TESTIMONY OF MICHAEL J. BEAN
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DEPARTMENT OF THE INTERIOR
BEFORE THE
HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY, HEALTH CARE, AND ENTITLEMENTS
"EXAMINING THE ENDANGERED SPECIES ACT"

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Chairman Lankford, Ranking Member Speier, and Members of the Subcommittee, I am Michael J. Bean, Counselor to the Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior. It is my pleasure to testify before you today regarding the implementation of the Endangered Species Act (ESA).

The Department is committed to making the ESA work for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. This job has never been easy, and it grows more difficult and complex every day. In passing the ESA, Congress recognized we face an extinction crisis. Since that time, the pace and extent of environmental change threatening the continued existence of more and more of our Nation's biological wealth, have made it imperative to have an effective, collaborative approach to conserving imperiled species.

The Listing Process

Listing under the ESA becomes necessary when a species declines, or threats to it increase, to the point where it is in danger of extinction throughout all or a significant portion of its range (an "endangered species") or it is likely to become endangered in the foreseeable future (a "threatened species"). The Fish and Wildlife Service lists a species if, after reviewing the species' status using the best scientific and commercial data available, it determines that the species is endangered or threatened because of any one or a combination of the following factors:

- the present or threatened destruction, modification, or curtailment of its habitat or range;
- overutilization for commercial, recreational, scientific, or educational purposes;
- disease or predation;
- the inadequacy of existing regulatory mechanisms; and
- other natural or manmade factors affecting its continued existence.

There are two processes the Service follows to identify species eligible for listing. The first is the candidate assessment process, which is initiated by the Service. The second is a petition process, which is available to the public.

The second process for identifying species that may warrant listing is the petition process. Section 4 of the ESA allows any interested person to petition the Secretary of the Interior either to add a species to, or remove a species from, the lists of threatened and endangered species.

Upon receipt of a petition, the Service must respond, within 90 days when practicable, with a finding as to whether the petition provides substantial scientific or commercial information indicating that the petitioned action may be warranted. If the Service determines that the petition did not provide such substantial information, the 90-day finding concludes the petition review process. However, if the Service determines that the petition does provide substantial information, the Service initiates a status review and issues an additional finding within 12 months of the receipt of the petition.

There are three possible outcomes of the "12-month finding": 1) listing is not warranted, and no further action is taken; 2) listing is warranted, and a listing proposal is promptly prepared; or 3) listing is warranted, but immediate action is precluded by higher priority actions. A "warranted but precluded" finding is made on the basis of the species' listing priority number and the listing workload. In such cases, preparation of a listing proposal is delayed until higher priority actions are completed, and the species is added to the list of candidate species and included in the next CNOR.

Our listing and delisting actions are rule-makings, published in proposed and final rule form in the *Federal Register*, and leading to revisions to Title 50, Part 17 of the Code of Federal Regulations. Once a proposal is published, the Service must allow for a public comment period on the proposal; provide actual notice of the proposed regulation to appropriate State, tribal, and local government agencies; publish a summary of the proposal in a newspaper of general circulation in areas where the species occurs; and hold a public hearing, if requested (see 16 U.S.C. § 1533(b)(5)). The Service's implementing regulations require that the public comment period on a listing proposal be at least 60 days long (see 50 C.F.R. § 424.16(c)(2)).

The Service always solicits independent peer review of its listing proposals, and has found such peer review to be a valuable element of the decision-making process.

ESA Consultation and Habitat Conservation Planning

Science is the foundation of our consultation and recovery activities under the ESA. One of the most important and effective tools available to recover endangered and threatened species is the consultation process prescribed by section 7 of the ESA. The Service engages in consultation with other Federal agencies to assist them in meeting their obligation to avoid taking any action

that would be likely to jeopardize the continued existence of a listed species or that would destroy or adversely modify their critical habitat.

Habitat Conservation Plans (HCPs) under section 10(a)(1)(B) of the ESA provide for partnerships with non-Federal parties to conserve the ecosystems upon which listed species depend, ultimately contributing to their recovery. HCPs are planning documents required as part of an application for an incidental take permit. HCPs provide the conservation benefits of proactive landscape planning, combining private land development planning with species ecosystem conservation planning. Working in partnership is foundational for the Endangered Species program, because the conservation of the Nation's biological heritage cannot be achieved by any single agency or organization.

Success of the Endangered Species Act

The ESA provides a critical safety net for America's native fish, wildlife, and plants. And we know it can deliver remarkable successes. Since Congress passed this landmark conservation law in 1973, the ESA has prevented the extinction of hundreds of imperiled species across the nation and has promoted the recovery of many others – like the bald eagle, the very symbol of our Nation's strength.

Earlier this month, the Service published a proposal to recognize the recovery of, and to remove from the protection of the ESA, the Oregon chub, a fish native to rivers and streams in the State of Oregon. The recovery of the Oregon chub is noteworthy because it is attributable in significant part to the cooperation of private landowners who entered into voluntary conservation agreements to manage their lands in ways that would be helpful to this rare fish. In some cases, landowners agreed to cooperate in reintroducing the fish into suitable waters on their property. The help of private landowners and the cooperation of state and federal partners were critical to the success in bringing this fish to the point at which it is no longer endangered and no longer in need of the protection of the ESA.

The recovery of the Oregon chub has taken a little more than twenty years of sustained effort. That is relatively speedy time frame within which to undo the effects of habitat loss and degradation and the other threats that are responsible for the endangerment of many species. The recovery and delisting of the bald eagle was the culmination of a 40-year conservation effort. The Aleutian Canada goose recovery took 34 years. Efforts to recover the whooping crane have been underway since the 1940's when fewer than 20 cranes remained. Those efforts have been dramatically successful, with a wild population today of several hundred birds. Likewise, the California condor and black-footed ferret, both of which were so perilously close to extinction that no individuals of either species survived in the wild, have made extraordinary progress. Today condors and ferrets have been successfully bred in captivity and reintroduced to the wild,

where they have successfully produced wild-born offspring. Despite the dramatic progress toward recovery that each of these species has made, the whooping crane, California condor and black-footed ferret are still endangered species and will likely remain so for many more years. That is the virtually inevitable consequence of waiting until a species has been greatly depleted before beginning efforts to recover it.

Cooperative Conservation Efforts

As the Oregon chub example makes clear, private landowners can hasten the recovery of endangered species through their cooperative efforts. The Oregon chub is just one of many endangered species that landowners are helping recover through voluntary agreements with the Service known as "safe harbor agreements." Safe harbor agreements with Texas ranch owners have helped restore the northern aplomado falcon to the United States, from which it had been absent for roughly a half century. In the southeastern United States, more than 400 landowners have enrolled nearly 2.5 million acres of their land in safe harbor agreements for the endangered red-cockaded woodpecker. These landowners have effectively laid out the welcome mat for this endangered bird on their land, as a result of which populations of this endangered bird are growing on many of these properties. Many others are doing similarly for other endangered species.

However, there is no reason to wait until a bird or other species is listed as an endangered species before beginning to enlist the cooperation of landowners. As the examples above make clear, a likely consequence of postponing conservation action is simply to prolong the time that a species remains on the endangered list. By beginning conservation efforts early, it may be possible to shorten the time that a species spends on the endangered species list, or even to avoid the need to place it on that list at all. The Service has fashioned tools to enlist the cooperation of private landowners and others in conservation efforts before species are listed, and landowners have been willing to use them. A case in point was the Service's decision last year with respect to the dunes sagebrush lizard in Texas and New Mexico. Although the Service had originally proposed to list the lizard as an endangered species, in the end, because of the substantial acreage encompassed by Candidate Conservation Agreements, the Service concluded that those agreements had sufficiently addressed the threats to that species so as to preclude the need to list it.

Increasing Flexibility to Reduce Regulatory Burden

Important as voluntary landowner agreements are, the law is very clear that decisions whether to list or not list species are to be based on the best available science. If the best available science shows that a species is in danger of extinction or likely to become so in the foreseeable future, the duty of the Service is clear: it must extend to that species the protection of the ESA by listing it as endangered or threatened. The law also allows anyone to petition the Service to list – or

delist or reclassify – a species, and it imposes strict deadlines for responding to petitions and for making a final listing decision once a proposed listing has been published.

At times, the volume of incoming petitions has exceeded the capacity of the Service to meet these statutory deadlines. When that happens, petitioners have often turned to the courts to secure new, judicially-enforceable deadlines for making these decisions. While the Service would prefer to be able to make its decisions within the deadlines specified by Congress, it has worked with stakeholders to take advantage of the time available to put in place conservation measures that could beneficially affect the ultimate listing decision.

A current example of that concerns the greater sage grouse, a species that occurs in eleven Western states. Under the terms of a 2011 court order, the Service must decide by September 30, 2015, whether or not to propose to list that species as a threatened or endangered species. Because of the scope of the sage grouse's habitat, all eleven states, the Bureau of Land Management, U.S. Forest Service, the Natural Resources Conservation Service and others are working closely together to do what they can to address the several threats to that species in advance of the late-2015 deadline.

Similar efforts have been underway for some time with respect to the lesser prairie chicken, a related bird that occurs in five states in the southern plains. The Service must decide later this year whether to list that species as threatened or endangered. The Service has proposed to list it as a threatened species, and if so listed, to accompany that listing with a special rule – known as a "4(d) rule" – that would give the five states the ability to manage the prairie-chicken under the terms of a range-wide conservation plan developed by the states. Although the ESA has since 1973 had two categories of listed species – threatened and endangered – in practice there has been little difference in how they are treated by the U.S. Fish and Wildlife Service. Recently, however, the Service has made more innovative use of the flexibility provided by Section 4(d) to fashion the rules applicable to individual threatened species so as to address major threats effectively without burdening activities that pose little threat.

There are still other mechanisms in the ESA to further the recovery of imperiled species by engaging the collaborative efforts of land owners and others. For example, Section 10(j) of the ESA allows experimental populations to be established in appropriate locales and has greatly benefited species such as California condors, black-footed ferrets and whooping cranes. These experimental populations are provided the full protection of the ESA in National Parks and in National Wildlife Refuges, but elsewhere they can be managed with greater flexibility.

The U.S. Fish and Wildlife Service (Service) has a record of decisions that are scientifically sound, legally correct, transparent, and capable of withstanding challenge. The Service works diligently with project proponents through the consultation provisions of the ESA to help projects achieve their goals while achieving ESA compliance and minimizing impacts to listed species. The Department strongly supports the Service's long track record of using the

flexibility of the ESA to create innovative programs and processes that make the law more predictable for private citizens and businesses and to encourage long-term cooperative conservation that helps species on their long road to recovery.

Conclusion

In closing, Mr. Chairman, America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. In implementing the ESA, the Service endeavors to adhere rigorously to the congressional requirement that implementation of the law be based strictly on science. At the same time, the Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery.

Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

BIOGRAPHY OF MICHAEL J. BEAN

Michael J. Bean is Counselor to the Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior. In that capacity, he advises on implementation of the laws and programs administered by the U.S. Fish and Wildlife Service. Prior to joining Interior in 2009, Bean headed the Wildlife Program of Environmental Defense Fund, where he helped develop agreements with farmers, ranchers, forest owners, and other private landowners in Texas, North Carolina, Utah, California, and other states to restore, enhance, or preserve endangered species on working lands. A 1973 graduate of the Yale Law School, he has served on the boards of Resources for the Future, the Environmental Law Institute, and the Board on Environmental Studies and Toxicology of the National Research Council of the National Academy of Sciences. His book, *The Evolution of National Wildlife Law*, the third edition of which was written with Melanie J. Rowland in 1997, is generally regarded as the leading text on the subject of wildlife conservation law. He is also the author of numerous book chapters, reviews, and articles on conservation in journals including *Agricultural History*, *Bioscience*, *Journal of the Washington Academy of Sciences*, *Natural History*, *Nature*, *Quarterly Review of Biology*, *Science*, and *Smithsonian*.