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DIRECTOR  
 ARIZONA GAME AND FISH DEPARTMENT  
 BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
 "Conservation, Consultation and Capacity; States Views on the need to Modernize the  
 Endangered Species Act"

Chairman Barrasso and Ranking Member Carper, I am Larry Voyles, and I appreciate the opportunity to appear before you today as Director of the Arizona Game and Fish Department (AZGFD) and as a Past President of the Association of Fish and Wildlife Agencies (AFWA) to share my perspectives on improvements to the Endangered Species Act (ESA). All 50 state fish and wildlife agencies (state agencies) are members of AFWA.

I served as President of the AFWA from September 2014 to September 2015. I have worked for the Arizona Game and Fish Department for over 42 years starting out as a District Wildlife Manager with responsibilities for wildlife management, wildlife biology, fisheries management, public affairs and law enforcement at a district level in 1974. After a decade in the field as a wildlife manager, I rose through the ranks ultimately to the position of Director, a position I have held since 2008. During my tenure as director I have served under three Governors, including one Democrat and 2 Republicans. I have served on a variety of national boards including as a member of the Board of Directors for the Council to Advance Hunting and the Shooting Sports, the Wildlife and Hunting Heritage Conservation Council, Co-Chair of the Agency/Industry Coalition, the US Sportsmen's Alliance Youth Program Advisory Council, and Chair of the Western Association of Fish and Wildlife Agencies Legal Committee. Perhaps most importantly, I currently sit on the Federal/State Joint Task Forces for ESA Implementation, and for Federal Aid Administration.

I take great pride in AZGFD and the new entrepreneurial business models we have developed for the support of state-led conservation. This approach to conservation has charted innovative relationships with businesses and industries that either benefit directly from good conservation or benefit indirectly when successful conservation efforts reduce the need for listing under the Endangered Species Act (ESA). The AZGFD has successfully simplified hunting and fishing license structures and reduced fees while at the same time increasing participation and total revenues for conservation. The Department is also currently pioneering efforts to develop customer relationship information technologies in order to

better understand and meet the needs of outdoor enthusiasts. These innovative approaches to conservation are the reason why I'm before you today. We can do better.

In keeping with the overarching themes of these hearings, my goal today is to share with you some thoughts, perspectives and recommendations on how the ESA can be improved in the arena of "Conservation, Consultation, and Capacity" and my discussion will be organized around these themes. A little background regarding how conservation is delivered in America will help to highlight the relevancy of these themes.

The amazing abundance of fish and wildlife that we enjoy today is a direct result of integrated systems of conservation delivery, conservation regulation and funding for conservation. When I delivered an address to the first Canadian Wildlife Congress on America's system of conservation in 2012, I described a metaphor for these integrated systems as "The Three Machines of Conservation." In essence I described the critical interrelationship of systems conservation delivery by the federal lands and resources management agencies, the state agencies, and private sector conservation by both non-profit and for profit organizations, corporations, and individuals, under the principles of the public trust doctrine. This doctrine holds that fish and wildlife is managed on behalf of the public. Although this doctrine has roots in Roman and English common law, its administration in America is a singular outgrowth of our system of democracy and the concept that government exists to serve the people. Our abundance of fish and wildlife can be attributed directly to the integrated resources, capacities and authorities that have been brought to bear in helping to define our collective fish and wildlife reality. The amazing conservation success stories of the twentieth century have their roots in the integrating power of the North American Model of Wildlife Conservation and can serve to help inform how we can improve upon our efforts to conserve and recover our most imperiled species of fish and wildlife.

Similarly, any discussion of improvements to the ESA must include analysis of how the power of these machines of conservation can be better integrated and brought to bear in the restoration of imperiled species. As an observation, we believe that the word "consultation" does not adequately characterize the desired state-federal relationship in ESA implementation, and we prefer the word "cooperation" which implies robustly working together to implement the ESA. The state agencies appreciate the value of the ESA as a landmark federal law to protect and recover the imperiled species listed under the Act. The ESA was last amended and authorized in 1988. Enacted in 1973, over the almost 44 years of implementation, we have learned much about the conservation of listed species and their recovery needs, such as how to facilitate, not proscribe, private landowner involvement. The AFWA General Principles for Improving Implementation of the ESA, approved by the State Directors in March 2016, are in the Appendix, but below is a brief description of some of them and why we want to improve our ability to recover species under the ESA.

### **Key Principles**

First, increase opportunities for the state agencies to take a more formal and active role and fully participate in all aspects of ESA implementation as intended by Congress, through the authority of Section 6 Cooperative Agreements. Legislative history of the 1973 ESA, excerpts from which are in the

Appendix, substantiate that Congress intended approved Section 6 agreements to avoid preemption of state law. State agencies have broad expertise, experience and often comprehensive data sets and analyses on listed species because before they were listed, the species were under state management jurisdiction. These data and the state agencies' interpretations should be more readily utilized by our federal partners throughout ESA processes. State agencies should be afforded the opportunity to participate in all implementation aspects of the ESA from listing decisions, to recovery plan development and conservation recovery efforts on the ground, to providing guidance to private landowners in the use of federal incentive programs that provide them more certainty, to decisions regarding down-listing and delisting of recovered species. The state agencies have the responsibility of the comprehensive nature of Section 6 as intended by Congress, but have not been able to exercise the authority under the ESA because of misunderstanding and misinterpretation by the federal executive branch agencies and courts.

Second, restore the distinction between threatened and endangered species listed under ESA to reflect Congressional direction and provide greater flexibility to manage these categories differently. Congress intended that the state agencies have the opportunity to lead the management of threatened species, including the provision of "take" as a means of conservation of the species, as substantiated in the 1973 ESA Legislative history. Unfortunately, the U.S. Fish and Wildlife Service (FWS) promulgated a default rule (50 CFR 17.31) in the mid-1980s that applies all Section 9 restrictions for endangered species also to threatened species unless the Secretary determines otherwise. This approach differs from the National Oceanic and Atmospheric Administration (NOAA), which has not adopted this rule in its application of Section 9. This rule essentially eliminated the distinction between the two listing categories.

Third, improve the listing process. This involves a consideration of adjusting the listing process decisions to a more realistic time frame in order to appropriately utilize the best available science. We appreciate recent efforts to improve the petition process, and we support a provision authorizing a prioritization process for species being considered for listing that will focus resources and energy on the species most in need of immediate conservation. The process needs to ensure that all state agencies' data are utilized and considered in decision-making, and giving greater weight to the those data and the states agencies' interpretation. In some cases, this may preclude the need to list a species under the ESA because of the quantity and quality of the state agency data supporting an appropriate science-based determination. However, state agency's data must be shared between state and federal partners in a way that upholds State privacy laws and respects private property rights.

Fourth, require ESA recovery teams to develop science based recovery plans for listed species and provide appropriate opportunities for the state agencies to lead recovery planning and implementation. The state agency and the Secretary must agree on the size and composition of the recovery team, with the state agency director having exclusive decision-making over which state agency experts sit on the Recovery Team. Recovery can be expedited by supporting and continuing state level initiatives and conservation partnerships to recover listed species. Further, require that the Secretary must initiate the delisting process once an approved recovery plan's population and/or habitat objectives established by the Recovery Team are reached.

Fifth, directly associate critical habitat designation to recovery plan development while jointly providing more discretion to designate or not designate critical habitat based comprehensively on continued implementation of state agency conservation plans or initiatives, state lessons-learned, implications for communities, funding availability, and other aspects that directly impact the recovery of a species. The scope of critical habitat should be better defined and clear guidance given to when designations are needed or required.

Additionally, create more specificity and flexibility in the delisting process to alleviate lengthy and unnecessary burdens on local communities by allowing both the listing and delisting of a species through Distinct Population Segment (DPS) designations of species and other applicable conservation approaches. Unfortunately, there are fewer statutory details provided for the delisting process, and we deduce that Congress assumed that delisting, which is the objective of the ESA, would quickly follow the recovery of a species because protections of the ESA were no longer required. That has not been the case, and delisting can take decades and require overcoming many obstacles even after species recovery goals are met. Further, once a species is delisted, it should return to state agency jurisdiction for sustainable conservation as designed by the state agency, with a species status report to the Secretary after 5 years. Improvements are also needed to Section 10(j), experimental populations, to improve recovery of these species often under unique conditions, with agreement by the state agency and the Secretary on geographic boundaries of 10(j) species reintroductions. Finally, the Secretary shall comply with all required state permits before 10(j) individuals are released.

Let me quickly describe the jurisdictional authorities for fish and wildlife in the state-federal relationship. Fish and wildlife conservation was one of “The powers not delegated to the United States by the Constitution ... [and thus] are reserved to the States respectively, or to the people” (10th Amendment). In the United States, fish and wildlife are owned by the public and managed as trust resources by the state agencies. . The state agencies have primacy for managing fish and wildlife within their borders and have concurrent management authority with federal agencies on migratory birds, inter-jurisdictional fishes, and the topic of today’s discussion – threatened and endangered species. For added clarification, candidate species under the ESA are under the management authority of the state agencies, not the federal agencies. Only Congress can give a federal agency authority to preempt the state agency’s authority for management of fish and wildlife, and then only for certain federal actions. The ESA is one example, but in doing this, Congress explicitly affirmed that the federal authority they gave the federal agency exists concurrent with the pre-existing authority of the state agency (defined in the ESA as the state fish and wildlife agency) for listed fish and wildlife species.

Section 6 of the ESA gives the Secretary explicit direction on how Congress expected the federal-state jurisdictional relationship to work. It starts with Sec. 6.(a) GENERAL—“ In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States.” Section 6 goes on to describe agreements into which the Secretary may enter to allow a qualified state agency to implement the ESA. These cooperative agreements contemplated that the Secretary, upon the state agency’s demonstration of the appropriate authority and adequate program design, would authorize an approved state agency to lead ESA activities by delegating his or her

concurrent authority to the state agency. The state agency would then be directing research and management of listed species, not just applying the Secretary's program for each species.

Unfortunately, the Section 6 authorities available to the state agencies have never been fully realized by the state agencies. Admittedly in the first dozen or so years of the ESA, only a few state agencies had the capacity and political support to realize the authorities under Section 6. Hence, the Secretary through the FWS exercised through rule and policy, a very significant portion of the ESA authority. In general since the mid-1980s, the state agencies have enhanced their staff, expertise, habitat management techniques, science capability for listed species, relationships with private landowners and local communities, and political support that would therefore enable them to more fully exercise their authorities and roles in implementing the ESA as Congress originally intended as substantiated in the 1973 Legislative history.

The following outlines a brief summary of perspectives and recommendations on how the ESA can be improved in the arenas of "Conservation, Consultation, and Capacity".

### **Conservation**

Due principally to litigation, additional court interpretation of federal rule and policy has led to a pathway of unraveling the ESA by eliminating the discretion to the Secretary to exercise his or her best professional judgment, as Congress originally intended. The ESA has become a regulatory tool for litigants to direct federal land management activities that meet their ideals, rather than to serve as an effective conservation machine. The way to improve this misguided condition is to tap into the capacity, conservation experience and expertise of the state agencies as a means to achieve desired conservation outcomes. Modernized delivery of ESA conservation through the state agencies is very different now in the state agency model of conservation delivery compared to 1973 when the ESA was enacted. ESA modernization needs to include integration of effective conservation by the state agencies implemented far enough in advance to proactively preclude the need to list species, through effective management of a species' life needs and habitat requirements.

One prominent example of state agencies providing proactive conservation of native species, occurring in our own Southwest, reflects the work of the Colorado River Fish and Wildlife Council states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming executing the three-species conservation agreement and strategy for Roundtail Chub (*Gila robusta*), Flannelmouth Sucker (*Catostomus latipinnis*), and Bluehead Sucker (*Catostomus discobolus*) in an effort to expedite conservation actions for the three species. The conservation measures and benefits outlined in this agreement and individual state agency strategies are designed to achieve the following benefits:

- Establish and/or maintain populations that contribute to conservation within their historic ranges;
- Identify, reduce, and/or ameliorate species threats through appropriately focused conservation efforts;
- Encourage participation of Federal and non-Federal partners into ongoing conservation efforts.

These efforts are intended to ameliorate threats (i.e., those that would be articulated under the five listing factors of Section 4 of the ESA) affecting populations throughout their respective ranges, while achieving the “three R’s” of species conservation through the following lenses:

- 1) Resiliency – Establishing populations in high quality/suitable habitat having reduced or managed threats;
- 2) Redundancy – Expanding the range of populations within waters capable of supporting expanded populations; and,
- 3) Representation – Ensuring preservation of genetic diversity through appropriate replication of populations within their natal watersheds.

Over the first ten years of the agreement, the Council states and partners implemented significant conservation for the three species. These efforts resulted in implementation of 60% of the conservation objectives, through hundreds of projects throughout the species’ ranges. On January 5<sup>th</sup>, 2017, the Council states reaffirmed their commitment to the agreement and its continued implementation, with no predetermined expiration date. The Council states have a renewed confidence in their capacity to continue protection and conservation of these unique fish species throughout their range.

These successes are not limited to the western U.S. Throughout the nation, state agencies are leading and supporting many innovative and collaborative efforts to keep common species common, prevent declines of imperiled species, and recover listed threatened and endangered species. There are many groundbreaking state-led conservation partnerships across the nation that have yielded significant conservation outcomes, including:

- Historic, state-federal efforts to conserve habitat for the iconic sage grouse and hundreds of other species that rely on sagebrush habitat;
- Delisting of the Louisiana black bear;
- Range-wide collaborative conservation of the Gopher Tortoise;
- Innovative Red-cockaded Woodpecker recovery efforts within the “Eastern North Carolina Sentinel Landscape;” and
- State-federal conservation efforts for the Lesser Prairie Chicken.
- The National Fish Habitat Partnership efforts, established 20 partnerships across all 50 states, and focused on restoration of fish habitat and ensuring clean water through state-led and community-based voluntary conservation efforts.

These efforts showcase the state agencies’ capacity, expertise, experience, and relationships with private landowners to focus, coordinate, and integrate budget and staff resources to deliver effective conservation. Additional ongoing, practical applications of this conservation framework include:

- Realizing conservation benefits of including state agencies in prioritizing recovery plans and appropriately integrating/considering state agency data and analysis for petitioned species;
- Enhancing conservation effectiveness by sharing capacity and expertise among state agencies in conservation, recovery and delisting species;
- Demonstrating and proving effectiveness of the state agencies’ efforts that preclude the need to list and accurately reflect conservation of species trending towards listing;

- Approaching species conservation through the state agencies preference and desire to manage at landscape scales, compared to the single species approach of ESA which can be inconsistent and run counter with the landscape approach;
- Providing necessary incentives through management by the state agencies, and landowner conservation incentives that are focused on all species, not just those protected by the ESA. When the nation was in crisis during the dust bowl era in the 1930's, the ingenious act of creating the Farm Bill and incentivizing private landowners to conserve soils and the environment literally changed the future of farming and our nation. By comparison, for listed species, no incentive is offered to the landowner to keep common species common, or to delist recovered species; and,
- Placing priority investment and focus of the ESA on conservation (vs. litigation), thus returning management of listed species to the professional state agency and federal practitioners, and away from the courts.

### **Capacity**

More than 2,200 species are listed as threatened or endangered under the ESA, and more than 500 additional species have been petitioned for listing. Using an average cost of recovery of a single species at greater than \$125 million, think for just one minute what that may mean for the species at risk in the future. Our nation's conservation future is in your hands. The manner by which we respect and manage our natural resources for the next generation is the measure by which we will all be judged. How does the public share and embrace the need for conservation at that cost?

As reflected in excerpts from the ESA Legislative history included in the Appendix, Congress repeatedly recognized that state agencies had far greater capacity in biologists and law enforcement agents to carry out the on the ground provisions of the Act, than did the Federal government. Congress intended the Federal government to establish a framework and policies for a national program that would be implemented through robust cooperation between the state agencies and FWS and NOAA-Fisheries.

Collectively, the 50 state agencies own, manage, or administer fish and wildlife conservation on more than 464 million acres of land and 167 million acres of lakes, reservoirs, wetlands, and riparian areas. These include properties under fee title ownership (24.5 million acres) as well as those leased or licensed in conservation agreements, grazing allotments or right-of-ways. For perspective, that land area is equivalent to about 4.7 times the landmass of California or 16.3 times the size of Pennsylvania, and 167 million acres is nearly 2.8 times the combined acreage of the Great Lakes. In addition, an estimated 56.7 million acres have been improved for the benefit of wildlife through private landowner agreements with the state agencies. Further, state agencies own 192,000 water rights and foster 53,000 formal partnerships to carryout fish and wildlife conservation.

The state agencies employ almost 50,000 women and men, including 11,000 degreed wildlife biologists, about 6,000 staff with advanced degrees, and 10,100 law enforcement officers. Further, they leverage the efforts of nearly 190,000 volunteers. Annually, the state agencies contribute more than \$5.6 billion to conservation through their collective annual budgets. Clearly, the contribution of the 50 state fish and wildlife agencies is enormous and integral to wildlife conservation in North America.

This capacity was exemplified in the case of the Sonoran Desert Tortoise, which was petitioned for listing in 2008. Although the petitioners cited a litany of challenges that threatened the future of the tortoise, AZGFD staff and partners had amassed 30 years of data on the biology and status of the species, and were able to successfully refute the petitioners' claims with scientifically credible data. Department data also proved critical to refuting erroneous information about tortoise habitat in the Phoenix metropolitan area, and demonstrated that economic development in that area was not a significant threat to the species. Further, the Department worked with partners to draft a Candidate Conservation Agreement that articulated significant conservation actions being implemented by ten signatory agencies throughout the tortoise's Arizona distribution. Our unprecedented set of data, coupled with commitments described in the CCA, contributed to a not warranted decision by the FWS.

State agencies often do the lion's share of work to manage federally listed species, and deal with associated conservation challenges. We are on the ground and on the front lines. Citizens, businesses and landowners are more likely to reach out to the state agency for assistance with listed species than to our federal partners, and state agencies are better positioned and experienced to find ways to provide necessary assistance and leadership.

State agencies have the unique ability, and need, to work with local development and industry to help ensure economic growth while managing our diverse fish and wildlife resources. The Arizona Game and Fish Department developed HabiMap®, a geospatial planning tool that gives industry a front loaded view on all fish and wildlife resources that may be affected by a proposed project. This web-based automated tool provides industry with instant access to information and data to assist in initial risk assessment, thus providing significant cost-savings throughout project development. This landscape scale wildlife information decreases risk, and can help avoid unexpected costs. HabiMap® also provides information, data, and analyses that otherwise would take hundreds of hours of AZGFD staff time each month. This provides a considerable cost savings to the Arizona Game and Fish Department, the state, and to industry. These and similar tools developed or being developed in other states provide capacity otherwise unavailable to FWS.

The state agencies are proud of their successes in recovering listed species and in proactively restoring declining species to sustainable levels so that the provisions of the ESA are not necessary. However, that does not mean that the state agencies are adequately funded to do this work. In general, under the American system of funding fish and wildlife conservation, over 75% of the budgets of state agencies come from fees voluntarily paid by hunters, recreational shooters, anglers and recreational boaters, in the form of hunting and fishing licenses and stamps, which are matched by federal excise tax revenues on hunting and shooting sports equipment and fishing tackle, and federal gasoline excise taxes attributed to boaters. Some state agencies rely exclusively on these funding sources. Others are fortunate to have additional funding mechanisms, such as state General Funds (MO), real estate transfer tax revenues (FL), or a portion of state lottery funds (AZ) dedicated to conservation.

The general public responds by saying that they pay federal and state taxes and therefore protect habitat on federal public lands, and fund federal management programs for species where both the state agencies and federal government have concurrent authority for ESA and Migratory Bird Treaty Act

species. In fact, hunters, anglers, shooters and boaters pay those same taxes, but in addition they voluntarily pay the fees and taxes I described above to provide conservation dollars for the state agency programs which benefit all of our citizens. However, these funds are inadequate for the state agencies to fulfill their conservation obligations to their citizens to manage and sustain the extraordinary biological diversity for which they are statutorily responsible.

North America's fish and wildlife conservation model and its conservation based delivery system is unparalleled. The fundamental tenets of this model and associated contributions of state agencies, combined with the collective efforts of diverse partners that state agencies continue to develop and maintain, are foundational and have contributed resoundingly to its effectiveness.

### **Consultation**

For the purposes of this testimony we are defining consultation as shared authorities and robust cooperation, as originally intended by Congress under the ESA. As outlined earlier, state agencies have the conservation experience, expertise and capacity, and should have the opportunity to be full partners in the ESA decision-making process. Section 6 of the ESA gives the Secretary explicit direction on how Congress expected the federal-state jurisdictional relationship to work. As specifically noted in Sec. 6.(a) GENERAL—" In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States" The legislative history of the ESA demonstrates that Congress intended that state agencies with qualified endangered species programs lead in the conservation and recovery of threatened species (see Sen. John Tunney's 1973 floor remarks in consideration of S.1983, in the Appendix). Here I provide a number of examples of ways in which that robust cooperation is lacking or unavailable, and where true collaboration and recognition of shared authorities could improve ESA processes and species recovery.

Unfortunately, due to the litigation pathway of unraveling the ESA, the state agencies feel the ESA has become a regulatory tool rather than a conservation machine. The ESA currently mandates that ESA recovery planning and actions use the best available science and also provide for the development of measurable recovery goals. However when challenged through litigation, the arbiter of disagreement over what constitutes "best available science" or "scientifically defensible goals" is a judge who may have little or no training in the complexity of the scientific process. Litigious groups capitalize on this "biology by Judge" to drive a lucrative business model. Amending the ESA to raise the bar for this kind of litigation designed to thrust the judiciary into the role of making decisions about science, would be appropriate. In addition, eliminating later amendments to the Equal Access to Justice Act (EAJA) would fundamentally restore the original purpose of EAJA (i.e., to assist and protect the rights of poor individuals litigating the government), and would eliminate the lucrative litigation-based NGO business model that has subsequently flourished. This propensity for litigation has alienated the state agencies and discouraged them from participating in the decision process. Consequently, much of the "best available science," which is generated and owned by the state agencies is not being used. These changes would help ensure that the evaluation of what constitutes "best available science" would be done by state agency and Federal scientists and not by judges.

Better collaboration and joint decision making with state agencies will result in better and more consistent application of consultations under Section 7 of ESA. In 1995, former President Clinton signed executive order 12962 regarding recreational fisheries, in which he stated, "All Federal agencies will aggressively work to identify and minimize conflicts between recreational fisheries and their respective responsibilities under the Endangered Species Act of 1973 ("ESA") (16 U.S.C. 1531 et seq.). Within 6 months of the date of this order, the [FWS] and the National Marine Fisheries Service will promote compatibility and reduce conflicts between the administration of the ESA and recreational fisheries by developing a joint agency policy that will: (1) ensure consistency in the administration of the ESA between and within the two agencies, (2) promote collaboration with other Federal, State, and Tribal fisheries managers, and (3) improve and increase efforts to inform nonfederal entities of the requirements of the ESA." Nonetheless, inconsistent Section 7 recreational fisheries consultations continue as a direct result of excluding state agencies in evaluations, which lead to take determinations that lack an appropriate science based decision. For example, the endangered Razorback Sucker occurs in the Colorado River, resulting in numerous Section 7 evaluations with respect to Rainbow Trout stocking, and take determinations have varied considerably. Specifically, four states have received "not likely to adversely affect" decisions based upon the following criteria: trout stocking would occur upstream of existing Razorback Sucker populations, and although spatial overlap may occur at times, the river's natural thermal regime and turbidity would segregate the two species; "take" was not reasonably certain to occur. In Arizona, "take" was considered reasonably certain to occur despite the fact that the local thermal regime and turbidity separate the species more effectively. Remarkably, although Nevada and Arizona share a boundary on Lake Mohave and have consulted on the same stocking action, the Section 7 determinations do not agree.

Proactive conservation involving state agencies allows industry and development to continue while providing appropriate resources to offset impacts upfront. Unfortunately, ESA roadblocks have led to delays and bottlenecks. For private landowners, Candidate Conservation Agreements with Assurances (CCAAs), Safe Harbor Agreements (SHAs), and Habitat Conservation Plans (HCPs) are available to provide the landowner protection from Section 9 take issues in exchange for certain proactive management actions. However, implementation is inconsistent among FWS regions and often difficult to implement. Although state agencies are encouraged to develop these agreements, the FWS has not made these efforts a priority. A specific example from Arizona involves a CCAA developed by AZGFD and submitted to FWS on April 18, 2014. The agreement provided a framework to conserve an ESA candidate fish species, the Roundtail Chub, on over 9 million acres. To date, this agreement has yet to receive final approval by FWS and progress stalled as a result of lack of staff resources and inconsistencies regarding the conservation agreement review process. Thus, this comprehensive, proactive conservation project has come to an unfortunate halt.

Finally, delisting is often stalled, not for the lack of meeting recovery criteria, but instead, working through legal action after those criteria are met. The Northern Gray Wolf and the Greater Yellowstone population of Grizzly Bear both serve as excellent examples of this situation. In both cases, after recovery criteria had been met, the FWS changed the recovery objectives for the species. In the Gray Wolf example, FWS further refused to finalize its July 16, 2013 proposed rule to delist the Gray Wolf in the continental United States even after acknowledging in the proposed rule that, 1) the original listing was not a listable entity (species, subspecies, or Distinct Population Segment) and therefore violates the

ESA, and 2) the Gray Wolf species is viable and not likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

### **Transformation to a modern conservation machine**

As I previously stated, I've had the unique opportunity to witness the changes that have occurred to state agencies over the entire lifespan of the ESA. This evolution has been extraordinary and has transformed state agencies into modern conservation machines. The state agencies are among the preeminent and vested authority on fish and wildlife in the United States. Federal agencies, other state agencies, local governments, tribes, conservation groups, businesses – even other countries – look to state fish and wildlife agencies for accurate data and information on fish and wildlife species and habitats. These partners often need to know which species are most important, where their habitat is located, what habitat is needed to maintain movement across the landscape, and how species should be managed and conserved. This information is vital to help communities grow, develop, live and recreate in accord with our environment.

To improve the state agencies' capability to provide this information to their many customers, and strengthen their leadership position on fish and wildlife matters, we have innovated and refined how we do business.

When the Western Governors adopted their Wildlife Corridors Initiative Report in 2008, they created the Western Governors' Wildlife Council and tasked its members with developing policies and tools to identify and conserve crucial wildlife habitat and migration corridors across the region. In that report, the Wildlife Council provided direction on how to address these management needs by working across political and legal boundaries and collaborating with other managers and the public. By putting these approaches into operation, the state agencies' important work to conserve the public's fish and wildlife resources will be enhanced, while at the same time facilitating necessary economic development in the region. Now guided by Western Governors' policy resolution 13-04, the Wildlife Council will soon be providing information on important fish and wildlife habitat that is compatible across the West and available to the public.

The Wildlife Council first approached the Governors' directive by launching regional pilot projects in 2010 with support from a grant from the Department of Energy. The year-long pilot projects allowed the Wildlife Council to test the framework outlined in their [White Paper](#), helping to refine their vision.

In August 2011, the Wildlife Council established a plan to develop a West-wide tool with the goal of launching a public and regionally compatible crucial habitat GIS tool by 2013. All the while, the Wildlife Council has continued to support the development of state-specific CHATs in individual states.

The Western Governors launched Crucial Habitat Assessment Tool (CHAT) in December 2013 as the Western Governors' CHAT and managed it through 2014. In April 2015, the Western Governors transferred full responsibility for CHAT to the Western Association of Fish and Wildlife Agencies (WAFWA) and the tool was renamed the Western Association of Fish and Wildlife Agencies CHAT.

Arizona, California, Kansas, Montana, Nevada, New Mexico, Oregon, Washington and Wyoming have already developed state-specific information on priority species and habitat. In addition, the Southern Great Plains CHAT provided information specific to the lesser-prairie chicken, a species with habitat ranging across five states. Other states are continuing to develop individual systems to provide additional state-specific information.

The WAFWA represents 23 state agencies and Canadian provinces, spanning from Alaska to Texas and Saskatchewan to Hawaii - an area covering nearly 3.7 million square miles of some of North America's most wild and scenic country, inhabited by over 1500 premier fish and wildlife species.

WAFWA is a strong advocate of the rights of states and provinces to manage fish and wildlife within their borders. The AFWA and WAFWA have been a key organization in promoting the principles of sound resource management and the building of partnerships at the regional, national and international levels in order to enhance fish and wildlife conservation efforts and the protection of associated habitats in the public interest.

In Arizona, HabiMap® has been used to assist in identifying preferred routes for transmission lines such as SunZia and South Line, routing new highway development such as Interstate-11, and informing land management decisions by the BLM, USFS, and our Arizona State Land Department. Beyond fish and wildlife, industry has been the biggest benefactor from the use of these CHAT tools. Predictable mitigations, avoidable conflicts, and anticipated costs have allowed industry to adopt and even champion these tools.

Perhaps the most comprehensive example of this is our work on the Lesser Prairie Chicken. On March 31, the WAFWA submitted to the FWS its third annual report detailing achievements under the Lesser Prairie-Chicken Range-wide Conservation Plan. Among other highlights, WAFWA reported on the purchase of an ecologically significant piece of property in Kansas, which permanently protects nearly 30,000 acres of high-quality lesser prairie-chicken habitat.

The range-wide plan is a collaborative effort of the state fish and wildlife agencies of Texas, New Mexico, Oklahoma, Kansas and Colorado and is administered by WAFWA. It was developed to promote conservation by providing a blueprint for lesser prairie-chicken conservation through voluntary cooperation of landowners, land management agencies and industry participants. This plan allows participants to continue operations while restoring and maintaining habitat and reducing development impacts to the bird and its habitat. "As we close out our third year of implementation, we're really hitting our stride," said Alexa Sandoval, Director of the New Mexico Department of Game and Fish and Chairman of the Lesser Prairie-Chicken Initiative Council. "We are encouraged that despite an oil and gas industry downturn, support for this collaborative conservation approach remains strong. We commend all of our partners for their participation in the range-wide plan."

The plan was endorsed by the FWS in 2013, and as part of the conservation effort, the state agencies agreed to report annually on the overall progress of the plan. Findings for 2016 include:

- **Land conservation efforts on private land increasing**  
By the end of 2016, WAFWA was conserving 16 sites totaling 133,703 acres either through fee title ownership or long-term contractual agreements. Three of those sites, totaling 33,053 acres, are permanently conserved through perpetual conservation easements or fee title ownership. The other 13 sites were 10-year contracts with private landowners, covering 100,650 acres across the range, three of which were executed during the past year.

Most significantly, a 29,718-acre land acquisition by WAFWA was finalized in June 2016, permanently protecting high-quality habitat in the sand sagebrush eco-region. The property was purchased from a willing seller and will continue to be managed as a working cattle ranch using livestock as the primary tool to create optimum habitat for the bird. In addition, 1,781 acres of privately owned native rangeland is now permanently protected in the mixed grass eco-region. WAFWA purchased a perpetual easement on the property that protects the conservation values of the site. The easement is held by Pheasants Forever.

- **Lesser prairie-chicken population stable**  
The annual lesser prairie-chicken aerial survey used to monitor populations was conducted from March through May 2016. The latest survey showed population trends have been stable after five years of data collection. An estimated breeding population of 25,261 birds was documented in 2016, which scientists say is not statistically different from the estimate of 29,162 birds in 2015 given the variability associated with the survey methodology. Aerial surveys for 2017 are underway and will run through mid-May. Results are anticipated in early July.
- **Industry projects generate mitigation credit, offset by conservation**  
In 2016, 114 industry related projects were processed and mitigated. There continues to be a surplus of credits available with a range-wide positive value of 71,639 units. This reflects the continued low energy prices that have slowed industry development in the region. WAFWA has focused on committing enrollment and mitigation fees for conservation contracts to benefit the bird and to ensure companies have available mitigation credit to develop as energy prices rebound. In July 2016, WAFWA developed a process to address non-payment of enrollment fees that provides several options to help companies stay enrolled in the program.
- **Technology enhances conservation decision-making**  
During 2016, significant progress was made in database development and accessibility. Highlights include the integration of impact and conservation sites into a relational database to ensure all habitat impacts are offset by an appropriate conservation site. In addition, a custom website was developed that provides participating companies a way to submit and approve new projects as well as view past submissions. WAFWA and the FWS can also use the web interface to obtain site-specific summary statistics, habitat mitigation credit balances and raw data.
- **Cooperative efforts enhancing conservation**  
A renewed cooperative effort between Natural Resources Conservation Service, Pheasants

Forever and WAFWA will enhance program promotion, monitoring activities, and conservation planning and delivery. There was also continued effort to work with state fish and wildlife agencies to identify and pursue research and management needs. Those activities included lesser prairie-chicken translocation efforts that moved birds from the shortgrass to sand sagebrush eco-region.

AZGFD has led in the development and application HabiMap® to realize the conservation of fish and wildlife habitat while meeting the objectives of development projects. The use of web-based, landscape scale geospatial wildlife information to instantly inform the earliest stages of Interstate-11 planning is cutting edge and is revolutionizing approaches to identifying and minimizing impacts to Arizona's natural resources. This unprecedented capability allows up front risk assessment and promotes cost effective development. For example, the Interstate 11 has the potential to fragment wildlife habitat both during construction and after completion. The Department is working with the Arizona Department of Transportation's Intermountain West Corridor team to provide critical data regarding Arizona's diverse resources. This collaborative effort will ensure that wildlife, habitat, connectivity, and wildlife safety issues are considered early in the design phase to avoid costly retrofitting later on. By designing connectivity features and habitat preservation efforts into the project as critical elements, there can be connectivity along the length Arizona's I-11 corridor, maintaining healthy and sustainable wildlife populations and habitat for present and future generations. The Department's efforts result in cost savings, highway safety, sustainable wildlife resources, and efficiency improvements to the state. The state will save money as the Department evaluates and addresses habitat, connectivity and safety up front, reducing the need to redesign and retrofit. Planning safe passage options for wildlife along the I-11 corridor will greatly reduce the number of vehicle/wildlife collisions, while improved connectivity will help maintain healthy and sustainable wildlife populations for all Arizonans to enjoy. The Department's tools under development to provide critical data and analyses for the I-11 corridor will also be used in future projects. Further, the state agencies are actively engaged in discussions about how to take the HabiMap® tool and applications as well as other similar state-led efforts and make them seamless across the country, even extending to our Canadian Provincial counterparts to improve management across the lifecycles and ranges of shared species like red knots and neotropical songbirds, caribou and moose, wolverines and gray wolves, sage grouse, waterfowl, and more.

I have dedicated my life to conservation. I believe that the content of these comments contain the essential components to revolutionizing conservation, both in the US and beyond. Our nation has already set the standard for conservation throughout the world. Today I humbly ask this committee to recognize that changes must be made, if we continue to lead the world in our commitment to conservation.

Thank you very much for the opportunity to share our perspectives and I would be pleased to answer any questions.



## Appendix



### **General Principles for Improving Implementation of the Endangered Species Act**

*Adopted March 18, 2016*

**Objective Statement:** Improve Endangered Species Act implementation to ensure its future by making it a more effective conservation program for fish and wildlife, and more acceptable to private landowners. This improved implementation would be directed and managed by state and federal fish, wildlife, and natural resource professionals.

#### **Principles for Improvement:**

- 1: Enables more effective and consistent conservation and protection of species.
- 2: Ensures fish, wildlife and natural resource professionals make Endangered Species Act decisions.
- 3: Facilitates the opportunity for robust utilization of state fish and wildlife agency concurrent jurisdictional authorities in Endangered Species Act implementation as Congress originally intended.
- 4: Focuses on management actions that will recover species to the point that provisions of the Endangered Species Act are no longer necessary, and the species can be delisted or down-listed.
- 5: The approach is apolitical and politically viable because it has bipartisan support.
- 6: Better incentivizes private landowner participation in application of the Endangered Species Act.

#### **Recommendations for Improvement:**

**I. Implement Preventive and Restorative Management:** improve cooperation between state and federal agencies to preclude the need to list species by addressing species life needs and habitat requirements, more fully recognize and integrate state-led conservation efforts, and improve processes and guidelines for listing decisions. Secure funding sources for these actions.

**II. Elevate the Role of State Fish and Wildlife Agencies:** increase opportunities for state fish and wildlife agencies to take a more formal and active role and fully participate in Endangered Species Act implementation actions as intended by Congress under Section 6 Cooperative Agreements.

**III. Improve the Listing Process:** make the best decision within a more realistic timeframe; prioritize species considered for listing; and insure all state fish and wildlife data are utilized and

fully considered in the listing determination whether such data are published or not; and include state agency expertise in the process of interpreting these data and drawing conclusions.

**IV. Require the Development of Science-Based Recovery Plans for Listed Species Directed by Recovery Teams:** enhance States' role including the opportunity to lead recovery planning and implementation, expedite recovery by supporting state level initiatives and partnerships; and increase flexibility and feasibility for recovery plan applicability.

**V. Relocate Critical Habitat Designation to Recovery Plan Development and Create More Flexibility:** create more flexibility for the Secretary to exercise discretion to designate or not designate critical habitat, better define the scope, scale and basis for critical habitat designations and include clear guidance on when such designations are needed or required.

**VI. Revise Down-listing and De-Listing Processes:** increase reliance on and give great weight to recovery plan population and habitat objectives to inform the initiation of the delisting or down-listing process and create more ecological and geographic flexibility for downlisting and delisting valid listable entities, regardless of how they were originally listed; expedite down-listing and de-listing processes to realize conservation successes and reduce unnecessary regulatory burdens.

**VII. Restore the Distinction between Threatened and Endangered Species Categories:** return to Congressional intent providing greater flexibility to manage these listed species differently; afford state fish and wildlife agencies the opportunity to manage threatened species as Congress intended; and allow take as a possible means of "conservation" in the Act.

**VIII. Fully Utilize State Conservation Agreements, Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, Safe Harbor Agreements and Habitat Conservation Plans:** provide consistency and guidance on utility.

**IX. Provide Certainty and Incentives for Private Landowners:** enhance clarity and increase conservation incentive options available; expedite the process for concluding these conservation agreements to enhance certainty to private landowners.

**X. Enhance Endangered Species Act Funding:** sufficient funding should facilitate successful conservation outcomes, species recovery, and delisting; enhance funding to states and federal agencies for all aspects of Endangered Species Act implementation.

**XI. Improve Implementation of 10(j) Experimental Populations to Enhance Species Recovery:** provide guidance on when the use of 10(j) experimental populations are appropriate and standardize post delisting monitoring plans.

**XII. Science and actual conservation work to recover species should drive Endangered Species Act decision making:** devolve the role of litigation and more fully realize Congressional intent for Endangered Species Act implementation.

**XIII. Establish more Consistent Implementation Procedures and Processes:** improve consistency and timeliness of administrative processes and actions implemented under the Act.

## **Legislative History of the 1973 ESA Bill On Passage: Excerpts**

### **Senate Consideration and Passage of S.1983, With Amendments, from the Congressional Record, July 24, 1973, pages 342-425**

Sen. John Tunney (CA):

“On the other hand, it was well established in the hearing record that most of the States possess much greater wildlife management resources than does the Federal government. Clearly any effort on the part of the Federal government to encourage the restoration of threatened or endangered species would fail without the assistance of the state agencies. This bill is designed to permit and encourage state endangered species programs that are in concert with the purposes of this Act.”

“Subject to the provisions of this Act which provide maximum protection for species on the brink of extinction, States with active endangered species programs are given full discretion to manage threatened species which reside in their boundaries.”

Sen. Ted Stevens (AK):

“Sections 6 and 16 provide for cooperation with the states. They provide the major backbone of the Act. Presently the states have an extensive network of endangered species legislation. Unfortunately, not all states have as yet implemented such programs. This bill will assist those states not yet involved to implement such programs and will, if the states do not, provide for Federal preemption.”

“As Dr. Ralph Mac Mullen, president of the International Association of Game, Fish, and Conservation Commissioners observed, state wildlife agencies employ over 5800 law enforcement officers across the Nation. Formal Endangered Species programs are being implemented in over 30 states.”

“Dr. Mac Mullen further observed that if the Federal government were to take away the right of the states to manage these species and to preempt the states, State Legislatures would not be willing to appropriate the necessary funds to protect endangered species.”

House Committee Report 93-412 (to accompany HR 37)

“The principal areas of discussion during the hearings and markup of legislation centered on the proper role of the state and Federal governments with regard to endangered species programs...”

“Any bill which is designed to deal with the complicated issues involved in the protection of endangered species must do so in light of least two competing considerations: first, protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies... Second however, the States are far better equipped to handle the problems of day to day management and enforcement of laws and regulations than is the Federal government...”

“Regulatory jurisdiction is given to the Federal government under this legislation and if a cooperative agreement is successfully negotiated and signed, to the states as well.”

“Where a cooperative agreement has been put in effect the bill allows concurrent jurisdiction over the species affected in both the state and federal judicial system.”

“In all other respects ... [than adherence to actions specifically permitted or prohibited by the Federal agencies]... the state law is not preempted but is merely subject to the “floor” of regulations under the Act.”

House Consideration and Passage of HR 37 with Amendments:

Cong. James Grover (NY):

“Second, we have adequately protected legitimate state interests, power, and authorities by providing for concurrent Federal/State jurisdiction...”

“It is imperative to realize, as the Committee did, that the greater bulk of the enforcement capabilities concerning endangered species lie in the hands of the state fish and game agencies and not the Federal government. It is on a state level that habitat areas will be located, and it is on a state level where this new Federal law will be implemented, subject to overall Federal criteria and guidelines.”

House Conference Report 93-740 (to accompany s. 1983 as reported by the House-Senate Conference Committee)

“As finally approved, the Act will have the effect of giving the states fundamental roles with respect to resident species for a given period of time... The conferees hope that this device will impel the states to develop strong programs to avoid the alternative of federal preemption.”

“It should be noted that the successful development of an endangered species program will ultimately depend on a good working arrangement between the federal agencies, which have

broad policy perspectives and authority, and the state agencies, which have the physical facilities and personnel to see that state and federal endangered species policies are properly executed.”