

**WRITTEN TESTIMONY OF  
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U.S. DEPARTMENT OF AGRICULTURE**

**REGARDING  
IMPLEMENTATION OF THE ENDANGERED SPECIES ACT BY THE USDA FOREST SERVICE**

**BEFORE THE  
SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY  
AGRICULTURE COMMITTEE  
U.S. HOUSE OF REPRESENTATIVES**

**MARCH 26, 2014**

**Introduction**

Good morning Chairman Thompson, Ranking Member Walz and Members of the Committee. I am Jim Peña, Associate Deputy Chief of the National Forest System of the US Forest Service, at the Department of Agriculture (Agriculture).

Mr. Chairman, I appreciate the opportunity to discuss the Forest Service's role in implementing the Endangered Species Act (ESA).

December 28, 2013 marked the 40<sup>th</sup> anniversary of the Endangered Species Act (ESA). The purpose of the ESA is to conserve threatened and endangered species and their habitat. Congress passed the ESA in 1973, recognizing the natural heritage of the United States was of "aesthetic, ecological, educational, recreational, and scientific value to our Nation and its people." Over the past four decades, the ESA has effectively promoted the recovery of numerous species, such as the Bald Eagle, the grey wolf in the Northern Rocky mountains and the western Great Lakes, the Grizzly bear, and many others. Currently, about 1,500 species and populations in the United States are listed as threatened or endangered under the ESA. A species is considered endangered if it is in danger of extinction throughout all or a significant portion of its range. A species is listed as threatened if it is determined that it is likely to become endangered in the foreseeable future. About 20 percent of the ESA's listed species have habitat within the 193 million acres of the National Forests and Grasslands that we manage.

The Forest Service's role in implementing the ESA is ensuring that relevant sections of the Act are integrated in our core activities, such as forest plans and projects. Managing habitat for threatened and endangered species is an integral part of the Forest Service mission. In implementing the ESA, the Forest Service must work with the US Fish and Wild Service (USFWS) and National Oceanic and Atmospheric Administration's (NOAA) Fisheries, sometimes referred to as National Marine Fisheries Service (NMFS), who administer the Act. There are costs

associated with protecting and recovering listed species; we have direct costs implementing the ESA in our processes and ancillary costs associated with litigation, and sometimes there are indirect costs, such as project delays or cancellations. I will outline briefly our role in implementing the ESA, some of our experiences with its costs, and close with our commitment to protecting habitat.

### **Forest Service role in implementing the ESA**

The Forest Service assists in the conservation and recovery of listed species by: undertaking recovery efforts as defined by USFWS or NMFS for listed species (section 4); and consulting with USFWS or NMFS on actions that the agency determines may affect a listed species or its designated critical habitat, including, as appropriate, how to lessen the impacts of potential take incidental to such actions (section 7).

Land management plans under the National Forest Management Act (NFMA) and proposed management actions utilize extensive environmental analysis to inform our decisions. National Environmental Policy Act (NEPA) documents are prepared by the Forest Service at the programmatic level for forest plans, and at the site-specific level for project decisions. Forest Service environmental analysis and decisionmaking also involves compliance with several other Federal statutes such as the Clean Air Act, Clean Water Act, and the National Historic Preservation Act. ESA compliance plays an integral role in our NEPA documentation requirements.

ESA is administered by USFWS and NMFS which establish the procedural mechanisms through which ESA's substantive goals are achieved, such as the section 7 consultation process with other Federal agencies. The ESA implementation regulation establishes formal or informal consultation process (section 7) between the Forest Service and USFWS or NMFS to ensure that proposed Forest Service actions do not jeopardize the continued existence of any listed species or its designated critical habitat. The Forest Service makes a determination regarding how a proposed action affects a listed species through completion of a biological evaluation or biological assessment (e.g., "no effect"; "is not likely to adversely affect"; "is likely to adversely affect"), and then the consultation process is initiated if there may be an effect on this species. Consultation occurs on proposed projects, as well as on the issuance of forest plans or plan amendments.

The Forest Service works closely with USFWS, NMFS, and state and local partners when listed species are at issue, particularly when a species occurs over multiple jurisdictions. For example, earlier this year the Oregon chub was the first endangered fish species in the United States to meet its recovery goals under ESA and was delisted by the USFWS. When the Oregon chub was listed in 1993 the population had declined to under 1,000 fish in eight known locations. Now, the Oregon chub's populations have grown to approximately 160,000 fish in 83 locations. This success was due to collaboration among private landowners, non-profit organizations, and state and federal agencies. The Forest Service's Willamette National Forest, which manages several populations of Oregon chub in the upper Middle Fork and Coast Fork Willamette River

sub-basins has been part of this success story by enhancing and restoring Oregon chub populations, ensuring long-term survival on National Forest System (NFS) lands.

### **ESA-related litigation**

Forest Service decisions are sometimes challenged by industry, environmental organizations, states, Tribes, local governments, or individual citizens. Only about two percent of all agency decisions are challenged in litigation. About 18 percent of cases filed against the agency allege ESA violations.

According to a recently published study<sup>1</sup> examining a 20 year period from 1989-2008, the Forest Service won completely 53.8 percent of their land management cases (plan and project), losing on some issue in 23.3 percent and settling 22.9 percent. The Forest Service prevailed fully in 51.8 percent of cases involving the ESA.

### **Direct and indirect litigation costs**

The total economic impact of all litigation, and particularly ESA-related litigation, is hard to discern and is not tracked by the agency. Direct and indirect litigation costs may result from judicial orders requiring payment of attorney fees and costs to a successful litigant. Liability for such costs and fees may arise through either the Equal Access to Justice Act (EAJA) or the ESA. These costs result in part from the EAJA, which allows qualified, prevailing litigants to be reimbursed by the federal government for attorney fees and court costs. The ESA authorizes courts to “award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.”<sup>2</sup> The agency also incurs costs in defending litigation, such as redirecting staff from other priority work to prepare administrative records and review legal briefs, but figures on such ESA-specific litigation costs are not available. In addition, every lawsuit filed requires the federal government to pay for the Department of Justice lawyers, departmental counsel, and the federal court system necessary to address the case.

Indirect costs associated with changing, delaying, creating new, or canceling projects due to losses in court or reaching settlement might exceed direct litigation costs, but there is no formal accounting of these costs.

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<sup>1</sup> Miner, A.M., R.W. Malmshiemer, and D.M. Keele. 2014. Twenty years of Forest Service land management litigation. *Journal of Forestry* p.32-40. \*Note: This study measured a win for the Forest Service conservatively, counting a case as a loss if there was any issue on which the Forest Service did not prevail.

<sup>2</sup> 16 U.S.C. 1540(g).

## *Canada lynx*

In 2000, the USFWS added the Canada lynx to the list of threatened species under the ESA. In 2007, the Forest Service added the Northern Rockies Lynx Amendments to the forest plans of 18 National Forests in the Northern Rocky Mountains. The amendments set broad standards for protection of Canada lynx habitat. The Forest Service formally consulted with USFWS on the adoption of the Lynx Amendments, and USFWS issued a Biological Opinion concluding that the Lynx Amendments would not jeopardize the continued existence of the Canada lynx.

In 2009, the USFWS expanded the designated critical habitat for the lynx on lands in Idaho, Montana, and Wyoming. This area encompasses parts of 11 National Forests with plans that include the Lynx Amendments. In 2013, applying 1994 Ninth Circuit precedent, the Federal district court for the District of Montana ruled that the 2009 critical habitat designation requires the Forest Service to re-initiate consultation with USFWS on the amended plans, and ordered the Forest Service to do so. The Government has appealed the district court's decision to the Ninth Circuit. On March 11, the Ninth Circuit granted the Government's request to stay the district court's order. In separate litigation, Forest Service ecological restoration projects have been enjoined based on the Montana court's ruling.

In contrast, the Tenth Circuit, relying on Supreme Court precedent, held in 2007 that re-initiation of consultation on plans is not required. The conflict between these cases is an example of some of the challenges that the Forest Service faces in implementing ESA.

## **Conclusion**

The Forest Service is committed to making the ESA work for the American people and to carrying out ESA's purpose of conserving threatened and endangered species. Extinctions globally are occurring at a rate that is unprecedented in human history. In passing the ESA, Congress recognized we face an extinction crisis. The Forest Service faces challenges with implementing the ESA and other laws. The agency must weigh the many uses the American people want from NFS lands. Thus, within our authority, we manage a wide variety of habitats for multiple species and multiple uses, in many instances on the same acreage. The Forest Service is committed to carefully managing our National Forests and Grasslands on which many species depend, as part of the natural legacy that we leave for future generations.

That concludes my testimony, Mr. Chairman. I am happy to respond to any questions you and the other members of the subcommittee have regarding ESA implementation.