H.R. 4840, "SOUND SCIENCE FOR ENDANGERED SPECIES ACT PLANNING ACT OF 2002"

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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LEGISLATIVE HEARING ON H.R. 4840, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO ENSURE THE USE OF SOUND SCIENCE IN THE IMPLEMENTATION OF THAT ACT. "SOUND SCIENCE FOR ENDANGERED SPECIES ACT PLANNING ACT OF 2002"

Tuesday, June 18, 2002
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to call, at 2 p.m., in room 1334, Longworth House Office Building, Hon. James V. Hansen (Chairman of the Committee) presiding.

The CHAIRMAN. The Committee will come to order.

STATEMENT OF THE HON. JAMES V. HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

The CHAIRMAN. The Endangered Species Act of 1973 sought to create a means by which threatened and endangered species and their ecosystems could be preserved from extinction. Like most other laws, it began with good intentions. Landmark species that were obviously imperiled, such as the American bald eagle, California condor, grizzly bear, and gray wolf were made the subject of the new conservation measures.

But this has changed dramatically in the last 30 years. We are here today because the act's good intentions have been convoluted by courts, Federal agencies, and a few special interest groups. As a result, we have a law that punishes landowners for good stewardship of their private property. We have a law that does not give priority to field-tested peer review science. We have a law that does not protect species.

We can talk for weeks about the best way to fix all the problems of the Endangered Species Act and never reach a conclusion. In fact, that is what we have been doing for years. That is why this Committee has decided to take a different approach.

The legislation before us takes one specific issue and proposes a commonsense solution. I believe this legislation is a step in the right direction to put the Endangered Species Act back on track and truly protect species that are in need of protection.

This Committee believes that a good starting point is to ensure that all policy decisions are made with sound science. It only makes sense that decisions with such far-reaching effects and consequences should be based on scientific information that can be defended before a Committee of experts from the scientific community. We know from experience that decisions are only as good as the data that goes into them. As I said earlier this year, unless policy decisions are based on sound science, good decisions are possible only by chance.

Sound science is founded upon two basic principles: honest scientists and legitimate scientific process. When both of these are together, good results are produced and good decisions are made. But lately the agencies' use of sound science has been questioned, and rightly so.

The Committee held hearings in March that dealt with the submission of false samples of hair from the threatened Canadian lynx by scientists participating in an interagency survey. If this incident had not been report by a retiring Forest Service employee on his last day of work, the false samples could have influenced management decisions in 15 different States and 57 national forests. Fortunately, this Committee was notified and we took appropriate action.

An even stronger argument for a sound science standard exists in last year's tragedy at Klamath Basin. The Secretary of the Interior was forced to shut down the irrigation water to more than 200,000 acres of cropland in California and Oregon because of biological opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. These opinions that claim higher lake and stream flows were necessary to protect three endangered species of fish. The lack of irrigation water throughout the warmest months of the year contributed to a direct loss of approximately $135 million and long-term losses exceeding $200 million.

Because many people argued that the decision to cutoff irrigation water was not based on sound science, Secretary Norton asked the National Academy of Sciences to conduct an independent review of the data used in the biological opinions. The NAS panel preliminarily found that the high water levels could actually be lethal to the fish in the Klamath River because of the increased water temperature.

The panel also found that the data in the biological opinions could not justify the conclusion. Because of the lack of a sound science standard for ESA decisions, both the farmers and the fish were harmed.

I have heard many other horror stories like those. No one knows how many decisions were made based on false data or by simple human error. That is why we need this legislation.

We all understand that this legislation will not resolve the entire sound science debate. Congress cannot legislate ethics, no matter how hard we try. But we can improve the process. This legislation integrates the sound science standard into the decisionmaking process. It gives greater weight to any scientific or commercial study or other information that is empirical or has been field tested or peer reviewed. It prohibits the Secretary of the Interior from de-

termining that a species is endangered or threatened unless data collected in the field supports such a determination.

This legislation also revises the contents of a listing petition and establishes a higher threshold to be met before the petition can be considered.

This legislation also establishes a peer review process by a board composed of scientists that meet National Academy of Sciences standards. Peer review would be initiated for the listing and delisting of species as endangered or threatened, the development of recovery plans, and in jeopardy opinions if the Secretary finds that there is significant disagreement or significant economic impact. This board would submit a report within 90 days, describing their opinion as to the scientific validity of the determination, along with any recommendations they may have. Additionally, this legislation provides for improved interagency cooperation and use of State information.

This is necessary legislation and I believe a commonsense solution to one problem with the Endangered Species Act. I look forward to today's discussion and turn to the gentleman from West Virginia.

[The prepared statement of Mr. Hansen follows:]

Statement of The Honorable James V. Hansen, a Representative in Congress from the State of Utah

The Endangered Species Act of 1973 sought to create a means by which threatened and endangered species and their ecosystems could be preserved from extinction. Like most other laws, it began with good intentions. Landmark species that were obviously imperiled, such as the American bald eagle, California condor, grizzly bear, and gray wolf, were made the subject of the new conservation measures.

But this has changed dramatically in the last 30 years. We're here today because the Act's good intentions have been convoluted by courts, Federal agencies, and a few special interest groups. As a result, we have a law that punishes landowners for good stewardship of their private property. We have a law that does not give priority to field-tested, peer-reviewed science. We have a law that does not protect species.

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Sound science is founded upon two basic principles: honest scientists and legitimate scientific processes. When both of these are together, good results are produced and good decisions are made. But lately, the agencies' use of sound science has been questioned, and rightly so. This Committee held hearings in March that dealt with the submission of false samples of hair from the threatened Canadian Lynx by scientists participating in an interagency survey. If this incident had not been reported by a retiring Forest Service employee on his last day of work, the false samples could have influenced management decisions in fifteen different states and fifty-seven national forests. Fortunately, this Committee was notified, and we took appropriate action.

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Marine Fisheries Service. These opinions that claimed higher lake and stream flows were necessary to protect three endangered species of fish. The lack of irrigation water throughout the warmest months of the year contributed to a direct loss of approximately $135 million dollars, and long-term losses exceeding $200 million dollars.

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This legislation also establishes a peer review process by a board composed of scientists that meet National Academy of Sciences standards. Peer review would be initiated for the listing and delisting of species as endangered or threatened, the development of recovery plans, and in jeopardy opinions if the Secretary finds that there is significant disagreement or significant economic impact. This board would submit a report within 90 days describing their opinion as to the scientific validity of the determination along with any recommendations they may have. Additionally, this legislation provides for improved interagency cooperation and use of state information.

This is necessary legislation and I believe a common-sense solution to one problem with the Endangered Species Act. I look forward to today's discussion.

STATEMENT OF THE HON. NICK RAHALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. RAHALL. Thank you, Mr. Chairman.

Mr. Chairman, it is my understanding that the purpose of today's hearing was to allow our fellow colleagues to come before this Committee and relate ESA horror stories, and I am looking out across the room and I do not see many of them. As a matter of fact, I see an empty witness table at the current time. Maybe they are waiting to flood in at the last minute.

I am impressed by the large number of members who chose not to take you up on your very kind offer, Mr. Chairman, to not be before the Committee today. I am just wondering, could it be because there are only isolated instances where the ESA has been a problem, and those instances have been blown out of proportion to be larger than life, than what they are? There are still, if we look at the whole perspective, there are still some folks who, when they hear helicopters buzzing overhead in the night, wonder whether they are in fact Blackhawk helicopters. There are still those who are concerned over a new world order and believe that the United Nations really controls America's Federal lands.

So I am wondering if perhaps some of those people are not behind some of the larger-than-life-proportion horror stories that are related to the ESA, and perhaps they are now trying to destroy America's faith in the Endangered Species Act. And I do not mean

that the Act is perfect, but I do not believe that we should be portraying the Endangered Species Act as being the source of all evil.

Tomorrow's hearing is yet another example of what I fear may be a trend or a conspiracy to portray it as all evil.

The fact of the matter is that the Endangered Species Act over the past 29 years has been responsible for keeping 99 percent of listed species from going extinct. And it is a fact that since the law was passed in 1973, of the 129 domestic species listed, 59 percent have been recovered or are improving or are in stable condition.

And when I look at my own congressional district in New River County, I see that there is the Peregrine falcon sightings that exist today because of the ESA. Our national symbol, the bald eagle, was almost extinct. I think it was it was Ben Franklin who proposed that our national symbol be some type of turkey. If not for the ESA, we might have had to revisit that question.

So there are countless examples of ESA success stories and our country is a better place for it. So as I said in the beginning, I am not here to suggest that the law is perfect, that it cannot be implemented better. I think, for example, more adequate appropriations to the Fish and Wildlife Service could go a long way toward addressing any concerns in that regard.

I have also offered to work with you, Mr. Chairman. I know you have been of the type that it is not "my way or the highway" position, and I appreciate that. And your staff has contacted mine about working on a proposal of mine, and I hope that we can continue to work together on this, and I appreciate that offer of yours to work together and I hope we can resolve our differences. Otherwise, I guess next week's markup will be a lively debate.

Thank you Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

The CHAIRMAN. The gentleman from Nebraska, Mr. Osborne.

STATEMENT OF THE HON. TOM OSBORNE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. OSBORNE. Thank you, Mr. Chairman, I appreciate the opportunity to testify. I certainly do not believe the Endangered Species Act is evil. However, I do believe that there are some significant changes that could occur that would benefit our whole country. You have mentioned some of the aberrations, and I believe they are aberrations: the Canadian lynx problem; the Klamath Basin in which $2,500-an-acre cropland was reduced to $35 an acre. We have all seen that the national Forest Service designated 920 million visitors a year ago, and there are actually only 209 million. And so as a result of some of these issues, I think there has been a loss of trust and a loss of credibility among some of the constituents that I have.

I would particularly like to discuss one issue that I think is of paramount importance to the State of Nebraska. This has to do with the endangered species listing of the whooping crane, which is certainly appropriate, because back in the 1970's there were less than 50 whooping cranes in existence and so the listing was absolutely necessary. In 1978, 56 miles of the central Platt River in

Nebraska was designated as critical habitat for the whooping crane, and therein began some of the difficulties.

Gary Lingle, who is a program director for the Whooping Crane Trust—and I would like to point out that the Whooping Crane Trust is an environmental group. Gary Lingle would be, I believe, on most counts labeled as someone who was an environmentalist or is an environmentalist. And so he wrote a commentary on March 22nd of 2000. This is what he said. He said:

"From 1970 through 1998, a total of 29 years, there are 11 years where there were no whooping cranes sighted at any time in the Platt River Valley." that is, 40 percent of the time, this so-called critical habitat had no whooping cranes at all.

He goes on to say this: "on the average, less than 1 percent of the population of whooping cranes was ever confirmed in the Platt Valley during that same timeframe." if something is critical habit, you would think that more than 1 percent of the whooping crane population would at some time visit that area.

Then he goes on to say this. He said: "I wonder if the Platt River would even be considered if the Fish and Wildlife Service was charged with designating critical habit today? Certainly, no one would be willing to state on a witness stand that the continued existence of the species would be in jeopardy if the Platt River were to disappear."

Again, this is a commentary based on the views of someone who worked primarily for an environmental organization for 15 years in the central Platt River.

Probably the most telling study that was done was a radio tracking survey that was done from 1981 through 1984. And during that period of time, there were 18 whooping cranes that were fitted with radio collars and they were tracked for 2-1/2 years. Three of those, three southbound migrations, two northbound migrations. Those 18 whooping cranes constituted roughly 20 to 25 percent of the total crane population existence at that time. The interesting thing was over that 2-1/2 years, at no time did any one of those 18 whooping cranes visit the Platt Valley.

Again, you would think that if that was critical habit they would have visited the Platt Valley at some point.

Fish and Wildlife has monitored the Platt River with two airplane flights a day over that so-called critical habitat area, and they have had some sightings. They are currently claiming as much as 2 or 3 percent of the whooping crane population visits the Platt. However, there is no way to determine if those are not multiple sightings. Many believe that they are.

So, at any rate, no matter how you slice it, there really is almost an insignificant number of whooping cranes that ever visit that critical habit, and most of the cranes that do only stay overnight. They do not mate there. They do not nest there. It is not a critical area.

So you may say, so what? Maybe they made an incorrect designation. What does that have to do with it? In order to comply with this critical habit designation, we have had to enter into a cooperative agreement between the States of Colorado, Wyoming, and Nebraska. It involves three States. And what they have had to do is to come up with some ways to meet the standards. And so

134,000 acre-feet of water are designated to an environmental account at the present time. And this water is mostly stored in Lake McConaughy in Nebraska. That, of course, is a significant loss of irrigation water. Nebraska has to contribute 100,000 acre-feet, Colorado 10,000 and Wyoming the remaining 20-some-thousand remaining acre-feet.

Also they have established endstream flows. Many biologists and people who knew something about the whooping crane said that 1,350 cubic feet per second at Grand Island would be adequate. The Fish and Wildlife said no, it would have to be 2,400 cubic feet per second, which most people say is way too deep for cranes to wade around in. So anyway, that water has to flow down the river in April and May. It is lost to irrigation. It cannot be recovered for any other purpose.

Also there are no new depletions, which means that since 1997, no one can drill a new well, no community can water from the Platt River Valley. So it has certainly restricted any type of new development in that area. The cost is estimated to be $146 million. And in 10 years, phase 2 will go into effect, which is 417,000 acre-feet, which happens to be the total of all the irrigation water in the Platt Valley.

So if we look at the Klamath Basin as a difficult situation, this is the same situation, only magnified many times over. We think this is a critical issue that needs to be looked at.

Also I might mention that we are now in a comment period on the critical habitat for piping plover. Again, Gary Lingle writes this in his report. He said: "That the central Platt does not offer any naturally occurring nesting habitat for these species, i.e. The piping plover and the least tern, is amply demonstrated by the fact that no tern or plover chicks were known to have fledged on any natural river sandbar during the entire decade of the 1990's." so for 10 years, there was no known fledgling or nesting activity on natural sandbars in the central Platt during that period of time. And yet they are going to designate, apparently, the central Platt and 430 other miles of river in the State of Nebraska as critical habit for the piping plover.

Now, the concern that we have is this: In 1985, the Fish and Wildlife said that critical habitat for the piping plover was ephemeral. Ephemeral means you cannot pin it down. It changes day to day, week to week. Sometimes there is a sandbar, sometimes there is one there. So they said at that point, we will not designate critical habitat for the piping plover or the least tern because it is ephemeral. 1985.

Now, today, they will designate 430-some miles of stream in Nebraska and thousands throughout Minnesota, North Dakota, South Dakota, and Montana. So that is certainly a change.

Last, let me mention this, Mr. Chairman. In the 1980's, EA engineering did a study about the piping plover on the Platt River. And generally speaking, the gold standard I believe for many groups is that you want to go back to the way it was before people got there. How was it before Lewis or Clark, or when Lewis and Clark saw it? How many buffalo? How many prairie dogs, and so on? So EA Engineering tried to determine what the piping plover and least tern population in the Platt River was in the 1800's.

In the early 1900's they can find no recorded data that indicates any evidence that piping plover or least tern were on the Platt River during those years. They said this is the reason why: The snowmelt off of the Rocky Mountains hits Nebraska in June, which causes flooding which wipes out all the nests. In August, the Platt River dries up, which means there is no habit for the young birds. Therefore, they said they do not believe and there is no record that there ever has been any habit for these birds. So the Kingsley dam was built in 1940, and after that time there did occur some habitat.

So if the standard was how was it originally, what we would have to say is that originally it does not appear that there were any piping plover and least terns on the Platt River.

Overall we feel this would be an erroneous designation. We feel because of the economic impact on the area, because the designation appears to be incorrect for the critical habitat, that we would like to see an independent peer review. We did not want to overthrow—we do not want to overturn the Endangered Species Act. We would like to simply see somebody evaluate and determine whether this is an accurate determination or not. It should not be Fish and Wildlife. It has to be an independent agency.

With that, I conclude my testimony, Mr. Chairman, and thank you for your time.

The CHAIRMAN. I thank you.

[The prepared statement of Mr. Osborne follows:]

Statement of The Honorable Tom Osborne, a Representative in Congress from the State of Nebraska

Mr. Chairman and Members of the Committee, I appreciate having the opportunity to testify today at this important hearing. I represent a very large rural area in Nebraska. Ninety-seven percent of this district is privately owned. Currently, landowners are very concerned about property rights and they are especially concerned about the Endangered Species Act because this Act can be tremendously invasive.

I believe there is a crisis of confidence among my constituents regarding the administration of the Endangered Species Act. I am going to mention just a few things that have happened that have led to this crisis of confidence. First, as you are well aware, the irrigation water for many farmers in the Klamath Basin was cut off abruptly, causing a great deal of financial hardship. There were two types of suckers in Klamath Lake, and coho salmon in the river below that were supposed to be protected by this action. As a result, the farmers lost their crops, some lost their farms, land values declined from $2,500 an acre to $35 per acre in that particular area. Oregon State University estimates that the loss of water cost the economy $134 million in that area. This was a tremendously costly and a very invasive situation.

Recently, the National Academy of Sciences, in an independent peer review, determined that there was insufficient data to justify the decision to shut off the irrigation water in the Klamath Basin. In other words, they said that this was something that should not have happened. Factors other than the lower levels in Klamath Lake were endangering the sucker fish. The National Academy of Sciences determined that the larger releases of water, the irrigation water that normally went down the irrigation canals, actually harmed the coho salmon because this water was warmer due to being held in the lake for a longer period of time. So the true result was the reverse of what they had tried to accomplish.

Second, more recently, in a congressional hearing, we heard from officials from the Fish and Wildlife Service and the Forest Service because seven employees of these agencies and a Washington State agency falsely planted Canadian lynx hair in the forests of Washington and Oregon. You might ask why in the world would somebody do this? Why would you go out and bother to take hair from a captive lynx and plant it in widespread areas? Apparently, this would result in a wider declaration of critical habitat for the Canadian lynx, which they felt in some way would help preserve the Canadian lynx.

Obviously, it was a falsehood and, according to testimony, others within government agencies were aware of the planted lynx hair and did not report it. The interesting thing was that after all of this happened, the guilty parties were subjected to counseling as a punishment, and most of them received their year-end bonuses and raises. What kind of a message are we sending if somebody falsifies data and yet practically no consequences occur as a result of that falsification?

Furthermore, the National Park Service recently indicated some false and inflated numbers of visitors. While 209 million people actually visited our national forests, they reported 920 million visitors, which was roughly a 400 percent increase. Why in the world would an agency do this? They certainly can count better than this. Some would assume that this had something to do with the fact that they wanted to point out overcrowding, and that maybe some more roads or some more areas of the parks needed to be restricted to visitors because of overcrowding.

Recently here in Washington, D.C., the Environmental Protection Agency gave the Corps of Engineers permission to dump thousands of tons of sludge into the Potomac River. Of course you would think that this was in direct violation of the Endangered Species Act because the short-nosed sturgeon occupies the Potomac River and it is endangered. Why would they do this? How in the world could you get by with this when out in the West you cannot do these things? It has caused beavers and ducks to be mucked up to the point where they have had a hard time surviving. It appears that if these tons of sludge are not pumped into the Potomac River, they would have to be put in dump trucks and trucked through the city of Washington, D.C., which is not real politically popular in this area.

Not surprisingly, this results in people in rural areas having the feeling that maybe there is a double standard and maybe people in some urban areas, because of the size of the population and the economic impact, do not pay quite the same price. This is a serious concern for my constituents.

An issue that is critical to the future of rural Nebraska involves the Central Platte River in the State of Nebraska. In 1978, 56 miles of the Central Platte were declared critical habitat for the whooping crane. At that time, there were not very many whooping cranes, probably less than 50, so they were listed as an endangered species and rightly so. They are now doing better. There are roughly 175 whooping cranes that generally fly through Nebraska today.

However, as a result of that designation, some things occurred. As a result, in order to protect critical habitat for the whooping crane, the Platte River Cooperative Agreement began to take shape. In-stream flows have been proposed for the Platte River, including 2,400 cubic feet per second of water in the critical habitat area in the spring. Interestingly, the original recommendation by many biologists was not 2,400 cubic feet per second, but 1,300 cubic feet per second. By tweaking it one way or another, the Fish and Wildlife Service almost doubled the flow and the amount of water that goes down the river. They want 1,200 cubic feet per second during the summer, and they want pulse flows of 12,000 to 16,000 cubic feet per second for 5 days in May and June of wet years. This is a huge amount of water in the Platte River, and it results in some flooding. The main issue here is that it deepens the channels in the river when you have these large pulse flows, and then how do you compensate for the loss of sediment in the river?

The problem with those pulse flows is as follows: the 12,000 to 16,000 cubic feet per second will deepen the channel in the river and will remove sediment. As part of its contribution to the Cooperative Agreement, Nebraska is being asked to contribute 100,000 acre feet of water, stored in Lake McConaughy; which will be distributed down the Platte River when people feel the cranes might need it. Wyoming contributes 34,000 acre feet of water and Colorado 10,000 acre feet of water, so the total contribution is 140,000 acre feet of water. This is a fairly expensive premise.

In addition, no new depletions are allowed in the Platte River basin. So we not only have these flow limits, but within 3 to 4 miles of either side of the Platte River, my constituents have not been able to establish a new well since 1997. This limits the expansion of communities, businesses, and farms.

The sediment that is lost in the river from the large pulse flows has to be replaced. At one time, there was a proposal to haul in 100 dump truckloads of sediment per day, and this would go on for years and years. You can imagine the cost of doing this. This was supposed to replace the sediment that these large pulse flows removed from the river. This proposal has been abandoned, but now the Federal agencies involved are reportedly talking about taking bulldozers and pushing islands into the river to cause more sediment. This is a very invasive and expensive process. The above plan is only Phase 1.

After 10 years, Phase 2 kicks in, and requires 417,000 acre feet of water, which about triples the amount of water required. This would be practically all of the irrigation water used in the Platte River system. Nebraska's farmers and ranchers are

rightly concerned that at some point the Endangered Species Act could be used in a way that would cut off all irrigation up and down the Platte River, which is several hundred miles long, and could make the Klamath Basin situation pale by comparison.

For the water to get to the beginning of the habitat area, which is 100 miles downstream from Lake McConaughy, it takes 5 days. It takes 7 days to get to the lower end of the habitat. Water is being released out of Lake McConaughy to control the flow. Rain often swells the river in those 5 days, resulting in much higher flows in the Platte River those required under the Cooperative Agreement. It does not seem possible to accurately regulate in-stream flows when the supply source, Lake McConaughy, is so far from the critical habitat area.

The current estimated cost of planning the Cooperative Agreement is $160 million. That is just to create the agreement. It is a small cost compared to the cost of the lost irrigation water, the lost power, and the sediment dumping.

Many people believe that the Cooperative Agreement has been time-consuming, expensive and burdensome to landowners. However, the aspect that is even more important is that the need for the Cooperative Agreement appears to be based on a false premise. The false premise is that the 56-mile stretch of the Platte River is critical for the existence of the whooping crane.

The area from Lexington to near Grand Island is the critical habitat for the whooping crane. Because the purpose of a critical habitat designation is to protect habitat whose removal or damage would further endanger the species, one would assume that this would be an area that would really be critical to the migration of the whooping cranes as they go north and south.

However, Gary Lingle, who served as the watershed program director for an environmental group called the Whooping Crane Trust for 17 years, filed comments on March 22, 2000, with the Fish and Wildlife Service. The comments state: "From 1970 through 1998, that is a total of 29 years, 11 years there were no whooping cranes." Almost 40 percent of the time, no whooping cranes were sighted at any point in this stretch of river, which is supposedly critical habitat. If this habitat is truly critical, it does not seem likely that no whooping cranes would be observed in 40 percent of the years.

The comments go on to say: "On average, less than 1 percent of the population of whooping cranes was ever confirmed in the Platte Valley during that same time frame." Again, if it is critical habitat, one would think that a higher percentage of cranes would be observed. But only 1 percent or less has been seen in that region of the river over 29 years, according to his comments.

The most convincing evidence that I have encountered that this segment of the Platte River is not critical habitat is that from 1981 to 1984, there was a radio-tracking study of 18 whooping cranes using electronic tracking devices. This study was conducted on three southern migrations and two northern migrations. Eighteen cranes at that time represented somewhere between 15 and 20 percent of the total whooping crane population. This research determined that none of those 18 whooping cranes used the Platte River at any time during the study.

Surely if this is critical habitat for the whooping crane, at least some of those cranes would have regularly used the river, but yet not one of them did over that 2-1/2 years. This was not a case where they could slip into the area under the radar screen. They were monitored electronically, so researchers knew their whereabouts at all times. They were simply not in that area of the river.

The Whooping Crane Trust comments go on to say: "I wonder if the Platte River would even be considered if the Fish and Wildlife Service was charged with designating critical habitat today. Whooping crane experts that I have visited would be hard-pressed to consider the Platte River, given our current state of knowledge."

The comments also say: "Certainly none would be willing to state on a witness stand that the continued existence of the species would be in jeopardy if the Platte River were to disappear." If this area of the Platte River for some reason went away, he does not know of any experts who would say that would harm the whooping crane. Yet this area is designated as critical habitat, which has caused all of the proposed in-stream flow regulations, the proposed 140,000 acre feet of water and the proposed sediment dumping into the Platte River to compensate for pulse flows. All who live in the Platte River valley will be potentially impacted in some way by what appears to be an erroneous designation.

When whooping cranes pass through Nebraska, a scattergram of where they stop is developed. The cranes travel through most of the state, and normally stay overnight. If this is critical habitat, they would stay for several days, a week, a month to regroup and mate; but they do not. Their stay in Nebraska is brief and, for the most part, random.

However, this central part of the Platte River is truly critical habitat for a group of cranes, called the Sand Hill cranes. There are roughly 400,000 to 500,000 Sand Hill cranes that come into that area, and they spend 2 to 4 weeks every year. They come from Arizona, Texas, Oklahoma, Arkansas and Louisiana. They funnel into this area, and are heavily concentrated. They later go to their nesting grounds in Canada and North Dakota.

It is possible that early on the Fish and Wildlife Service and others made an honest mistake. They could have assumed that the whooping crane has the same pattern as the Sand Hill crane, and that the whooping crane really needed this area to stage, to mate, to gain strength for the rest of their trip. But this is not the case.

One whooping crane was apparently imprinted with the Sand Hill cranes. It has even been named "Oklahoma." This particular crane flies with the Sand Hill cranes, and stays around for 3 or 4 weeks like the other Sand Hill cranes, because he apparently thinks he is a Sand Hill crane. One wonders how many of the sightings in the area have been of Oklahoma. He may have been sighted many times and counted accordingly.

The Fish and Wildlife Service is doing everything it can to make the habitat fit the whooping crane. Twice a day they fly the river looking for whooping cranes. If you look hard enough, you may find something. But, still, only 1 to 2 percent of the whooping cranes are spotted in that area as they come north or as they go south.

Additionally, the Fish and Wildlife Service is expected to declare 450 miles of the Platte River, the Loup River, and the Niobrara River as critical habitat for the piping plover and the least tern. Ninety-seven percent of these rivers flow through private land. Many of the same issues that apply to the whooping crane apply to the designation of critical habitat for these species.

The Whooping Crane Trust's comments also address the piping plover and the least tern. "[T]hat the Central Platte does not offer any naturally occurring nesting habitat for these species, i.e., the piping plover and least tern, is amply demonstrated by the fact that no tern or plover chicks were known to fledge on any natural river sandbar during the entire decade of the 1990s."

For some reason, the sand pits and the lakes and the other areas where the piping plover and the least tern have been successfully fledgling have not been declared as critical habitat only the rivers. This is a puzzle, at least to me.

The Whooping Crane Trust's comments go on to say: "This begs the question as to whether it is in the best interests of the species' long term well-being to attract them to an area where they are likely to be flooded or eaten by predators." This is the likely result because as the river is adjusted in the spring to hold down the flows, the birds nest on the sandbars in the river. Over the next 50 or 60 days, it is likely that the birds are going to get flooded out. The apparent intent of the proposed critical habitat is to attract them into an area that probably is going to result in their destruction. They would be much better off if they went to a sand pit or lake where they are not going to be flooded out by fluctuating river flows. The programs intended to save the piping plover and the least tern may actually contribute to their demise.

A study done by EA Engineering in the late 1980s indicated that the Central Platte did not play a significant role in the maintenance of the least tern or the piping plover prior to the construction of Kingsley Dam in 1941. According to the study, there are several reasons for this. The first is that as the river ran unimpeded; the snow pack melted; and the highest water would occur in June, which was the peak nesting time for the piping plover and least tern. The birds were wiped out because that water rose and washed out the nests that are built near the water level. In August, the Platte River would usually dry up. Most years there would not be any water in the river, which meant essentially that there was no feed or habitat for the young birds if they did manage to survive. Lastly, there was no historical data of tern or plover sightings on the Central Platte at all during the late 1800s and the early 1900s. The logical conclusion must be that this is not critical habitat that is indigenous to the species. If it is habitat at all, it is due to the creation of the dam. But even then, it has not been effective.

Because of these questions, I have requested the Secretary of the Interior to provide an independent peer review by the National Academy of Sciences of the science used in making these decisions. It is my understanding that the three states involved in the Cooperative Agreement, Colorado, Nebraska, and Wyoming, are now interested in having a National Academy of Sciences study completed prior to moving forward with the Cooperative Agreement. These states would also like assurances that the data used by the Fish and Wildlife Service is accurate. I know that Secretary Norton is dedicated to making decisions based on accurate data. I have talked to her, and I believe that she is committed to sound science.

It is important that those listening do not assume that I oppose endangered species. I enjoy wildlife and certainly do not want to see the whooping crane, the piping plover, or the least tern eliminated. It is important to remember that sometimes the Endangered Species Act may not only negatively impact farmers and ranchers, it may actually harm the species, as was the case with the coho salmon in Klamath Falls. I think it is only fair to say this, too. Certainly the great majority of Federal employees who work with endangered species are ethical and hard-working. I have met them and have worked with them. Unfortunately, it appears that an end-justifies-the-means mentality has become more and more pervasive. The absolute authority granted by the Endangered Species Act has given license, I believe, to rather serious abuses.

For those reasons, legislation like H.R. 4840 is important to the true protection of endangered species. The Chairman's bill will require that the Secretary of the Interior set standards for the scientific and commercial data that is used to take actions under the Endangered Species Act. The bill also will give greater weight to data that has been field-tested or peer-reviewed, which is very important to my constituents who have lost faith in the process. The insertion of sound science into the Endangered Species Act will only serve to enhance the protection of these species by proving to people throughout the country that the species in question truly needs to be protected. I thank the Chairman for his efforts and the opportunity to testify here today.

The CHAIRMAN. As you folks have noticed, we have a vote on. We have a 15-minute vote, and then two 5-minute votes following that. So what do you want to do?

Mr. RAHALL. We are being pretty loaded on the floor with votes, Mr. Chairman.

The CHAIRMAN. First, I will recognize the gentleman for a unanimous consent.

Mr. RAHALL. I ask unanimous consent that all Members on my side of the aisle be allowed to put statements in the record, and Mr. DeFazio to follow immediately.

The CHAIRMAN. Without objection, so ordered.

[The prepared statement of Mr. DeFazio follows:]

Statement of The Honorable Peter DeFazio, a Representative in Congress from the State of Oregon

I have been a strong advocate for Endangered Species Act (ESA) reform since the bill expired in 1992. I sincerely believe that we can make changes to the ESA that make it work better for individuals and communities impacted by management decisions made due to the ESA, and for species we are trying to recover.

In 1995, I favored ESA reforms that would help both communities and endangered species. The bill I supported would have maintained the core principles of the ESA, but could have prevented the fish versus people situation that we saw in the Klamath Basin last year. The reforms would have involved the state in any proposed species listing. It would have allowed the state to propose a Habitat Conservation Plan or other long term recovery strategy to prevent a listing. It would have also required Federal agencies to weigh social and economic impacts prior to listing a species. Unfortunately, the moderate, bi-partisan reforms I supported were rejected. Instead, a virtual repeal of the ESA, by Representative Pombo, was pushed through the Committee. Fortunately, the Majority's approach to reforming the ESA was rejected by the Republican leadership and never allowed to reach the House floor. I hope that is not the direction the Committee takes this time around.

I wholeheartedly support making sure management decisions are based on sound science. I don't think anyone wants to see ESA decisions being made based on science that is faulty or inaccurate; especially when the impacts of those decisions can have devastating social and economic impacts on local communities.

At the same time, we must allow scientists within our Federal agencies to do their job, and give them the resources to do it well. They must be allowed to use all the tools available to them, such as modeling, in an effort to make good decisions based upon available data. In addition, simply requiring more and better science of agencies that are severely underfunded will lead to worse science and therefore worse management decisions not better. Through stringent peer review of some key man-

agement decisions, and the science that informs them, we can move a long way toward weeding out seemingly arbitrary or capricious management decisions. I believe this can be done without drastic reforms that will undermine the ESA.

I hope the Committee recognizes that a better ESA can result from working together on a bi-partisan solution in the push for sound science. I am certainly willing to work with my colleagues on both sides of the aisle to ensure that the best science possible is used in making ESA decisions.

The CHAIRMAN. The gentlewoman from Wyoming is next.

This is kind of important stuff. I would appreciate your coming back at the conclusion of the gentlewoman's comment.

STATEMENT OF THE HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mrs. CUBIN. Thank you, Mr. Chairman. I would like to respond to Mr. Rahall's comments before I start my formal remarks.

First of all, I do not accept that there are countless success stories in the Endangered Species Act, especially when you consider the costs to the State and the cost to private individuals due to their inability to use their land to make their living. But I accept that there are some. And I think what we need to do is we need to find out, as you said, Mr. Rahall, what the facts actually are and what is exaggerated and what is not exaggerated.

Another remark that was made is 99 percent of listed species have been prevented from going extinct. We need to look at what is an endangered species. The wolf was put back in Yellowstone under the Endangered Species Act. There are 60 to 70,000 Canadian gray wolves alive and well on the North American Continent, but they live in Canada. Because there is an imaginary circle drawn by Bruce Babbitt around Yellowstone National Park, it was determined that the gray wolf was endangered, even though 60- to 70,000 were alive. That is another thing. I do not consider that a success story for saving the gray wolf from extinction. So there is another area that we need to look at.

There is one thing that binds most of us together who live in the West, it is the Endangered Species Act. While I could testify on how this law does not work or how it is only enforced in the rural West, which we know when we look at the Woodrow Wilson Bridge being built out here, or about how many billions of dollars that it has cost those who live near our public lands. That is not the purpose of our testimony today. Today I wish to share a textbook case which highlights why passage of H.R. 4840, the Sound Science for Endangered Species Planning Act of 2002, and peer-reviewed science, is so vital to achieve fair and just enforcement of the ESA.

On May 13, 1998, the Preble's meadow jumping mouse was designated as threatened in Wyoming and Colorado. Later, in March 2001, the Fish and Wildlife Service reached an out-of-court settlement with Biodiversity Associates, a quasi-local environmental group, to set aside critical habitat for the Preble's meadow jumping mouse.

I have to add as an aside that the State of Wyoming has continually been thwarted when trying to determine just how the science was done to make these determinations, such that the State was forced to file a Freedom of Information Act request.

At any rate, this action affects over 19 areas in southern Wyoming and thousands of square miles in Wyoming and Colorado. According to the Fish and Wildlife Service, these recovery areas were chosen through three different methods, and this really is important:

First, a trapper who was holding a live mouse looked at it and said, it looks like a Preble's or a subspecies of the Preble's mouse. Very few of these eyeball judgments were recorded by a photograph. No pictures, just a judgment by a trapper looking.

Second, the trapper took hole punches, the size of a pen tip, from the mouse's ear for a DNA sample. These samples were proven to be inconclusive in showing that the mice are Preble's meadow jumping mice.

Third, a mouse died, or was killed, and the skull was used in morphology studies, along with comparison to other skulls held in museums, to measure within one-hundredth of a millimeter to determine if the sample skull was a subspecies of the mouse. These, too, have proven inconclusive to those who reviewed the work.

Each time one method gets discredited, a new ineffective method crops up. Many times during the Preble's recovery team meeting, several different well-respected scientists and statisticians from across the country have shown that these approaches were totally ineffective. However, the shoddy science collected by the Fish and Wildlife still stands, and folks are still going to lose some of the beneficial use of their private lands to recover a jumping mouse, who no one has yet shown to ever have existed in Wyoming.

Is it unreasonable to ask that a law require a sound scientific basis before restrictions are placed on thousands of acres?

Further, in many instances private property owners, with good reason, did not allow Fish and Wildlife Service onto their property for a survey. These landowners were concerned that the use of their private land to support their families would play second fiddle to the recovery of a jumping mouse that has not been proven to ever have existed in Wyoming. They were justified in their concerns, and I do not blame them.

I have been told that some of these private lands were designated through drive-by surveys—that people did not even get out and look at the ground—and aerial photos.

These are real people who have real concerns, and I request sound science be the basis for the enforcement of ESA, not eyeballing mice for an identification that even DNA samples cannot prove conclusively.

I request that Federal agencies cooperate with the States involved and not hide the data from the States to make these determinations. It is an unfortunate day when the science used to restrict public and private land is so sloppy that it must be hidden out of the fear that it will be exposed for what it is.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

[The prepared statement of Mrs. Cubin follows:]

Statement of The Honorable Barbara Cubin, a Representative in Congress from the State of Wyoming

I thank the Committee for the opportunity to testify today.

If there is one thing that binds those of us who live in the West together, it is the Endangered Species Act. While I could certainly testify on why this law does not work, or how it is only enforced in the rural west, or about the many billions of dollars it has cost those who live near our public lands, that is not my purpose today.

Today I wish to share a text book case which highlights why passage of H.R. 4840, the Sound Science for Endangered Species Planning Act of 2002, and peer reviewed science, is so vital to achieve fair and just enforcement of ESA.

On May 13, 1998, the Preble's meadow jumping mouse was designated as "Threatened" in Wyoming and Colorado areas. Later, in March 2001, the Fish and Wildlife Service reached an out-of-court settlement with Biodiversity Associates, a quasi-local environmental group, to set aside "Critical Habitat" for the Preble's meadow jumping mouse.

I might add as an aside that the state of Wyoming has continually been thwarted when trying to determine just how the science was done in these determinations, such that the State was forced to file a Freedom of Information Act request.

At any rate, this action affects over 19 areas in southern Wyoming and thousands of square miles in Wyoming and Colorado. According to the Fish and Wildlife Service, these recovery areas were chosen through three different methods:

First, a trapper, holding a live mouse, looked at it and said the mouse looks like a Preble's or a subspecies of the Preble's. A very few of these "eye ball judgements" were recorded by photograph.

Second, the trapper took hole punches, the size of a pen tip, from the mouse's ear for a DNA sample. These have proven to be inconclusive in showing these mice are Preble's meadows jumping mice.

Third, a mouse died or was killed and the skull was used in a morphology study, along with comparison to other skulls held in museums, to measure to the one-hundredth millimeter to determine if the sample skull was a sub-species. These too have proven inconclusive to those who review the work.

Each time one method gets discredited, a new ineffective method pops up. Many times during Preble's Recovery Team meetings several different well respected scientists and statisticians from across the country have shown these approaches ineffective.

However, the shoddy science collected by the Fish and Wildlife still stands, and folks are still going to lose some of the beneficial use of their private lands, to recover a jumping mouse who no one has yet shown to ever exist in Wyoming. Is it unreasonable to ask that law require a sound scientific basis before restrictions are placed on thousands of acres?

Further, in many instances private property owners, with good reason, did not allow the Fish and Wildlife Service onto their property for a survey.

These land owners were concerned that the use of their private land to support their families would play second fiddle to the recovery of the jumping mouse that has NOT been proven to ever have existed in Wyoming!

They were justified in their concerns. I'm told some of these private lands were designated through "drive by" surveys or aerial photos.

These are real people, who have real concerns. I request that sound science be the basis for enforcement of ESA, not "eyeballing" mice for an identification that even DNA samples cannot prove conclusively. I request that Federal agencies cooperate with the States involved, and not hide the data used to make determinations.

It is an unfortunate day when the science used to restrict public and private land is so sloppy that it must be hidden out of fear that it will be exposed for what it is.

The CHAIRMAN. We will stand in recess. I urge members to come back.

[Recess.]

The CHAIRMAN. The Committee will come to order.

The last person to testify, I believe, was Mrs. Cubin from Wyoming. I do not see anybody on the Minority side. So next in line was Mr. Rehberg.

STATEMENT OF THE HON. DENNIS R. REHBERG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

Mr. REHBERG. Thank you, Mr. Chairman. I appreciate the opportunity to commend you, Mr. Chairman, for the introduction in the hearings of this opportunity on 4840. I spoke to a group of students this morning, and when asked how I got into politics, I told the story that my great grandfather created the Milk Control Board in Montana. My grandfather served on the Milk Control Board, and my dad sued them.

That is just what the Endangered Species Act reminds me of. By the way, when I was Lieutenant Governor, we eliminated it, so it took four generations to get back to where we should have been in the first place.

When the Endangered Species Act was created, it had a good motive, and the motive was try to save plants and animals. None of us disagree with the premise behind the Endangered Species Act. But I have to tell you when you have bumper stickers in the State of Montana that say, "Shoot, shovel and shut up," something is not working.

You have created an opportunity within the U.S. Congress and the court system where we are more litigation-driven than we are driven by creating the incentives to do the right thing. And so, while I hold some optimism over the legislation in front of us, sometimes I worry that perhaps we do not own the term "reform" when we talk about tax reform. There is good tax reform and bad tax reform. When we introduce legislation that has sound science and peer-review Committees, I worry that sometimes by establishing a standard such as "sound science," that we do not own that term either, and we may not like the sound science that some of our colleagues on either side of the aisle might implement to determine what an endangered species is or what a critical habitat may be.

I had an opportunity to travel to Nebraska on behalf of the Committee and have an endangered species hearing with Congressman Osborne. And with due respect to our colleague from West Virginia, maybe this Committee and some of the members on this Committee need to get out more and travel around the country, because they will find that emotions have not cooled when we are talking about endangered species.

When people in Washington, D.C. are considering listing the prairie dog as an endangered species, I would like to take them out to my ranch and show them four towns that have entirely decimated the grasses on that ranch. I would like to take them down to Nebraska, where we were, and show them the habitat of the crane that has never existed, but they want to make a determination that it is a critical habit.

And so I do not know if I hold out a lot of optimism that even this legislation will have the desired effects that we would like it to. I commend you for introducing it, getting the debate underway. I thank the Chairman for appointing me to the ad hoc Committee that you did to try and solve the issue. It was a bipartisan coalition of unlike-minded people. It took us 2 months to decide where to meet and when, so that will tell you how contentious the issue is.

But I came to the conclusion during these meetings that we all look at the Endangered Species Act from a different perspective. And while those that represented urban areas served on the Committee with their own desire to try to get back to something that was in the past, those of us who represent constituencies like mine in the State of Montana look at the Endangered Species Act as sometimes not being enforced consistently.

In Montana, I frequently use the example that the good guys are finally suing the urbanites over the Wilson Bridge and the aqueduct along the Potomac. Despite the fact that there is an endangered species being impacted within the Potomac, it seems like that project carries forwards. And yet if we have a project that we want to consider in Montana, the project cannot move forward, and so the law is being enforced inconsistently.

I hope these types of legislative proposals will allow us the opportunity to bring some sense back to the Endangered Species Act, and for that I commend you, Mr. Chairman, and wholeheartedly support your bill. Thank you.

The CHAIRMAN. I thank the gentleman from Montana.

[The prepared statement of Mr. Rehberg follows:]

Statement of The Honorable Dennis R. Rehberg, a Representative in Congress from the State of Montana

Mr. Chairman, I commend you for holding this hearing on your legislation, H.R. 4840, which amends and reforms the Endangered Species Act to ensure the use of ""sound science"" in its implementation.

The ESA as it stands is flawed in several respects:

- it is driven not by sound science but by litigation;
- it focuses on undeveloped land while discouraging positive management techniques to increase species populations;
- it inflicts human, economic, and social costs with little or no evidence of success in the recovery of endangered species; and
- it imposes undue financial and regulatory burdens on landowners when valuable resources are found on their property.

It is time we do something more than discuss existing endangered species laws, regulations, and policies and complain about the problems and hardships they impose.

It is time to, instead, address these issues and come up with real world solutions. It is time to take a hard look at the Act and offer suggestions and solutions to the unique challenges of ESA implementation.

The ESA itself gives little guidance as to what information or ""science""—these scientists and wildlife biologists need to consider before justifying a species" inclusion on the list. This leaves an enormous amount of discretion to those gathering information.

However, H.R. 4840 addresses a major problem with the ESA—the fact that it lacks definitions as to what constitutes the ""best"" science. The ""best"" science is that which is collected by established standards or protocols and analyzed in the manner most appropriate. The ""best"" science is not necessarily the science that ""proves"" what one wants it to approve. That is simply the most ""convenient"" science.

H.R. 4840 streamlines the scientific process involved and creates an avenue to allow the BEST science to serve as the basis of endangered species decisions, as opposed to the ""most convenient"" science.

In Montana, the overreaching effects of the ESA affect Montanans on a daily basis. Foresters are precluded from harvesting timber because of possible implications on a species; ranchers fear for their herds because of wolves. But before any of that, scientists must determine whether a species deserves to be ""listed"" as endangered or threatened.

It is imperative that everyone reads off the same page. We need consistency in the Endangered Species Act, from scientific basis to enforcement of the law, but enforcement is another discussion for another day.

In general, the ESA needs to be reformed. This legislation is the first step towards resolving the bureaucratic nightmare of policies and regulations and the multitudinous litigation associated with the Act. I look forward to hearing testimony on this aspect of ESA reform.

The CHAIRMAN. The gentleman from Tennessee.

STATEMENT OF THE HON. JOHN J. DUNCAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. DUNCAN. Thank you very much, Mr. Chairman. I thank you for calling these hearings.

This is a very important issue. And some people are surprised to learn that my home State of Tennessee has the fourth-highest number of endangered species or candidates for the endangered species list. And the U.S. Supreme Court case mentioned in the briefing paper over the Tellico dam is a case that came out of my district. The construction of the Tellico dam in Tennessee was held up for years because of something called the snail darter that supposedly was endangered. And then, after we added many millions of dollars to the costs, and delays and so forth, probably several hundred million more than what that dam cost than what it should have, they found snail darters all over the whole country.

And when you use the Endangered Species Act to tell farmers and ranchers and other property owners that they cannot use their property in the way that they wanted to, you take away an important element of the freedom that people have always valued so highly in this country, so you have a less free Nation, and I think that is an important consideration.

And when you tell people that they cannot develop but just a small portion of their property, then you jam people closer together in smaller and smaller areas and you drive up the costs for homes and other things, and the costs of building projects, and those costs have to be passed on. And so who gets hurt by that? Not wealthy environmentalists, but the poor and lower-income and now the middle-income type people.

The Washington Times in the mid-1990's ran an editorial that said this: "the Federal Endangered Species Program is out of control. Expenditures identified in recovery plans grossly understate the actual costs of recovery, because many tasks called for in the plans do not include cost estimates, and none of the costs imposed on the private sector are included. The government has no idea of the true cost of the Endangered Species Program. Though unmeasured, the cost of implementing the Act as currently written are in the multibillions. Yet, in over 20 years, not a single endangered species has legitimately been recovered and delisted as a result of the Endangered Species Act."

They gave examples of—at that time, the Fish and Wildlife was trying to spend, that year, $70.2 million to help the blunt-nosed leopard lizard recovery, $85.9 million for the loggerhead turtle, $53.5 million on the Black-capped Vireo, $29 million on the Swamp Pink, whatever that is.

One gentleman said earlier something about a conspiracy. Nobody is saying this is a conspiracy. And they talked about

helicopters and the U.N. and things that were totally off base, I think. When people cannot argue something on the merits, they sometimes get into childish sarcasm or name calling, and I am not saying that is what the gentleman intended to do. I do not think he intended that at all. But we need to talk about the merits of this legislation, and there need to be some changes to the Endangered Species Act if it is to do what it was intended. But we also are still going to balance that with the needs and desires of a free country.

Thank you very much, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

The CHAIRMAN. The gentleman from Nevada.

STATEMENT OF THE HON. JIM GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEVADA

Mr. GIBBONS. Thank you, Mr. Chairman. I too want to join and applaud you for your leadership for bringing this critically important issue before this Committee.

As I have explained to this Committee on many occasions, those of us west of the Mississippi are in desperate need of some real reform on the Endangered Species Act in its application to the purpose of what it was created for. And if we fail to implement some of these commonsense changes to the ESA or the Endangered Species Act, the Act itself will become endangered.

I think that is one of the critical reasons we are here today, Mr. Chairman, is to try to put some common sense back into it. Too often local ranchers, farmers, and State and county governments are finding themselves and their scientific data overruled by the emotion of the U.S. Fish and Wildlife Service, and who are often guided in their decisions by well-funded and emotionally driven environmental groups on some of these issues.

My colleagues, the abuses of the ESA and the reasons we are exploring this effort to reform the act, occur because the preservation of our wildlife is an issue driven too often by emotion and not enough by good, sound science that is going to be to the benefit of the species that it is intended to preserve.

I would like to commend you, Mr. Hansen, for holding this hearing and for your bold efforts on this issue. And I want to thank the Chairman for also allowing me the opportunity to take this issue back to my home State of Nevada, and on July 27 we are going to hold a Full Committee hearing in Elko, Nevada on the controversial listing of the bull trout in the Jarbidge River in Elko County, Nevada.

In this particular instance, let me explain, the Nevada Department of Fish and Wildlife had nearly 20 years' of scientific data recommending that the bull trout not be listed, because there was no threat to the population data of that species that they studied in that river, in that area, for nearly—more than two decades. And that information and that data was completely ignored and thrown out.

And in testimony, the U.S. Fish and Wildlife Service admitted they had not studied the issue, they had no data on the fish, but they were going on an emotional recommendation to list the bull trout. They threw out the scientific data by the State, the State bi-

ologists, and listed the bull trout as an endangered species. And this action was motivated by a petition drive of a special interest group, Trout Unlimited, not in an effort to save the bull trout, but in an effort to close an access road to the upper parts of the river by this organization. So they used the Endangered Species Act, without science, to accomplish a purpose that had nothing to do with the saving of the bull trout.

That is the kind of abuse and misuse of this Act that occurs in the West, and this is why we need to support H.R. 4840. Again, I want to thank the Chairman for granting the opportunity to have a hearing in Elko, I certainly would welcome any of the members of this Committee out to the Second Congressional District of Nevada. I think you will find Elko to be much more accommodating than even Washington, D.C., and I hope we can continue to highlight the importance of this effort across the country, and I would hope that my colleagues will join me in Elko on the 27th.

Thank you, Mr. Chairman, for this opportunity. I appreciate the opportunity.

The CHAIRMAN. When did you say it was? The 27th?

Mr. GIBBONS. July 27. Let me repeat that. July 27 at 10 a.m. In Nevada.

The CHAIRMAN. If it was Wendover, we probably all be there.

Mr. GIBBONS. It is actually about 3 hours to the west of Wendover.

The CHAIRMAN. The gentleman from the State of Washington, Mr. Inslee.

STATEMENT OF THE HON. JAY INSLEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. INSLEE. Thank you, Mr. Chairman. I guess the only observation I would like to make is I just wonder what people, 200, 300, 400 years from now, will be looking at if somehow the Archives—somebody pulls open the Congressional Record 3- or 400 years from now and sort of looks at our discussion about the Endangered Species Act and sort of asks, did our generation save too many species or did we save too few? And I kind of think the way things are going, that they would conclude that we did not save enough of them because the science is pretty compelling that we are having a rate of extinction that is pretty compelling, that we will have a rate of extinction that is extraordinary for the last 10,000 years.

I do not know that I will be able to collect on a dollar bet on that, Mr. Chairman, because we will probably not be around then, but I will bet they will conclude we did not save enough. And I am not sure this bill heads in that direction, but as always I appreciate the discussion.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The CHAIRMAN. The gentleman from Arizona, Mr. Flake.

STATEMENT OF THE HON. JEFF FLAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. FLAKE. I too commend the Chairman for bringing this legislation forward. Most of what I want to say has been said more articulately by Mr. Rehberg, so I will not go on. But Arizona has

many issues here. For example, our series of reservoirs are drawn down substantially now. Roosevelt Lake, the largest of the reservoirs, is down to about 20 percent of capacity. The problem is, in the meantime in the drawdown area, the willow fly catcher has nested, and now when we receive some much-anticipated rain, if it comes, we cannot fill it. We cannot fill it unless we charge the ratepayers substantial amounts, in the millions and millions of dollars, to purchase alternative habit elsewhere or go through other extreme measures.

So we do need to inject a bit of common sense here again, and for that I commend the Chairman for bringing this bill forward.

[The prepared statement of Mr. Flake follows:]

Statement of The Honorable Jeff Flake, a Representative in Congress from the State of Arizona

Dam construction has been halted in Maine; interstate highways have been diverted in Mississippi; on military bases and lands, everything from bombing range practice to amphibious landings has been curtailed, restricted, or cancelled. It has been used to restrict the use of private land for farming, ranching and development. Called by many the single most powerful law ever passed, the source of this land-use control is the Endangered Species Act (ESA). I believe the Endangered Species Act needs to be reformed and it needs to be done this year.

My home state of Arizona is addressing its own concerns with the ESA as we speak. Roosevelt Lake, a reservoir of the Salt River Project (SRP), provides 1.6 million people in the cities of Phoenix, Mesa, Chandler, Tempe, Glendale, Gilbert, Scottsdale, Tolleson and Avondale with water. The endangered Southwestern willow flycatcher breeds in large numbers within the draw-down zone of Roosevelt Lake. After an extended period of drought, the capacity of Roosevelt Lake is at 20 percent. When the rainy season arrives, and the reservoir fills, the current habitat of about 250 flycatchers will be submerged, thus causing a violation of the ESA.

The Salt River Project has been proactively planning for such a time. SRP, through research and experience, estimates that to mitigate that loss and to develop habitat, either above the water line at Roosevelt Lake or elsewhere, will cost between 10 and 20 million dollars. The flycatcher spends its winters in the tropics of Central America. Currently we are uncertain whether it is the loss of this breeding habitat that may be causing the species to decline. Either way, the enormous cost of addressing its Roosevelt Lake habitat will be passed along to the water and power users of Phoenix and other nearby cities.

As SRP plans to address its endangered species situation and we look to modifying the act, Zimbabwe, Namibia and South Africa have experimented in private wildlife management that might serve as a lesson to us. Tsessebe, a type of African antelope, were once threatened throughout Zimbabwe. They have been able to recover on private ranches thanks to changes in the law that granted private landowners full control over their land and the wildlife on it. Prior to this change, landowners had limited incentives to increase wildlife populations because the government denied them the full opportunity to profit from wildlife.

Our current system is a warning to any land manager that the presence of an endangered species on that land—even the potential habitat for a species—will likely change how that land may be used. A regulatory taking of that land could result. This leaves no incentive to make land attractive to endangered species, and in fact potentially accelerates the destruction of that habitat.

Reform is needed. As we look to that reform not only must we address sound science but we must consider innovative methods for change, and the advantages of environmental Federalism versus political centralization in our approach to the Endangered Species Act.

The CHAIRMAN. Mr. Cannon from Utah.

STATEMENT OF THE HON. CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. CANNON. Mr. Chairman, I apologize for being in and out. We had a mark-up in the Judiciary Committee.

I want to thank you for holding this hearing on the Endangered Species Act. I appreciate the comments of my colleagues. I would like to submit a statement for the record.

But let me point out that I think it is important that we focus on what the Endangered Species Act does so that we can actually help species. It is my sense that we have not had a single species that has been removed from the list of endangered species through acts that come under the purview of the act. Rather, you had species delisted because they are improperly listed in the first place or because species became extinct or because of other actions from groups or agencies outside of the purview of the Endangered Species Act.

So from my perspective, this is an enormously important hearing. I care about the stewardship we have of the Earth and the animals and the plant life on it. I hope that we can focus better on how we use our resources and less on a mechanism that is invidious, that costs huge amounts of money to people that are uncompensated for their losses, and which distorts our public processes and our systems so deeply.

So I thank you for bringing this bill in and having this hearing and I look forward to it.

[The prepared statement of Mr. Cannon follows:]

Statement of The Honorable Chris Cannon, a Representative in Congress from the State of Utah

Thank you, Mr. Chairman, for holding this hearing on the Endangered Species Act. This bill addresses one of the most basic deficiencies of the ESA: the lack of good science in the implementation of the Act. Clearly, many changes to the ESA are needed. Though H.R. 4840 is a very good bill, it only represents the first step towards fundamental reform. It is my hope that H.R. 4840 will be the first of many reforms of the Act.

Simply put, the Endangered Species Act has not accomplished its principle aim of saving species. The original intent of the ESA was to conserve and protect American species of plant and wildlife that are threatened with extinction. While the preservation of species is a laudable goal, it must be achieved in a common-sense manner. The Endangered Species Act was never intended as a tool to limit the public's access to public lands or use of their own lands yet that is exactly how it has been implemented.

Since its passage in 1973, the ESA has been fraught with problems. Numerous species have been listed improperly. Enforcement decisions have been speculative and often erroneous. Enormous, uncompensated costs have been imposed upon private landowners. And still, to this date NOT ONE SINGLE SPECIES has been removed from the list due to actions resulting from the ESA. Instead, species have been de-listed due to improper listing, other actions not related to ESA enforcement, and species extinction.

All too often the implementation of the ESA has been based on questionable scientific data that have received no independent peer review. This simply cannot continue. H.R. 4840 will give greater weight to empirical or field-tested data and will create a new, more reasonable threshold for petitioners to meet before a listing petition can be considered. It's past time for the Department of Interior to use sound, objective and unbiased science for all listings and delistings.

Sound science needs to be the modus operandi for implementing the ESA, not politics. H.R. 4840 will help remedy this problem.

The CHAIRMAN. The gentleman from Idaho, Mr. Otter.

STATEMENT OF THE HON. C.L. "BUTCH" OTTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. OTTER. Thank you, Mr. Chairman. I would echo the comments that I have heard thus far of my colleague from Arizona, and also my colleague from Utah, and I do not see any need in duplicating those same comments. But it does strike me of the 24 species that we have on the endangered list in Idaho—and we have gone through all of those, time and time again, so I will not go through and enumerate them once more—but we have done a better job of helping the survival of the law schools and the graduates from the law schools than we really have done on most of the species.

So I would hope that we could move most of these decisions out of the courts, and do that with sound science, do that with the best science in many cases.

I am wondering what science we call that in the Winachi National Forest, when the results were extremely clouded from the best scientists that were put up there to find as to whether or not there were Canadian lynx. And, of course, we have since heard of many other circumstances where the best science was used in order to establish a listing either of endangered or threatened or whatever.

But I would not disagree with Mr. Inslee, and it is too bad that this is the first time in 19 months that I have not disagreed with him and he is not here to hear it. So maybe I will drop by his office and just give this speech over again.

If I could have selected 200 years ago, I suspect in all appreciation and deference to my colleagues here who are LDS, excuse me for calling it the Mormon cricket, but we have the worst infestation in Idaho of the Mormon cricket. I apologize for that, Mr. Chairman. I cannot get any lower down here.

So I would just say to you that that is one that 200 years ago, that is one I probably would have selected and said, OK, we will not go any further with this one. The cricket, not the other.

Anyway, Mr. Chairman, I applaud you for your leadership and your continued efforts in order to bring some common sense to the whole endangered species question. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. I thank the gentleman.

The CHAIRMAN. I point out to you that the sea gulls have become socialists, because instead of going after the crickets and working hard like they should, they go to the garbage dumps where they get a free ride.

Mr. OTTER. If the Chairman would yield, it would be all right with me if you want to call them Catholic crickets, and I would still like to name them gone, no matter what. We have a devastating migration going on in Idaho right now, and we are without the authority to stop them from the greatest infestation in the location where they are, and that is all in the public lands. We can control them on the private lands, but we cannot control them on the public lands, and the result is they are migrating to the private lands where all the food is.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from California, Mr. Calvertse 30.

STATEMENT OF THE HON. KEN CALVERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CALVERT. Thank you, Mr. Chairman. I know for the 10 years we have been—I have been on this Committee, we have discussed the Endangered Species Act and reform, and I think this legislation is certainly timely.

In my own case in southern California, some people believe that because it is the fastest-growing area in absolute numbers, not in percentages like Arizona and Nevada, but in absolute numbers, that we are "ground zero" for ESA. In fact, the Carlsbad office is somewhat infamous, having an audit that you were very helpful in obtaining for that problem of mismanagement in Carlsbad.

And not only do we have problems in the way the law is written, but the way the law is presently implemented. In many cases, government agencies are not properly fulfilling their responsibilities—and that is also wrong—and not meeting time guidelines and so forth that is required under both section 7 and section 10 of the endangered species law. So I am looking forward to working on changing this.

We have difficulties in California. We have the famous Delhi flower-loving sandfly which has caused millions and millions and millions of dollars, and probably in the hundreds of millions of dollars in difficulties in southern California. We would like to work with it. Unfortunately, nobody has yet seen the fly.

But I remember one time that there was a mitigation that was considered, that they wanted to close the Interstate 10 freeway during the alleged breeding cycle of the alleged Delhi flower-loving sandfly, and somebody properly pointed out that that might not be a reasonable mitigation, to close the Interstate 10 freeway. So someone in the particular office went back to work and apparently came up with an idea to place speed bumps down the Interstate 10 freeway to slow down the traffic to about 15 miles an hour, and that way, as the sandfly flew across the freeway, it would not impact itself on the windshield. I do not make this up, Mr. Chairman. I am just reporting the facts.

We also have the Stevens kangaroo rat, the San Bernardino kangaroo rat, and the Pacific kangaroo rat, all of which come from the same base stock per se. They are all rats, but various kind of rats. I guess over the years they have kind of mixed and mingled and there are now variants of the Stevens kangaroo rats. We also built a wall. Somebody decided we had to keep rats on one side of the wall, and so they brought in the best engineers and somebody did a study on how high kangaroo rats jumped, and they figured out it was no more than 18 inches. So they built this wall 18 inches around this filtration plant. People travel from distances to see this wall. It is like the "great wall of rats." I do not make this up, Mr. Chairman. This wall was built. This wall now exists. Of course, if you fly over it, you will see that Stevens kangaroo rats happily live on both sides of this fence. I do not know if the Israelis will have any more luck with their fence than the Stevens kangaroo rats, but it did not work.

Finally, just recently we are building a new dam in my hometown of Corona to protect our friends downstream in Orange County. We love those people in Newport Beach. After 30 years of mitigation, they finally came to the fact that they are actually going to build the dam. But somebody had brought up that the least Bell's vireo breeding cycle is about the same time they were going to grade, and they needed to build this privacy fence between where the grading operation is and the trees, the willow trees on which the least Bell's vireo nest. So we spent hundreds of thousands of dollars of taxpayers' money building this privacy fence so the birds can do whatever they are doing, without somebody on a tractor watching, I guess. As I said, Mr. Chairman, I do not make these things up.

What I am trying to say is we need some commonsense reform this to this law. We all are concerned about the environment and certainly concerned about species protection, but sometimes we get caught in the fly, if you know what I mean. Anyway, I appreciate you bringing this up, Mr. Chairman.

The CHAIRMAN. I thank the gentleman from California. I will state that all of the statements that are printed will be put in the record as entered. Any objection? If not, so ordered.

This is going to be a very serious piece of legislation and I think the gentleman from California is right when he says common sense is what we are lacking in this. There are horror stories like you can't believe about this. They just go on and on. But it is a very emotional issue. I found that out this morning. I foolishly went on C-SPAN on this issue and had my head handed to me by a bunch of people pointing out that we on the Republican side don't see the big picture and that it is stupid to even work with it.

Well, a lot of folks don't realize that this bill is just taking a little bite. We are not taking much at all. This is a small bite, but one to start improving the act. And I am sure most of us possibly would have voted for the Act in 1973. I remember one past speaker saying to me, the one thing is the biggest regret I ever had was voting for the Endangered Species Act, as he lost an election. Doesn't normally happen to speakers, as you know.

I appreciate the testimony of each person who has been here, and I would like to point out to you that tomorrow at 2 o'clock in this room that we will have the Honorable Craig Manson, Assistant Secretary, Fish, Wildlife and Parks, Department of Interior, and Dr. William Hogarth, Assistant Administrator for Fisheries will be here to testify on this bill. I appreciate having as many of you here as we possibly could and intend to push this and see how far we can take it. I think it is very important that we move this bill and cover some of the areas that we feel important.

With that, I thank you all for being here and we are adjourned until tomorrow.

[Whereupon, at 3:35 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

[The prepared statement of Mr. Gallegly follows:]

Statement of The Honorable Elton Gallegly, a Representative in Congress from the State of California

Mr. Chairman, the time for reforming the Endangered Species Act is long overdue. The problems of the ESA, which have been highlighted by recent debacles such as Klamath Basin and the Canada Lynx Survey, have been of no surprise to most members of this Committee.

Both in the 104th and 106th Congresses, this Committee passed ESA reform. I have supported both of those efforts and support this legislation as well. We must finally enact into law the peer reviews and stronger scientific controls that will make the ESA protective of species, while also protecting the rights of private property owners.

While it has often been proven otherwise by outside scientific reviews, bureaucrats have incorrectly claimed to this Committee on numerous occasions that they acted on the best science available to them. This is small consolation to the communities adversely affected. Nothing can be gained by ignoring sound scientific data, including valid data collected from all sides of an issue.

Mr. Chairman, the Endangered Species Act was meant to protect and restore threatened and endangered wildlife. I support these goals, but these objectives should be achieved using sound science. Instead, by using less than sound science on occasions, the Act has had a negative impact on the lives of farmers and landowners, while in some cases also hurting the species the Act was intended to save. The environment and the public's faith in the government has suffered. Let us move forward with improving this act.

[The prepared statement of Mr. Radanovich follows:]

Statement of The Honorable George Radanovich, a Representative in Congress from the State of California,

Thank you, Mr. Chairman, for holding this hearing today on H.R. 4840 to ensure the use of sound science in Endangered Species Act (ESA) implementation.

In the San Joaquin Valley district that I represent in California, the ESA is often viewed as a threat to many individuals, especially those who own property. It is a threat for so many because few positive results and many negative results have occurred since the Act was signed into law in 1973.

One such example is the new University of California, Merced campus, which is near my congressional district. The new UC Merced campus went through a very public, very laborious and very long decision-making process to determine the most appropriate campus site. Beginning in 1988, every conceivable factor was taken into account to develop the selected location. In fact, thirty-eight factors were applied to eighty-five potential sites. These factors included the level of local public support, availability of transportation systems, and environmental issues; including air and water quality, and endangered species. After significant adjustments of the proposed footprint of the University were made thanks to good and thorough science, the University rightfully thought that all significant environmental issues had been satisfactorily addressed.

To the dismay of the University and many others, the Corps of Engineers said, "maybe it would behoove you to look somewhere else" to build the campus (Merced Sun–Star, April 16, 2002). Further, the Sacramento Bee and Modesto Bee say that the Corps "has not received from the University of California evidence that this campus is the most environmentally benign of the alternatives." (Editorial, April 24, 2002 and April 28, 2002). It now looks like the use of sound science does not fit into the vision of the Corps of Engineers. As a result, the first University of California campus in the central San Joaquin Valley is now being unduly delayed.

Similarly, I have come across a situation here in our nation's capitol with regard to ESA and sound science. It involves the Potomac shortnose sturgeon and the Washington Aqueduct. As you know, the aqueduct, owned and operated by the Army Corps of Engineers, is the source of some 200,000 tons of sludge dumped into the river every year. The sludge, surprisingly, is dumped directly into the primary spawning ground for the endangered sturgeon.

At a Subcommittee hearing I chaired last October, the Corps defended this practice by referring to a study they had done on the effects of the discharges on the river. Since I was skeptical of this study, I commissioned a peer review authored by a highly respected panel of scientists and biologists at the Institute for Regulatory Science. The panel's conclusion after reviewing the study was that the science was "inconsistent with known scientific and engineering standards." The panel fur-

ther concluded that the dumping should cease immediately, and a sludge treatment facility should be constructed. Unfortunately, the sludge dumping continues.

These inflammatory examples demonstrate that it is critical we support the small steps H.R. 4840 takes ensure sound science is brought back into the ESA process. H.R. 4840 achieves this first by giving greater weight to empirical science when Federal agencies are making ESA decisions. Second, listing petitions, under the legislation would be improved by requiring each petition to contain clear and convincing proof that the species is in peril. Also, the legislation adds balance to the current implementation of the ESA by creating a peer-review process for the listing and delisting of species, in addition to the drafting of recovery plans and jeopardy opinions. Furthermore, the Secretary of the Interior must accept data from landowners regarding a species and include the statistics in the rulemaking record. As a farmer, I can tell you the mantra among my constituents is that if you find an endangered species then you "shoot, shovel and shut-up" because the consequences against landowners are so harsh. This is not the way to encourage landowners to protect species. The bill before us today would help reverse the current mindset by acknowledging data collected by farmers and provide a positive step toward a better-working law.

In closing, I hope this Committee will move forward with H.R. 4840 as a modest bill to guarantee that Federal agencies use sound science when executing the ESA. With over 1,200 species currently listed, and very little if anything being done to actually recover endangered species, it is time for Congress to provide some direction to the Act. H.R. 4840 is a good place to start.

[The prepared statement of Ms. Solis follows:]

Statement of The Honorable Hilda L. Solis, a Representative in Congress from the State of California, on H.R. 4840

Mr. Chairman, Congressman Rahall and Members of the Committee, I want to take this opportunity to voice my opposition to H.R. 4840, the Sound Science for Endangered Species Act Planning Act.

This bill is a step in the wrong direction. If enacted, it will create impossible standards for listing a species for protection under the Endangered Species Act. Although advocates for this bill believe that it will add balance to the listing of endangered species, it will actually serve only to put our most fragile plants and animals at risk.

I am especially concerned that we don't have enough scientists to do the independent evaluations that are demanded in this bill. Our expectations of evaluation need to be realistic so that we have a clear understanding of the system and the process of listing endangered species.

I look forward to hearing the testimony of the witnesses and am hopeful that they can provide guidance for us so that we can have a meaningful bill that will provide for the protection of species and people.

[The prepared statement of Mr. Walden follows:]

Statement of The Honorable Greg Walden, a Representative in Congress from the State of Oregon

There was "no sound scientific basis".

This was the finding of 12 scientists convened by the National Academy of Sciences at the request off the Secretary of Interior when they were asked to review the science used for last year's decision to cut off irrigation water to nearly 1400 farmers in the Klamath Basin of Oregon.

"No sound scientific basis" for preventing water from being diverted down canals like it has for nearly 100 years to grow crops.

"No sound scientific basis" for destroying the livelihoods of many farmers and ranchers in the basin and causing some to go bankrupt.

"No sound scientific basis" for the emotional turmoil in the basin caused by the cut off.

"No sound scientific basis" that water held in Upper Klamath Lake to create higher lake levels would benefit the endangered sucker fish.

And finally, "no scientific basis" that sending more water down river to the endangered coho salmon would net any benefit.

In fact Mr. Chairman, the NAS study acknowledged that just the opposite should have happened in every case I listed because the evidence and the data showed that

sucker fish kills happened less frequently in years of low lake levels and the hot water sent down river for the supposed benefit of the coho salmon was most probably lethal to the very fish they were trying to save.

This is what we found when there was a sensible peer review of the science used to make endangered species decisions. What would have happened if the review had not been done? Would the water have remained off this year too? Possibly devastating the lives of all farmers and ranchers in the Basin and ending irrigated farming in the region forever.

The bill before us today does not "gut" the Endangered Species Act." It is not "the systematic destruction" of the Act that some in the environmental committee would have you believe. It is a sensible amendment to a law that is out of control. It basically says that these decisions made by some of the most junior government employees affect a lot of people. Therefore, we need to make sure that these decisions are based on sound science and not biased or unsubstantiated information or views.

By some estimations, the economic costs of the decision to shut off water in the Klamath Basin reached $200 million. The cost of the NAS review was just over $300,000. I believe that is a very good return on an investment.

Mr. Chairman, you have highlighted the need for this legislation in many ways. You have been very generous with your time and the time of your staff when it comes to the Klamath Basin. The Committee has had several hearings on the issue including a hearing in Klamath Falls that was attended by more than 1500 people. But there are other areas of the country that have similar situations. Earlier this year, this Committee had a hearing on the endangered Canada Lynx and the questionable scientific practices that went on with the Forest Service and the Fish and Wildlife Service in that case. We have also highlighted some problems with science on the Platte River in Congressman Osborne's district. The list could go on and on. How many other communities have to be impacted before we put credibility back into the Endangered Species Act. I think it should be now and I think this bill is the way to go about it.

The bill before us would:

Sound Science and ESA Actions

- Requires the Secretary to set standards for the scientific and commercial data that is used to take actions under the ESA.
- Requires the Secretary to give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed.

Sound Science and the Listing Process

- Sets minimum standards for the scientific and commercial data used in listing determinations.
- Listing actions must be supported by field data on the species.
- The listing agency must accept data on the species collected by landowners.

Sound Science and Recovery Planning

- Agencies preparing recovery plans are required to identify, solicit, and accept scientific or commercial information that would assist in preparing a recovery plan.

Sound Science and Peer Review

- Every proposed listing, delisting, recovery plan, or consultation under the ESA would be reviewed by a peer review panel.

Mr. Chairman, this bill is sensible. We should perfect it as much as possible and pass it as soon as possible to prevent another "Klamath" from happening.

CONTINUATION OF LEGISLATIVE HEARING ON H.R. 4840, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO ENSURE THE USE OF SOUND SCIENCE IN THE IMPLEMENTATION OF THAT ACT

Wednesday, June 19, 2002
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to call, at 2 p.m., in room 1334, Longworth House Office Building, Hon. James V. Hansen (Chairman of the Committee) presiding.

The CHAIRMAN. Today's hearing is a continuation of yesterday's hearing concerning H.R. 4840, The Sound Science for Endangered Species Act of 2002.

We are pleased to have with us today the Honorable Craig Manson, the Assistant Secretary of Fish, Wildlife and Parks, the Department of the Interior; and Dr. William Hogarth, Assistant Administrator for Fisheries, Oceanic and Atmospheric Administration of the Department of Commerce. We welcome you gentlemen here.

Yesterday's hearing brought up many important issues dealing with this legislation. I appreciate the input from my colleagues on both sides of the aisle. I will look forward to more important discussion on this matter today. I hope our discussion will be as productive as yesterday's.

[The prepared statement of Mr. Hansen follows:]

Statement of The Honorable James V. Hansen, a Representative in Congress from the State of Utah

Today's hearing is a continuation of yesterday's hearing concerning H.R. 4840, the Sound Science for Endangered Species Act Planning Act of 2002. We are pleased to have with us today The Honorable Craig Manson, Assistant Secretary of Fish, Wildlife, and Parks of the Department of the Interior, and Dr. William Hogarth, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration of the Department of Commerce. Welcome, gentlemen.

Yesterday's hearing brought up many important issues dealing with this legislation. I appreciate the input from my colleagues on both sides of the aisle, and look forward to more important discussion on this matter today. I hope our discussion will be as productive as yesterday's. With that, I turn the time to the Ranking Member of this Committee from West Virginia, Mr. Rahall.

The CHAIRMAN. With that, I would turn to the Ranking Member of the Committee from West Virginia, Mr. Rahall, but I don't see Mr. Rahall here. In that case, I guess I wont.

With that in mind, oh, we Mr. Miller here. Maybe he would like to give the speech for Mr. Rahall. Mr. Miller,

Mr. MILLER. I wouldn't dare speak for Mr. Rahall.

The CHAIRMAN. OK. In that case then, does anyone else have an opening comment they would like to make? Mr. Osborne, Mr. Pombo?

[No response.]

The CHAIRMAN. All right. We welcome our two witnesses. It is good to see you gentlemen again, and we will turn to you, Judge Manson, and appreciate your being here.

STATEMENT OF HON. CRAIG MANSON, ASSISTANT SECRETARY OF FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR

Judge MANSON. Thank you very much, Mr. Chairman. I am pleased to be here to offer the administration's perspective on H.R. 4840, The Sound Science for Endangered Species Act Planning Act of 2002.

We continue to appreciate the Committee's interest in this issue of the use of best available science, and we hope that we can make some progress with our comments here today and continue to work with the Committee on some of the issues that are of interest to the Congress.

We support H.R. 4840 with some modifications that I will outline. If implemented, this legislation will broaden opportunities for scientific input and assure additional public involvement in Endangered Species Act implementation. We also believe that it will improve the Fish and Wildlife Service's decisionmaking process and result in increased public confidence in the decisions made under the Endangered Species Act.

I appeared here several weeks ago as you know, to discuss two related bills, H.R. 2829 and H.R. 3705. And I noted at that time that it is important that our endangered species conservation decisions are based on the best available science because these decisions have a great impact on species, communities and importantly, individuals. And one of Secretary Norton's highest priorities is to improve the Department's science. I have been working with Dr. Steve Williams, Director of the Fish and Wildlife Service, and Dr. Chip Groat of the U.S. Geological Survey and Dr. Jim Tate, Science Advisor to the Secretary, to ensure that the Secretary's vision of improved science becomes a reality.

At that hearing back in March I gave a description of the guiding principles that embodied the administration's view of how—the Department's view of how independent scientific review should be integrated. We believe that a framework for review should allow the service to take advantage of the expertise of outside groups such as state fish and wildlife agencies.

On a related note, I would add that I was in Tucson yesterday and spoke to the Department of Defense Conservation Conference, and there are a number of highly qualified biologists and wildlife professionals working for the Department of Defense, and the are another group with respect to issues concerning the Department of Defense that is an example of an outside group that we should take advantage of as well.

Our framework should provide an opportunity for scientists and other stakeholders to air the differences and interpretation of science, and it should provide flexibility to allow a more robust independent review process for significant resource decisions. While we continue to move ahead with our administrative efforts, we believe that H.R. 4840 could be a significant step forward in meeting that vision.

I want to commend the Committee for its efforts in undertaking what is not an easy task in any context. it is important to note that the independent review process will not be a political process, but one that is meant to ensure that the science behind our decisions is in all cases the best available to our decisionmakers. In this respect H.R. 4840 requires that an independent review of science be carried out by qualified individuals as determined by National Academy of Science standards. The Department has had significant experience with the National Academy of Science review process, and we are comfortable that this provision will help ensure a truly independent scientific review process.

In reviewing this bill one is struck by the fact that a number of its provisions are familiar. Many have been discussed and presented and debated before. For example, Section 4 of the legislation, which requires solicitation of information from states and provides an opportunity for affected persons to participate in consultations, is substantially similar to provisions contained in S. 1180 in the 105th Congress introduced by Senator Kempthorne with the backing of the previous administration and Secretary Babbitt.

I want to take a moment to mention some of the key provisions of the bill followed by some of our concerns. First, Section 2(c) would require that listing petitions contain certain uniform information. These are similar to provisions in H.R. 4579 to reauthorize the Endangered Species Act, recently introduced by Congressman Miller. These requirements are straightforward, common sense, which dictates that it should be included in any listing petition. Section 3, which establishes the requirement for independent scientific review is really the cornerstone of the bill, and since the March hearing additional language has been added, which provides that the Secretary must appoint a review panel for proposed jeopardy determinations and proposals of reasonable and prudent alternatives if the Secretary finds they contain significant disagreement regarding the determination or proposal or it may have significant economic impacts.

Under the current practice the service seeks independent review of listings. While this provision would include both proposed jeopardy determinations and reasonable and prudent alternatives, the language will significantly narrow the number of actions that would be covered under this legislation. We believe it provides balance and is an important addition to the bill.

Further, for streamlining the review processes found in Section 3, requirement that the Secretary develop protocols for independent review and ensure that science panels are provided with clear guidelines consistent with the protocols.

Another provision that the Department greatly favors is Section 3(b) which provides that when an agency provides a biological assessment, it must solicit and review scientific and commercial that

a perspective applicant for a license or permit believes is relevant and make that information available to the Secretary.

Finally, there is a growing recognition that effective results in species conservation can be achieved by enabling those who live and work on the land to play a greater role in conservation of the species. The bill works toward that goal by creating opportunities for potentially affected parties to participate in the collection of data for use in the listing and recovery process. We believe that that type of involvement leads to greater scientific validity in the listing process.

I do have several suggestions regarding some specific provisions of the bill. I note that my time has expired. I would be pleased to discuss those at the Chairman's discretion.

The CHAIRMAN. Mr. Secretary, this is critical material to us, and if you want to take a couple minutes more and go through it, by all means. If you would rather do it afterwards or another time, that would be fine.

Judge MANSON. Well, I would be pleased to note just a couple of things that we have some concerns about. First, as I noted in March, we do have some concerns with the timelines provided in the bill and how those timelines would work in light of the statutory timelines already contained n the Endangered Species Act, specifically the review for listing and delisting should be concluded no later than the end of the public comment period. We would like to eliminate the 90-day period for the Secretary to consider the findings.

Additionally I would recommend that the Committee also provide that the Secretary has the ability to convene a review panel in cases where similar questions may exist when a no-jeopardy determination is made. Presently the bill provides when a jeopardy determine is made, a review panel would be concluded.

Now, this change to allow a review panel where questions exist on a no-jeopardy determination would allow the Department, when warranted, to ensure that sound science supports these decisions and provides adequate protection to species.

Additionally the bill requires the Secretary to compensate reviewers at a rate equivalent to a GS-14 pay grade. We understand and agree with the intent to improve the response from the independent reviewers by providing compensation, but our current budget constraints would make implementation of that provision difficult.

In addition, we have reviewed the bill and identified a few technical issues which need further clarification and correction. These are, as I said, mostly technical in language. I don't think they are substantive, but we would be pleased to work with the Committee and the staff to address those technical issues.

On the whole we believe that this is balance legislation that will ensure public involvement and the use of the best available science in our ESA decisions, and we support the bill with the modifications that I have noted.

[The prepared statement of Mr. Manson follows:]

Statement of Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior

Mr. Chairman and Members of the Committee, I am Craig Manson, Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior (Department). I want to thank you for the opportunity to present the Administration's views on H.R. 4840, the "Sound Science for Endangered Species Act Planning Act of 2002." The Administration appreciates the Committee's interest in ensuring the continued use of the best available science in the protection and recovery of endangered and threatened species.

As discussed more fully below, the Administration supports H.R. 4840 with modifications to address our concerns. We believe that, if implemented, this legislation will broaden opportunities for scientific input and assure additional public involvement in Endangered Species Act implementation. We also believe it will also improve the U.S. Fish and Wildlife Service's (Service) decision-making process and result in increased public confidence in the Service's decisions.

As I noted several weeks ago when I appeared before you to discuss two related Endangered Species Act sound science bills, H.R. 2829 and H.R. 3705, it is important that the species conservation decisions we make are based on the best available science because our resource management decisions can have a great impact on species, communities, and individuals. One of Secretary Norton's highest priorities is improving the Department's science, and I am working with Steve Williams, the Service's Director; Chip Groat, Director of the U.S. Geological Survey; and Jim Tate, Science Advisor to Secretary Norton, to ensure that this priority becomes a reality.

At the March 20, 2002, hearing, I provided a brief description of the guiding principles that embody the Department's view of how "independent scientific review" should be integrated into our decisions. The Department believes that a framework for review should allow the Service to take advantage of the expertise of outside groups, such as state fish and wildlife agencies. It should also provide the opportunity for Department scientists and other stakeholders to air differences in interpretation of the science behind the Service's decisions, and it should provide the flexibility to allow a more robust independent review process for significant resource protection decisions. While we continue to move ahead with our administrative efforts, we believe that H.R. 4840 could be a significant step forward in meeting the Department's vision.

Before I discuss the specific provisions of the bill, I want to acknowledge that addressing these issues in any context is not an easy task, and I would like to commend the Committee for its efforts in this regard. It is also important to note that the independent review process will not be a political process, but one which is solely meant to ensure that the science behind our decisions is, in all cases, the best available to our decision-makers. In this respect, H.R. 4840 requires that an independent review of science be carried out by "qualified individuals," as determined by National Academy of Science (NAS) standards. The Department has had significant experience with the NAS review process, and is comfortable that this provision will help ensure a truly independent scientific review process.

In reviewing this bill, one is struck by the fact that a number of its provisions are familiar; many have been discussed, presented, and debated before. For example, Section 4 of this legislation, which requires solicitation of information from states and provides opportunity for affected persons to participate during consultations, is substantially similar to provisions contained in S. 1180, introduced in the 105th Congress by Senator Kempthorne with the backing of the previous administration and then–Secretary Babbitt. As a result, we believe that most of the provisions are reasonable, and should garner bipartisan support.

When I testified before you in March, I outlined some of the Department's concerns regarding the provisions in the two bills then being considered by the Committee. These concerns included a lack of flexibility and increased workload and costs, and our requirement to meet statutory time frames. While many of H.R. 4840's provisions are similar to the provisions in those two bills, the legislation addresses some of the Department's concerns with those bills. We still have concerns with increased workloads, costs, and timing requirements. If I may take a moment, I would like to mention briefly several of the key provisions of this bill followed by some of our concerns.

First, Section 2(c) of the bill would require that listing petitions contain certain uniform information. These provisions are similar to provisions in H.R. 4579, a bill that would amend and reauthorize the Endangered Species Act, recently introduced by Representative George Miller. These requirements are straightforward, common sense which dictates that they should be included in any listing petition.

Section 3, which establishes the requirements for independent scientific review of decisions, is really the cornerstone of H.R. 4840. These requirements are not a new proposal. Similar, albeit less extensive, provisions were found in S. 1180 in the 105th Congress. As noted above, the Department expressed some concern with the implementation of these provisions. Since the March hearing, however, additional language has been added to subsection (j)(1)(A)(iv) in Section 3 which provides that the Secretary must appoint a review panel for proposed jeopardy determinations and proposals of reasonable and prudent alternatives if the Secretary finds they contain "significant disagreement regarding the determination or proposal" or that it may have "significant economic impacts."

Under current practice, the Service seeks independent review of listings and the development of recovery plans. Thus, while this provision would include both proposed jeopardy determinations and reasonable and prudent alternatives, the above language will likely significantly narrow the number of these actions that will be "covered actions" under this legislation. We believe this provision provides balance and, from the Department's perspective, it is an important addition to H.R. 4840.

Further potential for ensuring a streamlined review process is found in Section 3's new subsection (j)(4)(B), which requires the Secretary to develop protocols for independent review and ensure that review panels are provided with clear guidelines that are consistent with the protocols. I believe that if clear protocols and guidelines are presented to review panels at the beginning of the process, it will expedite review and reporting and will keep those panels focused on their true role—reviewing the adequacy of the science underlying the decisions.

Another provision that the Department greatly favors is Section 3(b), which provides that when an agency prepares a Biological Assessment, it must solicit and review scientific and commercial data that a prospective permit or license applicant believes is relevant, and it must make that information available to the Secretary. According to Service career staff, the Service often has problems getting complete information from other agencies. Because a robust Biological Assessment is essential to preparation of the Biological Opinion, other agencies should ensure that their Biological Assessments are complete. Moreover, a complete and comprehensive Biological Assessment means a more timely Biological Opinion. The Department enthusiastically supports this provision.

Finally, there is growing recognition that effective results in species conservation can be achieved by enabling those who live on and work the land to play a larger role in the conservation of species. H.R. 4840 works toward that goal by creating opportunities for potentially affected parties to participate in the collection of data for use in the listing and recovery processes as well as in the Section 7 consultation process. The Department believes this type of public involvement leads to better species conservation decisions.

For example, Section 4(a) of the legislation provides that, when conducting a consultation, the Secretary shall actively solicit and consider information from state agencies in each affected state. Secretary Norton has often cited her belief in the "Four C's"—Communication, Consultation, and Cooperation, all in the service of Conservation. Consistent with this philosophy, we believe this provision will further the Department's cooperative relationship with states in the conservation of species.

Similarly, Section 4(b) of H.R. 4840 requires the Secretary to provide applicants an opportunity to participate early in the development of draft biological opinions, and it provides for access to certain information used by the Service in the development of the biological opinion. It also provides applicants with the opportunity to submit comments on and discuss findings in the draft biological opinion with the Secretary and the Federal agency. Finally, H.R. 4840 ensures that the Secretary provides reasonable justification based on the best data available when she declines to include in the biological opinion alternatives proposed by a person during the development of that document. The Department believes that this type of enablement will lead to better species conservation decisions.

If the Chairman will allow me to make several suggestions regarding specific provisions of the bill to address some of our concerns. As I noted back in March, we do have concerns with the timelines provided in the bill and how those periods would work in light of the statutory timelines in the Endangered Species Act, and we would like to work with you to revise the bill on this point. Specifically, we would like to have the review for listing and delisting concluded no later than the end of the public comment period, and to eliminate the 90 day period for the Secretary to consider the findings.

Additionally, I would recommend that the Committee also provide the Secretary with the ability to convene a review panel in cases where similar questions may exist when a "no jeopardy" determination is made. This small change will allow the

Department, when warranted, to ensure that sound science supports those decisions and provides adequate protection to species.

Subsection (j)(3)(E) under Section 3 would require the Secretary to compensate reviewers at a rate equivalent to a GS–14 pay grade. While we understand and agree with the intent to improve responses from independent scientific reviewers by providing compensation, current Department of the Interior budget constraints would make implementation of this provision difficult. Therefore, this provision must be removed.

In addition, we have reviewed this bill and have identified some technical issues which need further clarification and correction. We are committed to working with you and the Committee to address them. Implementing this legislation will undoubtedly present both the Department and the Service with challenges, particularly in light of existing statutory time frames and budgets. We believe this is balanced legislation will ensure public involvement and use of the best available science in the Service's Endangered Species Act decisions, both now and into the future. As such, we support H.R. 4840 with modifications to address our concerns.

Mr. Chairman, this concludes my statement. I am happy to answer any questions that you may have.

The CHAIRMAN. I thank you for your testimony, Mr. Secretary.

Dr. Hogarth?

STATEMENT OF WILLIAM HOGARTH, Ph.D., ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. HOGARTH. Good afternoon, Mr. Chairman, and Members of the Committee. I appreciate the opportunity to discuss science in the implementation of the Endangered Species Act.

As the Director of NOAA Fisheries, I am a firm believer in using the best available science in all of our decisions regarding management of our living resources, and I support the Committee's commitment to these efforts.

In our 30 years of implementing ESA, our goal has been to administer the Act as officially and consistently as possible. As you know, that task is quite challenging. ESA requires NOAA Fisheries to use the best available scientific and commercial data when evaluating the impact of actions on endangered and threatened species. However, frequently we lack specific conclusive data and analysis on how a particular proposed project may affect a listed species or the status of a species considered for listing. Nevertheless, even with information that is incomplete, we must make a decision as mandated by the Endangered Species Act.

NOAA Fisheries face an increased workload in consultations, listing decisions and critical habitat designations. We have also been subjected to increased litigation in our implementation of ESA. There are some areas in which the ESA process can be streamlined, which we are attempting to do. The number of actions is increasing and we must ensure the changes to the ESA add to the quality of the actions rather than length or cost to the process.

We are also concerned about any modification to ESA that could increase the likelihood of litigations. While more data and scientific analysis is always desirable, we must focus on using the best possible information available.

In my comments on specific sections of H.R. 4840, I will focus on how we can work together to improve the science, while minimizing

the impact on the process, particularly any effects on the length of time as well as the cost of implementing the ESA mandate.

Section 2(b)(D), Sound Science and Decisions, these provisions will require the Secretary to give greater weight to scientific or commercial studies that are empirical or have been field tested or peer reviewed. We support the goal of basing our decisions on sound and peer-reviewed science, and we agree that empirical field-tested data are important. However, we would not want to diminish the use of models of populations, habitat use and/or life histories, which frequently do represent the best available science and are based on field-collected data. We welcome data from sources such as landowners or fishermen, for we can evaluate this data and compare it to data that has been systematically collected.

Section 3, Independent Scientific Review. This section would require agencies to use independent scientific review boards to review listing or delisting decisions, recovery plans and jeopardy decisions. NOAA Fisheries currently uses independent review of use in our listing and recovery plan proposals during the public comment period. However, we would want to work with the Committee to ensure that the bill's requirements would not duplicate, override or compete with the current processes. In particular, certain specific projects already have independent peer-review processes under way. Regarding the independent peer reviews of jeopardy decisions, we appreciate the bill's flexibility in allowing the Secretary to determine whether or not decisions should be subject to peer review. We would hope that the bill would not preclude the reviews of non-jeopardy decisions as well. These are important decisions and we would appreciate having the opportunity to use reviews.

Our primary concern with reviews is the potential for added time and government cost in implementing ESA. As you know, NOAA Fisheries is under enormous pressures to process a large number of ESA actions. In fact we process some 90 actions per year. And independent peer review process could potentially add 6 months to each action that is reviewed, and this type of delay could have tremendous economic impact to businesses including the fishing industry when we were trying to open and close seasons and also public projects.

Regarding costs. These would include creation and oversight of the list of the scientific reviewers and each independent review board. Administrative nomination and selection process, as well as the logistics of the meeting and travel will require additional FTEs. In fact the administration opposes a compensation position because it would require several million dollars not included in the Department of Commerce budget. A final concern regarding independent scientific review is a requirement that the Secretary may not delegate the authority to conduct all actions under this paragraph to NOAA Fisheries. It may only be delegated to someone who has been confirmed by the Senate, which would result in a significant demand on the schedule of the Assistant Secretary of Commerce, and would not be the most effective method for getting direct input into the process.

Section 4, Interagency Cooperation. We agree fully with the intent of this section to promote interagency cooperation in ESA activities. Indeed we currently include information from states in list-

ing and recovery activities and support opportunities to expand participation by states, the action agency and the applicant in the development of biological opinions. We would want to work with the Committee to ensure the expansion of participation is meaningful and allows us to meet our statutory deadlines on ESA tasks.

In conclusion, Mr. Chairman, NOAA Fisheries recognize that we must continue to ensure that we integrate better science of ESA, actions and their policy decisions, and that our process must be transparent to gain public confidence in our efforts to recover species. We believe that we can work with the Committee on H.R. 4840 to reach common goals of better science and transparency while ensuring an effective and efficient process. We, as the Department of Interior, support the intent of the bill, and look forward to working with you and our partner agency to improve our implementation of ESA, and I will be happy to answer any question.

[The prepared statement of Mr. Hogarth follows:]

Statement of Dr. William T. Hogarth, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

Good afternoon, Mr. Chairman and members of the Committee. I am William T. Hogarth, Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration (NOAA) at the Department of Commerce. I appreciate the opportunity to be here today to discuss H.R. 4840, the "Sound Science for Endangered Species Planning Act of 2002." I commend you and the Committee for your efforts to improve implementation of the Endangered Species Act (ESA)—and specifically, to ensure the best available science continues to guide agency actions and decisions regarding endangered and threatened species.

H.R. 4840 builds upon areas of consensus by codifying existing administrative policies, incorporating provisions similar to prior legislative efforts that have been supported by the previous Administration and members from both parties, and including portions of legislation introduced by members of this Committee. Although NOAA Fisheries has a few concerns that I will describe in my testimony, we anticipate that these can be resolved administratively or with the cooperation of the Committee. It is in this spirit that we join the Department of the Interior in supporting H.R. 4840, with modifications to address our concerns.

Since passage of the ESA almost 30 years ago, NOAA Fisheries, with the U.S. Fish and Wildlife Service (USFWS), has sought to administer the Act as efficiently and consistently as possible. As you know, our task has become quite challenging. As written, ESA requires NOAA Fisheries and USFWS to use the best available scientific and commercial data when evaluating the impact of actions on endangered or threatened species. When uncertainty exists, we must err toward the conservation of the species. However, we must also ensure that the policy decisions we make affecting a diverse range of interests are based upon sound science. This is difficult when decisions must be made using data and science that are still being developed, or does not have the confidence of the public.

The situation in the Klamath Basin demonstrates how difficult our policy decision making can become. In 1997, NOAA Fisheries listed Southern Oregon/Northern California Coast coho salmon as threatened under the Endangered Species Act. Critical habitat was designated shortly after that. We acknowledge that prior to 1997, very little information was available regarding the relationship between Klamath River flows and the biological requirements of salmon and steelhead. Coho salmon have been difficult to study both because of its life history, and because the populations of coho salmon have become depressed. Since 1997, a number of groups have gathered data and developed analyses regarding the relationship between the Klamath Project operations and river flows, fish habitat, and water quality.

NOAA Fisheries has worked diligently to understand and incorporate this information, almost as soon as we have received it, in conjunction with the annual planning process and consultations. During the development of the 2001 biological opinion, NOAA Fisheries considered all known minimum Klamath River flow recommendations developed over the past 50 years, including the Phase I Flow Study

by the Institute for Natural Systems Engineering (The Hardy Study). Unfortunately, we did not have a great deal of recent data regarding the coho to analyze.

On March 13th, I testified before this Committee regarding the National Academy of Sciences' draft report on NOAA Fisheries' 2001 biological opinion regarding coho salmon in the Klamath Basin. The Academy concluded that "there is no substantial scientific foundation at this time for changing the operation of the Klamath project to maintain...higher minimum flows in the Klamath River main stem for the threatened coho population." On June 1st, NOAA Fisheries issued a biological opinion that will begin to develop and implement a research program to identify and fill gaps in existing knowledge and, hopefully, produce better, peer-reviewed science in the Klamath Basin.

We have many more examples of how we currently integrate science into policy decisions, and I would be happy to discuss those with you further. However, I will now provide specific comments on sections of H.R. 4840.

Section 2(b),(d)—Sound Science in Decisions

H.R. 4840 includes provisions which would require the Secretary to give greater weight to scientific or commercial studies or other information that are empirical or have been field-tested or peer-reviewed when making decisions about listing, delisting, or when designating critical habitat. The agencies would be required to promulgate regulations establishing criteria for scientific and commercial data, studies, and other information used as a basis for these determinations. It would also prohibit the agencies from determining that a species is endangered or threatened unless data collected in the field support the determination.

We support the goal of basing our decisions on sound and peer reviewed science. In prior testimony, we have expressed concerns about giving greater weight to scientific or commercial data that are empirical or field tested, because we acknowledge that there are also other scientific methods (e.g., modeling and statistical analyses) that produce valuable scientific data. While it is usually a combination of various types of scientific data that have formed the basis of our evaluations, we recognize that utilizing empirical and peer-reviewed information enhances public confidence in decisions.

Section 2(c)—Contents of Listing Petitions

We commend Section 2(c) of the bill, which outlines measures to ensure the sufficiency of the contents of petitions to add a species to the list of threatened or endangered species. This language is similar to current policies used by NOAA Fisheries to determine whether a petition presents information that would lead a reasonable person to believe that the petitioned action may be warranted. The provision will help ensure the consistency and integrity of information considered in listing petitions.

Section 3—Independent Scientific Review

This section would require the agencies to use independent scientific review boards to review decisions to list a species, delist a species, or develop a recovery plan. Agencies would also be required to employ a review board if they determined that a proposed Federal action is likely to jeopardize the continued existence of a species, and also in cases where the Secretary finds that there is significant disagreement regarding a determination or proposal, or that a determination may have significant economic impact. The section defines who is qualified to sit on a review board, how the list of reviewers should be developed, the appointment of the boards, how many reviewers should sit on the board, their compensation (GS–14 pay), who may appoint boards (only those who have been confirmed by the Senate), and how the agencies will consider the opinions of reviewers. The Administration opposes the compensation provision, however, because it would require several million dollars not included in the Department of Commerce's budget.

Currently, NOAA Fisheries incorporates independent peer review in listing and recovery activities during the public comment period. We would like to work with the Committee to ensure that these requirements would not duplicate, override, or compete with existing Federal, state, tribal, and local efforts to provide personnel and resources for peer review of ongoing species recovery projects, such as the Independent Scientific Review Panel that currently reviews salmon recovery projects in the Columbia River Basin in the Pacific Northwest. Also, we would caution that new independent scientific review requirements will create new demands on the agencies without changes to statutory deadlines.

We commend this section of the bill for allowing the Secretary the flexibility to determine whether a review board is necessary for biological opinions that conclude that actions may jeopardize species. However, we would want to work to ensure that the requirement for a review of certain jeopardy opinions would not delay the com-

pletion of the biological opinion or economic activities that require a biological opinion. We are open to working with the Committee to ensure that a process is developed to maintain timely biological opinions.

We believe that the discretion to employ review boards must be consistent for all listing decisions, including decisions not to list a species. The Secretary should be allowed the flexibility to convene a review board for non-jeopardy biological opinions as well as jeopardy opinions. This would ensure that all decisions are supported by a rigorous review process.

Section 4—Interagency Cooperation—Consultations under Section 7 of ESA

We commend Section 4 of the bill, which would require NOAA Fisheries and USFWS to actively solicit and consider information from every affected state. We currently include information from states in recovery activities, and this provision will strengthen the cooperation between the states and the Federal Government.

NMFS also supports opportunities for the action agency and the applicant to participate in the development of biological opinions our existing regulations provide. We would like to work with the Committee to expand meaningful participation, including states, in a way that would continue to allow us to meet our statutory deadlines for completing opinions.

Mr. Chairman, while there may be some issues that we may need to resolve administratively or with your help, NOAA Fisheries recognizes we must continue to ensure that we integrate better science into our policy decisions, and that our process must be transparent to gain public confidence in our efforts to recover species. We believe H.R. 4840 includes some provisions to help move us in that direction. We look forward to working with the Committee and our partner-agency, the USFWS, to improve the implementation of the Endangered Species Act.

This concludes my testimony, Mr. Chairman. I would be glad to answer any questions you may have.

The CHAIRMAN. Thank you very much, Dr. Hogarth.

And now questions for our witnesses. Mr. Pombo?

Mr. POMBO. Thank you, Mr. Chairman.

Mr. Hogarth, in your testimony you talked about the difference between using field data or commercially available data versus modeling, and you raised an objection to the preference in the bill that science had included field-gathered information would have a preference over modeling. And I am not exactly sure what your point is with raising an objection there. It would seem to me that actual scientific information that is gathered in the field would be more accurate than a computer model developed in an office.

Mr. HOGARTH. I think there is some truth to that. What we are concerned about is that if you have a limited amount of field-collected data, sometimes a modeling exercise, if you worked on your model, would give you a much better long-term look at the data, and to be able to project over the long term the impacts, rather than if you just base it on a little bit of data from a small area. And we think that they should use a combination, but we did not want to lose the opportunity to have the models and to try to use the models and to perfect the models as we get additional data. We think they go hand in hand.

Mr. POMBO. I don't dispute what you are saying in terms of your answer, but I would call into question what is in your prepared testimony, because I think the answer that you gave to the question is different than the impression at least that is left by your prepared testimony.

Mr. HOGARTH. Thank you. I will look back at that because it is not that we oppose the field data. We think you should have specific data.

Mr. POMBO. The purpose, I believe of including that is that a lot of times it has come to our attention over the past several years

that your agency and others put more weight behind a computer-generated model than they do behind actual biological evidence that is gathered in the field, and that has many times called into question the validity of the answer that you come to.

I would also like to ask you, in terms of your prepared statement you state that: "We would want to work to ensure that the requirement for a review of certain jeopardy opinions would not delay the completion of the biological opinion or economic activities require a biological opinion."

What we are attempting to do in the bill is force you to use good science before you make your decision, and what you are saying in your prepared statement is: we will use good science as long as it doesn't delay us. And you are at odds with what I think the purpose of this bill is in terms of sometimes it is better for you to be delayed a month or two in coming to a final decision and making the right decision, versus you just making your decision based upon whatever science you have.

Mr. HOGARTH. Maybe again not worded as clearly as we tried—we did not want to add delays to this process under the mandates we have, plus at certain times not only are we using—you know, we do this process to open a fishery, and then, for example, we have to do a Section 7 consultation, a biological opinion for many of the fisheries that we open each year. And we are concerned that if we have a delay in any of these that that would cause undue hardship on the industry. We would like to try to work to make sure we do this up front and within the timeframe that we have and not add an additional 90 days or so to the process is what we are getting at. Some we are under important mandates and some we can plan ahead and some are fishing season connected.

Mr. POMBO. There is I think a legitimate concern in terms of the 90 days. The effort that the Committee is making, that those of us that were drafting this legislation, was to have specific timelines so that things don't just drag on forever. There are cases where having that specific timeline may ultimately delay a decision that should be made, and I understand the concern behind that. And we have had discussions and I am not exactly sure how we fix that yet, but we do not want you to delay a decision forever because you do not have that statutory timeline in place, and that is one of the purposes behind that.

In your testimony you state that when uncertainty exists, your agency must err toward the conservation of the species. Where is that mandate in the law?

Mr. HOGARTH. It is in the Endangered Species Act that you have to make—we are mandated to make the decision, plus we have to—I do not know the exact words on the precautionary approach, the principle.

Mr. POMBO. I have not been able to find that in the law.

Mr. HOGARTH. OK. I will see if I can locate it.

Mr. POMBO. That may be policy. That may have become common practice, but I don't find it in law, and if you find it there—

Mr. HOGARTH. I stand to be corrected, and I will look for it and let you know one way or the other.

Mr. POMBO. If it is there, I would appreciate it, you pointing it out to me. Do you believe that erring on the side of the species is using good science if no science exists?

Mr. HOGARTH. Is good science? I think erring on the side of the species if it is going extinct is the best science, yes.

Mr. POMBO. But if you do not have the science to back up that opinion, it is just your opinion that it is becoming extinct.

Mr. HOGARTH. That is the opinion of the—as in a group that we get together to make that decision, yes.

Mr. POMBO. But if you don't have the science to back up that opinion, you are not using good science.

Mr. HOGARTH. Well, I think you are using what you have at hand to make the best decision you can make, and you make it on the science you have. And if you have zero science I think we would probably not list or we would set up a program to begin additional information.

Mr. POMBO. But I think that your answer points out exactly why many of us believe this bill is necessary, and that is that a lot of times I believe that there is incomplete science available and decisions are being made.

Mr. DUNCAN. [Presiding] Thank you very much, Mr. Pombo.

Mr. Miller?

Mr. MILLER. Thank you, Mr. Chairman.

And, Dr. Hogarth, let me continue with you. As I understand this legislation and legislation I have been involved in, that is we obviously are trying to make sure that the scientific process by which a determination is made to list or delist or to provide recovery plans is on the best scientific evidence. What I don't understand in this legislation, and your dialog touched on it and you touched on it in your discussion with Congressman Pombo, and that is why are we now giving then preference to one kind of information versus another? it seems to me there is an internal inconsistency when you say we want the best science, but we are going to give higher standing to field-tested work or we are going to give higher standing to commercial studies as opposed to what, as opposed to governmental studies? If you want the best science, it seems to me—the concern I have heard out there from people who have to live and work with the ESA on a daily basis from the commercial side, from our cities and counties and developers and others, is whether or not they are confident that all of this has been considered. It is not about whether it has been weighed or not or whether their science has been judged the best science or not, but in many instances I think there is a proper claim that sometimes it hasn't been fully considered, because maybe people don't like it because it is commercial. That is not the test. The test is does it add to the debate and is it probative and is it helpful in arriving at the conclusion? And so I think I share your concerns with this legislation that we put a preference for empirical field tested and peer-reviewed data. Is that fair to say that you have that concern? I don't want to put words in your mouth.

Mr. HOGARTH. No, no. That is what we say. We do have that concern. We want all the data to come forward and to evaluate it, and we don't want to just base the decision on that limited data and to exclude the use of models that give us some predictive capa-

bility. We use models in everything we do today. I think if you look at hurricane predictions and everything we do, it is based on model projections, and we think that a model that is field tested is an excellent way to go for the long term. But we use all data that we can come forward with in making our decisions, all data that is available.

Mr. MILLER. Because the current law says that the Secretary shall make a determination as required by Subsection (a)(1) solely on the basis of the best scientific and commercial data available to him—we will probably want to amend that when we get back to it—available to him after conducting a review of the status of species. I mean that is what is driving it. I think there are legitimate questions about whether or not that in fact takes place, but whether or not you are giving greater weight to one type of evidence versus another. Field-tested data may be completely flawed. One of the reasons we are here is because some people tried to pretend that they had field tested some data that didn't turn out to be real. So how do we give greater weight to that?

Commercial data may be driven, as we know, by the payment of the contract. That is not to denigrate all commercial studies, but you have to weigh that in the universe, don't you, of what science you have available?

Mr. HOGARTH. The way we go through this process, and maybe this will explain it better, we put together a panel and that panel usually includes Federal people, State people, and sometimes independent people, and we bring all the data that we can find to that panel to make a decision or recommendation on listing, and then that is then reviewed up through the chain of command to make the final decision, but the scientists use every bit of data. Now, when you go to a model sometimes some data may be left out because you do not have the specifics of that that would fit into the model, but it is discussed when you make the final decisions on the listing or delisting of the process. And recovery plans also include a wide variety of people who come together with all of that information.

So we use a team approach and use all the data we can get, but I think there are sometimes situations where people feel like that, "Well, I had some data that I saw in my stream that wasn't given the full consideration that others may have"—

Mr. MILLER. We have anecdotal evidence. When you deal with endangered species everybody has a story they want to tell you about the guy down the street who had 100 critters on his front porch or something.

The other concern for me is on page 3 of the bill. It says, "For the purposes of paragraph B, evidence is clear and convincing if a preponderance of the evidence is based upon reliable scientific and commercial information." A minute ago we were talking about this being the best science available. "The evidence is sufficient to support a firm belief." In one paragraph we have three different legal standards. We have clear and convincing. We have a preponderance of the evidence, and we have a firm belief. I don't see how this clarifies or keeps you out of litigation. if I have got to sue on whether or not there is a firm belief, I think I can probably get through the courtroom door. And then the question is whether or

not you have a preponderance of the evidence based upon reliable scientific evidence, but the law said you have to make it based upon the best scientific evidence, and then of course the question is whether all of that meant the clear and convincing.

In your testimony you say you are concerned about entering into increasing litigation, given your workload. It seems to me that in that paragraph alone, there is enough hooks for every lawyer in town to hang their coat on. Do you think that is all one legal standard?

Mr. HOGARTH. Well, I think that, as we said earlier, we think that this bill is going the right direction, but we would like to work to try to tighten it up some because we are concerned about anything that gives increased litigation. And I think we can work with the staff and can work through those issues. We all want better science, and I think we can work through these issues.

Mr. MILLER. The other question is, on the consultation process, the question is who gets involved in the Section 7 consultations? I don't have the language right in front of me, but it is essentially, it looks to me like the person who gets to be involved is the person who has moved the action. But what about other people who are impacted by that action? We will take one close to our hearts, Klamath River. Does that mean just the irrigation district and/or its constituents get to be involved in that, or do the tribes downstream? Do the downstream farmers? Do the commercial fishermen, all of who are impacted by that decision, do they get to be involved in that?

Mr. HOGARTH. After we did the Section 7 consultation on Klamath and we did the biological opinion, we submitted it to the Bureau of Reclamation and they put it on the website for—I think in this instance it was—

Mr. MILLER. No, I understand that. But this one suggests who gets involved in the beginning of the process of Section 7.

Mr. HOGARTH. Well, basically in the beginning is the applicant, the one that comes forward is the one that is involved.

Mr. MILLER. So other impacted parties would not get to participate. They get to look at it on the website when it is done?

Mr. HOGARTH. In a draft form. They get to see a draft.

Mr. MILLER. But the immediate party gets to be involved—

Mr. HOGARTH. Right, because you negotiate with the party on actions that can be taken, and how you can work through the reasonable prudent actions, what is reasonable and—and you have to understand the project, so you have to work with them to get the details of the project and have the project—

Mr. MILLER. No, I understand that. But you also have to—my understanding of Section 7 is also about understanding the impacts and so you kind of take a survey of other agencies and parties to determine how they see that impact of your action; is that not correct?

Mr. HOGARTH. No, no. Once we understand the project we do the evaluation of the potential impacts of that. The only time you get to review that is when the draft of biological opinion goes out. Then everyone has a crack at saying, "Well, you did this wrong or your economics are wrong."

Mr. MILLER. I would be interested in—and you don't have to do it here, but in writing, let me submit a question to you about how this is drafted, about the beginning of that process before the draft is done.

And then let me just finish, Mr. Chairman, by saying I thank you for your remarks because I think this has to work on both sides of the streets, when you list and when you don't list. You have got to have this kind of ability to review that decision with the best science. It has got to work both ways because both of those decisions are critical decisions to interested parties here.

Mr. DUNCAN. All right. Thank you very much, Mr. Miller.

Mr. Osborne?

Mr. OSBORNE. Thank you, Mr. Chairman, and I thank you for introducing this legislation, and appreciate you two gentleman being here today.

I would like to get Dr. Hogarth off the hook here a little bit. You have been bearing the brunt of the hearing.

And I would like to address the remarks to Mr. Manson, and I would like to thank you, Mr. Manson, for what I heard to be general support of H.R. 4840, and I agree with you that this legislation in some ways would help end some of the negative perception of the way the Endangered Species Act is currently being enforced. Sometimes perception is worse than reality. And so I think an independent review is certainly very much in order.

And I am also glad to hear you say that you would like to have a little bit more credence given to those most affected by the process, landowners, people who bear the brunt of the Endangered Species Act. And I can tell you from personal experience that many people in Nebraska have felt somewhat disenfranchised and feel that they have been—you know, they make recommendations that are largely ignored, and so I think this would be very much appreciated.

And so, as you know, I have talked to you before about this project. I am going to take maybe a minute and just kind of go through it again. As you know, in 1978 there was 56 miles of Central Platte River was designated as critical habitat for the whooping crane, and out of that designation, we saw a number of issues come up. First of all, Fish and Wildlife said, "Well, we ought to have certain instream flows in the Platte River, 2,400 cubic feet per second in April and May, which is essentially non-irrigation time." Many recommendations were made in the 1,300 cubic feet per second range, which means that almost the Fish and Wildlife doubled the requirement. Some people say that is even too deep for whooping crane. So anyway, the instream flows are a problem.

Sediment replacement, Fish and Wildlife said, "Well, we need to put more sediment in the river," so we are talking about 100 dump truck loads a day for years and years. And then they changed that to pushing some islands into the stream. That is very expensive. So that is one of the issues. The 130,000 acres for the conservation account of water, which is a tremendous amount, and so on and so on. And the reason this is called into question is that I think it has been pretty well documented that no more than 1 to maybe 2 percent, at the very most 3 percent of the whooping cranes in existence ever use that or even visit that stretch of Platte River.

There was a study of 18 whooping cranes that had radio tracking devices put on them, and over 2-1/2 years none of them ever even approached that area. So we have kind of built a house of cards here. It is very expensive. It could be analogous to the Klamath Basin in terms of cost, because eventually they want to work the 417,000 acre feet, which would be in an environmental account which is equivalent to all of the irrigation water in the North Platte Valley. And if that was eventually taken we would have a huge economic impact.

So from our experience with Klamath, what we are asking for is simply a study, independent study before we go forward any further. The total cost is 160 million right now, and it is going to get much higher than that. And I know your concern is the cost of a study and where is the money.

And so what I would like to mention today, and I will give you a letter to this effect, currently there is a fair amount of money, Federal dollars going into the cooperative agreement to help formulate the plan. And so we are suggesting that some of that money be used for a study, and I think you will probably get some agreement by those in the cooperative agreement. I am not sure, but I think you will. So we would just like to have you take a look at that. We think that is a source of money that you already have. And if you could do this, we would very much appreciate it.

And so I really haven't asked a question. I have made a statement. But I am kind of interested in this, and we have quite a big stake in it and appreciate your help. So any comments you have, I would appreciate.

Judge MANSON. Well, we would look at that and determine if there are monies already appropriated that could be used for that purpose.

The other thing is that with respect to the 1978 designation of critical habitat, what I would like to be able to look at that again and see if it would meet the current standards for designation of critical habitat. The one issue there is that the service is currently occupied with a number of court-ordered designations of critical habitat under court deadline. And if we can work past that, then we can get to looking at things like that '78 designation and see if it would meet the current standards.

Mr. OSBORNE. Thank you very much. I see my time has expired, and I yield back.

Mr. DUNCAN. Thank you very much, Mr. Osborne.

Ms. Solis? You want to yield to Mr. Udall?

Ms. SOLIS. Yes, Mr. Udall.

Mr. DUNCAN. All right. Ms. Solis yields her time to Mr. Mark Udall.

Ms. SOLIS. Mr. Chairman, he was here before I was.

Mr. DUNCAN. It is listed wrong on Mr. Hansen's list. I am sorry. We will go to Mr. Mark Udall then.

Mr. UDALL OF COLORADO. Mr. Chairman, I think more accurately, I was here, but Ms. Solis, she sat down and was ready to do business and I was standing in the back, but I will—

Mr. DUNCAN. Whichever.

Mr. UDALL OF COLORADO. But I will be happy to ask some questions.

Mr. DUNCAN. Go ahead.

Mr. UDALL OF COLORADO. I want to thank my colleague, Mr. Osborne from Kansas, for not reminding people that sometimes people from Kansas think those of us in Colorado have actually taken the water from the Platte River and that is why you have the problems. And the folks from Nebraska as well have legitimate concerns, but we will continue to work with you.

I want to thank both of the witnesses for taking time to come to the Hill today. And at the last hearing you testified that the provisions of the bill might prohibit final action on listings or biological opinions until a review is conducted, and you thought perhaps this might conflict with the statutory timelines in the law. I get the sense now that you don't think that's much of a concern. My question will be, are you not afraid that you might be subject to more litigation if you cannot meet statutory deadlines, and what type of activities would be impacted if biological opinions cannot become final?

Either one of you want to respond?

Judge MANSON. Well, I did express a concern that the deadlines in the bill may be inconsistent with the deadlines that are currently in the ESA. I think that that is an issue that can be fixed. I do agree that the opportunity for review and the use of good science is important.

There are several ways to deal with that. One, without amending the bill, of course, a project applicant could agree to an extension of the time to conduct consultations, but I think that I terms of making the deadlines in the bill consistent with the deadlines in the Act itself, that just requires sitting down with staff and working through some of the issues. I don't think that is a significant stumbling block to the bill.

Mr. UDALL OF COLORADO. Mr. Secretary, in March you testified that the processes required in the legislation, including assembling and compensating review boards, would be costly to implement. It doesn't appear to me that H.R. 4840 provides any additional funding for this requirement. Do you still have those concerns or have you seen another way to meet those—

Judge MANSON. No. I am still concerned about the cost of compensating the review board.

Mr. UDALL OF COLORADO. Do you think we should include some further language in the legislation if it were to move ahead, that would provide that additional support?

Judge MANSON. Well, that certainly is at the discretion of the Committee. Obviously, it is not something that is in the President's budget currently.

Mr. UDALL OF COLORADO. Mr. Chairman, I want to thank the witnesses for taking their time to join us on the Hill today, and I look forward to further discussions about this very, very important act, the Endangered Species Act, and—

Mr. MILLER. Would you yield?

Mr. UDALL OF COLORADO. I would be happy to yield to my colleague from California.

Mr. MILLER. On that point in the discussion of the timelines, if I might, in what I guess is now referred to as the March testimony, NOAA testified that—and again, I go back to your discussions that

you and Mr. Pombo had—that, "We believe that giving greater weight to scientific and commercial data that is empirical or field tested when evaluating comparable data, we may not be using the best information." Is that consistent with your testimony today?

Mr. HOGARTH. Yes, sir.

Mr. MILLER. And I assume that is again because it is about taking all of the information to arrive at the best scientific conclusion, is it not?

Mr. HOGARTH. That is correct. We are not trying to belittle, by any stretch of imagination, any empirical or field-tested data. That is part of the package that you look at.

Mr. MILLER. And one of the things in this legislation is about fluctuations in populations and whether they are normal or not. It would seem to me that modeling there may be very helpful, because if you could model climate, wet years, dry years, stream flows, and then compare that with whatever we know about those populations, you may have a reason or you may have an understanding of the fluctuations in those populations. So modeling would contribute to the other data that is available, would it not?

Judge MANSON. That is correct.

Mr. MILLER. And in many instances, I assume that we believe the modeling is accurate. I mean, we model missile systems, and weapon systems, and brain surgery, and the genome. I mean, we do all kinds of modeling today that we have high, high reliance on, and a sense of reliability is I guess what I mean to say, that we place a great deal of reliability on, do we not?

Mr. HOGARTH. That's correct, yes. Most things, at this day and time, look like they have a model associated with them. I said earlier we predict hurricanes by models, we predict weather by models. We feel like we need good field data to verify the models, and we try to go out and gather the data that will supplement the models and to verify the models to make them more accurate. So the modeling is a vital part of what we do, but so is all data that people could bring forward because that helps you verify the model in the long run.

Mr. MILLER. Twenty-five—go ahead. You are right.

Mr. DUNCAN. Mr. Udall's time has expired, and so I am going to go next to Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman. I appreciate the courtesy of the Committee. We are in a markup in Energy and Commerce right now—well, we will resume in 10 minutes, so I have to go back over there, but I do appreciate it.

Dr. Hogarth and Mr. Manson, thank you for being here. I have read through your testimony, and Dr. Hogarth, especially your comments relative to the Klamath Basin because you know that's one concern I obviously have shared with you and this administration.

In that case, do you feel the decisions made by the National Marine Fisheries Service last year followed empirical data and was there science to back them up on the river flow issues?

Mr. HOGARTH. We feel like the biological opinion that we just put out, the one that just went out, we relied a lot on what the NRC had said, and what the audit study said and all. We tried to base it on all of the data we had in hand. We realized that, in doing that

biological opinion, a lot of that you know is a 10-year biological opinion, and we felt like there was a lot of things that needed to be field-tested based on NRC comments, the audit comments and our own biologists' opinion. So there was a lot of things built into that biological opinion to verify for long term.

Mr. WALDEN. You are using Hardy 2 data now, right?

Mr. HOGARTH. That is correct.

Mr. WALDEN. Has the Hardy 2 data that you are using been peer reviewed?

Mr. HOGARTH. It is in the process now. It has been, to a certain extent, but it is in the process of being peer reviewed, and also the NRC is looking at it as part of the final report that they will give us probably next March.

Mr. WALDEN. Has there been any issue raised, that you are aware of, involving the baseline data used by Hardy 2? Has there been any change?

Mr. HOGARTH. There has been some question, and I am not aware of all of the details, but there has been some questions.

Mr. WALDEN. My understanding is that the original data being used for Hardy 2 was disallowed because it was collected for another purpose and was not allowed to be used for something else, Hardy 2, and so they have had to go back and kind of start over.

Mr. HOGARTH. There were two, the Hardy 1 and the Hardy 2, and they are both I think being looked into.

Mr. WALDEN. I think this was within Hardy 2, actually. You might want to check on that.

Mr. HOGARTH. Yes.

Mr. WALDEN. Because I think that raises the issue, and I have had this conversation with some of my colleagues on the other side of the aisle. I am trying to get it where we make sure the science that is used is peer reviewed, whether you are listing or delisting, whether you are doing consultation or recovery or even the issue that came up about the data leading up to a decision to list or not list, that is fine with me if you want to peer review that.

But I just watch what happened in the Klamath Basin, and the follow-up that the NAS did, the Research Committee for the NAS, that basically said both your agency, NMFS, and the U.S. Fish and Wildlife Service made decisions that weren't fully supportable by the available science.

Mr. HOGARTH. I think, from the standpoint of some of the temperature stuff, the NRC did say that they don't agree, we may be right or we may be wrong, but they don't see the supporting evidence on it.

Mr. WALDEN. I think they said it more—

Mr. HOGARTH. And we do have—we have stated up front there is a lack of data on the Klamath on Coho, and that is why I think you are looking at a biological opinion to see that it does buildup to the flows, but it gives time to get the information. We did not stick with the 2400 CFFs that we had said earlier was necessary. We did go back to the NRC study, and we pretty much negotiated based on that.

Mr. WALDEN. Let me ask you a question, following up on what Mr. Miller said a few minutes ago, this issue of how we weight the data, whether it is the field-collected empirical. In line 8, on Page

2, talks about, "In making any determination under this section, the Secretary shall give greater weight to any scientific or commercial study or other information that is empirical or has been field tested or peer reviewed."

That wouldn't preclude, though, him giving some weight or him—whoever the Secretary is on out—giving some weight to modeled studies. That doesn't stop that, does it?

Mr. HOGARTH. That is what we want to make clear. We hope not, and that is why we wanted to work it out with the staff. We just want to make sure that we have that option. That is correct.

Mr. WALDEN. Are you aware of any modeling that occurs where there isn't field data collected?

Mr. HOGARTH. It would be very difficult, but there are probably some developmental models that have been done without a lot of field data.

Mr. WALDEN. So most of them would have field-collected data.

Mr. HOGARTH. Yes, some good field data. That is correct.

Mr. WALDEN. Because that is an issue that certainly comes up out in my district, and people I talk to on this issue is they really want to make sure that the data that are used, that you give some weight to that, where people have gone out and done in-field, in-stream studies, as opposed to somebody just kind of coming up with some theoretical model. That is, I think, really important.

There was a question that apparently came up about the decisions made in the Klamath Basin on some rules versus what has been done here in the Washington area. Are there different applications of rules?

Mr. HOGARTH. Not in my opinion, they are not. We looked at that very closely, and I am not aware. I know there has been some questions about ESA and Potomac River.

Mr. WALDEN. As you probably know, I think it is the short-nosed sturgeon has been on the list forever out here, and year-after-year raw sewage and storm runoff goes into the Potomac and the Anacostia by the billions of gallons, and we have heard all about the Wilson Bridge construction and supposedly how you just relocate the feeding beds of clams so that the sturgeon won't feed there while the bridge is being constructed. I can't imagine that being an alternative available to the farmers and ranchers in the Klamath Basin.

Mr. HOGARTH. First off, there is no evidence of shortnose sturgeon within 50 to 60 miles of the Washington Aqueduct. What few sturgeon have been seen look like it came through the Delaware canal, and we are not sure that that was, you know, but just based on water levels. We are going to find out. I can tell you that.

I have heard so many comments here that we have gone through the Potomac River Commission and the D.C. Fishery Commission, and talked to the State of Maryland, and we will find out about shortnose sturgeon either way around and look at the habitat. We will do the studies to determine it, and if they are in the area and if they have got critical habitat, then we will take appropriate action based on that.

Mr. WALDEN. But I understand that your agency just determined a "may affect" on those fish.

Mr. HOGARTH. Right, because the "may affect" is—you see the "may affect" is they are not in that area. So the "may affect" goes back to we are not sure what would happen if they were here. We haven't seen them in the area. We don't know. We have no evidence of them being in the area, and so that is the way—

Mr. WALDEN. But shouldn't we protect that habitat just in case they were to stray there?

Mr. HOGARTH. I think that is a point that we are looking at now.

Mr. WALDEN. The reason I ask that is we are having the same debate on lynx in my State. The Department of Fish and Wildlife in Oregon has said we don't think they have been here ever or at least, you know, like 10 cases in 100 years, and yet we are seeing the Federal Government come in and say, oh, gee, maybe we better restrict any activity in the forest around there because they may be showing up.

Now I realize that is not in your agency, and I realize I have also run over my time, but could it be that the fish aren't there because of what is getting dumped in the river? I mean—

Mr. HOGARTH. I think if the fish were in the river, we would have seen them in this stretch, the 50- to 60-mile stretch, the other topical habitats up and down the Potomac, we think. That is something we will be documenting.

As I said, the question has come up, and I think it is a valid question, and we need to go to get the evidence.

Mr. WALDEN. Would this have been historical habitat for them potentially?

Mr. HOGARTH. We just don't know. It could be. I mean, there is some evidence that the habitat is suitable in that vicinity for shortnose sturgeon, as it is in some other areas of the river. We need to document that.

Mr. WALDEN. I appreciate that.

Thank you, Mr. Chairman.

Mr. DUNCAN. Thank you very much.

Ms. Solis?

Ms. SOLIS. Thank you, Mr. Chairman, and thank you witnesses for being here.

As I understand it, the law already gives both agencies the authority to do much of what is being presented in the bill, and what I would like to know is if you think this legislation is essential and if you are just saying you are supporting it for the sake of supporting it or is it going to, you know, be something that is going to be dramatically different from what you are doing?

Mr. HOGARTH. I will take the first go and then let Judge Manson.

I think there are definitely, from a public perception we are dealing with today, a lot of criticism. The Native Species Act has administered the data that we make decisions on.

I think this bill goes a long ways toward refining that, making it more precise, concise, and we are going to—we conduct ESA science in the future. So I think, from that standpoint, it is good. I think it does, in several instances, as I say, I think we need to work with the staff to look at timing, to look at some of the other things.

For example, in my instance, and I think this may be an oversight, I am a political appointee, but I don't go through confirma-

tion. Whereas, the Director of Fish and Wildlife Service goes through confirmation. The way this bill is written, we wouldn't have, you know, the Secretary or the Under Secretary would be the one that would have to do all of this, and so he would be getting data and talking to fishermen. We would be the ones making the decisions. I think that is probably just an oversight on how the bill was written.

I do want to make sure that we talk about "based on belief," and things like that. That is something else we want to talk to the staff.

A lot of that litigation comes from process, and I hate to see us write another bill that sets up something that is not clear, and that will just give the public more of an opportunity to sue. Whether we win or lose, it does take a lot of time and money.

This bill does cost us over $2 million to do the peer review in the process that is set up. It is over $2 million because we do 90-some actions a year. Those are the concerns we have.

But, overall, I think the bill goes a long ways to give the public, hopefully, a better feeling and clarifies the things we need to do under the ESA because it is a tough bill and one that I think causes a lot of sort of controversy, and we need to make it clearer, and we support the bill because we feel like there are some things in here that really do go a long ways toward, hopefully, making the science better and perceived as being better, also.

Ms. SOLIS. In your earlier testimony, though, you mentioned that these authorities are already there within your agency, and they are already being exercised. So isn't this redundant?

Mr. HOGARTH. I think some of them are, but some of them I think, again, a real clarification goes maybe a step further than we go. For example, in the use of what is best science, to talk about the empirical data and the commercial data. They said that in the law now. How we utilize this data I think this does clarify that, and it does, I think, point out that or it makes it clear that we will have peer review. It sets out a process for that involvement, which is not set out now.

Ms. SOLIS. So are you saying that Congress should be allowed to define what that science is?

Mr. HOGARTH. Well, I hope that the Congress would, as I interpret this, that Congress will say use all of the science, and I think that is, hopefully, what the bottom line says; that we should take into consideration when we make these listing, delisting and recovery decisions, we take into consideration all data that is brought forward and that we use it all—empirical field data and peer-review data—we use it all. And if we use actual data, I think this bill says, if we use actual data, it should be a step above just using strictly models. As long as we can continue the modeling process, we are happy with that, but we want to make sure we can do that.

Ms. SOLIS. If I might, I think one of the concerns that was raised earlier was who is at the table to make those decisions early on and if that, in fact, is representative of all interested parties or stakeholders, and I think that, you know, I find some difficulty in realizing how all of that is going to be implemented.

Mr. HOGARTH. Sometimes this has not been a—I think we are finding in our agency, and we are trying to do this now—it has not been as streamlined as we would like to see the process work.

We are delegating a lot of our Section 7 to the field now, where it has been done in headquarters, to try to make sure that the people who are being affected have an input from the beginning. We also asked in our council process we have to start at the beginning with scoping, looking into various alternatives early in the game so that the public is involved.

We have, in the past, not released a lot of our biological opinions in draft form. We have completed them, and then we have released them as a final biological opinion. We are now making those available in a draft form to the people that are affected so they can have a time to look at the draft biological opinion and give us input before we finalize it.

So we are trying to make the process more transparent, an that is another thing I think this bill does is try to make sure that we have a transparent process and have the people affected involved in it.

Ms. SOLIS. I would ask the Secretary the same question.

Judge MANSON. I would say, first of all, that the vast majority of the provisions of this bill are not either in existing policy, nor are they things that could be done administratively.

I would say, second, to the extent that we might find things in here that could be done by way of something other than legislation, the legislation is important because it underscores the need for the agencies to follow processes, and it enhances public confidence.

The third thing I would say is that these issues are sufficiently important enough that it is most appropriate for the Congress to examine them and to legislate—

The CHAIRMAN. [Presiding.] Does the gentlelady have something more you wanted to ask?

Ms. SOLIS. Not at this time.

The CHAIRMAN. The gentleman from Tennessee, Mr. Duncan?

Mr. DUNCAN. Thank you, Mr. Chairman.

Judge Manson, yesterday I read a portion of a Washington Times editorial which said that the Endangered Species Act was simply out of control and one member said yesterday that the bill had done more to protect lawyers than it had endangered species. Member after member, yesterday, told all kinds of examples of horror stories that have occurred because of this act.

I don't suppose you have had a chance to review some of those statements that were given yesterday in here, but have you read some of these horror stories, and do you agree that this act, that we need to take another look at it, because in the last almost 30 years since this Act first came into being that there have been some pretty unfair, even ridiculous actions taken because of this act?

Judge MANSON. I aware of the statements that the members made yesterday, and I have heard a number of those examples given before. I have said publicly, on a number of occasions, as recently as yesterday in Tucson, that the administration of the Endangered Species Act requires improvement, and there are a number of ways to improve the act, and we hope to undertake some of

those as a matter of policy, and perhaps some as a matter of rulemaking, and certainly work with the Congress on bills such as this that go down the road to improve the administration of the act.

Mr. DUNCAN. All right. Thank you.

Mr. Hogarth, in the Klamath Falls controversy, you say in your statement that the National Marine Fisheries Service "did not have a great deal of recent data regarding the Coho to analyze when forming the 2001 biological opinion, yet the Agency went ahead and issued a jeopardy opinion anyway."

Also, in your statement, you mentioned the fact that the National Academy of Sciences said there was "no substantial scientific foundation for the actions that were taken." Don't you think that this bill would help improve that? There was an implication or several implications a while ago that this bill would preclude data, when actually one of the main goals of this bill is to get agencies to take into consideration even more data, and specifically field data, for instance, more emphasis on field data, but also input from landowners. Many landowners have felt like they have really had no voice or no input in some of these decisions.

What do you say to all of that?

Mr. HOGARTH. I think, as I said earlier, we do have a scarcity of data. There is no doubt about that. I think if you look at the status, even based on what we have got—the Coho—is that we have a real problem with the numbers of Coho returning, and that is one of the things I think we had to take into consideration.

I think, based on experience that we have, I think there is a great deal of experience in the literature, and also we know that you have to have habitat and flow, and that is one of the concerns we had during the critical time that, you know, what the flow—we may have had a difference of opinion as to the amount of flow that is needed, but I think even the NRC talked about thermal effusion and things that we knew we had to examine, and that is what we are doing now.

I think any data, yes, in response to the question about additional data in this bill and additional data, we want additional data. If the timber companies, which I know some of them do work out there, have brought it forward, that should be utilized. If the landowners have it, then we should utilize it, and I think that is what this bill says, and I think we should make sure that is done.

Mr. DUNCAN. All right. And, finally, before my time runs out, let me just mention, Mr. Osborne, yesterday, said about the Klamath Falls controversy that farmland that had been worth $2,500 an acre almost overnight went down to $35 an acre.

Around that time, Kimberly Strassel, who is a deputy assistant editor of the Wall Street Journal and a columnist for them, wrote a column called "Rural Cleansing." And she had gone to the website of specifically the Sierra Club, and I think some of the other environmental organizations, and had language that they had, saying that their goal really was to get people off the land and get more land into public ownership, and so forth, and that we needed greater density of people in the cities and so forth, and their concern really wasn't for the environment, it was just it was sort of a power grab in a way. I would like to place that column, called "Rural Cleansing," in the record, at this point, and I would

also like to request that each of you read that column. I will send it to you, and you consider that as you think about the ramifications of this act.

Thank you very much, Mr. Chairman.

Mr. POMBO. [Presiding.] Without objection, it will be included in the record.

[The Wall Street Journal column "Rural Cleansing" has been retained in the Committee's official files.]

Mr. POMBO. I would like to also ask unanimous consent that our colleague, Congressman Thune, be allowed to sit on the dais during this hearing.

Without objection.

Mr. Inslee?

Mr. INSLEE. I would agree to that only if Mr. Thune agrees not to play baseball tomorrow night.

[Laughter.]

Mr. INSLEE. My 15-year-old son is visiting Washington, D.C., and he would like to know what your opinions are as to whether or not he should feel relatively confident that species in the United States of America will not go extinct during his lifetime.

Could you each give me your view as to whether you believe you can give us a reasonable assurance that Federal policy will prevent the extinction of any species during his lifetime?

Judge MANSON. There inevitably will be species that will go extinct in your son's lifetime. As to some of those species, there is no amount of Federal policy or law that will prevent that, at least no amount of Federal policy or law that is acceptable in the democratic process that we have.

Species extinction, with respect to some of those species, is completely unrelated to policy issues that we might face. Now, as to the other ones, where policy, that is, acceptable policy in the context of the democracy that we do have, I can assure him that the law and, if the implementation of the law and the administration of the law is improved, we will do a great deal to protect the biological diversity of the United States.

I think that it has to be done in a context—one of the things that is important about this, it seems to me, that is relevant to your question is that we are talking ultimately about public policy decisions informed by good science, and as such, there are always competing priorities, and we have to make the public policy decisions with respect to species protection in the context of all of the other public policies that we have to weigh and implement. But having done that, we will, if the implementation of the law is improved and if it is done in a manner that is consistent with public policy priorities, we will do a lot to preserve biological diversity.

Mr. HOGARTH. I pretty much agree with what the Judge said. I think one of the concerns is the will of the people. Some of these decisions are going to have some great economic I think price tags attached to them to maintain some of the species, and so I think it is the will of the American public as to if they want to pay that price and does Congress want to keep a tough bill.

The Endangered Species Act is a very tough bill, and if we can implement it properly, I think that is no problem, but I think it is a very tough bill. There are a lot of economics. When you start

talking about the impact of recovering some of the salmon on the West Coast, for example. I am not sure they will ever be back in all of the streams that they were in 100 years ago, but I think we will have coho, we will have sockeye, we will have the salmon available, but I think there are some tough decisions that the American public will have to make and Congress in the future.

Mr. INSLEE. I note in this proposal, at least the way it has been described, it would allow input in a certain context from the permit applicants, but from other interested people. So, in a context here, it would allow an applicant for a land use to put in additional information, but not the fishers or the people concerned, from an environmental perspective. Does that make any sense to you to do that, to just allow the one side, if you will, to make input on this and not everyone?

Judge MANSON. Well, from my point of view, the input of the applicant should take preference over the input of other people because the applicant is the one who will be granted or denied a license or a permit. The applicant is the one who will bear the greatest economic burden as a result of the potential denial of a permit.

I would say, however, that the bill does not preclude the agencies from considering the input of other people who may have an interest or who may be affected, and I would suggest that a great deal of that is done presently. I think it is worthwhile and important to underscore the primacy of the applicant in this process, however.

Mr. INSLEE. I can't let that pass, just to note disagreement, at least from one Member of Congress, that any American has any greater interest in any of these decisions than any other great interest. I mean, that is like saying—I guess what you are saying is, is that in a Klamath Basin context, the water users for agriculture would have a leg up or a greater right in consideration, as one American citizen, than those of the tribal members, for instance, or those who are interested in fish preservation.

Can you tell me, I guess you are saying because they have a greater economic interest, they have a greater interest worthy of consideration by the American democratic system?

Judge MANSON. Well, it is important to understand what we are talking about. We are talking about, in the bill, what is talked about is the ability of the applicant to sit down with the agencies and discuss the terms that the applicant ultimately will be responsible for implementing, that the applicant ultimately will be responsible for bearing the burden of.

Now, at the same time, I indicated that the bill does not preclude the taking into account the interests of other individuals. It doesn't bar that at all and, indeed, the agencies frequently, for example, the Fish and Wildlife Service has long published draft biological opinions and has accepted comment from other individuals about those, but the key part about the bill is the ability of the applicant to be the person involved in determining what conditions the applicant ultimately must bear.

Mr. MILLER. Would the gentleman yield?

Mr. INSLEE. Certainly, if I have any time.

Mr. MILLER. I just can't disagree with you more. That is a very serious consideration, but to suggest that that is where the impact or the major impact will fall, I mean, one of the things we have

learned about the environment, and we will go back to Klamath, is this watershed stretches all of the way from up in Oregon all of the way out to the Pacific Ocean, and its impacts, small changes can have huge impacts on populations, treatyholders and others downstream.

And to suggest that one person, one group gets to go in and sit down, as it says in the bill, and discuss with the Secretary this information is kind of contrary to sort of fairness to all. We are not talking about everybody gets to talk to the Secretary, but people who are directly impacted by these actions. The purpose of the consultation is to determine the impacts on various constituencies within the expertise of the agencies or whatever, and now you run in one party who gets to sit down, and submit, and discuss with the Secretary and the Federal agencies information about their reasonable alternatives.

Well, the tribes may have a reasonable alternative, the timber companies may have a reasonable alternative, the commercial fishermen may have a reasonable alternative or the tourism industry down on the coast may have a reasonable alternative, and they are all directly impacted, and some may be financially more impacted because they don't get Federal subsidies, they don't get direct payments that some of these other people get in different watersheds. They are treated as second-class citizens here?

Mr. MILLER. Mr. Chair, just to make one parting comment.

Mr. POMBO. The gentleman's time has been expired.

Mr. MILLER. Would you allow me just one parting 10-second comment? Just to comment, you two gentlemen disagree, the witness and the Congressman. I just think both need to be heard. You both need to be heard on ESA issues, too.

Thank you, Mr. Chair.

Mr. POMBO. Mr. Otter?

Mr. OTTER. Thank you, Mr. Chairman, and thank you, gentlemen, for being here.

Your Honor, how long have you been with the Agency?

Judge MANSON. About 4 months now.

Mr. OTTER. And yourself?

Mr. HOGARTH. Eight years, but I have only been the assistant administrator since last September.

Mr. OTTER. Mr. Chairman and members of the Committee, it strikes me that one of the problems that we are having here is many of the horror stories that we are reviewing here today were really the result of other people making those decisions, and we are trying to have these two gentlemen answer for all of those decisions that were made prior to their arriving at these agencies. So, unlike my colleagues, I am prepared to give you folks the benefit of the doubt.

It also strikes me that of all of the science, and the true science, and the good science, and the bad science, and everything else, common sense is never mentioned anywhere in this.

During this morning's hearing, we had a lot of discussion about whether or not the laws, and the Clean Water Act was one of those that came up, were being applied equally in the West as to the East, and one of the panelists said that, well, one of the problems that we have is that the East has been industrialized, as has the

West Coast, for a long period of time, and so there was already a high level of contaminants available.

And so when we asked you to clean up a water body in the East, it has been that way for 150 to 200 years or has been contributing that way for 150 to 200 years, and so when we ask you to remove 50 percent of the pollution, you are starting from a much higher level of pollution. Then, when we ask you to do it in the West, we say we want you to remove 50 percent of the pollution, we haven't had all of this buildup for 150 to 200 years, and so it is much more difficult for us to remove 50 percent of a very little bit, as opposed to 50 percent of a whole lot.

I don't know if I am getting through to you here. It made sense when I thought of this question, maybe it doesn't on reflection now, but it seems to me that the agencies are trying to apply the laws equally, but we are maybe using the wrong models.

And if we want to reach a certain level of acceptable contaminant in the water that is not going to endanger a fish or endanger a species, that that is what we ought to be speaking to, rather than percentages, but everything that we heard from the EPA this morning was expressed in percentages, and maybe that is what gives us the impression out West that it is a much—it is an unfair application of the law, because, you know, we are getting away with dumping 200,000 tons of sludge.

And I heard the folks this morning, on the other side of this dais explaining away, well, what about all of the other pollution that is going on with cruise ships and things like that? But we were willing to overlook the 200,000 tons of sludge, and it was stated because of the economic hardship that would be put on the local folks if they had to remove that sludge or build another catch basin or build a tertiary, preliminary secondary and tertiary treatment to keep that out of the Potomac River.

Well, I have to tell you, we have had some pretty good hardships on our watershed. We have shut down 32 lumber mills during the Clinton years, we idled 12,000 miners all because every activity that we have in Idaho is on the watershed.

To Mr. Miller's point, there isn't anything that we can do that we don't have to account for some part of the Endangered Species Act or the Clean Water Act or some other rule or regulation, and so I guess that is the frustration that we, who come from the West, have with it because it seems so patently unfair.

Let me ask you a question, now that my time is almost up, Your Honor. When you are looking at a species, do you look at it holistically in the United States or specifically to a geographic region? When the U.S. Fish and Wildlife decides to look at a species for threatened or endangered classification, how do you look at that?

Judge MANSON. Well, they actually look at both.

Mr. OTTER. Well, then, how is the determination made?

Judge MANSON. Well, the issue is whether—there are several layers to this—but the issue is whether it is facing extinction throughout all or a portion of its range.

Mr. OTTER. I see. Well, let me give you an example. When wolves were reintroduced in Idaho in 1994, there really hadn't been substantiated that there was a presence there, but we found out in other States there is actually not a bounty on them, but there is

a taking for management purposes in one of our other 49 sister States, that they were actually taking wolves.

But when those wolves were introduced into Idaho, let me tell you exactly what happened. We lost the activity on all of the watershed in the managed area as a result of that, which included a lot of grazing for the livestock, included logging, included mining. The logging and mining, especially the logging that we could no longer do, has now allowed for a lot of overgrowth. Now that has been going on for a long time because of the suppression of fires and stuff like that.

Now we find out that we are getting perilously close to an endangered species, a potential threatened species listing on species like the Rocky Mountain elk and the Clearwater herd, which at one time was the world's gene pool for elk. We are down to 3 calves, 3 calves this year, per 100 cows of calf-bearing age. In any other herd, you would expect a minimum of 28 for sustained numbers, but because of the wolf introduction, and the elk, especially elk calves, happens to be the preferred meal of a wolf, and by the U.S. Fish and Wildlife's own numbers, each wolf pack will take 87 onglets a year, and 80 percent of those will be—87 onglets—and 80 percent of those will be elk. So now we have another species that is being threatened because of the introduction of a species through the "may affect" rule and "could have been" rule.

So it just seems like the faster we go, the behinder we get in this thing. That is why it is so confusing to us. I would like to help my colleagues figure out how we can live with this and exist with it.

My question, I guess, comes down to do you, when you are figuring out whether to displace or replace a species that may have been there, like the wolf, is there an effect taken in on the other wild species that are there?

Judge MANSON. Decisions are to be made an ecosystemwide basis, and that should include a consideration of all of the other species that depend upon the same ecosystem and what the effect on other species will be in that ecosystem by action that affects one particular species.

I am not intimately familiar with the situation with the elk.

Mr. OTTER. The very nature of a wolf, and we knew this when it was introduced, the very nature of a wolf is, once there are sufficient numbers in a certain area, the alpha wolf is going to take over, and everybody else sort of has to leave. They have got to go someplace else.

So, even though we may have directed that into the Lemhigh Range, and that is where the wolf is going to be and reestablished, they are now in, you know, they have grown by 13 times the size that was originally intended, without a management plan, without a plan to protect the rest of the ecosystem, an ecosystem that they hadn't been planned to go into. How are we going to recover, how are we going to protect the other habitat and the other species that are now going to be endangered?

Judge MANSON. The only thing I would say is that wolf management is a complex issue. We are trying to work with the States affected to develop management plans for the wolf, and in doing so, we will look at it on an ecosystemwide basis.

Mr. OTTER. Thank you.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Flake?

Mr. FLAKE. I appreciate the testimony, and I wish I could have been here for more of it.

But just a follow-up question. Mr. Hogarth was talking about the sturgeon, and the aqueduct, the waterway, and the plans to protect here, and I am struck by the measurement used that, you know, what the threshold is, is it suitable habitat or was it here before, has it been displaced, whatever. And just looking at Arizona, we have a situation with the Mexican spotted owl, where nobody has claimed that it has ever lived in Arizona, simply that Arizona provides suitable habitat, and the logging industry has been completely decimated—completely—in Arizona, simply to protect what has been deemed suitable habitat, with no claim whatsoever that it ever lived there.

It seems, I don't know how anybody could reach any other conclusion, but that there is a different standard West and East of the Mississippi, different thresholds as to how species are protected.

Could I just get a brief answer from Mr. Manson on that?

Judge MANSON. There should not be a different standard between East and West, in terms of species protection. The Agency should be applying the same legal standards, the same biological standards, East and West, and—

Mr. FLAKE. Do you concede that there is a problem or that someone could easily reach that conclusion?

Judge MANSON. Well, I certainly think that I have heard enough to be convinced that there is a perception of a problem, and the perception needs to be dealt with either by figuring out that it is true, and fixing that truth of it, or figuring out where we have gone wrong in the process to leave the impression.

Mr. FLAKE. How long should that process take?

Judge MANSON. In terms of?

Mr. FLAKE. How long will it take you to determine whether that is simply a perception or if that is reality?

Judge MANSON. Well, I am not sure I could give you a 30-day or a 90-day time line, but I will tell you this; that I will ensure that the Fish and Wildlife Service is sensitive to that perception and that they work diligently to ensure that that does not become fact in any specific case that comes before them and to understand where in the process things have gone wrong to leave that impression.

Mr. FLAKE. Mr. Hogarth, you were nodding your head a minute ago. Do you see that as a perception or a—

Mr. HOGARTH. I think it is a perception. It has come to my attention quite a bit. Like I say, I have been in this job since September, and I think I was aware of it before then, but I have heard it quite a bit with the Washington Aqueduct.

We are in the process now of reviewing all of the data we can find on the Potomac River. I worked on the Potomac River back in the—I am going to age myself now—but back in the 1960's. It was so green then you could cut it with a knife, and you could see exactly where you had been. And I know, for a fact, I sampled it for 5 years, there were no sturgeon in the area.

Mr. FLAKE. Is the Potomac, in your view, is it suitable habitat?

Mr. HOGARTH. And that is what we have got to determine. I think we can do that between now and next spring.

Mr. FLAKE. Why is it that in Arizona they can determine that it is suitable habitat pretty quickly in order to shut down logging operations, but here it takes a lot longer?

Mr. HOGARTH. Well, I think we have to sample from the type of bottom habitat that is there, what type of bottom it is, and what the temperature ranges are, and we will look at that. There is some evidence that, without a doubt, there is some habitat in the vicinity that is suitable for shortnose sturgeon.

Mr. FLAKE. Well, that should be, in the Arizona standard, that is enough evidence to shut down logging. Why isn't it here? I would submit that it is more than a perception. It has gone beyond perception. There is a problem, and it is one that I think, Mr. Manson, it would be well to deal with.

One other quick question along these same lines and along the lines of where this bill could help, I believe, with sound science.

In Arizona, we have a whale of a problem here with the Southwestern Willow Flycatcher. We have a situation—and you mentioned you were just in Arizona, and you know we are under a severe drought, as is most of the West—the Roosevelt Lake, which provides about 70 percent of the water used by about 80 percent of the urban residents of the Phoenix area, over 3 million people, is about 20-percent capacity at the moment. Over the past couple of years, as the lake has been drawn down, the Southwestern Willow Flycatcher has nested in the draw-down areas. Now we are under a problem of filling the lake. If we are blessed to receive enough rain, we can't fill the lake without burdening the rate payers with extreme cost to buy or to maintain or establish suitable habitat elsewhere. The Southwestern willow flycatcher is a migratory bird that spends most of its time in Central America. We don't know, haven't a clue, no science says whether or not the habitat has been destroyed down there or where we are, leading to declining populations. This is an area where sound science can really help us determine where the problem is. Do you agree?

Judge MANSON. I would agree that sound science would help us determine exactly where the issues are that caused the decline of that species. I would add that there is, as I understand it, fairly well in progress a habitat conservation plan for that species that is being developed, and that certainly will have the benefit of allowing water supply issues to be dealt with while preserving the species at the same time.

Mr. FLAKE. I thank the Chairman.

Mr. POMBO. Thank you.

Mr. Manson and Mr. Hogarth, I don't expect you to admit that there is a different standard between the east and the west, but if there is a question in your mind, I am sure the Committee would be more than happy to share with you the hearing records from hearings that we have had over the last 7 years, and I think we are probably up somewhere around 50 hearings that we have had, and if you need any information, we would be more than happy to share that with you. And to hear Mr. Hogarth talk about the shortnose sturgeon and not knowing if there is any evidence that it had ever been there—and we just went through the listing of

habitat on the red-legged frog, where about 5 percent of California was set aside as critical habitat. Much of that area is in Mr. Miller's district, is area that has houses built on it, and subdivisions, and malls, and it was considered critical habitat for the red-legged frog, and Fish and Wildlife admitted that in much of that area that they didn't know if the red-legged frog had ever been there, but that it was suitable habitat if one wanted to live there.

The kit fox, the San Joachim Valley kit fox, a very similar situation, we are protecting tens of thousands of acres in my district as habitat for the kit fox with fully admitting, the Fish and Wildlife Service fully admitting that the kit fox does not exist on much of that land, but it is suitable habitat.

In your area we have a suspected sighting of an endangered species of an endangered salmon in the Mokelumne River. Just the suspected sighting of a salmon in that river was enough to alter the pumping schedules and the use of that river, because someone thought they may have seen one.

In terms of the shortnose sturgeon, there are a number of suspected sightings. There is no science to back that up, but there are a number of suspected sightings, fishermen that have said that they have seen sturgeon, that they have caught sturgeon within the Potomac. I would not want you to base your decision based upon that alone, but there is a definite difference in the way the law is being implemented in some parts of the country versus other parts of the country, and I don't think anyone can say that there is not a difference. And if any of you really do believe that, I think you really need to research it much more thoroughly. I am not going to ask you to further answer that because I think both of you have given your positions on that already.

I would like to ask Mr. Manson. There were questions brought up earlier that much of what is in this bill can be done administratively or is already done. And your response to that was that there is very little here; there are a few things that you may be able to do administratively, but there is a lot of things that are not currently done.

Just for the record I would like you to expand upon that somewhat. Peer review is part of the process you go through, but the peer review that we outline here is very different than what has been done in the past.

Judge MANSON. Yes, I would agree with that. Both agencies have a peer review process in policy that is published in the "Federal Register." The process in this bill, however, is significantly different than the process in the policies that currently exist, so this does not duplicate anything that is presently being done. There are other provisions here that clearly are different from anything that has been done before, and so this bill is not just surplusage. This bill makes some significant changes in the way the Act is implemented.

Mr. POMBO. Let me ask you in terms of the information that is gathered that you base your decisions on, does the bill in its current form require you to gather as much information as you can and to base your decision on that?

Judge MANSON. I would say it does in the sense that it does not change the requirement that we use the best available science, and

that means gathering the best available science. The bill doesn't preclude that. The bill encourages that by indicating that there will be a review process.

Mr. POMBO. One issue that—and I would like to ask both of you gentlemen this question, but I will start with you, Mr. Manson. One issue that comes up repeatedly and it has come up in the past with similar legislation, was that if you are required to do peer review, to gather more information, to spend the time to give us the confidence that your decision is based upon the best available science, that that will in some way slow down the process? I would like yo to comment on that because I would much rather have you take a little longer to make a decision and have that decision be based on good science.

Judge MANSON. Well, I have to agree with that as a matter of policy, that it would be better to take a little longer and make a better decision than to make a hasty decision. The only issue I had was that the timelines don't fit together right now, and I regard that more as a technical issue than a real substantive issue.

Mr. POMBO. And I will grant you that, that we do need to relook at the timelines.

Judge MANSON. Right. But I would agree that it is better to make a considered decision, even if it takes a little longer, than to make a hasty decision.

Mr. POMBO. Mr. Hogarth?

Mr. HOGARTH. I agree with that unless—the problem I have is if you have a timeline and you don't meet it, you set yourself up for litigation and you set yourself up then for the court to take an action because we didn't meet the timeline. And that is the thing that bothers me. You could be out of time and then you could have a judge taking control of it. So we have to be very careful till we make sure the timing works together so that we don't add something that gets up to a timeframe that we can't meet.

I have 105 lawsuits right now. I hate to have another law that adds more to it.

Mr. POMBO. Well, none of us want, if at all possible, to do anything that is going to increase in any way the number of lawsuits. I know the people who drafted this bill had the intention of trying to eliminate a number of these lawsuits in the future.

I would like to thank you both for testifying and for spending the time here with us this afternoon. This is an extremely important issue, an extremely important piece of legislation. I will pledge, along with Mr. Walden and myself, that we will, and the Chairman, continue to work with you guys and try to iron out some of those differences that exist, some of the concerns that you have. I believe that a number of the concerns that were raised are legitimate that we can fix before this bill comes up for a markup. So I appreciate your time and effort in being here. So thank you very much.

Judge MANSON. Thank you, Mr. Chairman.

Mr. HOGARTH. Thank you, Mr. Chairman.

Mr. POMBO. The hearing is adjourned.

[Whereupon, at 3:41 p.m., the Committee was adjourned.]

[Additional statements submitted for the record follow:]

[The prepared statement of Mr. Thune follows:]

Statement of The Honorable John Thune, a Representative in Congress from the State of South Dakota

Mr Chairman, I would like to start my statement today on a note of thanks. I appreciate the opportunity you and the Committee have given me to share the effects of the Endangered Species Act (ESA) on my constituents, in South Dakota.

Earlier this year, I met with a number of South Dakotans who have had significant problems with the Fish and Wildlife Service (FWS) and how it interprets and implements the ESA. This is important in my state because the ESA is not some abstract or limited regulation that merely touches upon the lives of a few. It has the potential to devastate the economy in some parts of my state should the FWS decide to list the black tailed prairie dog.

I certainly believe that the ESA was passed in good faith and with noble intentions. Unfortunately, its impact on South Dakota is not entirely noble.

Mr. Chairman, there needs to be a point at which the ESA gets an injection of common sense. For example, right now there is no empirical or hard data on the population of prairie dogs in the State of South Dakota, and there has not been a statewide prairie dog inventory conducted to determine their population. Yet, the Fish and Wildlife Service has proposed that the prairie dog be listed as threatened. This is a concern to my constituents. When they can't even rely on the Federal Government to use real, empirical data to make a change that could have devastating impact on their livelihoods, who can they rely on? That's why I have introduced H.R. 3920, the Rancher Protection Act.

My bill would require the Federal Government to use the best scientific and commercial data available to determine whether the black-tailed prairie dog is truly a threatened species. Importantly, the bill also requires the Fish and Wildlife Service use peer reviewed data to ensure greater accuracy and data that counts actual population of the prairie dog rather than estimates.

In addition, the bill requires the FWS to accept and acknowledge data from local landowners, and include the data in the rule-making record compiled for any determination that the species is an endangered or threatened species. Local landowners have a wealth of knowledge concerning the population of local species and their input should be given greater weight.

In summary, what this really comes down to is one simple fact: there is an absolute necessity to reform of the Endangered Species Act. South Dakota ranchers are suffering because of the excesses of this law. My legislation would address this problem with regard to the black tailed prairie dog, but more needs to be done. What we need is comprehensive reform of the Endangered Species Act. I hope that this hearing is another step in addressing this critical need.

Again, Mr. Chairman, I thank you again for giving me this opportunity, and I look forward to the results of this hearing and hope that this Committee will be able to address the problems with the ESA this year.

[A statement submitted for the record by the American Society of Civil Engineers follows:]

Statement submitted for the record by the American Society of Civil Engineers on H.R. 4840

Mr. Chairman and Members of the Committee:

The American Society of Civil Engineers (ASCE) appreciates the opportunity to present this statement for the record to the Committee on H.R. 4840, the Sound Science for Endangered Species Act Planning Act of 2002, an original bill introduced by the Chairman and two Members on May 23, 2002.

ASCE was founded in 1852 and is the country's oldest national civil engineering organization. It represents more than 125,000 civil engineers in private practice, government, industry and academia who are dedicated to the advancement of the science and profession of civil engineering. ASCE is a 501(c)(3) non-profit educational and professional society.

Civil engineering, considered one of the oldest engineering disciplines, encompasses many specialties. ASCE members practice engineering in the professional areas of surface water and groundwater hydrology, agricultural irrigation systems, environmental and water resources systems, watersheds and wetlands management, highway and construction engineering and other fields subject to the jurisdiction of the Endangered Species Act (ESA).

Engineers apply the theories and principles of science and mathematics to research and develop economical solutions to technical problems. Engineers design, plan, and supervise the construction of buildings, highways, and transit systems. They develop and implement improved ways to extract, process, and use raw materials, such as petroleum and natural gas. They develop new materials that both improve the performance of products and take advantage of advances in technology. They analyze the impact of the products they develop or the systems they design on the environment and people using them. Engineering knowledge is applied to improving many things, including the quality of health care, the preservation of endangered species, the safety of food products, and the efficient operation of financial systems.

The Society sponsors numerous specialty conferences each year and publishes 29 rigorously peer-reviewed technical journals in such fields as ports and waterways, hazardous materials, cold regions engineering, structural engineering, energy engineering, environmental engineering and construction engineering.

I. Summary

ASCE would be pleased to support enactment of H.R. 4840, with certain important modifications.

- Section 2 of the bill, Sound Science, should be retitled to drop the reference to "sound science." Additionally, the section should be further modified to remove the terms "commercial data" and "commercial study" in reference to the material to be used in making determinations under the ESA. Such a requirement already is in the Act.
- Section 3, Independent Scientific Review, should be stricken in its entirety. The "independent review" contemplated by the bill is unnecessary and would result in burdensome and duplicative peer reviews that would be carried under an impossibly short deadline.

II. ASCE Policy on the Endangered Species Act

The Endangered Species Act (ESA) should integrate science and engineering in the process of identifying and listing species and their critical habitats. Species listing and critical habitat decisions should require peer review and improved collection and field testing of data. The law should allow concerned individuals to consult with the U.S. Department of the Interior to determine whether a proposed action will jeopardize a species.

The Act should require that a scientific demonstration of a take of individuals of a species precede enforcement actions. If a species is determined to be in jeopardy, economically feasible and prudent alternatives for its preservation must be considered. ASCE encourages consideration of social and economic impacts of critical habitat designations and supports incentives for conservation of species, including "no surprises" assurances and provisions for multispecies conservation plans. Environmental mitigation alternatives should be reasonable and prudent and related to the nature and extent of the environmental impact.

Government, business and industry must make significant investments to protect and enhance the habitat of endangered species. It is essential that these financial resources are allocated based on sound engineering and science as well as a balance between environmental and economic concerns. The law should focus on incentives and "no surprises" assurances for habitat preservation rather than penalties and single species listings.

Background

A. The Endangered Species Act

The Endangered Species Act (ESA) of 1973is a comprehensive attempt to regulate the destruction of all species and to consider habitat protection as an integral part of that effort. Under the ESA, species of plants and animals (vertebrate and invertebrate) may be listed as either "endangered" or "threatened" according to assessments of the risk of their extinction. In addition, distinct population segments of vertebrate species may also be listed as threatened or endangered.

The ESA, enacted in the early years of the contemporary environmental movement, sweeps broadly, requiring extensive and costly preservation efforts for thousands of plant and animal species. It does so one species at a time, however, and fails to consider ecosystemwide issues in species conservation. Nevertheless, the Act and its economic consequences were controversial almost from its inception. Some have argued that this was due largely to congressional innocence of its potential to affect a wide range of species—and economic interests.

Once a species is listed, powerful legal tools, including citizen-suit provisions, are available to aid the recovery of the species and the protection of its habitat. If a

species is listed as threatened or endangered, the appropriate agency must use section 4 of the ESA to designate critical habitat (areas where the species is found, and any other areas where features essential to the species' conservation exist) at the time of listing. If the publication of this information is not "prudent" because it could harm the species (e.g., by encouraging vandals or collectors), the appropriate agency may decide not to designate critical habitat.

Congress placed a heavy emphasis on designating critical habitat. It provided for exceptions where the economic benefits of these designations exceeded their costs, where the habitat simply could not be determined, or in those few cases where the designations would not be prudent.

The ESA permits "incidental take" of species listed as threatened and endangered as long as a habitat conservation plan (HCP) is concurrently developed. But HCPs do not require recovery of listed species; they only must ensure that "the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild."

Finally, the Act requires the Secretary to consider, in addition to scientific data, commercial data that might affect species or property owners in the listing of a species as endangered or threatened.

B. The Decline of Species

The decline of plant and animal species has accelerated in recent years. Scientists disagree over the precise reasons for this diminution, but habitat destruction and fragmentation are seen as a major factor in the loss of species. Anthropogenic alterations in the environment, however, could become the more consequential element in the loss of speciation in future.

Nevertheless, the current consensus among scientists is that habitat loss is the greatest threat to plant and animal species; the protection of critical habitat has been a focus of Federal efforts under the ESA. Indeed, the preservation of habitats is seen by many observers as the best method of protecting ecosystems from destruction.

The Fish and Wildlife Service (FWS) clearly agrees. "Virtually every major study of the conservation of imperiled species considers habitat as a major component in a species' conservation and eventual recovery."

Other experts, however, believe the use of habitat conservation plans (HCPs) may not do enough to address the problems of habitat loss. "HCPs are not 'plans provid[ing] protection for currently endangered species' because there is no promise of recovery of these species. The cumulative effect of this planning process across the landscape on survival of endangered species has not been adequately addressed by the Department of the Interior, which implements the ESA."

The agency may postpone designation for up to one year if the information cannot be determined. While any area, whether or not Federally owned, may be designated as critical habitat, private land is affected by designation primarily if some Federal action (e.g., license, loan, permit, and the like) is also involved. In either case, Federal agencies must avoid "adverse modification" of critical habitat, either through their own actions or activities that are Federally approved or funded.

C. The ESA Process

Federal progress in species preservation under the ESA has been the subject of a great deal of commentary, much of it highly critical. As of November 30, 2001, the FWS and the National Marine Fisheries Service (NMFS), which is responsible for marine species under the ESA, had listed a total of 1,252 U.S. species (512 animals, 740 plants) as endangered or threatened.

As of late 2001, the FWS and the NMFS had designated critical habitats for only 150 of these 1,252 endangered or threatened domestic plant and animal species, according to the agencies. This represents approximately 12 percent of all listed species. Of the 150 completed critical-habitat designations, 140 have been promulgated by the FWS.

The effect of this failure to designate critical habitat is to identify certain species as needing special help, and then allow the overwhelming majority of them to remain either homeless or on the brink of homelessness. The dearth of ESA success stories must be considered at least in part the predictable consequence of this fundamental disconnect.

IV. Policy Considerations

A. Section 2, H.R. 4840

As introduced, section 2 of H.R. 4840 would amend section 4 of the ESA to require the Department of the Interior to rely on "sound science" and any "commercial study" that, taken together, have been "field-tested and peer-reviewed."

1.) Science is a systematic body of knowledge that aims to produce reliable explanations of physical and material phenomena. Scientists use experimentation, observation and deduction to achieve this aim. The laws of science are taken to be universally applicable; they form the theoretical structure of the physical sciences.

The phrase "sound science" is a political term, not a scientific one. There is science, and there is everything else. The term "sound science" is meaningless to the scientist or engineer, to whom all data that are (1) empirically determined, (2) testable and (3) incapable of being falsified are by definition science. In this sense, all science is sound.

With rare exceptions, the science of any subject is incomplete at a given moment. It frequently is speculative, hinting at half-seen solutions. It may not lead in the direction that the political communities in Congress or at the regulatory agencies wish to go (or provide a perfectly illustrated path for those inclined to follow it). Science certainly cannot foresee every unfortunate consequence of a policy decision or provide perfect certainty for policymakers. To suppose that there is another, greater level of "sound science" somewhere in the universe just waiting to grant such clarity is a myth.

The phrase "sound science" is meaningless to scientists and engineers and should not be included in the statute.

2.) The bill's requirement for the Secretary to consider a "commercial study" when taking any action under the ESA duplicates the current requirement in section 4 of the Act. Moreover, the modifiers "field-tested" and "peer-reviewed" before the phrase "commercial study" add no weight to the present statutory directive. A commercial study is in no sense a form of scientific evidence; it is not susceptible to peer review in the standard sense.

If the Committee considers that the Act needs greater clarity on this point, it may wish to extend the economic-impact test for critical-habitat designations found at § 1533(b)(2) to the listing of a species as endangered or threatened. Economic literature, like studies from the physical sciences, is universally subject to rigorous peer review.

B. Section 3, H.R. 4840

Section 3 of the bill would require the Interior Department to carry out a 90-day "independent scientific review" of all actions taken under the Act, including listing decisions and the development of recovery plans. The provision would require the Secretary to appoint five-member independent review boards to "review and report" on "the scientific information and analyses" relied upon by the government for any major ESA action. The reviews would have to be completed within 90 days of the creation of the review board.

Such a requirement would be burdensome on the Act's implementation, which already lags badly. More importantly, this short-term review could add nothing to the months-long (even years-long) peer reviews already accorded to the thousands of scientific articles published in dozens of journals on biology, evolution, conservation ecology and the like.

The objective of thorough peer review is to evaluate and rate the scientific and technical merit of the research in a given field. These reviews focus on the quality of the science and the impact it might have on our understanding of the phenomena, rather than on details of technique and methodology. A proper review can take weeks, months, or, in some cases, years.

The requirement for a peer-review board in H.R. 4840 seems to be an effort to bring into focus the character of the agency's regulatory effort rather than the quality of the science itself. As such, it can do nothing to resolve whatever remaining scientific disagreements exist with respect to species extinctions and other subjects relevant to the ESA.

Mr. Chairman, that concludes our statement on H.R. 4840. If you or Members of the Committee have any questions, please do not hesitate to contact Michael Charles of our Washington Office at (202) 789–2200 or by e-mail at mcharles@asce.org.