

MODERNIZATION OF THE ENDANGERED SPECIES ACT
TESTIMONY BEFORE THE SENATE COMMITTEE ON ENVIRONMENT &
PUBLIC WORKS

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Chairman Barrasso, Ranking Member Carper, Members of the Committee

Thank you for the opportunity to provide comments on the difficult task of modernizing the Endangered Species Act (ESA). I do not need to highlight the difficulty of the task you have undertaken. The ESA is as controversial as it is important. There have been several prior attempts to modernize the ESA. All have fallen victim to the inability of the various interests to reach common sense compromises in the interest of the public well-being. The ESA contributes much to America, but we now have 40 years of experience to guide thoughtful updates to the statutory framework.

My comments are more practical than academic. They are informed by decades of legal practice, nearly 8 years as United States Attorney under President Clinton, 8 years as Governor of Wyoming and ongoing private practice working with clients in Wyoming and other parts of the United States. Obviously, this time period has included both Republican and Democrat administrations in Washington,

D.C. I have found the people involved, even those with which I deeply disagreed, to be good and decent individuals.

My current practice is generally natural resource based clients including wind, oil and gas, coal and the largest Habitat Conservation Bank in the United States, a greater sage-grouse habitat bank encompassing more than 500,000 acres. I have been asked to discuss a few of my experiences in actually trying to work with, and sometimes around, the ESA. While I share “fly-over country’s” general unease with the federal government, protection of endangered or threatened species is an appropriate and necessary role for the federal government.

As a former member of the federal executive branch and Governor, I naturally favor executive branch action as opposed to legislative action. But in this case, legislative action is needed to affect mid-course corrections to focus the ESA on its original objectives and to improve its operation in our current circumstance. The original, groundbreaking legislation granted broad authority to the executive branch. Over time, the mix of regulations, court decisions, policy guidance and individual agency actions by Presidential administrations of differing but still well intentioned views have created a nearly unworkable system.

I would commend to the Committee the excellent work of the Western Governors Association. The wonderful Governor of Wyoming, Matt Mead, undertook a serious, bi-partisan effort to engage stakeholders and formulate a

series of thoughtful, experience based recommendations for improving the implementation of the ESA. The recommendations reflect a growing consensus about areas to be addressed within ESA modernization. I hope the Committee will take seriously the good work of Governor Mead and his colleagues. I would reference particularly the discussion of the regulatory insertion of the precautionary principle and the discussion of state/federal cooperation.

However, my comments are strictly my own and should not prejudice your view of the Western Governors Association efforts.

LISTING PROCESS

A higher content threshold should be established, in statute, for consideration of petitions to list. I am aware of the recent USFWS rule making, effective October 27, 2016 clarifying the petition process (50 CFR Part 424.14). Nothing in the clarifying rules suggests the examples I cite could not happen again. The final rule is more a codification of current practice than groundbreaking. The rule as first proposed was more ambitious and significantly enhanced the role of the states in the petition process. These provisions were largely abandoned in the Final Rule. Much has been made of the USFWS providing a definition of “substantial information”. A term, which is not, but should be, defined in the ESA. The Final Rule states:

“For purposes of this section, ‘substantial scientific or commercial information’ refers to credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition is warranted...” (42 CFR 424.14(h)(1)(i).

As the USFWS notes in the response to Comments, this simply represents the longstanding state of the law.

“These concepts are in no way new to the Services’ practice; this is how we have and must evaluate petitions.” Federal Register Vol. 81, No.187; page 66473. In general, the USFWS Response to Comments preceding final adoption makes clear that nothing has actually changed. (See: Federal Register Vol. 81, No. 187 September 27, 2016, pp. 66462-66484.)

Currently there is no *meaningful* screening of petitions and what is required only involves the best credible scientific and commercial data that is “available”. See 16 U.S.C. § 1533(b)(1)(a). A higher threshold of reliable data and species specific knowledge, including a mandate to deploy the most current advancements in genetic and other scientific thinking, does not seem too much to ask of someone seeking to invoke the power of the federal government. Especially when the logical results of the exercise of such federal power impacts the personal and property rights of so many other people.

By way of example, an individual found a single Narrow-foot Hygrotus diving beetle (*Hygrotus diversipes*) by a highway bridge in Wyoming in 1964. Little data was collected in the intervening 40 years, save several field collection efforts. Despite admonitions from scientists in Wyoming that more data should be collected before jumping to any conclusions about the beetle, a petition was filed to list the species under the ESA. The petition itself noted the lack of important data related to the beetle, but none-the-less called on the federal government to list the species based on “available science.”¹ USFWS continues to kick the proverbial can down the road to this day to buy time to collect more data to determine if the species should be listed – an effort that should have been undertaken by and required of the petitioner before engaging us all in a wild-beetle-chase. To date, Wyoming has spent almost \$110,000 in state funds, funds that could have been directed to on-the-ground habitat work to conserve mule deer, bighorn sheep and other wildlife, to complete the inadequate homework of the petitioner. Given the absence of a viable threshold, the burden of proof seems to

¹ With regard to the beetle, an important historical footnote is that the species was targeted by activists for the express purpose of slowing oil and gas development in northeast Wyoming. The state received copies of correspondence between certain environmental groups wherein they discussed the need to find an obscure species in the area of known oil and gas development for the specific purpose of hobbling such development. Hugh Leech’s discovery and publication related to the Narrow-foot Hygrotus diving beetle in 1964 remains that obscure species today.

immediately shift to those who could be impacted by the potential listing, especially considering the tremendous, negative economic implications of a listing.

A second, but certainly related factor at play in this context is the “precautionary principle,” which encourages movement towards listing based on the absence of data. Again, the person or business impacted by a potential listing bears the burden of proving a negative—that is proving the species should not be listed. A higher threshold would also prevent USFWS and other from spending time on ill conceived petitions. In Wyoming, there was an attempt to list a snail, named the Black Hills mountain snail *by the petitioners* (proposed *Oreohelix cooperi*) based on the shape of the male snail’s reproductive organs. I use the terms “named by the petitioners” and “proposed” because, prior to the filing of the petition, neither “Black Hills Mountain snail” nor “*Oreohelix cooperi*” were used to describe a distinct species of snail. The “cooperi” was previously considered to be a subspecies of another type of snail. It was only through the petition that this “new” species was announced to the world. There was no peer reviewed literature or other scientific study presented to support such an assertion of a new species, other than the musings of the environmentalist petitioners *in the petition*. Functionally, the species was created out of whole cloth by the petitioners. Ultimately, we were forced to spend over \$60,000 on genetics studies to sort out the petitioners’ knotted science – a task that should have been required of them

before the petition was accepted by USFWS. Again, the burden of proof fell to those potentially impacted by a listing instead of being required, in the first instance, of the petitioner.

The availability and accessibility of incredible scientific tools has changed drastically since the ESA was drafted. Genetic study is readily available, unlike in the dark ages of 1973. Perhaps the day has come to require that petitioners do more than simply recount what is “available” and impose an expectation that they meet a modern standard of science in their listing requests, especially when they are “doing science on the fly” as was the case with the Black Hills snail.

Beyond the petitioning process, recovery efforts would be enhanced by requiring a listing decision to include the specific conditions necessary to achieve a de-listing. The listing process is intended to encourage public and private actions to preserve and recover a particular species or subspecies. However, the current process does not establish the necessary conditions to meet these objectives.

Public and private actions to preserve or recover the species would be more focused and effective if the statutes required the listing notice, which is a formal rulemaking under the Administrative Procedure Act, to also include the conditions necessary to achieve a delisting.² Public and private actions are more likely to be

² By extension, then, any changes to the recovery criteria would have to be accompanied by full, notice and comment rulemaking.

forthcoming if specific objectives are identified at the outset. If the agency possesses sufficient knowledge of the threats to a species to list, it should also possess sufficient knowledge to define the requirements to delist at the same time.

You will hear from numerous people about the problems created by the 90 day and one-year timeframes for review and decision-making. Those problems are real and need to be resolved. As noted, significant part of the solution should be the imposition of a higher content threshold for consideration of a petition. In effect, this is a form of triage for the multitude of petitions received by the agency. Defacto triage occurs within the agency by the simple decision of what to focus on each day. A higher content threshold would help ensure effective triage given limited resources.

The flip-side of the listing process is de-listing. De-listing has not been a priority for USFWS. For instance, there appears to be substantial agreement, including from USFWS, that the Utes' Ladies Tresses (a plant) should be de-listed but such action is not a priority for the agency. Manpower is usually cited as the reason for delay but the process could be simplified by specifying, at the time of listing, the requirements to delist and adhering to them absent a rulemaking or new petition that presents information to suggest that delisting is not warranted.

SECTION 6 "COOPERATION WITH THE STATES"

Section 6 is, perhaps, the most under-utilized provision of the ESA. Within the ESA, there is much discussion about Cooperative Federalism and State/Federal Partnership. In reality, the states are at best limited partners and at worst viewed as adversaries. States expend resources but lack decision-making authority. There is a healthy, and intended, tension built into our federal system. States and the federal agencies often possess different views about issues, and even how to achieve shared goals. But, USFWS understands the ultimate authority rests with them and, absent statutory direction from Congress, shared information and decision-making remains the exception and not the rule. A few examples illustrate the issue.

GRIZZLY BEARS

Grizzly bear management remains controversial to this day. Grizzly bears are magnificent animals and a species truly worthy of preservation. The current controversy started in 1973 with, the then controversial, closing of open pit garbage dumps in Yellowstone National Park. The Interagency Grizzly Bear Study Team was created the same year. Wyoming suspended grizzly bear hunting in 1974 and the bear was listed as threatened in 1975. In 1982, USFWS published the Grizzly Bear Recovery Plan. It was revised in 1991, 2007, and 2011. Each time the geographic area encompassed by various requirements was expanded and the population numbers and management prescriptions were expanded. These

requirements, as a practical matter, applied to both private and governmental activities. At the same time, the number of grizzly/man encounters grew. The State of Wyoming was required to spend tax and hunter license fee dollars to support this federal activity. Wyoming's Game and Fish Department has spent more than \$43 million on Grizzly Bear management since 1980. Each time we neared de-listing, the goal posts for recovery were moved, the USFWS cited "...best available science and commercial data." This term is guided by some USFWS guidance, but remains largely subject to USFWS interpretation, even when the state game and fish agencies actually have as much knowledge as their federal counterparts and more on the ground experience. Congressional guidance in this area would be appropriate.

Through litigation and administration changes, the grizzly bear management and delisting process became more contentious and difficult at each turn. Even when USFWS sought to delist in 2007, successful litigants stalled the process based on speculative threats, which may or may not be related to the original basis for listing and have since been discounted through peer reviewed science. And now, when state and federal biologists agree that a robust and genetically diverse population exists, de-listing has stalled again. The disagreement between Wyoming and the federal government revolves around a desire by USFWS to retain post de-listing control of grizzly management. This is contrary to the ESA,

which makes delisting the final federal decision subject to review five (5) years later. Post de-listing management is the responsibility of the States and not the federal government. Section 6 was crafted to foster cooperation. Our experience with the grizzly bear suggests we can do better to achieve this objective.

GRAY WOLF

Plans for the re-introduction of the Gray Wolf into the Greater Yellowstone Ecosystem began in the 1980's when Wyoming had a Democrat Governor and America had a Republican President. The plan was for the re-introduction of Gray Wolves into Yellowstone Park as a "non-essential, experimental population". The expectation was the wolf population would remain within and be managed within the area encompassed by Yellowstone National Park, Grand Teton National Park, John D. Rockefeller Memorial Parkway and the adjacent US Forest Service designated Wilderness Areas. Then in 1994, the USFWS decided to designate the entire State of Wyoming as part of the wolf recovery area for the "non-essential, experimental population". While I love my State, few would argue the entire state is suitable wolf habitat. Throughout the ensuing years, through USFWS policy changes and litigation the Gray Wolf population continued to grow and the area over which USFWS asserted management control also continued to expand. And the number of wolf/man encounters escalated. Wyoming's Game and Fish Department has spent more than \$9 million dollars of license fee and tax funds

since 1980 to support this federal priority. (And again, the USFWS mandates applied to government and private activities.) The pattern of “moving the goal posts” was again repeated by USFWS. The Gray Wolf remains listed today.

This pattern of “moving the goal posts” is both frustrating and nearly impossible to fold into the management of the resources and politics of a State. Each time, USFWS would rely upon the phrase “...the best available science and commercial data”. What is left out of the discussion, and why cooperation is not real, is that USFWS remains the sole custodian of the determination of what constitutes “...the best available science and commercial data”.

SAGE GROUSE

Wyoming, over the past several decades, confronted a series of listing petitions for the sage grouse. Wyoming is home to roughly 40% of the country’s sage grouse population. Rather than continue to react to events, we chose to develop a sage grouse management plan designed to preserve sufficient birds and habitat to avoid a listing. In 2007, with the able assistance of Steve Allred, then Interior Undersecretary, we convened a series of meetings with stakeholders. Steve attended some of the meetings, more importantly he empowered the local USFWS and BLM personnel to work closely with Wyoming and he kept Washington D.C. out of the mix.

Together, they developed, what became known as the “Wyoming Sage Grouse Core Area Strategy”. It was not designed to save every bird, every blade of grass or sagebrush stand. The design focused instead on preserving more than enough birds and habitat to avoid a listing. After much controversy, we adopted a plan and enforced it. It protected nearly 15 million acres of important habitat and most of the sage grouse population.

USFWS ultimately made a warranted but precluded finding for multiple sage grouse listing petitions relying substantially on the Wyoming effort to avoid a full listing.³ The decision was tested in an Idaho federal court. The Judge reluctantly upheld the decision but made clear the issue would be revisited, unless the federal government acted to create appropriate sage grouse protections and adequate regulatory mechanisms on federal lands.

Amending BLM Resource Management Plans (RMPs) and similar US Forest Service planning documents was the logical approach to address the concerns raised by the Judge. Unfortunately, this is when discussions moved from the States and the federal field offices to Washington, D.C. From my perspective, four policy preferences or attitudes account for the ensuing struggle between the

³ A “warranted but precluded” finding by USFWS does not terminate federal protections. Such a finding automatically makes the species a “Sensitive Species” for BLM land management pursuant to BLM Manual 6840, section O.2A.

States and the Department of the Interior. While each of these may be viewed as appropriate policy objectives, they are not directly required by the ESA

First, the original Wyoming Core Area Strategy was morphed into an effort to save every bird, every blade of grass and generally preserve the “Sagebrush Ecosystem”. A requirement, which is not in the ESA.

Second, it became a vehicle to move the BLM land management further from its “multiple use, sustained yield” mission, implied in the Federal Land Policy and Management Act (FLPMA), and into a species management agency. A pattern began decades ago but accelerated in recent times. While the Supreme Court in *Kleppe v. New Mexico* recognized managing wildlife as part of BLM mission, it could hardly have contemplated that mission would supplant most of FLPMA.

Third, the RMP revisions for sage grouse became a vehicle to implement a vision of larger landscape scale planning. The RMP drafting efforts were continually overshadowed by USFWS in combination with the USGS announcing new science, adding ideas and ultimately designation of important habitat and withdrawal recommendations. Landscape scale planning makes sense as a scientific matter but such policy preferences should be developed and articulated broadly rather than slipped into RMP revisions specifically for sage-grouse.

Fourth, the command and control model that has supplanted “Cooperative

Federalism” encouraged a “one size fits all” preference for dealing with the States. While this is administratively attractive, it fails to account for the wide variations of topography, land ownership, bird numbers, habitat conditions, threats to birds and habitat and history among the States encompassed by the sage grouse range. The Wyoming strategy would not work in Montana or Nevada.

Committee members are no doubt thinking “that is all interesting, but what does it have to do with modernizing the ESA?” Please consider the following.

Amend the ESA to recognize that it is logical to consider state boundaries in the determination of “distinct population segments” or DPS (including revisions to the definition of “significant portion of the range” under the DPS policy) for purposes of listing and delisting. While not outwardly appearing to serve as biological considerations, the reality is that the presence or absence of thoughtful state management plans inherently affects the conservation status of a species or habitat. By accounting for changes in management philosophy “at the state line” through the listing status of the species, each state could manage species differently and be judged accordingly. Species do not recognize political boundaries, be they State or National Park boundaries as we learned with wolves and bears.

Recognition of State boundaries should be an option but not a mandate. This option would allow each state to craft its own response to ESA requirements or leave it to the federal agencies. In this manner, states would not be penalized by

the action or inaction of another state or be conscripted into an issue they do not choose to address. Further, it would allow USFWS to narrowly tailor a listing to those areas that should be listed – because of known threats or the presence or absence of a thoughtful management plan – and those that should remain outside the purview of the ESA.

As a real example, I would offer Wyoming's experience with the Preble's meadow jumping mouse. The Preble's range extends from Colorado to northern Wyoming. As you might surmise, a Preble's mouse living around or within urban Denver, Colorado, faces a much different set of circumstances and threats than a Preble's living near rural Wheatland, Wyoming. When it was listed under the ESA, the USFWS acknowledged as much. Unfortunately, listing is an "all or nothing" proposition – even though the mice in Wyoming are fat and happy irrespective of whether they are listed or not. In time, the USFWS was able to implement special rules, known as 4(d) rules under the ESA, to relieve Wyoming agricultural producers and others impacted by the listing from the oppressive take requirements of the ESA, but not before many farmers and landowners nearly lost their livelihoods. In my view, the Preble's should have never been listed, at least in Wyoming, because there were no or at least very limited threats to the species in my state. This said, because even the USFWS knew that its main interest was in controlling the threat of urban development for the protection of the mouse, the

4(d) rule should have been published *simultaneously* with the listing rule to spare Wyoming and its economy what USFWS and other admitted was needless pain.

Require USFWS to articulate the recovery or listing avoidance goals in a clear and concise manner. Once done, they could be modified only through public notice and rulemaking. This would give substance to Section 6 of the ESA, which encourages cooperation with the States. Under the current practice, USFWS will not provide concrete guidance, arguing that such guidance would be “predecisional”. Instead, they assert certain practices or actions are necessary but may not be sufficient to avoid a listing or achieve recovery. A conversation often accompanied by a wink and a nod. A perfect example is USFWS suggesting certain areas were important sage grouse habitat to be protected and essentially forcing a withdrawal proposal by BLM. At the same time USFWS was arguing it could not mandate such action. If USFWS wants to direct land management, they should own the decision.

I recognize that the insertion of policy preferences cannot and should not be legislated out of the system. However, it would be appropriate to require those preferences be measured against the specific objectives of the ESA as related to an individual species and not an entire landscape such as the Sagebrush Ecosystem.

Finally, I must add my voice to that of the Western Governors Association on the matter of funding. I recently had the honor of Co-Chairing with John L.

Morris, Founder and CEO of Bass Pro Shops, the “Blue Ribbon Panel on Sustaining America’s Diverse Fish and Wildlife Resources”. This is a non-partisan panel representing outdoor recreation, the retail and manufacturing sector, the energy industry, conservation and sportsman organizations along with state game and fish directors. The geographic reach of the members is nationwide.

One of the significant lesson learned is the unfunded mandate nature of the ESA. While very noble in intent, the ESA has matured into full blown, unfunded federal mandate. State recreation agencies and game and fish departments are stretched to the breaking point by the costs of managing fish, wildlife and recreation resources. One of the unintended consequences of passage of the ESA in 1973 was severely taxing these already stretched resources.

Our federal government simply “helicopters in” with ESA requirements. States are compelled to respond to listing petitions, species management directives, creation of adequate state regulatory mechanism, information requests, data and analysis disputes and meeting, after meeting, after meeting, etc.

USFWS actually has no choice but to pressure the states. USFWS lacks sufficient scientific, manpower and data resources to meet the federal mandate. I would add from experience, USFWS also lacks sufficient enforcement resources. I am not advocating a great expansion of the USFWS budget. States remain the front line in these efforts so resources should be directed to them. This can be

done as recommended by the Western Governors or as recommended by the Blue Ribbon panel or a device of your own creation. But, we must concede “there is no free lunch”. And the states lack the resources to feed the appetite of the ESA unfunded mandate.

MITIGATION

Mitigation, including compensatory mitigation, is an important tool for the preservation of a species. A rational mitigation policy is based on avoidance, minimization and compensation for that which cannot be practically avoided or minimized. In properly balancing the needs of the economy and our cherished environmental values, compensatory mitigation is an important asset. Practically unavoidable impacts have traditionally been measured against a “no net loss” policy. This approach is logical and legally supportable.

The recently announced USFWS mitigation policy and other, associated Department of the Interior guidance go too far. The rule adopted a “net conservation gain” policy. It is a distinct overreach. I have read the recent Interior Department Solicitor’s Opinion attempting to legitimize “net conservation gain”. Suffice to say, I found it unpersuasive. When it takes 31 pages of discussion containing no citation to specific statutory language dictating “net

conservation gain”, you know you are attempting pile up gravel and call it a marble monument.

If we are serious about species preservation, we should focus compensatory mitigation on preserving the best habitat on a scale capable of sustaining a genetically diverse population preferably over an extended timeframe. As a starting point, the compensatory mitigation timeframe needs to be at least equal to the timeframe over which the impacts extend. There are various existing and evolving models for the provision of compensatory mitigation. Some are government sponsored and some are purely private sector initiatives. The general categories are project proponent sponsored, in lieu fee programs, habitat exchanges and habitat banks. The clearest federal guidance exists for Habitat Banks. This is one of the few areas, in which I actually support federal legislation. I do not support the federal government being in the business of providing compensatory mitigation for projects. I do support codification of a set of standards and then allowing the private market to develop mechanisms that respond to those standards. Markets work but they work best when the marketplace signals are clear and consistent.

Mitigation is recognized in the ESA, but the issue is not specifically within the scope of my remarks but habitat and species preservation will not occur without disciplined compensatory mitigation. During my term as Governor,

Wyoming created a Wildlife and Natural Resources Trust Fund. We also had experience with so called “postage stamp” mitigation, which is the preservation of unconnected parcels which may or may not aid the life cycle of the species in question.

I would encourage the Committee to schedule time to receive testimony on the compensatory mitigation issue. As our population and economy grow, the number of unavoidable conflicts will escalate. Compensatory mitigation, properly applied with discipline and focused on the objectives of the ESA can be a powerful tool, particularly in encouraging private investment in critical habitat.

ESA ENFORCEMENT

During my time as U.S. Attorney and in my current practice, I have had experience on both sides of the table, in various parts of America, related to the enforcement of the ESA. Most of the experience is related to Department of Justice criminal investigations and prosecutions. The enforcement provisions of the ESA are adequate but you may want to consider inserting language encouraging the use of civil remedies prior to criminal enforcement. When a matter arises and is referred to the Department of Justice for criminal enforcement, there may or may not have been adequate investigation conducted to determine that it is a criminal matter. Once at Department of Justice criminal, there is a tendency to ignore civil disposition. This is due in part to the pre-disposition of

prosecutors and in part due to the public pressure surrounding ESA matters. The sense of proportionality can be lost. There is a large difference between intentional and incidental take, with or without a permit. There is also a substantial difference between the loss of one member of a species and a pattern of violation. While these judgments are properly left to the discretion of the prosecutor, you may want to require some higher threshold before matters are referred for federal prosecution.

ABANDON CANDIDATE DESIGNATION

While the logic behind the determination that a species might be “warranted” for listing but precluded by other priorities made sense when it was embedded into the ESA, I believe that our collective experience with these “candidate species” supports abandonment of the idea. First, there is no room for “purgatory” in wildlife management. In my view, a species should either be listed and subject to ESA protection or management should be left with the states. There is either sufficient urgency and concern that the hammer of the ESA is required or there is not. Today, the candidate designation is the regulatory equivalent of a “punt” and has been used far too often to make it meaningful. At some point, the candidate species list became so long that it lost its value in terms of helping order ESA priorities. Second, as a practical matter, there are simply not enough federal resources in the listing and delisting budgets to fully address *listed* species – no

less candidates. Third, the candidate “safety blanket” has become a favored litigation tool for environmental groups – leading to the mega-settlements of the Bush and Obama eras and further diminishment of sparse federal resources that could and should be used to recover truly threatened and endangered plants and animals. Finally, although it is a “punt” of sorts, it is not without effect in terms of federal land management determinations. After being named a candidate, a species enjoys significant protection – as if it were listed – when federal land management and other agencies take actions that might overlap its range. USFWS and NOAA should fully own the regulatory responsibility that attends a listing and not engage in a system that leaves us with “de facto listings” that only serve to hobble other federal and state agencies. This is especially true considering the massive number of candidates that have been “listed” and the reality that USFWS and NOAA do not have the resources to make a final “list” or “no list” decision for each of them. As a result, they languish on the list and serve as a burr under the saddle of both environmentalists and the regulated public.

SUE AND SETTLE

A lawyer mentor of mine told me that a “bad settlement is usually better than a good lawsuit.” This advice is valid only if you have standing in the settlement discussion and approval process. States, businesses and individuals often have vital interests at stake in litigation brought by environmental groups.

These vital interests are not part of the confidential settlement discussions or the agreement on terms. Even when afforded the post settlement opportunity to comment, it proves to be a futile exercise. The train has left the station.

This issue is difficult because we do not want to encourage continuation of litigation that should settle. However, it may be appropriate to compel disclosure of the existence and substance of ESA settlement discussion in significant cases impacting numerous non-parties. I would point to the settlement entered by USFWS agreeing to processing schedules for numerous listing petitions as a case in point.

ATTORNEY AND EXPERT WITNESS FEES

With some adjustments, I support the ESA provisions allowing judicial review of agency action. However, the unrestricted payment of attorney and expert witness fees merits review. We have created an entire industry of interest groups and law firms that rely on these provisions for income and salary. This is particularly true now that the practice of law is more of a business than a profession.

I would recommend the following steps for consideration.

1. Establish a benchmark for reasonable attorney and expert witness fees. A “one size fits all” benchmark would not work since attorneys generally charge more in Washington D.C. or New York than in

Denver or Santa Fe. However, it may be appropriate to benchmark their fees against the amount the federal government pays private lawyers who act as public defenders in federal criminal cases. I recall these are subject to regional adjustments.

2. The amount awarded to litigants, law firms and expert witnesses should be published in the Federal Register, whether awarded by a judge or part of a “sue and settle” agreement. Most especially in the latter case.

CONCLUSION

I would again encourage you to seriously consider the work of the Western Governors Association. In particular, the section related to State/Federal cooperation, the precautionary principle, “foreseeable future” and judicial review. I would also encourage you to take advantage of those who have been through the battles to amend the ESA in the past. My friend and former colleague, Steve Quarles, lives in DC and is a true expert with experience dating back to the Wild Horse and Burro Act and beyond.

Thank you.