is defined as "what a willing buyer would pay in cash to a willing seller." See e.g. United States v. 564.54 Acres of Land, 441 U.S. 506 (1979). This means what knowledgeable buyers will pay voluntarily for property based on its existing uses and those uses that are reasonably foreseeable in the future. This will not include purely speculative uses that have no basis under current market conditions. Likewise, the existence of state and local regulations is relevant to a determination of fair market value. The government is adept at utilizing appraisers and other experts to help determine the fair market value in cases where it condemns nonfederal property and it is anticipated that the Secretary may utilize similar means when disagreements over the fair market value may arise. Thus,

• A landowner who proposes to engage in a timber harvest in accordance with state and local law will be able to claim reasonably that the fair market value of the use is the reasonably anticipated profit from the harvest after all expenses are accounted for.

• If a landowner seeks to develop land in a manner that is prohibited by the zoning laws of a local municipality, then that prohibition will affect the determination of fair market value.

• If a landowner seeks to harvest timber in a manner prohibited by a State's forestry laws, then that prohibition will affect the determination of fair market value.

• If a landowner seeks to fill tidal wetlands that are protected by a State's public trust doctrine, the prohibition will affect the determination of fair market value.

• A landowner who proposes to build a single-family home in accordance with state and local law, will be able to claim that the fair market value of that use is the value attributed to a lot by virtue of the ability to build that single-family home. The landowner may not claim that the value of the foregone use includes uses not allowed by state or local law, such as housing that exceeds local density requirements when there is no reasonable chance of obtaining a variance.

• A landowner who proposes to build a skyscraper in a corn field (assuming such were allowed by local law) will not be able to claim that fair market value of the use includes such an unrealistic and speculative project.

• The Secretary will be able to rebut a suggestion from a landowner who claims that the fair market value is anything other than what a willing buyer will pay to an unrelated willing seller in the open market.

• A landowner who does not employ the services of a licensed appraiser operating under the Uniform Standards of Professional Appraisal Practice (USPAP) will, in all likelihood, be rebutted by the Secretary when she presents evidence from

an appraiser that meets the USPAP requirements.

• A landowner who has already agreed to set aside land under an HCP, will not be eligible for aid for foregoing a use on the land previously set aside because any enforceable agreement to set the subject land aside will be accounted for in the fair market value.

• A landowner seeking aid for foregoing a frivolous use will not gain by this provision as the time and costs of proceeding with administrative process and then gathering adequate evidence of fair market value will likely exceed any aid available for the frivolous use.

• A landowner who deliberately falsifies data or an estimation of fair market value would be engaging in fraud, actionable under federal law.

Section 10(c): Species Recovery Agreements and Species Conservation Contracts

Section 10(c) amends Section 5 (16 U.S.C. § 1534) and provides for voluntary species recovery agreements and species conservation agreements. These species recovery agreements of not less than 5 years will allow landowners to voluntarily work to protect and restore habitat, contribute to the conservation of listed species, and implement a management plan. In exchange for these agreements, the Secretary will make annual payments or provide other compensation. This section will, therefore, enlist the support and cooperation of landowners by making them active partners in the recovery of listed species.

In addition to species recovery agreements, section 12 also provides for species conservation agreements. This will promote landowners' use of conservation practices for the conservation of species and their habitat. Landowners who enter into long term contracts of 30 years will be entitled to contract payments equal to the actual costs of the conservation practices; landowners who enter into shorter contracts of 20 or 10 years will be entitled to 80% and 60% of the costs, respectively. This provision will encourage landowners to enter into long-term agreements for the long-term conservation of listed species, but it may discourage shorter-term agreements even if they will help conserve the species and it may, therefore, discourage some landowners altogether from entering into agreements.

It is important to stress that these contracts and agreements will be voluntary. New Subsection 5(l)(2)(A) provides, in part, that the Secretary "may not require a person to enter into an agreement under this subsection as a term or condition of any right, privilege, or benefit." By making these agreements strictly voluntary, landowners are much more likely to be enthusiastic and willing partners of the recovery and conservation efforts promoted by this Act.

Other Provisions:

Critical Habitat: Section 5 repeals existing provisions providing for the designation of critical habitat. Despite inflated claims of certain professional critical habitat litigation mills, there is no evidence that the designation of any critical habitat has contributed to the recovery of any threatened or endangered species. Of the 15 species determined to have recovered, only two had a designation of critical habitat and there is no showing that the critical habitat designation had anything to do with that recovery. Critical habitat designations have been beset with agency failures—failures both to meet deadlines for designating critical habitat and failures to perform adequate analyses—especially economic analyses—prior to a critical habitat designation. The entire management agenda of the critical habitat program is being driven by court decisions that have nothing to do with weighing whether critical habitat designations do any good at all for any species.

When the Fish and Wildlife Service designated over 400,000 acres of critical habitat for the Alameda whipsnake in four California counties, in response to a court challenge, the Agency openly acknowledged it included areas that were not essential to the conservation of the species:

We recognize that not all parcels within the proposed critical habitat designation will contain the primary constituent elements needed by the whipsnake. Given the short period of time in which we were required to complete this proposed rule, and the lack of fine scale mapping data, we were unable to map critical habitat in sufficient detail to exclude such areas.

65 Fed. Reg. 58933, 58944 (October 3, 2000).

The deficiencies did not stop there, however. The Agency also failed to adequately consider the economic impacts of the critical habitat designation. Although the critical habitat included highly populated areas of the State of California in the midst of a housing shortage, and costs associated with critical habitat were estimated at $100 million for the University of California, and

a like amount for the mining industry, and state and local agencies identified severe limits that would flow from critical habitat affecting fire and flood protection activities, the Service concluded the designation of critical habitat for the Alameda whipsnake would have no significant economic effect.

In response, Pacific Legal Foundation attorneys, representing home builders, small businesses and local landowners, challenged the critical habitat designation in court. In Home Builders Association of Northern California v. United States Fish and Wildlife Service, 268 F. Supp. 2d. 1197 (E.D. Cal. 2003), a federal court invalidated the critical habitat designation for the Alameda whipsnake and remanded the matter to the agency to redesignate the critical habitat and redo the economic analysis.

This has lead to further litigation. Recently, Pacific Legal Foundation attorneys filed suits in federal court challenging the critical habitat designations of 42 species in 42 counties of the State of California, covering almost 1.5 million acres. Each of these designations was promulgated as a result of a court action and suffers from the same deficiencies as the critical habitat for the Alameda whipsnake—the designations are over broad and the economic analyses are inadequate.

Thus, the ESA critical habitat requirement is, at best, inefficient, and, at worst, wasteful, on two fronts. First, according to the very agency tasked with the responsibility for protecting listed species, the designation of critical habitat provides no meaningful protection to the species beyond the protections already provided by other provisions of the Act, such as the Section 9 take provision which prohibits anyone from harming a listed species. This was also the conclusion of the district court in Home Builders. While the environmental intervenors argued that the invalid critical habitat designation should be left in place for the protection of the Alameda whipsnake, the court found no evidence that setting aside the critical habitat would have any harmful effect on the species.

And, second, the critical habitat requirement breeds endless litigation that diverts limited resources from true conservation efforts.

What critical habitat designations have done is make the use of millions of acres of nonfederal land especially difficult, with landowners facing severe risks if they move forward with projects or even if they merely continue a traditional use of their land.

Best Scientific Data: Section 3(a) defines “best available scientific data” to be the data the Secretary deems most accurate, reliable, and relevant. Moreover, this data will be made public for review by affected members of the public. There have been too many instances where data relied upon by the agency has proven to be unreliable and, remarkably, unavailable to the public for review. For example, in the listing of the California gnatcatcher, the determination that the California gnatcatcher was a separate species from the common Mexican gnatcatcher was a scientifically controversial decision—and one for which the underlying data was unavailable for public review.

At present, both the implementing agencies and the courts have interpreted “best available” to mean any evidence whatsoever. This has resulted in unnecessary listings and overly broad “critical habitat” designations. For example, in a July 15, 1998, study entitled Babbitt’s Big Mistake, the National Wilderness Institute documented the following.

Historically data error has been the most common actual reason for a species to be removed from the endangered species list. Species officially removed because of data error include: the Mexican duck, Santa Barbara song sparrow, Pine Barrens tree frog, Indian flap-shelled turtle, Bahama swallowtail butterfly, purple-spined hedgehog cactus, Tumamock globeberry, spineless hedgehog cactus, McKittrick pennyroyal and cuneate bidens. While officially termed ‘recovered’, the Rydberg milk-vetch and three birds species from Palau owe their delisting to data error (see Delisted Species Wrongly Termed Recovered by FWS, p. 16). Many other currently listed species have been determined to by substantially more numerous and to occupy a much larger habitat than believed at the time of listing (see Environment International, Conservation Under the Endangered Species Act, 1997).

Publications, Studies, Reports, Legislative Briefs at http://www.nwi.org.

“Best available” data is often not peer reviewed. Currently, the agencies use peer review on an informal, ad hoc basis. This has proven inadequate as events in the Klamath area have shown. In 2001, the Biological Opinion for the Klamath Project concluded that any water diversions for irrigation purposes would jeopardize listed salmon and sucker fish, although numerous claims were made that the Biological Opinion ignored more reliable data that showed that water diversions would not jeopardize the fish. Based on this conclusion, the Bureau of Reclamation prohibited all water diversions from the Klamath Project to Klamath area farmers who depend on irrigation water from the project. A firestorm of protests followed calling on the Administration to take a closer look at the data for 2002. In response, the Administration subjected the data to “peer review” by the National Academy of Sciences. An expert scientific committee of that body subsequently determined that the 2001 Biological Opinion was faulty because the “best scientific and commercial

data” showed that water diversions for irrigation would not jeopardize the listed fish.

The proposed reform requires that the Secretary promulgate regulations that will “establish criteria that must be met to determine which data constitute the best available scientific data.” This should help establish minimal standards of reliability for scientific data relied upon by the agencies.

Better Supported Listing Decisions: Section 4 requires that the “best available scientific data” be used in listing decisions. Factors to be considered include the inadequacy of existing regulatory mechanisms. It is hoped that this will include private conservation efforts. This provision also refers to “other natural or manmade factors.” Here, it is hoped that the existence of hatcheries and similar programs will be taken into account. One of the problems with some of the salmon listings in the Pacific Northwest is that they failed to include the populations of hatchery salmon. This provision does require that the use of “distinct population segments” be used “only sparingly.” It is hoped that the Secretary will abide by the spirit of this guideline; otherwise it may not be terribly meaningful and the specter of listing genetically identical populations (for example, a wild salmon that coexists with hatchery salmon) will continue.

This section also requires that the Secretary conduct, at least once every five years, a review of listed species “based on the information collected for the biennial reports to Congress.” The data in these reports, however, can be weak and subjective. It may be more efficacious not to limit the reviews to this data.

Posting of Data: Section 6 requires that data supporting a petition to list a species must be provided to the Secretary and must be posted for public review on the internet. This will avoid the perception that some listing decisions have been based on a paucity of reliable evidence. Advocates of listing a particular species should welcome the opportunity for a full public review and discussion of the data upon which listing petitions are based.

Jeopardy: Section 3(c) revises the definition of the term “jeopardize the continued existence” to include an agency action that “would be expected to significantly impede, directly or indirectly, the conservation in the long-term of species in the wild.” This new definition is not an improvement from the plain language of the term “jeopardize the continued existence” and may make it more difficult for agencies to move forward with needed projects.

In conclusion, this proposal will go a long way to increase the effectiveness of this nation’s efforts to conserve and recover threatened and endangered species by harnessing the cooperation and ingenuity of America’s landowners. Thank you for this opportunity to share my views with this Committee.

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