

Statement of John D. Leshy  
before the  
Senate Committee on the Environment and Public Works  
Hearing on S. 614  
September 9, 2020

Mr. Chairman, Ranking Member Carper, members of the Committee,

I am John D. Leshy, Professor Emeritus at the University of California, Hastings College of the Law. I have worked on ESA issues for more than four decades, including extensive experience in the executive branch. I appreciate your invitation to testify today on the important question raised by this bill, which would delist the Greater Yellowstone Ecosystem (GYE) grizzly bear and insulate the delisting from judicial review.

The ESA is a cornerstone of national policy protecting our environment and natural resources. It was designed to combat what the eminent biologist Edward O. Wilson has called the “folly our descendants are least likely to forgive us”—namely, the “loss of genetic and species diversity” from human causes.

It was enacted in essentially its current form in 1973 with broad bipartisan support; indeed, there were almost no dissenting votes. President Nixon said, in signing the ESA into law:

“nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans. I congratulate the 93d Congress for taking this important step toward protecting a heritage which we hold in trust to countless future generations of our fellow citizens. Their lives will be richer, and America will be more beautiful in the years ahead, thanks to the measure that I have the pleasure of signing into law today.”

The earth’s web of life, or creation, is complex. It is no surprise, then, that the ESA is itself somewhat complicated, and decisions in its implementation can be difficult. The Act’s regulatory core is the decision to list (or delist) species. Congress specifically instructed the executive to make listing determinations “solely on the basis of the best scientific and commercial data available,” after taking into account any efforts being made to protect such species. 16 U.S.C. §1533(b)(1)(A).

Congress built into the ESA's regulatory process an important component; namely, judicial review of executive branch agency decisions that implement the Act. But Congress went beyond merely acknowledging the possibility of judicial review—it affirmatively encouraged it through what it called “citizen suits.” 16 U.S.C. §1540(g). This section makes clear Congress's expectation that the courts have an important role to play to ensure that Congress's intent is fairly carried out by the executive.

I worked for nearly a dozen years in the Interior Department, where I bore some responsibility for overseeing implementation of the ESA. I know firsthand that judicial review can be a pain in the neck to agencies who are usually doing their best to implement complicated congressional enactments in what are often challenging circumstances. I know the frustration that comes when a court rules, in effect, “you didn't follow the correct procedure,” or “you considered something you shouldn't have,” or “you failed to consider something you should have,” and “therefore we are setting your action aside and sending the matter back to you for correction.”

The frustration can be particularly acute where, as here, the ESA has already been working to produce a tangible benefit. Indeed, the GYE grizzly is, from all appearances, an ESA success story in progress, for its population has rebounded substantially since the grizzly was listed under the Act in 1975.

Nevertheless, the Ninth Circuit Court of Appeals recently mostly affirmed a Montana federal district court decision setting aside the delisting decision of U.S. Fish & Wildlife Service (FWS) and remanding the matter to the FWS for further action. *Crow Indian Tribe v. State of Wyoming* (9th Cir., July 8, 2020), affirming 343 F. Supp. 3d 999 (D. Mont. 2018).

There is little doubt that Congress has the constitutional authority to override this court decision and insulate its action from further judicial review, like S. 614 proposes to do.

But that is not to say that Congress should take this step, for it is important to keep the bigger picture in mind, and especially the constructive role the courts can play and have played in the Act's overall implementation.

Judicial review is a policy-neutral tool. It is available to all interests who share the objective of ensuring that the executive branch carries out the law as Congress has written it. Congress provided that “any person” can sue, and the Supreme Court has encouraged the use of citizen suits by those who are regulated under the Act.

Specifically, in *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997), the Court held that ranchers and irrigation districts had standing to challenge a biological opinion issued by FWS that was threatening to reduce their water supply, on the ground the opinion failed to conform to the Act's requirements. Congress's intent in the ESA, Justice Scalia wrote for a unanimous Court, was not just to protect species, but also to avoid "needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." Numerous federal court decisions show that those regulated by the Act have used judicial review with some success.

It is also worth noting that plaintiffs in the GYE grizzly delisting litigation included several Indian Tribes, tribal members and Indian organizations, who believed their concerns had not been sufficiently addressed by FWS.

My considered judgment, based on my long experience in environmental regulation, is that, overall, the benefits of judicial review clearly outweigh its costs. Court decisions have helped clarify ambiguities, reconcile disparate provisions in complex statutes like the ESA, promote fair processes (including insuring that all affected interests are heard), and curb agency excesses—all the while working to fulfill the intent of Congress.

That judgment leads me to the conclusion that it is rarely, if ever, appropriate for Congress to consider short-circuiting judicial review. When Congress does that, it can have real costs.

Let me offer a concrete example. In 1973, the U.S. Court of Appeals for the D.C. Circuit ruled that the Interior Department's approval of the Trans-Alaska Pipeline violated the National Environmental Policy Act (NEPA) because it failed adequately to consider the alternative of an all-Canadian land route. That route would have conveyed Alaska North Slope oil to the Midwest, where demand and refinery capacity were greatest. It would also have avoided the need to transport the oil on tankers through the potentially hazardous waters of Prince William Sound in the northern Gulf of Alaska. *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). Not long afterward, the Congress voted to overturn that court decision, prevent further consideration of that alternative, and insulate the Department's NEPA compliance and its decision to approve the pipeline from further judicial review. (In the Senate, it took a vote by Vice-President Agnew to break a tie.) The pipeline was completed in 1977 and the rest, as they say, is history. A few years later, the Exxon Valdez ran aground in Prince William Sound, spilling eleven million gallons of crude oil, which fouled some thirteen hundred

miles of coastline. The costs to the environment, to fishermen and others whose livelihood depended upon it, and to Exxon's bottom line and its reputation, were huge.

I would not claim that a congressional decision to delist the GYE grizzly bear and insulate the matter from further judicial review would have such major consequences, even though the species is an iconic one in American culture. But the lesson of the Trans-Alaska Pipeline is that judicial review can and often does produce better long-run outcomes for all interests.

Finally, even assuming there is a strong sentiment in the Congress that the GYE grizzly ought to be delisted, it is not at all clear that congressional action is needed to achieve it. Indeed, it appears to me the FWS could readily, even easily, correct the three defects the 9<sup>th</sup> Circuit identified in its delisting decision.

First, the Court required the FWS to determine whether, if the GYE grizzly were delisted, a "sufficiently distinct and protectable remnant population" of grizzlies would likely remain. The Court noted the FWS seemed to agree that further review along this line should be undertaken (and my understanding is that FWS is currently doing this). The Court also noted that FWS had raised what the appellate court called "legitimate concerns" about the overbroad scope of the trial court's order, and so it cautioned that "extensive analysis" (as the district court seemed to have in mind) was *not* needed. Instead, FWS need only determine whether delisting the GYE grizzly would "render the remnant population no longer viable." Because the grizzly is, generally speaking, a well-studied species, this should not be difficult.

The second shortcoming the Court identified grew out of the conservation strategy the FWS had adopted in its 2007 de-listing decision, which recommended that FWS should take specific steps to protect the genetic diversity of the GYE grizzly population if natural connectivity with other grizzly populations was not established. In its 2017 delisting decision, the FWS abandoned this recommendation, concluding that genetic concerns did not pose a threat, and making a vague promise to consider "possible future action" if they did. Both the trial court and the court of appeals found this new FWS conclusion was contradicted by the best available science (thus violating 16 U.S.C. §1533(b)(1)(A)), because numerous studies indicated genetic health remained a concern. Therefore, the Court ruled, if the FWS was to delist, it needed to have in place "concrete, enforceable mechanisms" that would "ensure long-term genetic health of" the GYE grizzly. Because the FWS has had the question of protecting genetic diversity before it for so long, it seems to me correcting this defect can readily be done in a new delisting decision.

The third defect was the FWS's failure, in its delisting decision, to commit to revisit, and if necessary to recalibrate, its conservation strategy based on new population estimates as they are made. The FWS delisting conservation strategy initially included such a commitment. It was dropped in the final version at the urging of affected states, it even though the record indicated FWS officials thought this would result in a "biologically and legally indefensible" delisting. The FWS did not appeal this portion of the district court decision but affected states and other intervenors did. The 9<sup>th</sup> Circuit upheld the district court's conclusion that the failure to commit to recalibration was error. Because FWS already had already been moving to do this, it certainly appears this too can readily be done in a new delisting decision.

I take no position on whether the GYE grizzly should be delisted. From my vantage point at 30,000 feet, so long as FWS paid attention to the best available science and followed the correct process, it would seem the decision could go either way. It also seems to me that, whether or not the GYE is delisted, the need will remain for both the FWS and the pertinent states to carefully manage the bears for the sake of all, humans and bears alike.

Again, I appreciate the opportunity to testify, and am happy to answer any questions you might have.