



**Prepared Statement of  
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**U.S. Senate  
Committee on Environment and Public Works**

**Hearing on S. 2372, The Recovering America's Wildlife Act**

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**Main points**

- Successful wildlife conservation depends on respecting property rights and making species an asset rather than a liability to private landowners.
- State conservation programs can tap the benefits of federalism while avoiding the conflict that frequently arises under federal programs.
- The Endangered Species Act could be better implemented to encourage effective and innovative state conservation by restoring Congress' original design for the regulation of threatened species.
- To be sustainable, conservation funding should reflect the wide variety of interests that value wildlife, rather than relying too much on a single source.



## Introduction

Thank you Chairman Carper and Ranking Member Capito for the invitation to participate in this committee's consideration of the Recovering America's Wildlife Act (RAWA). RAWA calls for significant federal investment in state conservation initiatives to recover endangered and threatened species and to conserve other wildlife species before they trigger listing under the Endangered Species Act. These are admirable goals, and I appreciate the opportunity to discuss how we can best pursue them.

It is important to understand RAWA in the broader context of federal and state conservation policies and what we've learned from the results of those policies. Today, I will focus on four principles that should be front of mind as this committee considers this legislation and the future of wildlife conservation. First, successful conservation begins by respecting private property rights and making wildlife an asset to private landowners rather than a liability to be avoided. Second, pursuing conservation through states can encourage innovation and accountability while avoiding the conflict that too often arises under federal policy. Third, Endangered Species Act policies may frustrate RAWA's goal of encouraging effective state conservation programs. For example, Congress should consider how the Fish and Wildlife Service has undermined one of the Endangered Species Act's key incentives for state conservation by issuing a rule that purports to overrule Congress' decision to distinguish regulation of endangered and threatened species. This rule, which was recently repealed but the agency has expressed its intent to readopt, exacerbates conflict, eliminates a key incentive for recovery efforts, and undermines state conservation. And, finally, sustainable conservation depends on broadening funding sources beyond hunters and anglers to better reflect the wide variety of interests that value wildlife.

## The Property and Environment Research Center

I am the vice president of law and policy with the Property and Environment Research Center (PERC), a conservation research institute based in Bozeman, Montana, and dedicated to improving environmental quality through property rights and markets. For four decades, PERC's research has explored the critical role of private property, incentives, and innovation in successful conservation. It has emphasized the importance of making species an asset for landowners, rather than a

liability, and the dire consequences for wildlife when we get the incentives wrong.<sup>1</sup> And PERC has studied how policies can encourage collaboration between federal and state wildlife agencies, private landowners, and conservation organizations—or can create endless and counterproductive conflict.<sup>2</sup> In addition to research, PERC also puts its ideas into practice, by partnering with private landowners and conservation groups to develop innovative, voluntary strategies to advance conservation.<sup>3</sup> Prior to joining PERC, I spent nearly ten years as an environmental attorney, including participation in significant litigation involving the Endangered Species Act. In that role, I saw firsthand how well-intentioned but misguided policies can encourage conflict at the expense of collaborative conservation.

## I. Honor private property rights and support voluntary stewardship

Aldo Leopold famously remarked that “[c]onservation will ultimately boil down to rewarding the private landowner who conserves the public interest.” Perhaps nowhere is this more true than in the context of wildlife conservation.

Private lands play a central role in sustaining wildlife. In 2009, the Fish and Wildlife Service reported that approximately half of the species listed under the Endangered Species Act depend on private land for at least 80 percent of their habitat.<sup>4</sup> But it’s not just endangered and threatened species that depend on the goodwill of private

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<sup>1</sup> See, e.g., Jonathan Wood & Tate Watkins, *Critical Habitat’s “Private Land Problem”: Lessons From the Dusky Gopher Frog*, 51 Envtl. L. Rep. 10,565 (2021); Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act’s Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (April 2018), available at <https://www.perc.org/2018/04/24/the-road-to-recovery>; Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (2011); Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series (1995), <https://www.perc.org/sites/default/files/Endangered%20Species%20Act.pdf>.

<sup>2</sup> See, e.g., *The Road to Recovery*, *supra* n.1; Jonathan Wood, *A Prairie Home Invasion: How Environmental Federalism Can Lead to Real Recovery of Endangered Species*, PERC Reports (2017), available at <https://perc.org/2017/12/09/a-prairie-home-invasion/>; Terry Anderson & Reed Watson, *An Economic Perspective on Environmental Federalism: The Optimal Locus of Endangered Species Authority*, in *The Endangered Species Act and Federalism: Effective Conservation through Greater State Commitment* (2011).

<sup>3</sup> See, e.g., PERC, *Elk Occupancy Agreements*, <https://perc.org/elk-occupancy-agreements/>.

<sup>4</sup> See Fish and Wildlife Serv., *Our Endangered Species Program and How it Works With Landowners* (2009), available at <https://www.fws.gov/Endangered/esa-library/pdf/landowners.pdf>.

landowners. The Greater Yellowstone Ecosystem, which PERC calls home, has the longest intact migrations of elk, muledeer, and pronghorn.<sup>5</sup> While 68 percent of the land in the Greater Yellowstone Ecosystem is public,<sup>6</sup> the ecosystem's prized elk spend up to 80 percent of their winters on private land, where snows are less deep, forage is more attainable, and conditions are more favorable.<sup>7</sup> And, according to the Audubon Society, more than 80 percent of the grasslands and wetlands that provide essential bird habitat are in private ownership.<sup>8</sup> There is simply no way to achieve conservation goals without working with private landowners.

That's why PERC was pleased that the National Climate Task Force, in its recent "*Conserving and Restoring America the Beautiful*" report, included respect for private property rights as one of the "essential ingredients to building and maintaining broad support, enthusiasm, and trust" in conservation efforts.<sup>9</sup> I fully agree with its observation that "[e]fforts to conserve and restore America's lands and waters must respect the rights of private property owners. Such efforts must also build trust among all communities and stakeholders, including by recognizing and rewarding the voluntary conservation efforts of private landowners."<sup>10</sup>

Despite broad recognition that the goodwill and cooperation of private landowners is of central importance, our environmental policies do not always reflect this basic fact. Instead, too often, regulations make wildlife a liability for landowners to avoid, rather than an asset to conserve. Such regulations get the incentives backward and send a

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<sup>5</sup> See Todd Wilkinson, *The Marvelous Migrations of Greater Yellowstone*, PERC Reports (2019), available at <https://www.perc.org/2019/12/06/the-marvelous-migrations-of-greater-yellowstone/>.

<sup>6</sup> See Patricia Gude, Andrew J. Hansen, and Danielle A. Jones, *Biodiversity Consequences of Alternative Future Land Use Scenarios in Greater Yellowstone*, 17 *Ecological Apps.* 1004 (2007).

<sup>7</sup> See Whitney Tilt, *Elk in Paradise: Conserving Migratory Wildlife and Working Lands in Montana's Paradise Valley* (2020), available at <https://www.perc.org/wp-content/uploads/2020/07/Elk-In-Paradise.pdf>.

<sup>8</sup> See Nat'l Audubon Soc'y, *North American Grasslands and Birds Report* (2019), available at [https://nas-national-prod.s3.amazonaws.com/audubon\\_north\\_american\\_grasslands\\_birds\\_report-final.pdf](https://nas-national-prod.s3.amazonaws.com/audubon_north_american_grasslands_birds_report-final.pdf).

<sup>9</sup> See Nat'l Climate Task Force, *Report: Conserving and Restoring America the Beautiful* (2021), available at <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf>.

<sup>10</sup> See *id.*

strong signal to landowners not to conserve or restore habitat. Worse, they may even create perverse incentives, encouraging landowners to preemptively destroy habitat as the only way to avoid unwelcome and unfair burdens.

This phenomenon is perhaps best understood in the context of the Endangered Species Act, which can impose strict limits on private landowners who accommodate rare species or conserve their habitats.<sup>11</sup> Studies have shown, for instance, that the statute’s “take” prohibition can encourage landowners to preemptively destroy habitat and avoid the regulatory consequences of a listed species’ potential presence.<sup>12</sup> Likewise, “critical habitat” designations result in a so-called “stigma effect,” immediately lowering the value of designated land because prospective purchasers recognize the designation as a regulatory risk and lower their offers accordingly.<sup>13</sup> Recent studies show that critical habitat designations can reduce land values by as much as 70 percent—a significant blow to landowners who may be relying on that land for their income, their retirement, or to send their kids to college.<sup>14</sup> As a result of these perverse incentives, the evidence suggests that the Endangered Species Act has fared poorly at conserving habitat and encouraging restoration of habitat on private land.<sup>15</sup>

But this phenomenon is not limited to endangered and threatened species, nor to regulatory burdens. Often, wildlife impose other significant costs on landowners that they must account for when making decisions. As mentioned above, private ranches provide the vast majority of winter habitat for elk in the Greater Yellowstone Ecosystem. But elk don’t always repay the kindness of these landowners. Elk compete

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<sup>11</sup> See *Critical Habitat’s “Private Land Problem”*, *supra* n.1; *The Road to Recovery*, *supra* n.1.

<sup>12</sup> See Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers*, 32 Econ. Inquiry 150 (2004); Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & Econ. 27 (2003).

<sup>13</sup> See David J. Hayes, Michael J. Bean, Martha Williams, *A Modest Role for A Bold Term: “Critical Habitat” Under the Endangered Species Act*, 43 Envtl. L. Rep. 10,671, 10,672 (2013) (commentary by Obama administration officials from the Fish and Wildlife Service acknowledging critical habitat’s stigma effect). See also *Critical Habitat’s “Private Land Problem”*, *supra* n.1, at 10,569–73.

<sup>14</sup> Maximilian Auffhammer, et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 Land Econ. 188, 206 (2020).

<sup>15</sup> See Adam J. Eichenwald et al., U.S. Imperiled Species Are Most Vulnerable to Habitat Loss on Private Lands, 18 Frontiers Ecology & Env’t 439 (2020); Adler, *supra* n.1, at 6–31.



with cattle for forage, damage fences, attract predators, encourage illegal trespass by hunters, and bring disease risks.<sup>16</sup> Consequently, a PERC survey of Paradise Valley landowners found that 85 percent of those in agriculture would like to see fewer elk and other wildlife on their property.<sup>17</sup>

Reducing burdens and making wildlife an asset to private landowners, however, can avoid conflict and result in better conservation outcomes. Recently, PERC and the Greater Yellowstone Coalition (GYC) partnered with ranchers outside of Yellowstone National Park on Montana's first elk occupancy agreement.<sup>18</sup> Under the agreement, PERC and GYC paid for a fence that will keep elk and cattle separate, and thereby reduce disease risks and competition for forage, in exchange for the landowners managing nearly 500 acres of their land as winter range for elk.<sup>19</sup> At a time when migration corridors in the area are increasingly under threat, creative tools like this show how we can voluntarily engage landowners in conservation while avoiding conflict.

I applaud Senator Heinrich, Senator Blunt, and RAWA's other cosponsors for recognizing the importance of property rights and voluntary, collaborative conservation. Section 6, for instance, provides that funds cannot be conditioned on landowners providing public access to private lands, waters, or holdings. This makes sense. Requiring landowners to sacrifice their property rights as a condition of participating in conservation is only likely to alienate potential partners.

It may be helpful for the committee to incorporate broader protections for private property rights, rather than addressing access alone. The Blue Ribbon Panel report on which RAWA is based explained that the intent is to support "voluntary, non-regulatory measures that have been proven to prevent threatened and endangered

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<sup>16</sup> See *Elk in Paradise*, *supra* n. 9, at 18–20.

<sup>17</sup> See *id.* at 20.

<sup>18</sup> See *Elk Occupancy Agreements*, *supra* n.3.

<sup>19</sup> PERC does not accept government funding, and its contribution to the elk occupancy agreement was thanks entirely to voluntary support from private donors.

species listings.”<sup>20</sup> Incorporating this intent explicitly in the legislation may provide comfort to private landowners interested in participating in conservation programs who may otherwise fear that state wildlife conservation strategies may change or be implemented to include burdensome regulation. When conservation programs depend on the voluntary participation of landowners, those programs tend to be sensitive to the costs wildlife impose on landowners. They are, therefore, more likely to make wildlife an asset to landowners and to reward them for their role in conserving the public interest.

## **II. State conservation programs can tap the benefits of federalism while avoiding the conflict that frequently arises under federal programs**

Focusing on state conservation programs can expand the benefits of federalism to wildlife conservation. Dispensing policy making decisions among 50 states rather than concentrating them in a single national regulator can promote accountability and innovation by tapping the states’ role as laboratories.<sup>21</sup> If two states adopt different approaches to conserving the same species, monitoring the results can expand our understanding of what works and what doesn’t. But under a one-size-fits-all federal model with nothing to compare results to, accountability and reflection about why an effort succeeded or failed is more difficult.

Federalism also allows policies to benefit from local knowledge and to fit local conditions. Given the varied needs of wildlife species, ecosystems, landowners, and communities, federalism is particularly valuable for wildlife conservation.<sup>22</sup> Thus, it makes sense to prioritize wildlife conservation through state initiative and innovation, rather than federal edict.

It also makes sense for another reason. Surveys show that state conservation initiatives enjoy far greater support among voters and landowners than do federal

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<sup>20</sup> Blue Ribbon Panel on Sustaining America’s Diverse Fish and Wildlife Resources, Final Report and Recommendations (Mar. 2016), available at <https://www.fishwildlife.org/application/files/8215/1382/2408/Blue%20Ribbon%20Panel%20Report2.pdf>.

<sup>21</sup> See Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987). See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>22</sup> See Temple Stoellinger, *Wildlife Issues are Local—So Why Isn’t ESA Implementation?*, 44 Ecology Law Quarterly 681, 723 (2017).

programs. A 2020 nationwide survey by the Duke Nicolas Institute for Environmental Policy Solutions, for instance, found that 65 percent of rural voters prefer environmental issues to be resolved by state and local governments, compared to only 25 percent support for federal regulation.<sup>23</sup> The survey found that urban and suburban voters similarly prefer state and local solutions.<sup>24</sup>

This preference is also reflected in the extent to which landowners are willing to work with state or federal agencies. A survey of Utah landowners found that 84 percent were willing to partner with a state university and 63 percent willing to partner with the state wildlife agency.<sup>25</sup> Only 50 percent, however, were willing to work with the Fish and Wildlife Service.<sup>26</sup> A survey of North Carolina landowners shows a similar disparity between trust in state agencies and the Fish and Wildlife Service.<sup>27</sup> Another survey of forest landowners suggests that such disparities are due to the sort of Endangered Species Act conflicts discussed above.<sup>28</sup> That survey, like the others, found that landowners highly value conservation but are wary of partnering with the Fish and Wildlife Service. “The apparent contradiction between favorable views of wildlife conservation and negative views of endangered species conservation,” the authors explain, “may indicate the need for policy changes in the protection of listed species on private lands. These results point to a missed opportunity to capitalize on these landowners’ openness to wildlife conservation; attitudes toward the ESA may

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<sup>23</sup> See Robert Bonnie, et al., *Understanding Rural Attitudes Toward the Environment and Conservation in America*, Duke Nicolas Institute for Environmental Policy Solutions 19–20 (2020), available at <https://nicholasinstitute.duke.edu/sites/default/files/publications/understanding-rural-attitudes-toward-environment-conservation-america.pdf>.

<sup>24</sup> See id. (62 percent preference for state and local solutions versus a 28 percent preference for federal regulation among urban and suburban voters).

<sup>25</sup> See Megan E. Hansen et al., *Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species*, Center for Growth and Opportunity at Utah State University, Policy Paper No. 2018.003 (2018).

<sup>26</sup> See id.

<sup>27</sup> See id.

<sup>28</sup> See Lauren K. Ward et al., *Family Forest Landowners and the Endangered Species Act: Assessing Potential Incentive Programs*, 116 J. Forestry 529 (2018).

improve if past regulatory conflicts are set aside in favor of new voluntary incentive programs.”<sup>29</sup>

Distrust between the Fish and Wildlife Service and private landowners can have other conservation costs, too. Landowners may refuse access to their property or refuse to share information about the wildlife and other environmental values it contains for fear that the agency will use this information against them later.<sup>30</sup> This can reduce our knowledge about wildlife, lead to ill-informed and errant regulatory decisions, and misallocate limited conservation resources.<sup>31</sup> States can help mitigate this problem. A Texas program to conserve the dunes sagebrush lizard, for instance, was designed specifically to ensure that parcel-specific information given to the state would not be shared with the Fish and Wildlife Service to assuage landowners’ concerns about the federal agency’s potential use of such data.<sup>32</sup>

### **III. Congress should ensure that the Endangered Species Act is implemented consistent with its original design to support the success of state conservation initiatives.**

In considering RAWA’s proposed investment in state conservation strategies, this committee should be mindful of the relationship of state conservation efforts to existing federal policies, especially whether those policies are likely to enhance or undermine state engagement and innovation. Relevant here, the way in which the Endangered Species Act is implemented can significantly affect the flexibility states enjoy to pursue conservation and their incentives to do so.

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<sup>29</sup> See *id.*

<sup>30</sup> See Critical Habitat’s “Private Land Problem”, *supra* n.1, at 10,573. See also Amara Brook et al., *Landowners’ Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation*, 17 *Conservation Biology* 1638 (2003); Stephen Polasky & Holly Doremus, *When the Truth Hurts: Endangered Species Policy on Private Land With Imperfect Information*, 35 *J. Env’t Econ. & Mgmt.* 22 (1998).

<sup>31</sup> Errant delistings based on incomplete or biased information have been a recurring problem under the Endangered Species Act. See, e.g., Robert Gordon, *Correcting Falsely “Recovered” and Wrongly Listed Species and Increasing Accountability and Transparency in the Endangered Species Program*, Heritage Found. Backgrounder (2018), available at [https://www.heritage.org/sites/default/files/2018-04/BG3300\\_0.pdf](https://www.heritage.org/sites/default/files/2018-04/BG3300_0.pdf).

<sup>32</sup> See *Defenders of Wildlife v. Jewell*, 70 F.Supp.3d 183, 195–96 (D.C. Cir. 2014).

Like most federal environmental laws,<sup>33</sup> Congress intended the Endangered Species Act to contain a substantial cooperative-federalism component. The Endangered Species Act asserted federal authority over private and state lands and activities affecting listed species, but this was not a step taken lightly.<sup>34</sup> Senator Tunney (D-CA), the bill's Senate floor manager, described the Endangered Species Act's take prohibition as an unfortunate but necessary measure to prevent extinction of endangered species.<sup>35</sup> However, he explained the statute was written to "minimiz[e] use of the most stringent prohibitions."<sup>36</sup> Indeed, he continued, "prohibitions against taking must be absolutely enforced *only* for those species on the brink of extinction."<sup>37</sup>

The statute achieved this aim by limiting the take prohibition to endangered species.<sup>38</sup> Congress also authorized the Secretary of the Interior to adopt regulations for a threatened species if "necessary and advisable" for the conservation of that species.<sup>39</sup> However, there were two significant limitations on this authority. First, as the Senate report accompanying the Endangered Species Act emphasized, take could only be regulated on a species-by-species basis after an assessment of whether it was necessary and advisable for the conservation of "*the particular* threatened species."<sup>40</sup>

Second, and more relevant here, federal regulations governing the take of threatened species were expected to require state approval as a means of encouraging state

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<sup>33</sup> See Temple Stoellinger, et al., *Improving Cooperative State and Federal Species Conservation Efforts*, 20 Wyo. L. Rev. 183, 203–04 (2020); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 NYU Envtl. L.J. 179, 214–15 (2005).

<sup>34</sup> See Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23, 25–28 (2015).

<sup>35</sup> Congressional Research Service, A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 358 (statement of Sen. Tunney) (hereinafter "ESA Legislative History").

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> 16 U.S.C. § 1538. See *Take It to the Limit*, *supra* n. 25, at 23–24.

<sup>39</sup> 16 U.S.C. § 1533(d).

<sup>40</sup> S. Rep. No. 93-307, at 8 (1973), reprinted in ESA Legislative History, *supra* note 35, at 307 (emphasis added).

conservation efforts.<sup>41</sup> Section 6 of the Endangered Species Act requires the Fish and Wildlife Service to enter into cooperative agreements with any state that develops a program to conserve listed species if such program satisfies five criteria.<sup>42</sup> If a state obtains a cooperative agreement under this provision, Section 4(d) provides that federal regulations governing take of threatened species apply “only to the extent that such regulations have also been adopted by such State.”<sup>43</sup> By offering states this say over federal regulation, Senator Tunney explained, Congress wished to “encourage[]” states “to use their discretion to promote the recovery of threatened species” by developing their own innovative strategies.<sup>44</sup>

This approach may sound foreign to anyone familiar with the actual implementation of the statute. This is because, soon after the statute was enacted, the Fish and Wildlife Service purported to reverse Congress’ decision to distinguish endangered and threatened species in this manner. Turning the statute’s text on its head, the service issued a rule, commonly known as the blanket 4(d) rule, prohibiting take of all threatened species (including any listed in the future) unless the agency later took steps to reduce regulation of a particular species.<sup>45</sup> As a result, the cooperative federalism arrangement envisioned by Congress has not been realized.<sup>46</sup>

This departure from Congress’ design has had two significant and unfortunate consequences. First, by broadly eliminating the distinction between endangered and threatened species, the blanket 4(d) rule undermined a key incentive for landowners to recover endangered species.<sup>47</sup> Under the statute, regulatory restrictions are

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<sup>41</sup> 16 U.S.C. § 1533(d).

<sup>42</sup> *Id.* § 1535(c).

<sup>43</sup> *Id.* § 1533(d).

<sup>44</sup> ESA Legislative History, *supra* n.35, at 358.

<sup>45</sup> See Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975).

<sup>46</sup> See Temple Stoellinger, *Wildlife Issues are Local—So Why Isn’t ESA Implementation?*, 44 Ecology Law Quarterly 681, 723 (2017).

<sup>47</sup> See *Road to Recovery*, *supra* n.1, at 14–15. See also Fish & Wildlife Serv., *Regulations for Prohibitions to Threatened Wildlife and Plants*, 84 Fed. Reg. 44,753, 44,755 (Aug. 26, 2019) (repealing the blanket 4(d) rule to “incentivize[]” landowners “to take actions that would improve the status of

supposed to decrease as species recover and tighten if they decline. This carrot and stick approach aligns the incentives of landowners with the interests of rare species.<sup>48</sup> The blanket 4(d) rule, however, generally makes landowners indifferent about a species' status once the species is listed.<sup>49</sup>

Second, the rule undermined incentives for states to develop innovative conservation programs and to secure cooperative agreements.<sup>50</sup> Instead of states developing comprehensive conservation programs in exchange for the power to approve species-specific 4(d) rules, the Fish and Wildlife Service has asserted broad authority over activities involving threatened species and limited states to designing species-specific programs in exchange for limited say over how federal regulations might be relaxed for the species.

Four decades of experience have shown the consequences of this approach: far too much conflict and too little conservation. While the Endangered Species Act has been successful in preventing extinction, the way it has been implemented has not succeeded in recovering and delisting species, a goal which has been met for only 3 percent of listed species.<sup>51</sup>

In 2019, the Fish and Wildlife Service repealed the blanket 4(d) rule, creating the possibility of a return to Congress' original design and the conservation incentives it presents. However, that reform may be short lived. Despite representing to courts

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endangered species" through "the possibility of downlisting the species to threatened and potentially receiving regulatory relief in the resulting 4(d) rule").

<sup>48</sup> See *Road to Recovery*, *supra* n.1, at 14–15.

<sup>49</sup> See *id.* See also 84 Fed. Reg. at 44,755.

<sup>50</sup> See, e.g., *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992) (adopting the service's argument that, notwithstanding Section 4(d)'s explicit state approval requirement, state programs are preempted to the extent they do not adopt the relevant 4(d) rule).

<sup>51</sup> See U.S. Fish & Wildlife Serv., Delisted Species, Env'tl. Conservation Online Sys. (ECOS), <https://ecos.fws.gov/ecp/report/species-delisted>. The Endangered Species Act leaves no doubt that its goal is the recovery and delisting of species. See 16 U.S.C. § 1532(3) (defining conservation as the steps taken to bring listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary").

that this reform does not interfere with its ability to conserve listed species,<sup>52</sup> the service has announced its intent to restore the blanket rule anyway.<sup>53</sup>

This regulatory pendulum is relevant to today's discussion because, if Congress is to invest significant sums in state conservation initiatives, it should ensure that those initiatives are set up to succeed. To the extent that implementation of the Endangered Species Act frustrates incentives for state conservation, that misalignment should be resolved.

For instance, this committee should consider the relationship between RAWA's wildlife conservation strategies and ESA cooperative agreements. Do these strategies qualify as state conservation programs for purposes of a cooperative agreement? If so, should Congress' approval and funding of those strategies entitle states to the benefits of a cooperative agreement? If not, what additional (potentially costly and time-consuming) hoops must states jump through to enjoy these benefits?

This also raises questions about the relationship between 4(d) rules, state efforts to recover endangered and threatened species, and the need to recognize and reward recovery efforts through the delisting process. Under the Endangered Species Act's original design, primary regulatory authority moves in steps from the federal government to the states as a species recovers from endangered, to threatened, to delisted.<sup>54</sup> And, in appropriate circumstances, the transfer may be made even more gradual by providing several intermediate steps while a species is listed as threatened.<sup>55</sup> This gradual approach can reduce tensions and help to build trust among states, landowners, and conservationists.

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<sup>52</sup> See Fed. D.'s Motion for Stay, ECF No. 150, 19 n.10, *State of California v. Haaland*, No. 19-cv- 06013 (N.D. Cal. filed Oct. 7, 2021). See also Frazer Decl., ECF No. 132-1, ¶ 9, *State of California v. Haaland*, No. 19-cv-06013 (N.D. Cal. filed August 13, 2021).

<sup>53</sup> See Fish and Wildlife Serv., *ESA Implementation: Regulation Revisions*, [https://www.fws.gov/endangered/improving\\_esaregulation-revisions.html](https://www.fws.gov/endangered/improving_esaregulation-revisions.html) (last updated June 4, 2021).

<sup>54</sup> See *The Road to Recovery*, *supra* n.1, at 15, 18–21.

<sup>55</sup> See PERC Comment on Proposed 4(d) Rule for the Lesser Prairie Chicken, Dkt. No. FWS-R2-ES-2012-0071 (Sept. 1, 2021), available at <https://www.perc.org/wp-content/uploads/2021/09/PERC-Comment-on-LPC-Rule.pdf>; PERC Comment on 5-Year Status Review of Grizzly Bear, Dkt. No. FWS-R6-ES-2019-N144 (Mar. 16, 2020), available at <https://www.perc.org/wp-content/uploads/2020/03/public-comment-grizzly-bear-status-review.pdf>.

Suppose, for instance, that the Fish and Wildlife Service had sought to encourage and reward state efforts to conserve grizzly bears by gradually ceding more and more authority to states as populations hit recovery benchmarks.<sup>56</sup> Under this approach, states would have had an opportunity to demonstrate their ability to manage the species and to build trust with conservation interests concerned about backsliding. And the stakes of a delisting would have been relatively lower, since states would already have been exercising a significant, independent role by that point. Instead, there's been more than a decade of conflict and litigation over grizzlies in the Greater Yellowstone Ecosystem and, despite being widely recognized as recovered, the population remains listed.<sup>57</sup>

Such results risk discouraging state efforts to recover listed species by denying states and their partners a critical reward for successful efforts. That risk should particularly concern this committee, since the frequently expressed concern about species backsliding under state management has never materialized. No species has recovered and been successfully transferred<sup>58</sup> to state management only to later have to be relisted. RAWA proposes that 15 percent of funds be used to recover endangered or threatened species, as well as candidates for listing.<sup>59</sup> The success of such investments depend on a realistic path to recovery and delisting. Restoring the Endangered Species Act's original design to encourage state conservation and incentivize recovery efforts would help lead to more conservation successes.<sup>60</sup>

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<sup>56</sup> See PERC Comment on 5-Year Status Review of Grizzly Bear, *supra* n.49.

<sup>57</sup> See Fish and Wildlife Serv., *Grizzly Bear in the Lower-48 States: 5 Year Status Review* (2021), available at [https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/5.%20SIGNATURE%2020210226\\_Five%20Year%20Status%20Review\\_Grizzly\\_v5.pdf](https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/5.%20SIGNATURE%2020210226_Five%20Year%20Status%20Review_Grizzly_v5.pdf).

<sup>58</sup> Of course, delistings have frequently led to litigation and species being relisted because of some federal misstep. But this reflects only the Endangered Species Act's strong incentives for conflict, rather than anything about what would happen if recovered species were transferred to state management.

<sup>59</sup> S. 2372, § 5.

<sup>60</sup> See *Road to Recovery*, *supra* n.1

#### IV. Conservation funding should reflect the wide variety of interests that value wildlife

Another principle Congress should consider is the need to broaden the base of support for conservation funding to reflect the full range of interests that value wildlife and to enhance accountability. Too often, conservation funding is dependent on only a single source and is vulnerable to changing economic and cultural conditions.

Hunters and anglers currently fund a significant portion of wildlife conservation at the state level through user fees and excise taxes. The collective annual budgets of state fish and wildlife agencies exceed \$5 billion, and more than half of that funding comes from sources related to hunting and fishing.<sup>61</sup> The largest portion is revenue from state sales of hunting and fishing licenses, which amounts to nearly \$1.7 billion.<sup>62</sup> (The second-largest portion is federal matching funds from an excise tax on firearms, ammunition, fishing tackle, and related items.)<sup>63</sup>

Asking hunters and anglers to contribute to the conservation of game species and other wildlife they value makes sense. And it can promote accountability, by making sportsmen feel invested in the results of programs they help fund. But sportsmen are not the only people who value wildlife conservation or who impact wildlife and its habitat.<sup>64</sup> Encouraging states to broaden their approach to include other interests

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<sup>61</sup> See Tate Watkins, *How We Pay to Play: Funding Outdoor Recreation on Public Lands in the 21st Century*, PERC Public Lands Report 24 (2019), available at <https://www.perc.org/2019/05/28/how-we-pay-to-play-funding-outdoor-recreation-on-public-lands-in-the-21st-century/>.

<sup>62</sup> See U.S. Fish and Wildlife Serv., *FY2021 Hunting License Data*, <https://www.fws.gov/wsfrprograms/Subpages/LicenseInfo/Natl%20Hunting%20License%20Report%202021.pdf>; U.S. Fish and Wildlife Serv., *FY2021 Fishing License Data*, <https://www.fws.gov/wsfrprograms/Subpages/LicenseInfo/Natl%20Fishing%20License%20Report%202021.pdf>

<sup>63</sup> See U.S. Fish and Wildlife Serv., *FY2021 Pittman-Robertson Apportionment*, <https://www.fws.gov/wsfrprograms/Subpages/GrantPrograms/WR/WRFinalApportionment2021.pdf>; U.S. Fish and Wildlife Serv., *FY2021 Dingell-Johnson Apportionment*, <https://www.fws.gov/wsfrprograms/subpages/grantprograms/sfr/SFRFinalApportionment2021.pdf>.

<sup>64</sup> See Courtney L. Larson, et al., *Effects of Recreation on Animals Revealed as Widespread through a Global Systematic Review*, PLOS One (2016), available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0167259>; Alyson B. Courtemanch, *Seasonal Habitat Selection and Impacts of Backcountry Recreation on a Formerly Migratory Bighorn Sheep Population in Northwest Wyoming, USA*. M.S., Department of Zoology and Physiology (2014), available at <https://static1>

will make funding more sustainable, especially if the share of the adult population that engages in hunting and fishing continues to decline.<sup>65</sup>

Interest in outdoor recreation and other means of experiencing wildlife are on the rise. Prior to the covid pandemic, the Bureau of Economic Analysis reported that outdoor recreation accounted for \$459.8 billion in economic activity in 2019.<sup>66</sup> Thus, there is substantial potential for other outdoor users to contribute to wildlife conservation.

In fact, revenues from recreation fees have become a significant share of some national park budgets in recent years due to increased visitation, implementation of new fees, and increases of existing fees. In total, fee revenues have risen by 40 percent over the past five years, from \$316 million to \$442 million.<sup>67</sup> About 70 percent of all fee revenue is generated by the National Park Service, while the Forest Service generates another 22 percent of the total.<sup>68</sup> Under the Federal Lands Recreation Enhancement Act, many federal sites that collect fees can retain 80 percent of the revenue to maintain and improve sites.<sup>69</sup> As with the use of hunting fees to fund conservation of game species, recreation fees can increase accountability by incentivizing land managers to respond to users' needs. While funding systems for state parks vary widely across the country, park users provide virtually all funding in several states, and many states rely on users for a significant portion of overall state park funding.<sup>70</sup>

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<sup>65</sup> See *How We Pay to Play*, *supra* n.55, at 25.

<sup>66</sup> See BEA, Outdoor Recreation Satellite Account, U.S. and States, 2019 (2020), available at <https://www.bea.gov/news/2020/outdoor-recreation-satellite-account-us-and-states-2019>.

<sup>67</sup> See Tate Watkins, *Enhancing the Public Lands Recreation Fee System*, PERC Policy Brief (2020), available at <https://www.perc.org/2020/11/18/enhancing-public-lands-recreation-fee-system/>.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *How We Pay to Play*, *supra* n.55, at 23.



Another way to expand sources of conservation funding while increasing accountability is to give contributors more choice about how their money is spent. This would encourage those who help fund conservation to be informed about the aims and results of different programs. States have already experimented with this model for many species. California, for instance, has a voluntary program for taxpayers to contribute to the state's sea otter recovery program.<sup>71</sup> In the long run, having those who care most about wildlife approach conservation programs from the perspective of an investor is likely to contribute significantly to the success of such programs.

Section 7 of RAWA requires a state match to receive federal funds and identifies several categories of funds that states can use, including hunting and fishing license fees. It's not clear whether this is the only type of user fee permitted, but that doesn't appear to be the intent. Given the need to broaden sources of conservation funding, this committee should consider urging states to think creatively about other sources.

## Conclusion

Thank you for the opportunity to provide testimony on RAWA and the importance of aligning policies to incentivize species conservation. Congress has the opportunity to conserve our nation's wildlife by advancing conservation approaches that respect property rights, promote local decision-making, and expand funding opportunities. I look forward to the discussion and answering any questions.

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<sup>71</sup> See Cal. Coastal Conservancy, *Sea Otter Recovery Fund*, <https://scc.ca.gov/grants/sea-otter-recovery-fund/>.