STATEMENT OF
COLORADO STATE REPRESENTATIVE CORY GARDNER
BEFORE THE FISHERIES, WILDLIFE AND WATER SUBCOMMITTEE,
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

Statement for the Record

This morning's hearing is a critical part of an ongoing national discussion that, I hope, will lead to modernization of the Endangered Species Act, one of this country's most powerful and far reaching laws.

As a member of the Colorado General Assembly, I represent House District 63, which encompasses the majority of Eastern Colorado – an area larger than the States of Massachusetts and Connecticut combined. My constituents depend, directly or indirectly, on farming and ranching for their livelihoods. Because of the district's agrarian nature, property rights and land use is of paramount importance, and the role of the Endangered Species Act in their lives has grown dramatically. Over the thirty-two years since the Act's passage, it has, more often than not, instilled fear rather than trust and cooperation. Fear about the use and value of private land. Fear over litigation and boutique lawsuits. Indeed, the fear of conservation by litigation has driven a wedge between resource users and many in the environmental community.

The goal of recovering threatened and endangered species is a noble one. Witness after witness has testified before this committee concerning the intent of the Endangered Species Act and expressed their belief that the principal goals of the Endangered Species Act are truly laudable. It is the Act's implementation that stirs debate; advocacy for complete elimination is rare. Unfortunately, the Act as currently written fails to provide the tools and means necessary to recover and delist species, and instead results in permanent listing. The numbers speak for themselves. Of the 1,827 listed species, only 16 have been delisted as a result of recovery.[1]

Perhaps nothing demonstrates this point better than a cartoon I came across last week while reading a local newspaper (attached). The cartoon shows two hippopotamus-like animals, one saying to the other, "The good news is that we've been removed from the Endangered Species list. The bad news is that we've been removed from the Endangered Species list." The cartoon illustrates the policy tug of war, pitting those who would rather see a perpetual state of listing than changes to the law of that actually result in the recovery and delisting of species. I believe that Congress has an obligation to

[1] As of March 30, 2005, a total of 1,078 species of animals and 749 species of plants had been listed as either endangered or threatened, of which the majority (518 species of animals and 746 species of plants) occur in the United States and its territories and the remainder only in other countries. 16 species have been delisted due to recovery, to date. Nine species have become extinct since their listing, and 15 have been delisted due to improved data. Numbers compiled using data from the Congressional Research Service.

remove the fear, to update the Endangered Species Act and begin the process of recovery. And it must do so while respecting private property rights and giving equal statutory standing to the States.

Modernization of the Endangered Species Act must start by making the State a true partner and coequal. The State is not just another voice, but must statutorily be made an equal partner of federal government.

While Colorado has enjoyed some tremendous successes in working cooperatively with the U.S. Fish and Wildlife Service, we wholeheartedly support greater flexibility in the administration of Section 6 of the Endangered Species Act.

Through Section 6, the roles of the State and federal agencies can be clarified and delineated. A revamped Section 6 should give greater flexibility to States, allowing them, should they choose to do so, to take over pre-listing conservation, recovery planning and implementation oversight, habitat agreements and Habitat Conservation Plan administration, delisting responsibilities, and post-delisting monitoring. Even when States do not take the lead, their involvement should be co-equal with the Federal agencies. States, along with landowners, must also be given more say in the Section 7 consultation process. Stronger emphasis should be placed on pilot programs that delegate Section 7 and Section 9 authority to the States.

Further efficiencies can be gained by coordinating joint rulemaking and decision-making processes between the wildlife agencies and federal government for administrative and regulatory actions. Disagreements and stalemates could be resolved by the respective Secretaries of Interior or Commerce.

Even though Colorado has had the foresight to put forward modest funding for species conservation and recovery, States should be given the financial resources to assume an expanded role in ESA administration and implementation. The cost States incur as a result of assuming greater responsibilities could be offset by passing back the federal savings achieved as a result of ESA updates and program delegation.

With the State as a coequal, the Secretary should give a presumption in favor of State information and recommendations on listing. And, in accordance with the views of the International Association of Fish and Wildlife Agencies, the Secretary should be required to refute the State's information through independent peer review if the Secretary disagrees with the State recommendation.

The State has a far better understanding of its species' needs than the federal government. In-State employee expertise should be embraced by the Endangered Species Act, not rejected or downplayed. Federal biologists may not have the specific expertise that a State specialist can offer. For example, in 2003, the Fish and Wildlife Service made an effort to list the black-tailed range rodent (also known as the black tailed prairie dog). Listing of the range rodent would have resulted in a significant portion of the eastern plains being designated as critical habitat. However, the Fish and Wildlife

Service's preliminary habitat acreage estimates were refuted by the State of Colorado, which carried out its own study – based on years of work within the State by employees familiar with the issue – that showed range rodent habitat acreage was actually seven times greater than that estimated by the Fish and Wildlife Service.

Taxonomic and genetic uncertainties should be studied and independently peer reviewed prior to listing of a species, and the information threshold in listing petitions should be raised. Perhaps nothing illustrates this better than the Preble's Meadow Jumping Mouse. In 1998, federal officials based their decision to list the mouse as threatened on a fifty year old study. The 1950's study – based on test results from 3 mice and the skins of 11 others - was the best science that had been done up until the listing of the Preble's mouse. The Endangered Species Act only requires that species protection be based on the best available science - not the best possible science.

Businesses and governments spent over $100 million to cope with the Preble's Meadow Jumping Mouse. Nearly 31,000 acres along streams in Colorado and Wyoming were designated critical mouse habitat, triggering rigorous land use restrictions. Ranchers were prohibited from clearing weeds out of their irrigation canals. Grazing was restricted and regulated. Reservoir construction was halted in the middle of the worst drought in 300 years. Counties spent millions of dollars to build "mouse tunnels" under roads and reservoirs. A $5 million bridge was built in order to avoid Preble's habitat.

As the cost of living with the Preble's Meadow Jumping Mouse increased, a Denver scientist completed a modern genetic study revealing that the Preble's Meadow Jumping Mouse was actually identical to the Bear Lodge Meadow Jumping Mouse. In other words, the study revealed that the mouse did not exist.

To avoid mistakes like the Preble's Meadow Jumping Mouse, the scientific bar must be raised to embrace modern scientific techniques and independent peer review. While the Fish and Wildlife Service has submitted the mouse for delisting, there remains concern that the Service will try to delay the delisting. I urge the members on this Committee to make sure the delisting process proceeds in a timely fashion.

State agency expertise should also be recognized through greater flexibility to not list a certain area or State if it is receiving adequate management within that portion of its range. Last year, the Fish and Wildlife Service entertained the listing of the Mountain Plover, a shorebird that inhabits portions of the Colorado High Plains (in fact, the Plover's habitat is primarily in the district I represent). The decision to list was being made, in part, on the mistaken assumption that agricultural practices negatively impacted the survival of the bird. Working with local farmers, ranchers, federal agencies and non-governmental organizations, the State has forged a new partnership to conserve the Mountain Plover. The ultimate product of this partnership included agreements between individual landowners and the Department of Interior, wherein landowners agreed to put into place conservation measures to stave off the listing of the bird. (The centerpiece of this project included the provision of an 800 number, which landowners could call to request nest flagging on their property before plowing their fields). Had the Mountain

Plover been listed, this solution would not have been available - Section 9 taking prohibitions and Section 7 consultation requirements would have imposed restrictions that would have stopped the agreement in its tracks. The experience also enabled the state to gain a much greater scientific understanding of the plover that could guide in its recovery.

Significant changes should also be made to Critical Habitat designation. The State and individual landowners should be equal partners with the federal government during the designation process for Critical Habitat. Statutory timelines on Critical Habitat designations should be eliminated, thereby providing State and federal governments with greater flexibility to enter into private contracts and cooperative agreements. Changes to Critical Habitat mesh well with the suggested changes to Section 6, Section 7, and Section 9.

In terms of recovery, the Fish and Wildlife Service should be statutorily required to develop a quantifiable recovery plan at the time of the species listing. In Colorado, it took fourteen years to establish recovery goals for the Upper Colorado River Fish Recovery Program. Under the Act as it stands today, recovery plans are not binding but instead act more like general guidelines, adding little to the actual recovery of the species. Delays and unclear recovery goals are not acceptable. The recovery plan should identify key bench marks and measurable scientific data points that will ultimately lead to the delisting of the species. The State should play a major role in the development of the recovery plan and should have the option of leading recovery planning.

This statement has highlighted several of the problems surrounding the Endangered Species Act, along with some important suggestions to improve it. Colorado has also had some successes in spite of the current form of the ESA.

In 1999, Governor Bill Owens created an Office of Species Conservation and Recovery within the Executive Director's Office of the State Department of Natural Resources. The Governor's motivation was simple: common sense dictated that the most efficient means of dealing with threatened and endangered species issues was through that level of government which is closet to the problem, wherein we could channel the necessary biological expertise and the dollars to effect recovery to at-risk species and species already listed. The Office is geared toward working to restore the health of at-risk species to preclude listing, and promote recovery for those already on the list with an eye toward enhancing the possibilities of expediting delisting whenever possible.

At the same time, my predecessors in the Colorado General Assembly created a funding mechanism to allow Colorado's participation in interstate species recovery efforts and to promote conservation and recovery within our own borders. This mechanism is known as the Native Species Conservation Trust Fund, and the General Assembly capitalized the Fund with $15 million over two years. Today the Fund is allowing Colorado to achieve it's cost-share obligations for recovery of the four "big river" fishes in the Upper Colorado and San Juan Rivers and gives the State the

opportunity to put resources on the ground to enhance recovery efforts for terrestrial and bird species.

Finally, Colorado has taken advantage of those portions of the Endangered Species Act which give States the flexibility and the lead in species protection and recovery. Section 6 of the Act, which allows States to undertake State-directed conservation agreements, has given the State the ability to take up projects with our own recovery priorities and capabilities in the forefront.

So far, the results are dramatic. Colorado has taken up numerous species conservation projects with this new-found administrative and budgetary flexibility. The following examples tell the story best:

- The State has used Section 6 of the Act to put together a comprehensive conservation plan directed by the State to continue the Canada Lynx reintroduction in Colorado while accommodating agricultural production interests. Furthermore, the State is taking the lead on much of the science being generated which will ultimately cause lynx to be recovered throughout the United States.

- Currently the State Division of Wildlife is working with the U.S. Fish and Wildlife Service to implement a Candidate Conservation Agreement with Assurances (CCAA) for landowners who have Gunnison Sage Grouse habitat on their properties. Once implemented, this will be the largest CCAA of its kind, including hundreds of landowners.

We have spent the last thirty-two years living under an Endangered Species Act that falls short of accomplishing its goals. We know what works, what does not, and what protections must be made for the people impacted by the Act and the species we are trying to recover. It is time to put aside the mistaken perception that any changes made to the Endangered Species Act will result in a complete rollback of ESA protection. It is time instead to begin the work of recovering species. The protection offered by the Endangered Species Act should not be status quo, but instead, a tool of last resort. Earnest modernization will make this a reality.

Thank you, Mr. Chairman and Committee, for accepting this statement for the record. Please know that I stand ready to assist you as your work on the Endangered Species Act proceeds.

Colorado State Representative Cory Gardner
Fisheries, Wildlife and Water Subcommittee,
Senate Environment and Public Works Committee
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10 - JOURNAL-ADVOCATE, Sterling, Colorado, Wednesday, September 14,2005