



December 27, 2019

Western Congressional Caucus  
Att: Tim Charter & Doug Levine  
Via Email only

Re: Endangered Species Act Reform initiative

Dear Mr. Charter and Levine:

Please accept this correspondence as the vigorous support of the Organizations identified above relating to the Western Congressional Caucus Roundtable where we were pleased to discuss our experiences around Endangered Species Act issues. The Organizations welcome this discussion as we believe a review of the Endangered Species Act (“ESA”) is badly needed and look forward to involvement in the process moving forward. The weaponization of the ESA for use against activities that might not be supported by a particular group is far too common and a major challenge facing all forms of recreation on public lands.

The Organizations believe the ESA must become both more efficient and more consistent in its impacts between species and over time and effectively achieve species populations that allow for the delisting of species. When the ESA was originally passed, there was strong bi-partisan support for the Act. This support has eroded due to some foundational problems with the Act which have manifested themselves in various listing processes. Significant erosion of support has resulted from technological advances that have been made since the passage of the Act, as exemplified by recent advances in DNA testing and analysis, which has resulted in impacts to the listing process that simply were never envisioned when the Act was passed. The Organizations submit there is a need to simply update the Act and refocus on effectively achieving many of the original objectives that were to be addressed. The Organizations are submitting these comments in order to fully explain some of our concerns after a more complete review of these issues.

**1. At the landscape level, the listing/delisting process for any species is simply badly out of balance.** While it is comparatively easy to list a species under the Act, removal of any species from the list is functionally impossible. Clearly, this imbalance of processes was not envisioned when the Act was passed, as public support for a process that resulted in easy additions to the list and the impossibility of removal of any species would not have garnered large-scale support. The Organizations welcomed discussions surrounding the heightened listing requirements that

were recently completed by the USFWS, such as increased state involvement and scientific review prior to acceptance of a listing petition. These new petition requirements would address one of the major impacts on the ground from the imbalance of the entire process, mainly that the filing of any petition regardless of how poorly scientifically based has a huge chilling effect on efforts that might involve habitat areas or efforts to mitigate threats. It has been the Organizations experience that the mere assertion of a possible listing of a species has a huge unsettling effect on any efforts to improve habitat or mitigate threats as often land managers stop anything in the habitat area when there has been a petition filed, as land managers are simply unsure how to proceed.

**2. Too often the ESA is relied on by those who are opposed to projects and failed to be involved in the NEPA process.** The ESA process allows an entirely separate course of action often allows those opposed to a project to derail collaborative efforts that might be in place to benefit the species that have been developed in the NEPA process. The Organizations are aware of numerous trail improvement projects that are derailed by ESA issues raised by those that are merely opposed to multiple use. It has been The Organizations experience that the driving force of some of these efforts has more to do with a personal interest opposing a project or philosophical opposition to a particular activity. This must be addressed.

**3. Hard population goals must be set for a species or DPS and must be honored in the delisting process.** Too often population goals are not provided in the ESA process at all and if there are population goals provided, they simply are not honored. These types of hard objectives are the general standard for the management of a challenges being faced by the country, and as such should be applied to ESA actions. This is simply good management and is a critical in developing public support and coalitions that are necessary to improve species populations. The goal simply gives the public something to rally around and work towards. Logic dictates that any determination that a population is sufficiently threatened to warrant listing would rationally require that a target population for the area has been created and it has not been met. Rather than specify what this target population in the documents released, often these targets are omitted and hampering effective management of the species moving forward. Providing identifiable population goals for areas would be a critical component of public comment for wildlife management professionals and researchers, as often the target population and methods of identifying accurate measurement methodology are the basis for extensive analysis and comment from these groups of the public. Without target goals, this comment simply is not obtained. The Organizations believe that these identifiable goals will be a critical component of public support for the management of various species in the future. This public support for management will allow private lands to be managed with a variety of tools for improving grouse habitat.

**4. The §7 consultation process must be amended to ensure that both positive and negative benefits from planning efforts are reflected.** Too often the Organizations are aware that land

managers stop analysis of ESA issues at determinations of "no negative impact" from planning in the §7 consultation process. The Organizations submit that stopping at this point precludes viable opportunities to benefit species as managers often continue without asking if the proposal is even related to the threats to the species. The impacts of such an arbitrary limitation on analysis recently occurred in the Bear Creek area outside Colorado Springs. Managers were sued regarding recreational usage around Bear Creek and possible impacts on genetically pure cutthroat trout. Litigation was settled and NEPA was commenced but no one ever identified the threats to the species at the location or that a very old and deteriorated dam was the only obstruction between the genetically pure fish and their primary threat, mainly reintroduced hybrid fish. This arbitrary limitation on analysis should be avoided as limited resources can easily be directed towards issues that are entirely unrelated to the species decline. Unfortunately, the successful resolution of the challenges in this area were again impacted by ESA issues as those groups that challenged the management of the area again threatened to sue on a variety of ESA process related issues.

**5. The question of "What is a species?" simply must be resolved.** Currently if a possible species fails any portion of the questions used to define "what is a species" is the species is listed. This situation is the basis for ongoing and vigorous discussion in the scientific community. As a result, two species can look identical with slightly different genetic traits, but be broken into separate populations and both be listed. On the conversion, species can look very different and be genetically identical and again both be listed. This situation has been exemplified with the Alabama sturgeon, Greater/Gunnison Sage Grouse and is exceptionally common in the listing of various plants, where exceptionally minimal differences are identified as the basis for an ESA listing and a common weed. The Organizations are intimately aware that answering this question has profound impacts on many facets of ESA actions but it must be looked at. The ever-changing target of what is a species makes conservation efforts difficult if not impossible.

**6. Funding of litigation efforts is simply badly out of balance with resources directly benefitting the species.** The Organizations submit that the funding of litigation efforts and defense of litigation brought against the USFWS is simply badly out of balance with the portion of resources directly benefitting the species. The Organizations offer that the ESA has created a cottage industry where certain groups to sue to government on ESA issues and then recover all legal fees when any portion of the action is successful. Often these legal fees are awarded at levels far in excess of amounts awarded in other causes of actions, such as those brought under the authority of the Equal Access to Justice Act. Simply bringing recovery rates for ESA into consistency with rates for EAJA would be a major step forward.

The imbalance of EAJA provisions are compounded by the fact that parties that intervene to assist in defense of claims with the government are functionally precluded from recovering their legal fees. The Organizations believe there are two additional alternatives; 1: increase the burden on parties to recover funding for ESA litigation on EAJA; and 2: allow interveners to recover costs.

**7. Cumulative economic impacts of multiple listings must be looked at.** While the Greater Sage Grouse efforts have garnered a significant amount of public interest due to the large habitat areas at issue, many species that are listed have smaller habitat areas. These smaller habitat areas do not mitigate the impacts of the large number of small habitat areas has on public lands and recreation. Often it is difficult if not impossible to identify any public land that has not been identified as habitat for an Endangered Species in the state of Colorado. These cumulative impacts are simply never reviewed. The Organizations must express frustration with economic analysis provided in some listing proposals which rely on agency costs as the economic impact of habitat designations. Agency costs simply are not the proper measure of economic impacts to local communities, and this should be clearly and unequivocally stated in regulations moving forward.

**8. Impacts from previous ESA efforts should be recognized.** The Organizations are aware of several situations where there have been negative implications to ongoing efforts that have established viable and sustainable species populations for species that have been listed that such as the reintroduction of the Canadian Lynx in Colorado and Grizzly bear around Yellowstone. These stumbles have had major impacts on the future management and reintroduction of any species. Colorado legislature immediately acted after lynx listing by requiring specific legislation to reintroduce any species that might be listed. As part of any recommendation, certain species/populations should be looked at for delisting in the legislation such as the grizzly bear, lynx in Colorado and Gunnison Sage Grouse.

We look forward to participating in further meetings on this issue and welcome the discussion as it moves forward. If you have questions please feel free to contact either Fred Wiley, ORBA's Executive Director at 1701 Westwind Drive #108, Bakersfield, CA. Mr. Wiley phone is 661-323-1464 and his email is fwiley@orba.biz. You may also contact Scott Jones, Esq. at 508 Ashford Drive, Longmont, CO 80504. His phone is (518)281-5810 and his email is scott.jones46@yahoo.com.

Respectfully Submitted,



Scott Jones, Esq.  
ORBA Authorized Representative



Fred Wiley,  
ORBA Executive Director