

STATEMENT OF THE HONORABLE MARK GORDON
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BEFORE THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
REGARDING S. 4589 – A BILL TO AMEND THE ENDANGERED SPECIES ACT OF 1973

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Good morning Chairman Barrasso, Ranking Member Carper and members of the committee. I am Mark Gordon and have the honor and privilege to serve as the Governor of the great State of Wyoming. As a lifelong rancher, sportsman, wildlife enthusiast and resident of Wyoming, I have a strong understanding of the Endangered Species Act (the Act or ESA used interchangeably) and its contribution to wildlife conservation across our country.

Today, I will offer my perspectives regarding necessary modifications to the Act. While the Act has been effective in protecting and recovering many species of wildlife, improvements are needed to better align the Act with its original intent—to protect imperiled species, recover them in accordance with scientific recovery objectives and to **delist** or remove species from the threatened or endangered species list. The Act hasn't been updated since 1988 and the bill your committee is considering today includes many amendments that, if passed, would serve to make the Act more effective.

The implementation of the Act has been important to my state for quite some time. My last two predecessors have appeared before this committee to offer similar perspectives regarding the Act—Governor Dave Freudenthal in February 2017 and Governor Matt Mead in July of 2018. Governor Freudenthal and his administration invested significant time and resources into how the ESA was implemented in Wyoming. Governor Mead, as chair of the Western Governors Association (WGA), made ESA improvement his highest priority policy objective. The WGA served as a driving force in developing many of the initial ideas discussed and analyzed related to ESA improvement. Many of the ideas in the bill you are considering were inspired by the bipartisan work of the WGA, led by Wyoming's Governor.

Americans are passionate about wildlife and wild places, and that sentiment is abundant among the residents of my state. While there is some disagreement around the ways and means protection and recovery occurs under the Act, most agree with its underlying objectives. From its signing in 1973 by President Nixon, the Act is intended to provide protection while a given species recovers and that at the point the species reaches recovery, the species' management should be returned to the states and tribes. I strongly support the notion that wildlife is best managed by the states and tribes where they live and that the Act is most effective when it is applied to those species that truly become imperiled as shown by the best science.

The largest barrier to returning the management of fully recovered species to the states and tribes is litigation—not litigation based on whether a species is recovered, but litigation aimed at exploiting technicalities in how the United States Fish and Wildlife Service (USFWS) promulgated rules. While the basis for judicial review of agency actions was provided with good intent, federal judges have used challenges to delisting rules to delve into science and policy to a level that certainly was never intended by the legislative branch. Endless court challenges on species conservation run counter to the objectives of the Act. These suits, and the associated investment of money, time and energy, detract from species recovery and conservation and divert important resources away from species that truly need help.

The work states and tribes carry out every day across our country for imperiled species conservation is a vital component to the discussion of recovery efforts. Despite the fact that little to no federal funding exists to support state's efforts nor that no specific mandates require states to take certain actions in the ESA, they do it anyway. Critics of amending the Act seem to insinuate that states do not want to conserve at risk species or that states lack the capacity and expertise. Nothing could be further from the truth. The public trust doctrine outlined in the North American Model of Wildlife Conservation is the bedrock for wildlife conservation in our country. Most wildlife in our country are managed, and managed quite well, by state and tribal governments in trust for their citizens. I am proud of the significant achievements state wildlife managers in my state and others across the nation have accomplished. Wildlife continues to be abundant and diverse and this is due in large part to the efforts of states and tribes.

Private landowners, ranchers and farmers across our nation have made amazing contributions to wildlife conservation and should be recognized. In my state, farmers and ranchers have demonstrated their commitment to wildlife as the ultimate conservationists. They know their land and the species that live there better than anyone else. Their willingness to contribute habitat for wildlife, while simultaneously making their living off the lands they own and manage, is testament to their talent and capability to balance the needs of all people and animals that rely on their lands to survive. Specifically, in Wyoming ranchers have been integral partners on the recovery of black-footed ferrets and Wyoming toads.

Wildlife Management and Species Conservation in Wyoming

Wyoming is proud to be a leader in managing at-risk species and recovering those species listed under the Act. We have also taken a proactive role to address challenges before a need arises to list species under the Act. Wyoming has many notable examples of contributions. Some demonstrate ESA successes and some demonstrate areas where ESA improvement is warranted.

Grizzly Bear

The successful recovery of the Greater Yellowstone (GYE) grizzly bear population is, in my opinion, the most significant conservation success story in the history of wildlife conservation in North America. It is a stellar example of the power of the ESA to conserve this nation's treasured wildlife resources. Listing the grizzly bear as a threatened species in 1975 triggered a full-court press of scientific research and natural resource policy development. Today, we know more about the GYE grizzly bear than any other wildlife species on the face of the earth. Constant observation, monitoring and study of these bears since 1975 by many of the world's best scientists have given

us unparalleled scientific knowledge. Wyoming is proud to have paid for, and taken a leadership role in, grizzly bear recovery and management over the last four decades. Those who purchase hunting and fishing licenses in Wyoming have financed the Wyoming Game and Fish Department's \$50 million investment in grizzly bear recovery. The fruit of this investment is evident in a recovered population showing steady growth from as few as 136 bears when first listed to at least 700 to 1,200 in the ecosystem today. In addition to the significant financial investment, Wyoming people have changed the way they work, live, and recreate in grizzly bear country providing further assurance the species' future is safe.

Unfortunately, despite the fact that this species has been fully recovered as measured by all federally and scientifically determined recovery objectives for over 20 years, the GYE grizzly bear remains listed today. It remains listed not because there is some un-accounted for threat. It remains listed not because there is scientific concern over the population's viability. The species remains listed because on two occasions the federal courts have rejected the USFWS final delisting rule. In both cases, the court delved into complex scientific findings and the policy decisions of the USFWS. The court seemed to ignore the findings and conclusions of grizzly experts and science in favor of ruling in a way that pleased environmental litigants. It is no coincidence that five of six suits challenging the most recent 2018 grizzly bear delisting rule were filed in the same Montana District Court where previous environmentalist-backed suits were heard and decided in favor of plaintiffs.

The State of Wyoming continues to spend \$2 million annually to manage grizzly bears and the ever-increasing number of conflicts between bears and people. The States of Idaho and Montana also spend significant amounts of money and invest human capital into grizzly management. These costs are higher because the state simply acts in an assistance role to the federal government. Much of the financial resources allocated to grizzly bear management could be used on other species if the GYE population was not listed.

Gray Wolves

After five lawsuits and 15 years, the gray wolf population was finally delisted. Similar to grizzly bear, the species was fully recovered by all federally developed criteria for over 10 years before management was completely turned over to the states and tribes. Similarly, the scope of most litigation was on technicalities and post-delisting state and tribal management plans and not on population viability. Today, after four years of state management, the wolf population is thriving and is consistently managed far above federally required recovery objectives. Delisting required at least 100 individual wolves and 10 breeding pairs. Under Wyoming state management these numbers have held consistent between 160 and 180 wolves and as many as 17 breeding pairs, which does not include the wolves in the national parks.

Black-Footed Ferret

Black-footed ferrets were thought to be extinct in the 1970s. In the mid-1980s, near Meeteetse, WY, a ranch dog showed up at his owner's doorstep with a dead ferret. Subsequently, biologists located and captured nearly 20 black-footed ferrets from the wild. These were the last known black-footed ferrets in the world. The State of Wyoming worked hard with the USFWS to breed and rear black-footed ferrets in captivity at the Wyoming Game and Fish Department's wildlife

research facility. These black-footed ferrets were raised for future release into natural habitats. Thanks to the collaborative work of the state and USFWS, ferrets have been reintroduced in Wyoming and at least 10 other states and countries (Canada and Mexico). The species remains listed, but recovery continues as new populations are established in the mammal's historic native ranges.

Greater Sage-Grouse

Wyoming is home to the largest greater sage-grouse population in the world. When species declines indicated there were potential threats to sage-grouse habitat, the State of Wyoming crafted its own plan termed the core area strategy to conserve populations and ensure their future viability. This model was emulated by other states with dwindling grouse populations and subsequently, the USFWS opted not to list the species. Because of this state-led conservation effort, multiple land uses like oil and gas extraction, ranching and recreation can continue and the population is stabilized. In this case, involved states, private landowners and stakeholders went to extremes to alter land uses and make long-term commitments to conserve sage-grouse without the necessity of using the Act.

Wyoming Toad

The Wyoming toad is found to only live in a small geographic area of southeast Wyoming. The species is listed under the Act and state and federal efforts have secured suitable habitat for this extremely rare species. Wyoming's work with local ranchers, wildlife enthusiasts and water users have contributed to preserving this species. The Act continues to provide necessary protections for an at-risk species that has significant threats to native habitat.

Canada Lynx

The Canada lynx has been listed for 20 years and have never had a recovery plan. In 2014, a federal court ordered the USFWS to draft a recovery plan or make a determination that it wasn't necessary. Recent decisions by the USFWS indicated a recovery plan is not needed because the species may no longer meet the definition of a Distinct Population Segment (DPS) under the ESA and should be delisted. If the species is delisted, it will have been listed for over two decades, recovered and delisted with no recovery plan.

Significant restrictions were put in place in western Wyoming based on Canada lynx critical habitat designations under the ESA. Much of the land area identified as critical habitat encompassed areas where state biologists never believed were suitable for lynx occupancy. Because of the restrictions imposed by critical habitat designations, other habitat improvement projects were prohibited. These were habitat projects that would have benefited other species like sage-grouse, mule deer and other sagebrush obligate species. The states had little input into critical habitat designations. Early input by Wyoming and a listening ear by the federal government would have ensured critical habitat designations were practical and realistic.

As of today, there is no clear indication of when delisting may occur. This example illustrates the importance of requiring a recovery plan prior to listing to ensure states, tribes and other partners understand what is required to achieve recovery.

Necessary Amendments to the ESA

The original intent of judicial review of USFWS final agency decisions was well intended; however, it has become clear that endless litigation by environmental groups has become the single biggest challenge to the future efficacy of the ESA. Giving states an incentive to commit to and provide resources for state management plans and the recognition of their data-collection efforts will work; endless litigation does not. While the State of Wyoming invested in conservation for listed species, even in the face of multiple legal challenges, public support for this type of investment is waning.

This bill's prohibition of judicial review during post-delisting monitoring is necessary and will not be harmful to species conservation. Giving states and tribes a period of time as defined by the post-delisting monitoring period to implement their state and tribal management plans makes good sense and is protected by stop-gaps in the existing ESA.

Prohibiting judicial review during post-delisting monitoring is harmless due in large part to the fact that during this period, the USFWS could immediately re-list the species if it were to decline or fall below recovery objectives and other parameters of the recovery plan. The states have proven time and time again they are committed to and capable of managing wildlife within their borders. They should be given the chance to do so for delisted species without the threat of endless and costly lawsuits that in the end do not benefit the species in question.

It is important to note the extreme costs of managing wildlife through litigation. Many environmental litigants are paid significant sums of money for legal costs when they obtain a favorable ruling. As an example, following the recent grizzly bear decision out of the 9th U.S. Circuit Court, plaintiffs have requested over \$1.4 million in attorney fees. While they have not been awarded their full request yet, it is likely they will be awarded a large portion of the ask. This is just one case for one species and the amount of money being spent across the country to litigate is extreme.

The current bill provides significant improvements in allowances for state and tribal involvement throughout all processes associated with the ESA. This version requires the Secretary to notify governors when an ESA petition is filed. It provides allowances for state agencies to lead recovery teams and to take significant roles in recovery planning and implementation. Governors and tribal leaders would have the opportunity to weigh in on listing decisions before they are made. These are critical steps to recognize the value local wildlife managers bring to discussions involving the preservation and recovery of imperiled species. Additionally, it provides a path for state and tribal governments to help define early in the process the criteria that will be used to define recovery. Almost 30% of species listed under the ESA do not have a recovery plan. It is hard to imagine state, federal and tribal governments can meet the intent of the Act by working towards recovering imperiled species if they do not know how recovery will be defined. Those biologists and scientists closest to the habitats where at-risk species live have the best on the ground working knowledge of critical biological metrics that are necessary to plan and implement recovery. State biologists and wildlife managers have relationships with private landowners, federal land managers and other stakeholders. In the end, the Secretaries of Interior and Commerce still hold final decision authority, but the improvements in this version of the bill demonstrate increased value in state and tribal involvement throughout ESA required processes.

The current bill in sections 4e recognizes the value of voluntary conservation efforts by states, tribes, private landowners and others. It directs the Secretary to evaluate voluntary conservation efforts and gives the Secretary the ability to formally consider those actions and plans as regulatory mechanisms. In any five-factor analysis prior to down-listing or delisting, the evaluation of regulatory mechanisms is one of the most substantive evaluations. States and tribes have the opportunity to demonstrate commitments to the future viability of delisted species through regulatory mechanisms and this addition would be additive and productive.

Additionally, this draft allows state and tribal collected wildlife data to be used in a manner commensurate with scientific data collected by federal agencies. Science has evolved significantly since the Act was signed into law in the 1970s. Today we have radio and global positioning system location devices that provide real time biological data—data that would have taken months or years to collect two decades ago. Aerial data collection and advances in geographic information systems have accelerated the rate at which information can be collected and analyzed. As is demonstrated in Wyoming with grizzly bear, black-footed ferret, Canada lynx, greater sage-grouse and many more, state collected data is the best available science. States invest millions of dollars to collect these data and they should be used in combination with all available information to assess species status, plan recovery objectives and monitor progress.

Funding

I applaud the committee for contemplating funding implementation of the Act in this bill. I strongly believe it is worthy of your consideration. The ESA is often an unfunded mandate for state and tribal governments. As is illustrated in our Wyoming examples, working to conserve and recover at risk species is costly. Under section 6 of the Act, there is some funding that is provided annually to states, but in amounts that are inadequate to pay for the expensive work required for species conservation. In Wyoming our Game and Fish Commission allocates \$2 million annually to grizzly bear management and conflict mitigation. USFWS, Section 6 funding only reaches up to \$100,000 annually.

Combining a predictable long-term funding source with necessary improvements seems to me to be a balanced package that would reflect commitment and rededication to the original tenants of the ESA. I am keenly aware of the fiscal challenges you and the rest of Congress face. With that said, I would assert if this particular Act has survived this long and continues to be one of the most important pieces of environmental law in our country, it is worth statutory commitment to long-term and predictable funding to ensure it is implemented effectively. States, tribes, private landowners and others will be more apt to enhance their efforts if they can count on resources to fund their work.

Conclusion

I appreciate the opportunity to testify before you today and look forward to your committee's and the full Senate's progress on these important improvements to a landmark piece of legislation. In many ways, the Act has provided the framework and regulatory requirements to prevent hundreds of species from becoming extinct. Congress showed great vision and wisdom when they enacted the Endangered Species Act. However, implementation of the Act clearly shows that many of their original intentions are not being met. Less than 3% of those species listed have been delisted. The

ESA is no longer working effectively and is in desperate need of revision. I hope you are able to work cooperatively with all of your colleagues to find a path forward to enhance the Act to a level where it revitalizes conservation for decades to come. Protecting and conserving America's wildlife is a noble cause supported by nearly all of our citizens. It reflects American values and puts us in a leadership role globally on the importance of wildlife and habitat conservation.