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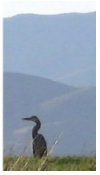

TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY

HEARING on Implications of the Endangered Species Act and related legislation on National Forest System management

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March 24, 2012

This hearing and other recent attention to the Endangered Species Act (ESA) is important. It can draw together a larger, serious, good-faith examination by focusing on topics that promote improvement without disregarding the purposes of each law. One way to do this appears in the recommendation from the *American Wildlife Conservation Partners* that I submit for the record.

Below are ideas focusing on listing species, delisting species, and, in between those 2 steps, how the Forest Service could contribute to species recovery.

Forest management itself could stand its own review and should. Creating a more effective ESA would not cure all that ails forest management. Central planning is more pronounced in forest policy than ESA. The planning approach has driven the Forest Service into detailed specialties in planning and process at the same time its traditional field expertise has retired.

"Implications" is a good banner for this hearing, because many of the problems with ESA are in how things work, and not obvious from how they are written. Working from the implications is a good approach both for tracing out the cold policy logic and also for navigating the hot rhetoric. To have a serious review means addressing strong opinions, and means there must be a good-faith effort to acknowledge improvement as a good idea from those who prefer the status quo and also, from those who would amend the Act, a commitment to the legitimacy of the goals of the ESA.

## Implication on Species Listing

ESA does not say but implies that the Forest Service policy of producing multiple uses is conditional. The intent of ESA is "to halt and reverse the trend toward species extinction, whatever the cost" (TVA v. Hill 437 U.S. 153 (1978). ESA does not say this, but implies it, according to the Supreme Court. Therefore, forest policy that says National Forests will

produce "multiple use" and "sustained yield" (16 U.S.C. 528–531), and that makes these among the "required assurances" of Forest Service plans (16 U.S. Code § 1604), are, by implication, secondary to species conservation.

A species listing forces the Forest Service to reconsider any settled plan or policy considered harmful to listed species. Right now this revision is underway for the long-eared bat. Known to the Fish and Wildlife Service (FWS) since 1985 – almost 30 years ago – as possibly qualifying for protection under ESA, the long-eared bat was one of many species to be put on a schedule for listing as a result of the 2011 court settlement agreement in the U.S. District Court for the District of Columbia. This is also known as the Multi-District Litigation Settlement, or "mega-settlement" involving hundreds of species. FWS proposed listing the bat last Fall, promising to complete that decision in 1 year. During that year, the Forest Service must learn what it can about the bat and revise its own policies accordingly.

These do-overs of forest policy would be better done in a process that did not span 30 years and cram the work in the last of those years.

The schedule for listing decisions now in place (somewhat) under the multi-district litigation settlement was worked out by FWS and litigators behind closed doors. As melting down the system in court produces a schedule, why not skip the melt-down and create a schedule in an open public decision?

There is a reason, which goes back to the intent of Congress as read by the Supreme Court in TVA v. Hill: because FWS must protect whatever the cost, it cannot set priorities according the limits on their spending. Fixing this will take amending ESA.

An actual schedule developed through public process and standing in place of today's across-the-board deadlines for listing decisions would end the chaos of deadline lawsuits and enable the Forest Service better to know what species to consider as plans are written.

## Implication on DE-Listing

At delisting – the other end of the ESA process – is a similar situation. Lawsuits opposing delisting on procedural grounds have raised new issues forcing changes on Forest Service management.

In the dispute over delisting the Yellowstone grizzly bear, when the population reached recovery goals, lawsuits prompted the addition of habitat goals. Once these were met, more lawsuits followed raising the possibility the Forest Service may be called upon to produce more whitebark pine before the bear is returned to the care of state agencies.

This happens because ESA does not allow FWS to use recovery goals and state conservation plans as causes for delisting, but as considerations only. This is another implication that warrants serious discussion. When deciding a species delisting, FWS must consider the same 5 factors required during the original listing. None of these gives weight to recovery goals having been met.

## Implication for Helping Recovery

Between listing and delisting is the time when the Forest Service could be helping with active species conservation, but is obstructed by a central irony of ESA, which is that by insisting on passive protections, ESA limits active recovery.

This implies that stopping harms is enough to recover species. Attempts to act positively to promote recovery are deterred because the necessary handling of individuals of the species, and managing habitats require more process for approval. This blunts a great potential the Forest Service has in stewardship contracting to produce cash from forest habitat management that can pay for recovering species.

## Implication for another Law: Sikes Act

These issues in listing, delisting, and using stewardship contracts to promote recovery outline a set of ESA ideas for a serious review of that law.

As to other laws with implications for forest management, consider the Sikes Act. This requires a formal arrangement between the Forest Service (and other agencies) and state wildlife agencies to coordinate population and habitat management. This has not been made a practical reality. If it were, the Forest Service could give state wildlife agencies the role of expert on the wildlife issues now used against the Forest Service for political purposes.

As we know from the admission of old-growth advocates that they used the spotted owl as a surrogate to change forest policy (Yaffee, S. L. 1994. The Wisdom of the Spotted Owl. Island Press. pp. 215-216), and as we have seen that approach leave the species in danger to another threat, it would be better to focus species policy on species. State wildlife agencies are species experts responsible for wildlife populations. Activating a formal role as such through the Sikes Act could create more effective coordination with the Forest Service and its habitat management responsibilities.

## Closing: Implication of Gridlock

In closing, there is a final implication in the ESA and other laws concerning the politics of gridlock. The problems of ESA and the National Forests are wedged between a central-planning system that serves some people perfectly well on one side and, on another side, a

vision for smaller command-and-control government (or even privatization). The implication is that these are our only choices: government or less government, even private ownership. This is a false choice according to what is clear from the many ways people succeed in keeping common-property in agreeable condition. The third way is a way to break gridlock.

Economist Elinor Ostrom and colleagues have found that between wholly-governmental ownership such as a National Forest and a less-regulated or even private ownership there are ways that collaboration can play a formal role if authorized to do so. The main ingredients are information, rules for resolving conflict, incentives for compliance, and infrastructure (Dietz, T. et al. 2003. The Struggle to Govern the Commons. Science 302(5652):1907-1912).

Each of these ingredients is currently available in the central-planning system. They could be broken out and reconfigured to make a real place for state-local governance in National Forest Management. It will not necessarily be any simpler than the current situation, but experience shows it will be more effective in supplying more of the demands of more people. In doing so it would be a 21st century contribution to Gifford Pinchot's 100-year old vision for the greatest good for the greatest number over the long term.

I urge Congress to make a serious and good-faith effort to pursue these and other ideas. Escaping gridlock requires good-faith commitment to improvements and to a goal for actual, active species recovery.

Thank you.