



December 4, 2015

Western Governors Association
1600 Broadway, Suite 1700
Att: Zach Bodhane
Denver, Colorado 80202

Re: Species Conservation and ESA initiative

Dear Mr. Bodhane:

Please accept this correspondence as the follow up correspondence relating to the Western Governors Association meeting in Cody, WY targeting Species Conservation and Endangered Species Act issues ("WGA initiative") submitted on behalf of COHVCO, CSA, TPA. Prior to addressing our experiences with the Endangered Species Act, we believe a brief summary of each Organization is needed. The Colorado Off-Highway Vehicle Coalition ("COHVCO") is a grassroots advocacy organization the 150,000 registered OHV users in Colorado seeking to represent, assist, educate, and empower all OHV recreationists in the protection and promotion of off-highway motorized recreation throughout Colorado. COHVCO is an environmental organization that advocates and promotes the responsible use and conservation of our public lands and natural resources to preserve their aesthetic and recreational qualities for future generations.

The Trail Preservation Alliance ("TPA") is a 100 percent volunteer organization whose intention is to be a viable partner, working with the United States Forest Service (USFS) and the Bureau of Land Management (BLM) to preserve the sport of trail riding. The TPA acts as an advocate of the sport and takes the necessary action to insure that the USFS and BLM allocate to trail riding a fair and equitable percentage of access to public lands.

Colorado Snowmobile Association ("CSA") was founded in 1970 to unite winter motorized recreationists across the state to enjoy their passion. CSA advocates for the 30,000 registered snowmobiles in the State of Colorado. CSA has become the voice of organized snowmobiling seeking to advance, promote and preserve the sport of snowmobiling by working with Federal and state land management agencies and local, state and federal legislators.

While the primary mission of the Organizations most directly relates to motorized recreation, the overall scope of the Organizations often has a larger impact as motorized recreation and access can take many forms and involve many activities, including camping, hunting and fishing and other recreational activities where motorized access to public lands is critical but not the primary recreational activity sought. Under federal land management standards, when an area is open to motorized access it is rarely closed to any other activity. For purposes of this document, CSA, COHVCO and TPA are identified as "the Organizations".

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

The Organizations are involved in large number of species related processes from landscape level planning, such as recent Greater Sage Grouse efforts, to local efforts often on areas smaller than a Ranger District. This involvement has ranged from: On the ground support for on-going wolverine research; Active participation in various stakeholder efforts; Funding extensive habitat restoration efforts through the State OHV grant process; intervening in ESA related litigation and actively assisting in the disbursement of the new Lynx Conservation Assessment and Strategy to land managers. The Organizations submit that ESA related issues are the single largest threat facing all recreational activity on public lands. This relationship cannot be reconciled with the fact that recreational usage of public lands is often totally unrelated to species decline, as too often land management decisions are based on the need to appear to do something for the species rather than sound scientific process to benefit the species.

The Organizations would submit that recreational interests and groups must play a more prominent role in WGA initiative moving forward, as there are a wide range of recreational activities occurring on public lands. These activities represent a massive economic driver for all

levels of regional economies and are critical component of the western lifestyle. While many attendees at the meeting in Cody were thrilled with the non-listing of the Greater Sage Grouse, the Organizations are not ready to declare those efforts a success from a recreational perspective. The Greater Sage Grouse process has not been the normal experience in the handling of ESA issues, and this must not be overlooked. Determinations regarding many species with smaller habitat areas are often made without significant review and based on significant uncertainty in science and management, simply due to the volume of proposals and efforts that are on-going. The cumulative impact of these smaller species efforts is that there are few locations on public lands that are not identified as habitat for some type of plant, animal, fish or insect. The cumulative management situation presented identifies many issues in the process that must be resolved in order to develop a more effective ESA moving forward.

1. At the landscape level, the listing/delisting process for any species is simply badly out of balance. While it is comparatively easy to list a species under the Act, removal of any species from the list is functionally impossible. Clearly this imbalance of processes was not envisioned when the Act was passed, as public support for a process that resulted in easy additions to the list and the impossibility of removal of any species would not have garnered large scale support. The Organizations welcomed discussions surrounding the heightened listing requirements that were recently initiated by the USFWS, such as increased state involvement and scientific review prior to acceptance of a listing petition. While this is a step in the right direction, this simply does not resolve the imbalance in the two processes problems.

The Organizations submit that some type of filing fee associated with the petition process should be looked at on a per species/per petition basis. In association with this filing fee, a requirement of each petition only addressing a single species should be addressed. The implementation of a filing fee and single species per petition requirement would have minimal impact on the delisting process as often any delisting is done on a species specific basis. The Organizations submit that these criteria would be important steps in addressing the recent flurry of listing petitions targeting hundreds of species in a single document. These petitions are often difficult to understand and try and associate particular issues with particular species. Clearly these types of petitions were not envisioned when the Act was passed and are insulting to both the parties to the efforts and the goals and objectives of the Act. The Organizations submit that any benefit to any species that could result from these super petitions is minimal at best.

These new petition requirements would address one of the major impacts on the ground from the imbalance of the entire process, mainly that the filing of any petition regardless of how poorly scientifically based has a huge chilling effect on efforts that might involve habitat areas or efforts to mitigate threats. It has been the Organizations experience that the mere assertion of a possible listing of a species has a huge unsettling effect on any efforts to improve habitat or

mitigate threats as often land managers stop anything in the habitat area when there has been a petition filed, as land managers are simply unsure how to proceed.

2. The current version of the ESA simply does not work. Many assert that the overall success rate of the ESA is only 1% based on delisting of species and others assert that the Act is 99% effective as only a few species have been found extinct. While the Organizations believe that the 1% delisting levels may not be the best measure of the effectiveness of the ESA, the Organizations support the position that the ESA has been minimally effective in increasing species populations in most cases. The exact percentage of species listed or delisted really does not impact that position.

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

4. Hard population goals must be set for a species or DPS and must be honored in the delisting process. Too often population goals are not provided in the ESA process at all and if there are population goals provided, they simply are not honored. These types of hard objectives are the general standard for the management of a challenges being faced by the country, and as such should be applied to ESA actions. This is simply good management and is a critical in developing public support and coalitions that are necessary to improve species populations. The goal simply gives the public something to rally around and work towards.

On January 18, 2011, President Barack Obama issued Executive Order 13563, which specifically required that all agencies:

"(4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt;"¹

The requirement of EO 13563 that all agencies provide performance objectives is highly relevant to the management under ESA. Logic dictates that any determination that a population is sufficiently threatened to warrant listing would rationally require that a target population for the area has been created and it has not been met. Rather than specify what this target population in the documents released, often these target are omitted, violating the clear mandate of the Executive Order and hampering effective management of the species

¹ See, Executive Order No. 135623, 76 Fed. Reg 3821 (2011).

moving forward. Providing identifiable population goals for areas would be a critical component of public comment for wildlife management professionals and researchers, as often the target population and methods of identifying accurate measurement methodology are the basis for extensive analysis and comment from these groups of the public. Without target goals, this comment simply is not obtained.

The Organizations believe that these identifiable goals will be a critical component of public support for the management of various species in the future. This public support for management will allow private lands to be managed with a variety of tools for improving grouse habitat.

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

The US Supreme Court recently specifically addressed the situation where resources were directed towards minimally significant issues and stated as follows:

“And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.”²

Given this clear statement of concern over the wasteful expenditure of resources for a certain activities in an attempt to manage an environmental issue, the Organizations are very concerned regarding what could easily be the wasteful expenditure of resources for the protection of several species in the Proposal, as recreational usage of habitat areas simply is not an issue contributing to the decline of the species.

² See, *Entergy Corp v. Riverkeeper Inc et al*; 475 F3d 83; (2009) Opinion of Breyer J, at pg 4

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

7. Funding of litigation efforts is simply badly out of balance with resources directly benefitting the species. The Organizations submit that the funding of litigation efforts and defense of litigation brought against the USFWS is simply badly out of balance with the portion of resources directly benefitting the species. The Organizations propose that a revision of the Equal Access to Justice Act must be looked at as part of this discussion as ESA and EAJA have created a cottage industry where certain groups sue the government on ESA issues and then recover all legal fees when any portion of the action is successful. The Organizations believe that these petitions often have little or nothing to do with increasing populations and are often found sufficient due to funding limitations and the large number of species that are either listed or proposed to be listed.

The imbalance of EAJA provisions are compounded by the fact that parties that intervene to assist in defense of claims with the government are functionally precluded from recovering their legal fees. The Organizations submit there are three alternatives; 1: increase the burden on parties to recover funding for ESA litigation on EAJA; 2: remove ESA actions from EAJA; 3: allow interveners to recover costs.

8. Funding for active management of threats must be expanded and used in partnership with other governmental agencies. While the ESA has provisions to allow federal monies to be directed to states under §6 §6 money is simply not available at levels to really make any difference to a species. Not only are state level efforts the primary location of specific species knowledge and expertise State level efforts are the primary source of funding for the management of both proposed species and any species that might be listed. Often state funding to manage species is provided at a factor of 10 to 20x levels of federal money that is available under §6. The Organizations submit that reallocation of Land and Water Conservation Fund money could represent a viable source for significant additional federal funding to benefit species on the ground.

9. Better science must be developed on species. Too often the lack of science is seen as a basis for listing and often listing of species is based on a lack of science, such as happened with the Canadian Lynx. While much of the lack of science around the Canadian Lynx has been resolved, this resolution has taken almost 2 decades to develop due to exceptionally limited funding. This is simply unacceptable.

While the Organizations welcomed the attempts in the Greater Sage Grouse planning efforts to tailor Sage Grouse plans to address more site specific issues and challenges facing various populations, the Organizations are very concerned that any information and research exchange behind the scenes was limited at best. Many exceptionally similar species were listed (Gunnison Sage Grouse in Colorado) under situations and circumstances that were exceptionally similar to the circumstances that led to the non-listing of the Greater Sage Grouse. This type of consistency is critical to the development of an ESA on the ground.

10. Cumulative economic impacts of multiple listings must be looked at. While the Greater Sage Grouse efforts have garnered a significant amount of public interest due to the large habitat areas at issue, many species that are listed have smaller habitat areas. These smaller habitat areas does not mitigate the impacts of the large number of small habitat areas has on public lands and recreation. Often it is difficult if not impossible to identify any public land that has not been identified as habitat for an Endangered Species in the state of Colorado. These cumulative impacts are simply never reviewed.

The Organizations must express frustration with economic analysis provided in some listing proposals which rely on agency costs as the economic impact of habitat designations. Agency costs simply are not the proper measure of economic impacts to local communities, and this should be clearly and unequivocally stated in regulations moving forward.

11. Warranted but precluded status generally. In the recent landscape settlement regarding the administratively created status of warranted but precluded the USFWS withdrew the status as a valid listing position. The Organizations submit the "warranted but precluded" status should be reinstated legislatively. Any revision to the ESA should clearly identify this status moving forward as the status provided significant flexibility in the prioritization of species under limited budgets. The removal of this status by the service was a mistake as there will always be management discretion in the management of this many issues, regardless of the issues being managed. The Organizations do not believe sufficient funding could be supplied to allow for complete management of all species that have been listed or are under review for listing.

12. Landscape level/multispecies conservation efforts. There has been extensive discussions regarding the need for landscape level efforts to address multiple species in order to reconcile management and impacts to species. The Organizations believe this is an interesting discussion but only a small piece of the puzzle. One of the foundational principals of this type of analysis is

the assumption that the decline of species is related to a lack of habitat. Often this is not the case.

Such management and analysis is also exceptionally complex and highly localized as exemplified by the Desert Renewable Energy and Conservation Plan in California, where efforts similar to this were undertaken. While this process remains on-going the efforts have proven exceptionally complex, often difficulty has arisen in coordination of efforts and research and in the Organizations opinion has produced a product that has strayed badly from the original purpose and need of the Proposal. The Organizations believe these efforts are interesting but present significant issues when looked at from a cost/benefit position, unless the proper scale of analysis is looked at. Rather than require additional analysis in the ESA process, the Organizations believe that accurate and meaningful analysis of current efforts and at current geographic levels must be required. Similar goals can be achieved with significantly lower costs.

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

The Organizations look forward to participating in further meetings on this issue and welcome the discussion as it moves forward. Please feel free to contact Scott Jones, Esq at 508 Ashford Drive, Longmont CO 80504 or via email at scott.jones46@yahoo.com or via telephone at 518-281-5810.

Respectfully Submitted,



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COHVCO & CSA President
TPA Authorized Representative

D.E. Riggle
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Trails Preservation Alliance

cc: Governor John Hickenlooper; Senator Corey Gardner; Congressman Scott Tipton; Congressman Doug Lamborn