TESTIMONY OF CRAIG MANSON,
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BEFORE THE HOUSE COMMITTEE ON RESOURCES,
REGARDING H.R. 3824, THE THREATENED AND ENDANGERED
SPECIES RECOVERY ACT OF 2005

September 21, 2005

Mr. Chairman and Members of the Committee, I am Craig Manson, Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior. Thank you for the opportunity to testify before you today regarding H.R. 3824, the "Threatened and Endangered Species Recovery Act of 2005."

At the outset, let me note that because the bill was introduced just days ago, on Monday, September 19, we have not had sufficient time to fully analyze the legislation or to develop a formal Administration position on the bill. After we have had more time to review the bill, we would be happy to more fully discuss its provisions with the Committee. Given this, I plan today to provide some general observations on the Endangered Species Act and the Department's role in implementation, and then offer some preliminary comments on the Threatened and Endangered Species Recovery Act.

Generally, we support provisions of the bill that better enable the U.S. Fish and Wildlife Service to set priorities, provide stability for landowners and encouragement of private stewardship, and focus, over the long term, on the recovery of species. We also recognize the importance of decisions informed by scientific standards that are transparent and generated by generally accepted scientific practices.

The Department's Role in Endangered Species Act Implementation

The Endangered Species Act was passed in 1973 to conserve plant and animal species that were in danger of extinction. The Act states that the policy of Congress is that the federal government will seek to conserve threatened and endangered species, and that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of treaties and conventions such as the Convention on International Trade in Endangered Species (CITES).

Under the law, species may be listed as "endangered" or "threatened." All species of plants and animals, except pest insects, are eligible for listing if they meet the criteria specified in the Act and, once listed, the species is afforded a range of protections available under the Act, including prohibitions on killing, harming, or otherwise taking listed species of animals. In addition, federal agencies are to utilize their authorities to carry out programs for the conservation of endangered or threatened species, and must insure that any action authorized, funded, or carried out by the federal agencies is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of a listed species' critical habitat, which is designated pursuant to the Act.

Currently, there are 1,268 listed domestic species (993 endangered and 275 threatened). Of these, 286 are candidate species being reviewed on an annual basis. The Service has determined that these candidate species warrant listing, but listing proposals are precluded by higher priorities. In addition, the Service currently has published proposed rules to list 16 species as either endangered or threatened. The Service has 58 pending petitions to list a total of 76 species as either endangered or threatened. Of these petitions, the Service has published 11 findings that the petitioned action to list the subject species may be warranted, and has initiated a status review for the involved species.

The Department has made great strides in improving administration of the Act. For example, under the banner of the Department's Cooperative Conservation Initiative, we have a host of grant programs that promote partnerships with states, landowners, and other citizen stewards to protect and enhance habitat for threatened and endangered species. These and related grant programs also help maintain, protect, and restore habitat in ways that help prevent the need to list species as endangered or threatened. The Service has worked to improve our recovery program, including the establishment of a process whereby high priority recovery needs of species can better be allocated and addressed by Service Regions, and the development of a new recovery implementation database for better tracking of recovery actions. We have also implemented streamlined section 7 consultation processes for several kinds of activities, such as hazardous fuels treatment projects, habitat restoration, and recreational activities in the Pacific Northwest, cutting completion time for consultations under the program by one-third.

The Service has also worked with the National Marine Fisheries Service to develop an analytical framework for use in consultations and the preparation of Biological Opinions. This framework makes the process more transparent, objective, and reproducible, and yields more consistent and legally defensible conclusions.

We recognize that successful protection of many fish and wildlife species depends significantly on cooperation of private landowners who manage the vast majority of habitat. The Department developed our Cooperative Conservation Initiative programs, among others, to enhance successful implementation of the Act by working with landowners. The Service looks for opportunities to partner with private landowners.

The President's budget emphasizes investments that work through partnerships to help improve habitat and recover populations of at-risk, threatened, and endangered species. Building on Secretary Norton's vision of cooperative conservation, in 2002, the Department launched two new conservation initiatives: the Landowner Incentive Program and the Private Stewardship Grants Program (referred to collectively as the Species Protection Partnership Program). Both programs offer incentives for private landowners to protect imperiled species and restore habitat, while engaging in traditional land management practices like farming or ranching. Nationally, the Landowner Incentive Program offers a positive, non-regulatory opportunity for landowners and Tribes to protect at-risk and endangered species, most of which depend upon private land for habitat. Together, the Landowner Incentive Program and Private Stewardship grants reflect a cooperative way of doing business — working in partnership with landowners. The response from landowners is overwhelmingly positive. In addition, other tools such as the Cooperative Endangered Species Grants (section 6) and funds provided for habitat conservation planning assistance and related land acquisition also support cooperation.

For example, in fiscal year 2004 the Service, through its Partners for Fish and Wildlife Program, established partnerships with private landowners to restore valuable fish and wildlife habitats. The Service, in cooperation with its partners, restored and improved over 36,000 acres of wetlands; almost 263,000 acres of native prairie and grasslands, and other uplands; 375 miles of riparian corridors, streambanks, and instream aquatic habitat; and 28 fish passage barriers were removed.

Unfortunately under the Act, our work related to endangered species has been in large part driven by lawsuits. As of September 8, 2005, the Service is involved in 34 active lawsuits on listing issues with respect to 93 species; including 8 lawsuits on 90-day petition findings for 11 species, 8 lawsuits on 12-month petition findings for 11 species, 11 lawsuits regarding final determinations for 22 species, 11 lawsuits regarding critical habitat for 13 species, and 22 lawsuits regarding merits challenges on 65 species. The Service is also complying with court orders for 51 lawsuits involving 103 species.

For many years now, the Department has noted that the one area of implementation that continues to be a challenge and a source of controversy is the designation of critical habitat. The Service has been embroiled in a relentless cycle of litigation over its implementation of the listing and critical habitat provisions of the Act for over a decade. This has resulted in a Section 4 program with serious problems due not to agency inertia or neglect, but to a lack of scientific or management discretion to focus available resources on the listing actions that provide the greatest benefit to those species in utmost need of protection. In FY 2004, the Service proposed critical habitat for 12 species and completed critical habitat designations for 25 species. Currently, the Service is working on 31 critical habitat proposals for 51 species. All of the FY 2004 and FY 2005 proposed and final designations were the result of court orders or settlement agreements.

Protection of habitat is the key to sustaining and recovering endangered species. However, the critical habitat process under the Act is not an effective means of conserving habitat; the Service has characterized the designation of critical habitat as the most costly and least effective class of regulatory actions it undertakes. In 30 years of implementing the Act, the Service has found that the designation of critical habitat provides little additional protection and can result in negative public sentiment, and also because there is often a misconception among the public that, if an area is outside of the designated critical habitat, it is of no value to the species. At the same time, the designation of critical habitat imposes burdensome requirements on federal agencies and landowners and can create significant economic and social turmoil.

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. Almost universally, the courts have declined to grant relief. Consequently, as the result of court orders and court-approved settlement agreements, the Service has little ability to prioritize its activities to direct resources to listing program actions that would provide the greatest conservation benefit to those species in need of attention. As noted by the previous Administration, lawsuits that force the Service to designate critical habitat necessitate the diversion of scarce federal resources from imperiled but unlisted species that do not yet benefit from the protections of the Act.

The Service is not operating under a rational system that allows them to prioritize resources to address the most significant biological needs and, as a direct result of litigation, the Service has had to request a critical habitat listing subcap in its appropriations request the last several fiscal years in order to protect funding for other Endangered Species Act programs.

At this point, compliance with existing court orders and court-approved settlement agreements will likely require funding into fiscal year 2008.

Preliminary Comments on the Legislation

For certain areas in the Act, we need Congressional action in order to update and improve implementation. With this in mind, I offer the following preliminary comments on H.R. 3824, the Threatened and Endangered Species Act of 2005.

Section 3: Definitional Changes

Section 3 of H.R. 3824 would define "best available scientific data" and require the Secretary to issue, within one year of enactment, regulations to establish necessary criteria to identify such data. Because we recognize that our resource management decisions can have an impact on communities, individuals, and natural resources, the Department has been working to strengthen the science behind our decisions for some time. We recognize that the data and scientific information utilized by our bureaus must meet the highest possible ethical and professional standards.

Section 5: Repeal of Critical Habitat

We have been supportive of need to change critical habitat to provide individual agency discretion to focus on those actions that provide the greatest benefit to the species most in need of protection. We believe that habitat needs of listed species may be addressed through conservation mechanisms such as listing; section 7 consultations; the recovery planning process; section 9's prohibitions of unauthorized take; section 6 funding to states; and the incidental take permit process, as well as through cooperative conservation grants and partnerships.

Section 10: Recovery Plan Provisions

Section 10 of H.R. 3824 provides new criteria for developing and issuing recovery plans under the Act. Recovery of threatened and endangered species is the primary purpose of the Act. The recovery planning process and on-the-ground implementation are among its most important components. Our available resources would be better spent focusing on those actions that truly benefit species in need – like the development and implementation of recovery plans.

Most importantly, section 10 would elevate the importance of recovery planning by requiring that final recovery plans for listed species be published within 2 years after the date a species is listed, and, for species listed on the date of enactment but without a recovery plan, would require the Secretary to develop a priority ranking system for preparing and revising recovery plans, along with a schedule for development or revision of plans. These changes should advance the recovery planning process and ensure that recovery remain a primary purpose of the Act.

There are provisions in the bill that, even with the small amount of time we have had to study the bill, concern us. Several of these concerns are detailed below.

Section 10: Species Conservation Contract Agreements

Section 10 of H.R. 3824 would create long-term "species conservation contract agreements." These provisions would require the Secretary to enter into these agreements in cases where a landowner presents a contract to the Secretary and the Secretary finds that the landowner owns the land or sufficiently controls the use of the land to ensure implementation of such an agreement. The Secretary would then be responsible for funding between 60 and 100 percent of the landowner's costs to implement conservation practices specified in the agreement. The payments have no matching requirement.

We have concerns about the lack of flexibility under these provisions as well as the cost of implementing them.

Section 13: Exceptions to Prohibitions

Section 13 of H.R. 3824 includes a provision that allows a property owner to request from the Secretary a written determination that a particular proposed use of the owner's property complies with section 9(a) of the Act. The provision provides that, if the Secretary does not provide a written answer within 90-days (subject to an extension that may be granted by the property owner), the Secretary is deemed to have determined that the proposed use complies with section 9(a) of the Act.

We recognize the importance of stability and certainty for landowners, and the need to create incentives to encourage landowners to protect species habitat. However, we have concerns with this section. We believe it could

add significant additional process to our implementation of the Act. In addition, in many cases the 90 day deadline may not be adequate time to complete such a determination. Finally, while the Secretary may request an extension, it is not at all clear that an extension would be granted and, for those requests that result in “deemed decisions” that the use does not comply, the Secretary would be required to pay compensation under the provisions of Section 14 of H.R. 3824.

Section 14: Private Property Conservation

Section 14 of the legislation would establish a new conservation aid program for private property owners who receive determinations from the Secretary that proposed uses on the property would not comply with section 9 of the Act. Grants awarded under these provisions would have no matching requirement, and would be in an amount of no less than the fair market value of the proposed use. The provisions would require mandatory payments by the Secretary to a landowner if certain criteria are met.

As noted above, we recognize that successful protection of many fish and wildlife species depends significantly on cooperation of private landowners who manage the vast majority of habitat. The Department’s Cooperative Conservation Initiative and other programs are specifically designed to provide opportunities to partner with private landowners. In fact, we believe that if participation in these programs was taken to its logical zenith, they could eliminate the problem the Committee is seeking to address.

We have concerns about the lack of flexibility under section 14 as well as the cost of implementing it. We are also concerned that the determination of fair market value lies with two interested parties – either the Secretary or the property owner. Finally, it is unclear from the language of the bill what, if any, property interest the United States is acquiring from the property owner after payment of fair market value. We are willing to work with the Committee to explore other ways to lessen potential burdens of the Act on private landowners.

Conclusion

Mr. Chairman, we realize that assembling this legislative package has been a monumental task, and we greatly appreciate your continued commitment to species conservation. I have presented here, in very summary fashion, some initial comments that we have identified in this bill. We look forward to working with the Committee as we move to strengthen and improve the Endangered Species Act.