

**Legislative Hearing on H.R. 4315, H.R. 4316, H.R. 4317, and H.R. 4318
April 8, 2014**

Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515

Testimony on Environmental Litigation Abuses

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Thank you for the opportunity to testify in support of H.R. 4316 (the Endangered Species Recovery Transparency Act) and H.R. 4318 (the Endangered Species Litigation Reasonableness Act). Holsinger Law, LLC is a small, Denver-based law firm that specializes in lands, wildlife and water law. I am testifying as the manager of Holsinger Law, LLC. In that capacity, I can attest to the rampant litigation abuses under the Endangered Species Act (“ESA”) and the need for H.R. 4316 and H.R. 4318. These measures would improve and update the ESA while ensuring scarce conservation resources go to real, on-the-ground work rather than taxpayer-funded litigation.

I. The Endangered Species Act should be Updated

Last year was the 40th anniversary of the ESA. The ESA is the most powerful environmental law in the world. The end product of nearly a century of federal encroachment on state authority and control over wildlife, it was passed by the Congress and signed by President Nixon in 1973. The ESA replaced 1966 and 1969 laws which provided for the listing of endangered species but with little substance. The 1973 Act has been reauthorized eight times. Significant amendments have been enacted in 1978, 1982, and 1988, while the overall framework of the 1973 Act has remained essentially unchanged.

Former Idaho Senator Dirk Kempthorne tried, but ultimately failed, to amend and reauthorize the ESA in 1997. I was intimately involved in those efforts as well as the amendments to the ESA that passed the House in October, 2005 under the leadership of former House Resources Committee Chairman Richard Pombo. Unfortunately, the Senate never adopted similar legislation. The last time the ESA was updated (1988), the Soviet Union was a superpower and Def Leppard topped the pop charts.

II. Litigation Abuses

Like no other law, litigation drives the ESA. Unfortunately, a few activist groups have buried the U.S. Fish and Wildlife Service (“FWS”) with listing petitions and litigation under the ESA. The Center for Biological Diversity (“CBD”) and WildEarth Guardians

(“WEG”) have petitioned to list hundreds and hundreds of species under the ESA. As soon as the FWS is overwhelmed responding to petitions, these groups start litigating over missed deadlines. They are creating the very problems upon which they are suing the FWS.

CBD and WEG¹ have been litigants in no fewer than 1,366 cases between 1990 and the present. WEG was involved in 401 cases while CBD was a party to 965 cases. Of the WEG cases, approximately 95% have been brought against the federal government. In 2010, WEG filed more than one new lawsuit per week. Most of these have been brought against the U.S. Department of the Interior (DOI), and most have raised claims related to the ESA. In just the past five months, these two groups have been a party to an additional 19 cases.

We compiled this information using the Public Access to the Court Electronic Records (“PACER”) system and performing a query for “WildEarth Guardians” and “Center for Biological Diversity” as a party in each of the federal district courts, courts of appeal, and the U.S. Supreme Court. The earliest case included in this data was filed in 1990. The search using this method was finished on November 12, 2013. In order to update the information, the PACER “National Case Locator” function was utilized to search for cases in which WEG or CBD were a party that were filed between November 13, 2013 to April 4, 2014. These cases were then added to the numbers generated using the former method.

Responding to litigation-driven settlement agreements has consumed the FWS and a significant part of its budget. Activist groups often collect taxpayer-funded attorney fees when new deadlines are negotiated in these cases – perpetuating a vicious “sue and settle” cycle.

In the summer of 2011, WEG and CBD announced a settlement agreement with the FWS that imposed deadlines for final determinations for listed status on 757 species no later than September, 2016. The Plaintiffs collected over \$140,000 in attorney fees and costs from the taxpayers as part of the settlements. Since the settlements, CBD has been a party to approximately 179 lawsuits and WEG has participated in 88 lawsuits.

On March 17, 2014, the State of Oklahoma (“Oklahoma”), along with the Domestic Energy Producers Alliance (“DEPA”), filed suit against the FWS citing the use of “sue-and-settle” tactics. Additionally the settlements require the FWS to submit either a “warranted” or “not warranted” decision, effectively eliminating the “warranted but precluded” category. Scott Pruitt, Oklahoma Attorney General, also stated that the “sue and settle” timelines force decisions from the FWS before they have had a chance to review the science, which violates the original structure of the ESA requiring sound science before a listing determination is made. Overall, the parties argued that FWS has deviated from the ESA requirements and the guidance FWS adopted thereunder by committing to these unrealistic deadlines; and that this action undermines support for state-led voluntary conservation programs of other species.

¹ Formerly known as Forest Guardians.

Despite the settlement agreements, CBD has boasted of filing new ESA petitions (including one emergency petition) and lawsuits as recently as April 3, 2014, with 15 press releases announcing notices of intent to sue, lawsuits filed, and lawsuits joined since the beginning of the year.

III. Robbing the Species to Pay the Attorneys

Congress passed the Endangered Species Act with visions of protecting grizzly bears and bald eagles from reckless human-caused extinction. Few could have foreseen how all-out protective efforts on behalf of such little-known creatures as the burying beetle, the pallid sturgeon, or the Preble's meadow jumping mouse would adversely impact U.S. taxpayers due to rampant litigation abuses in which millions of dollars of taxpayer funds are used to prepare, litigate, and settle lawsuits brought by just a few activist groups.

This abusive litigation does little to further conservation of species. It does much to pad the pocketbooks of a few litigious groups and their attorneys. The Center for Biological Diversity ("CBD") posted an astonishing \$1,406,139 in legal returns in 2012 (17% of that year's total revenue) and \$503,509 in 2011. In WEG's 2011 Financial Report, they stated \$303,406 in legal income—accounting for 16% of their total income for the year. 2010 brought them \$153,545 in legal income.

Even the FWS has recognized the huge social and economic cost of such activist litigation. In discussing critical habitat, the FWS has stated it:

. . . provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic cost. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection....²

IV. H.R. 4316 and H.R. 4318 will Improve the ESA

Currently, no one seems to know exactly how destructive this litigation is. H.R. 4316, The *Endangered Species Recovery Transparency Act*, introduced by Rep. Lummis, would require the FWS to report the resources used to respond to ESA litigation, including the number of employees needed, the funds used, and the attorneys fees awarded due to litigation and settlement agreements. This information is vital to determine how taxpayer dollars are being consumed by attorneys rather than being used to support real conservation work. By reviewing this information, steps can be taken to direct funds where they will more effectively promote the conservation and recovery of endangered or threatened species, and to also support boot-on-the-ground conservation efforts at the local level.

² 69 Fed. Reg. 53135 (Aug. 31, 2004).

As an attorney in private practice, I have seen environmental groups claim excessive hourly rates in litigation. It is not uncommon to see claims for more than \$500 per hour. H.R. 4318, The *Endangered Species Litigation Reasonableness Act*, introduced by Rep. Huizenga, would place a cap on attorney fees that can be awarded by the courts. Litigation abuses result in excessive pay-outs of taxpayer funds. A cap limiting the hourly rate for prevailing attorneys would diminish the incentive to “sue and settle” by activist groups, but more importantly, allow taxpayer dollars to be more effectively allocated to the conservation and recovery of species.

I strongly support the passage of these measures to improve the ESA and urge the Committee to advance them in the legislative process.

V. Conclusion

Now is hardly the time for “business as usual” under the ESA. Scarce resources are being wasted on litigation driven by a handful of activist groups with little or no real conservation benefits. People and wildlife would benefit from improvements to the ESA, through enactment of H.R. 4316 and H.R. 4318. I urge Congress and the Administration to work together to reduce frivolous litigation through disclosure of costs to the taxpayers and a reasonable cap on the hourly rate for awards of attorney fees. It is high time to stop wasting taxpayer dollars and rewarding frivolous and abusive litigation.

Thank you again for the opportunity to testify on these important measures.

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Kent Holsinger is the managing partner of Holsinger Law, LLC. Kent has been recognized for his work on ESA issues by the Wall Street Journal, the Washington Times and on National Public Radio, among many others. He currently represents a broad array of clients in complex ESA, NEPA, water and land use issues.

Exhibit A

to
Kent Holsinger Testimony
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Center for Biological Diversity Litigation 1990 – Present

This table summarizes the number of cases in U.S. Federal Court system in which the Center for Biological Diversity has been a party.

Alabama	2	Louisiana	10	Oklahoma	0	Fed. Claims Court	0
Alaska	31	Maine	2	Oregon	21	1st Circuit	1
Arizona	3	Maryland	0	Pennsylvania	0	2nd Circuit	2
Arkansas	0	Massachusetts	2	Puerto Rico	1	3rd Circuit	0
California	244	Michigan	1	Rhode Island	0	4th Circuit	0
Colorado	20	Minnesota	1	South Carolina	0	5th Circuit	42
Connecticut	0	Mississippi	1	South Dakota	0	6th Circuit	1
Delaware	0	Missouri	0	Tennessee	2	7th Circuit	2
District of Columbia	103	Montana	9	Texas	2	8th Circuit	3
Florida	11	Nebraska	2	Utah	0	9th Circuit	218
Georgia	5	Nevada	5	Vermont	0	10th Circuit	14
Guam	1	New Hampshire	1	Virgin Islands	1	11th Circuit	12
Hawaii	17	New Jersey	0	Virginia	0	D.C. Circuit	62
Idaho	7	New Mexico	12	Washington	15		
Illinois	0	New York	1	West Virginia	0	COURT OF APPEALS TOTAL	352
Indiana	0	North Carolina	0	Wisconsin	1		
Iowa	0	North Dakota	0	Wyoming	1	U.S. Supreme Court	2
Kansas	0	Northern Mariana Islands	0				
Kentucky	1	Ohio	0	DISTRICT COURT TOTAL	606	OVERALL TOTAL	965

Methodology Used to Generate Above Data: This information was obtained using the Public Access to the Court Electronic Records (“PACER”) system and performing a query for “Center for Biological Diversity” as a party in each of the federal district courts, courts of appeal, and the U.S. Supreme Court. The earliest case included in this data was filed in 1990. The search using this method was finished on November 12, 2013. In order to update the information, the PACER “National Case Locator” function was utilized to search for cases in which Center for Biological Diversity was a party that were filed on or after November 13, 2013 to April 4, 2014. These cases were then added to the numbers generated using the former method.

Exhibit B

to
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WildEarth Guardians Litigation 1990 – Present

This table summarizes the number of cases in U.S. Federal Court system in which the WildEarth Guardians has been a party.

Alabama	1	Louisiana	0	Oklahoma	1	Fed. Claims Court	0
Alaska	0	Maine	0	Oregon	0	1st Circuit	0
Arizona	34	Maryland	0	Pennsylvania	0	2nd Circuit	0
Arkansas	0	Massachusetts	0	Puerto Rico	0	3rd Circuit	0
California	11	Michigan	0	Rhode Island	0	4th Circuit	0
Colorado	61	Minnesota	0	South Carolina	0	5th Circuit	0
Connecticut	0	Mississippi	0	South Dakota	2	6th Circuit	0
Delaware	0	Missouri	0	Tennessee	5	7th Circuit	0
District of Columbia	50	Montana	5	Texas	2	8th Circuit	1
Florida	1	Nebraska	0	Utah	1	9th Circuit	30
Georgia	0	Nevada	3	Vermont	1	10th Circuit	62
Guam	0	New Hampshire	0	Virgin Islands	0	11th Circuit	0
Hawaii	1	New Jersey	0	Virginia	0	D.C. Circuit	9
Idaho	4	New Mexico	112	Washington	1		
Illinois	0	New York	0	West Virginia	0	COURT OF APPEALS TOTAL	102
Indiana	0	North Carolina	0	Wisconsin	0		
Iowa	0	North Dakota	0	Wyoming	1	U.S. Supreme Court	0
Kansas	0	Northern Mariana Islands	0				
Kentucky	0	Ohio	0			DISTRICT COURT TOTAL	301
						OVERALL TOTAL	403

Methodology Used to Generate Above Data: This information was obtained using the Public Access to the Court Electronic Records (“PACER”) system and performing a query for “WildEarth Guardians” as a party in each of the federal district courts, courts of appeal, and the U.S. Supreme Court. The earliest case included in this data was filed in 1990. The search using this method was finished on November 12, 2013. In order to update the information, the PACER “National Case Locator” function was utilized to search for cases in which WildEarth Guardians was a party that were filed on or after November 13, 2013 to April 4, 2014. These cases were then added to the numbers generated using the former method.

EXHIBIT C

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WEG Litigation Since 2011 Settlement

District Court Cases with WEG as Plaintiff:	46
District Court Cases where WEG Intervened:	17
Appeals Commenced with WEG as a Party:	78

Total:

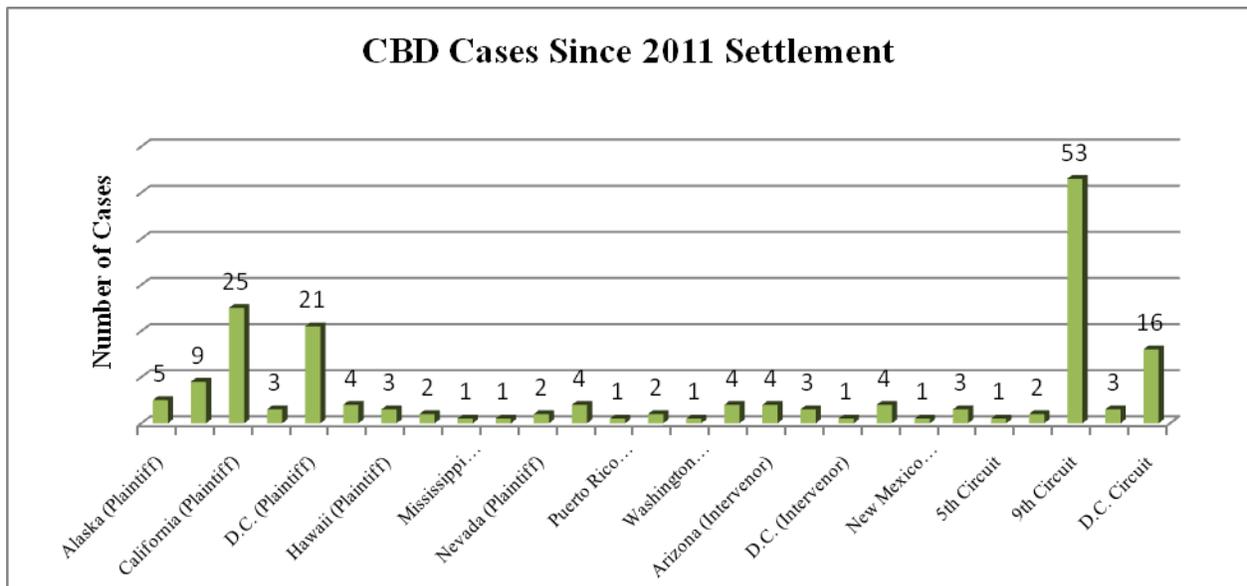
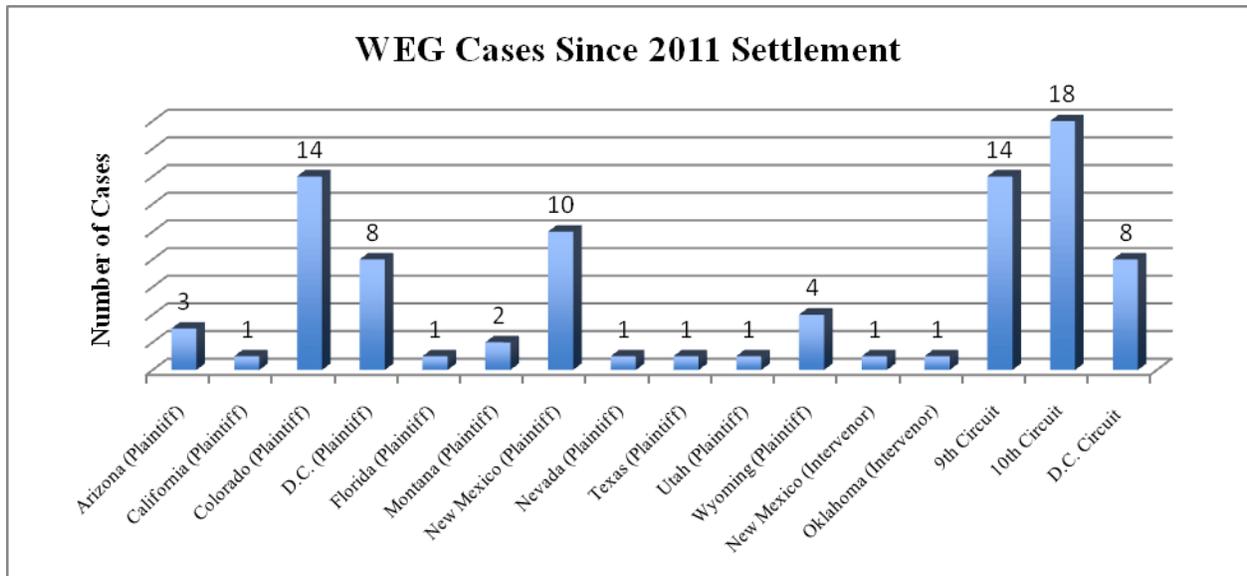
88

CBD Litigation Since 2011 Settlement

District Court Cases with CBD as Plaintiff:	84
District Court Cases where CBD Intervened:	17
Appeals Commenced with CBD as a Party:	78

Total:

179



Methodology Used to Generate Above Data: Using Public Access to Court Electronic Records (“PACER”) under the search function “National Case Locator” we performed a keyword search in the “Party Name” box for “Wildearth Guardians” (“WEG”) or “Center for Biological Diversity” (“CBD”). We limited the search results to cases filed *after* the entry of the settlements in *In Re Endangered Species Act Section 4 Deadline Litigation*; the WEG settlement was entered on May 10, 2011 and the CBD settlement was entered July 12, 2011. We then downloaded the results. Next, we eliminated cases where WEG or CBD participated in the case as a defendant, interested party, or was denied intervention. We then sorted the results into the role of the organization (e.g. plaintiff, intervenor, etc.) and the court where the case was filed. Finally, we performed summations and created tables and charts (above) to display the results.