

Committee on Resources

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To the
US House of Representatives
Committee on Resources

Field Hearing on
Examining the Impact of the Endangered Species Act on Southeastern New Mexico

June 7, 2004

Chairman Pombo and Distinguished Committee Members,

I am here today to discuss the impact of the Endangered Species Act ("ESA") on the oil and gas industry in southeastern New Mexico. Without question, the current ESA has had and is having a tremendous negative impact on our industry. More and more time and energy is being drained from our everyday business activities to identify, analyze, evaluate, discuss and address ESA issues. I personally am spending more than 25% of my time dealing with ESA issues and I am getting tired. The playing field is continually moving; rules and regulations are continually changing. I am not alone in my sentiment that it is getting to the point where it is not worth the hassle. Companies large and small are questioning whether it is worth it to continue fighting the unrelenting wave of restrictions and regulations due to species after species being proposed for listing.

The current Endangered Species Act is a failure that has not saved a single species and is in need of immediate change before it does any more mischief. It must be changed because events are coming together to potentially drive ranching and oil and gas in New Mexico to the point of extinction. While many would question this, you can look at the lumber industry and see that the threat is real. Good riddance many would say. "They are destroying the environment." But what happens when these same people have to pay double or triple the cost for gasoline, food, power, heating and cooling, clothing, building materials, etc. Or, worse yet, not have any of these necessities. How loud would the cry be if the trade deficit doubled and this nation was held hostage by foreign nations that have made their dislike of the United States clear. I wonder how they would like that "environment".

The cartoon below from the 6/2/04 Albuquerque Journal speaks volumes about the issue we are examining today. Science fiction is drowning out real science. Science of old, where something was studied, data collected and unbiased truths were discovered and reported has been replaced with political science where a pre-determined outcome or opinion is identified and data, if any, is manipulated to reach the political truth desired. Today, perception and opinion are called truth. The adage of "saying something often enough makes it factual and true" is all too prevalent in these times.

It is very apparent that groups trying to list species under the Endangered Species Act are assaulting the financial support of New Mexico, the very existence of local ranchers and oil and gas operators, and threatening our national security. Five years ago a group of environmental foundations decided there should be an ANWR in every state. Two key weapons that they are using are NEPA and the ESA. While NEPA is not the subject of this hearing, it is important to understand that the motivation behind these groups is to obstruct and remove lands from any multiple use and return them to wilderness.

The Lesser Prairie Chicken, the Tiger Beetle, the Sand Dune Lizard, the Black Tailed Prairie Dog, the

Aplomado Falcon, the Roswell Springsnail, the Koster's Tryonia, the Pecos Assiminea and Noel's Amphipod are all species that are being used to remove access to public lands. This loss of access leads to a loss of production that leads to a loss of revenue that causes a greater deficit due to the necessity of importing more foreign oil and gas and other commodities resulting in a serious national security problem. Below are examples of the impact from each of these species.

Lesser Prairie Chicken and Dune Sagebrush Lizard

The limited chicken population in New Mexico is on the edge of the historic range and therefore subject to greater increases and decreases in population due to natural forces (drought, predation and disease) rather than human activity. However, because SE New Mexico has the most federal land in the five states with chicken habitat it has become a main targeted area to "save the chicken". Industry members have been meeting with various workgroups to identify ways to assist the chicken population for years. For over 20 years the BLM has been imposing timing stipulations that restrict drilling and workover activity for up to a quarter of the year in much of Lea, Eddy and Chaves counties. These restrictions for chicken mating were imposed and not removed even though many of the areas had no chicken sightings or activity.

Environmental groups recently filed a petition with BLM to create an Area of Critical Environmental Concern in the middle of the oil field in southeastern NM. The ACEC includes over 343,000 acres and proposes to restrict any grazing and drilling for oil and gas to protect chicken habitat.

For over a year a government promoted shinnery oak habitat workgroup that includes regulatory agencies, environmentalists, ranching, and oil and gas has been working very hard to identify ideas and plans to help the prairie chicken and the dune sagebrush lizard. After a year's work on ways to help the chicken and lizard and keep it from being listed, we were disturbed to hear a BLM representative tell the group that there may not be anything we can do about a listing because of the Tiger Beetle that hasn't been addressed yet and also the prairie dog. The industry was also just informed that, contrary to what we were led to believe, the Carlsbad and Roswell districts are amending their RMPs relating to oil and gas and endangered species even though the workgroup has not completed its document. Ranching and oil and gas are faced with continual pressure to remove more and more lands from leasing and severely restrict grazing in the name of preserving habitat. This is occurring even as it appears that more and more birds have been sighted during a time when the habitat is in very poor shape due to the sustained drought.

We also have another problem because the reported habitat conditions for the chicken are different than the lizard. In the case of both species, specific science is lacking concerning the affect of oil and gas activity. There has been very little, if any, peer-reviewed science that pinpoints oil and gas activity as causing a reduction in the chicken or lizard population. Regardless of credible science, lands continue to be withheld from leasing, stipulation restrictions continue to be imposed and RMPS amended.

Concerning the Dune Sagebrush Lizard, producers have been required by the Carlsbad office to move sand dunes and to limit the number of wells in a section to 13, because Charlie Painter, NMG&F biologist, thinks that is the most that should be allowed. But there are questions about where habitat really exists. The 1994 Distribution field report found dune sagebrush lizards in 51% of the habitat the researchers considered suitable. A concentration of areas along the Lea-Eddy County line were considered to be very good habitat but contained no lizards. Conversely, the lizard was observed at 100% of the evaluated sites considered not to be potential habitat in dune grassland. On a March 30, 1994 telephone conference, Dr. Rob Gordon of Environmental Issues Council said that habitat is only suitable if the lizard lives there.

Aplomado Falcon

In 2002, The Carlsbad BLM Office removed 82,014 acres of minerals south of Hope, NM, some of which were nominated for leasing by oil and gas producers in the January and April sales. Questions were raised on this withdrawal and Leslie Theiss, Carlsbad Field Manager, explained the withdrawal in a letter dated April 16, 2002 to the members of the BLM/Industry Working Group. The oil and gas industry asked for a description of the economic impacts statement required by Executive Order 13212.

Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 requires BLM to manage land for multiple use and sustained yield. Multiple use and sustained yield do not exist when the two major users and income producers on federal lands are restricted or denied operations due to the Aplomado Falcon which has only nested once in southern New Mexico for over 50 years. USF&W in a Section 10j under the ESA notice said the bird ranges from near the Mexican border south to Argentina. Additionally the letter

says that data needs to be collected on habitat quality before consultation begins. The BLM was protecting an area that has not been established as habitat. BLM finally relented and leased the area, but with stipulations.

The Aplomado Falcon is also prominent in the Otero Mesa discussion. The environmental community is claiming that the Otero Mesa area is prime habitat for the falcon and must be protected. The problem is that according to USFW in August 1992, suitable habitat consists of inter-tree distances of 30m (avg.), tree densities of 19 trees/40 ha (avg.), tree height of 9 m (avg.), and 92% ground cover at 0.7m off the ground and 70% at 0.5m. This does not sound at all like the Otero Mesa. In 2001, no nests had been verified in the U.S. since 1952, when a nest was reported near Deming, NM. From 1990 to 1999 there have been only 9 falcon sightings in NM. BLM officials indicated that there was one nesting discovered a few years ago near Deming but it was unsuccessful due to assumed egg predation.

Roswell Springsnail, Koster's Tryonia, Pecos Assiminea and Noel's Amphipod

A number of snails in and around the Pecos River have been listed and as a result oil and gas activities have been restricted. BLM is holding APDs because the drilling of wells might develop a leak that might get into the water table and might reach the Bitter Lakes Refuge. Bill Radtke, supervisor at Bitter Lakes, said, at the first snail meeting in October 1996, that the biggest threat to the snails is the dropping water table. In the handouts from this October meeting, there was a list, citing "Wilson 1981", of the major existing sources of potential ground water contamination in New Mexico and the only oil and gas activity listed is oil or gas refining. The only refinery is downstream some 40 miles south of Bitter Lakes.

The New Mexico Oil Conservation Division wrote EPA and said there are no proven cases of water pollution resulting from oil and gas activities in New Mexico. The Roswell water basin is connected to the Refuge. The water on the Refuge is not fit for drinking and is more saline than the ocean. It has become more saline since the 1940s. Since the river has a higher saline content and the wells in the area are lower in saline content and used for irrigation and drinking, the Refuge must be recharged by the Pecos. Therefore, these facts indicate that contamination from drilling wells is not a problem so there is no basis to indicate that the oil and gas activity north of Roswell poses a threat to the snails. Regardless, the BLM continues to prohibit drilling near the refuge.

The ESA has been a failure.

The Endangered Species Act must be changed because it has been a complete failure. Further, the damage caused by regulatory restrictions and land withdrawals is incalculable.

Dr. Michael Coffman wrote the following August 2, 2003:

" For three decades, environmental purists have actively promoted the pantheistic notion that plant and animal life rank higher on the species hierarchy than people. Their "return-to-the-wild" agenda argues that human life activities are the enemy of plant and animal species, and only through their efforts to halt growth and shut down people's normal and necessary life endeavors will Mother Earth smile again.

Federal environmental regulations like the ESA have destroyed the lives of tens of thousands of people, closed entire communities, and confiscated hundreds of millions (if not billions) of dollars of private property, all in the name of protecting the environment. Michael Kelley of the Washington Post Writers Group describes the brutality of the ESA in the July 11, 2001, issue of MSNBC:

'The Endangered Species Act...has been exploited by environmental groups who have forged from it a weapon in their agenda to force humans out of lands they wish to see returned to a pre-human state.'

Of the sixty species that have been de-listed and supposedly 'recovered,' twelve were actually extinct, thirty were incorrectly listed in the first place or had data errors, twelve were recovered due to actions resulting from other laws or private efforts (not the ESA), and the balance were de-listed due to management of U.S. Wildlife Refuges. The ESA has not been responsible for recovering even a single species."

The Partnership for the West noted that the Endangered Species Act, in its 30-year history, has had a 99 percent failure rate in restoring species to health. On the other hand, the Partnership said, the ESA "has a high rate of success as a tool to confiscate private property, discourage private conservation efforts that actually conserve species and habitat, devastate rural communities, curb economic growth and destroy

jobs."

What should be done?

There must be action right now to revise the current Endangered Species Act. The first Endangered Species Act was passed in 1966 in response to Rachel Carson's book *Silent Spring*. The Act directed all federal agencies to identify native fish and wildlife threatened with extinction. Federal agencies were provided money by Congress to purchase habitat for endangered species and to protect the species. In 1969 the ESA was amended to also protect invertebrates. The last change occurred in 1973 and this is the Act commonly referred to in the media. The 1973 Act added Section 4 that said species will be listed without reference to possible economic or other impacts. In 1978 the Supreme Court held that a listed species must be protected at whatever cost. Section 7 of the EAS prohibits any federal action that will jeopardize a listed species or substantially modify its habitat. Section 9 prohibits the taking of a listed species and defines a take to include actions that will annoy to such an extent as to significantly disrupt essential behavior patterns. It is this section that has cost the federal government, actually us, the taxpayer, millions of dollars in takings lawsuits.

The definition of "taking" must change. The U.S. Supreme Court legitimized this convoluted interpretation on June 29, 1995 in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. In doing so, the Court ruled that the word "take" included altering the habitat of an endangered species thereby allowing the government to take private land for an endangered species without paying for it.

Writing for the Heritage Foundation on November 18, 1998, Alexander Annett notes that: "Because of the Supreme Court ruling, the ESA empowers the federal government to regulate any land that is thought to provide 'suitable habitat' for an endangered species without proof of death or injury to an identifiable animal that was caused by the landowners." As evidenced in Klamath Falls, zealous bureaucrats can impose arbitrary and capricious habitat recovery plans on private property that instantly strips the value often their life savings from a landowner.

The Federal Government should be required to pay for takings of private property. The ESA costs multiple billions of dollars annually, but the landowners who happened to have the last critical habitat needed by a species shoulders most of that cost. This is neither fair nor just when the reason the species is endangered results primarily from nature and secondarily from the actions of society as a whole. The only solution is for federal agencies to pay just compensation to landowners adversely affected just as the U.S. Constitution supposedly requires.

Paying for the huge costs of implementing the ESA would expose the real cost to the taxpayers footing the bill, forcing the USFWS and other agencies to prioritize what species must receive protection to allow for their recovery, while putting less emphasis on those species that are not in real jeopardy.

The legal authorization for the ESA expired in October 1992 and Congress has done nothing but provide funding since. It would be very difficult to refuse to reauthorize the ESA, but it might be possible to go back to the 1969 Act. That could be done by taking out Sections 4, 7, 9 and 11g. This is one way to stop the abuses of the ESA.

Other suggestions to make the ESA workable would be to use only a biological and numerical definition of endangered species. Only a pure species can be classified, no sub-species or distinct populations. Only those species with total numbers indicating a threat can be listed.

Socio-economic impacts must be on an even or greater par than all other considerations. Sec. 11 on penalties at (g) citizens' suits must come out. One alternative is to allow any citizen to counter sue those filing citizens' suits and the loser pays. Species, to be listed, must exist in more than one state. Half of the 1082 species listed do not. Finally, put into law the 1997 *Bennett v. Spear* Supreme Court case. It found that the best scientific and commercial data must be used to designate critical habitat and to make the decision to list. Federal agencies, currently, list and designate critical habitat without any science or with only studies that have not been peer reviewed.

We recognize that it takes time to get bills through, but we are faced with the local BLM offices changing rules overnight. It seems that they hear about a new study or theory on the prairie chicken or lizard and the next day it is a rule. Recently the news media has been speaking about the large amount of leased land that has not been developed. A major reason for this is regulatory restrictions caused by the Endangered Species Act. Without access to land to explore for new reserves our nation's producing capability will

decline at an even greater rate while our demand for oil and gas continues to increase. The inescapable conclusion is higher prices for all commodities due to the pervasive need for energy in most all business areas. Our nation's need for more energy will demand an increase in the importation of foreign oil and gas and weaken our economy with greater trade deficits. Recent events have proven time after time that many of these foreign countries are very unstable and do not look kindly upon our great nation. It will be years before any possible supplemental energy source may become valid. Everything reasonably possible much be done to ensure that our nation has the resources it needs.

The oil and gas industry in southeastern New Mexico has been providing a continued source of energy to this nation for over 80 years. Past experience and improved present practices show conclusively that we can drill and produce oil and gas safely, with little or no impact to all species. Time has proven in many areas (offshore platforms, the Alaskan pipeline, etc) that the existence oil and gas activity has improved many habitats rather than destroyed it as was originally claimed. Our industry is committed to improving our operations and minimizing any impact on the environment. We continue to meet and work with the various groups to identify ways that we can help threaten species. But the Endangered Species Act must be changed to more accurately reflect the needs and responsibilities of this nation.

Thank you.