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Testimony Re: ESA December 12, 2013

Chairman Hastings, Ranking member DeFazio and Committee members good morning, I am Jeff Sikes, Legislative Director for the Association of Arkansas Counties. I appreciate the honor and privilege of testifying here today on a matter of great concern in my home state, namely the potential listing of over 40 species under the Endangered Species Act (ESA) with a required designation of critical habitat for each.

As I speak to you today, I represent not only the 75 counties of Arkansas, but also a number of public and private stake holders who have come together to push back against this historic number of potential listings and designation of critical habitat that has put our state, and many states in the south, in danger of becoming, quite literally, covered by critical habitat units. These stakeholders include:

1. Arkansas State Chamber of Commerce
2. Arkansas Environmental Federation
3. Arkansas Association of Conservation Districts
4. Arkansas Forestry Association
5. Arkansas Farm Bureau
6. Arkansas Timber Producers Association
7. Arkansas Poultry Federation
8. Arkansas Independent Producers and Royalty Owners
9. Agriculture Council of Arkansas
10. Camp Ozark
11. Arkansas Cattlemen's Association
12. Energy and Environmental Alliance of Arkansas
13. Cargill Foods, Inc.

As we speak, Arkansas has submitted comments on two of these species, the Neosho Mucket and the Rabbitsfoot Mussel, who, combined, have the potential of putting 42% of our state's watershed into critical habitat.

While we do not oppose the listing of candidate species, whose listings are supported by good science, we heartily oppose the designation of critical habitat unless absolutely necessary. As I'm sure most of the members know it is the designation of critical habitat that can give the green light to devastating environmental litigation. In fact as far back as 1989 Donald Carr, former acting Assistant Attorney General for the Land and Natural Resources Division, stated "Critical Habitat does have advocacy value. It helps the prosecutor get rid of showing the steps to jeopardy"

In the current situation, we in the south find ourselves dealing with the results of a settlement between Department of Justice attorneys and various environmental groups. This settlement was the result of a court-ordered mediation that was completely secret in nature until the results were

quietly rolled out. We only found out about this settlement because of my relationship with a gentleman from out west, who along with being an expert on the Secure Rural Schools and Community Self-Determination Act reauthorization issue, was also an expert in ESA matters. Were it not for his alerting me, and, just as importantly, educating me as to why I should be alerted, absolutely no one in Arkansas or indeed much of the south, would've had any idea they should be alarmed or have any further idea as to what they should do about it. Clearly, this process of "sue and settle" is broken and should be addressed. More importantly, the public outreach and information provided by the U.S. Fish and Wildlife Service (FWS), in the wake of these settlements, should be greatly increased so as to avoid future catastrophes for ill-informed business and land owners.

I would suggest that future education provided by the FWS be better-rounded, proactive and not limited to waiting for a request which cannot happen if business or landowner has no knowledge the action is occurring. Currently, it is the official position of the FWS that a landowner has no reason to fear an ESA listing or critical habitat designation unless there is some sort of nexus between the landowner and the federal government---and this is true as far as it goes. It completely misses, however, the most probable and most potentially devastating impact of the ESA and here I am referring to third party litigation. This litigation has devastated the West and now appears prepared to wreak the same sort of havoc in the South/Southeast. There should be no attempts, by the FWS, to minimize the impacts that may be visited upon the landowners, most of whom work there tails off every day, to support their families and pay taxes..

This leads me to my final point. We absolutely must change the way the FWS performs its Economic Analysis prior to the designation of critical habitat. I am not an economist; however, as I understand it the service currently utilizes an incremental model, as opposed to more inclusive cumulative model (co-extensive), to determine the economic impact of declaring critical habitat. The upshot of this method is that it only measures the costs of agencies talking to each other during Section 7 Consultations. This is guaranteed, indeed designed, to provide an analysis that is ridiculously low and certain to mislead the reader as to the real human and economic impact of declaring critical habitat.

To give you an example of what I mean, the service's economic assessment regarding the declaration of critical habitat for the Neosho Mucket and Rabbitsfoot Mussels provides for, a \$220,000 per year impact spread across 12 states, over a 20 year period, for a total projected impact of 4.4 million dollars. Our Economist, Dr. Jim Metzger, Professor of Economics, University of Arkansas in Little Rock, in the briefest of snapshots, and excluding third party litigation, projected the loss to Arkansas alone to be \$20-50 million dollars. The good news, if there is any, is that it would not require an act of Congress but a change with Service regulations (73 FR 33052) and the Office of Management and Budget (OMB) guidelines for best practices for the conduct of economic analysis of federal regulations

In closing, we must attempt to slow down "sue and settle" activities and, when a loss or settlement is inevitable, educate the affected landowners as to all of their ramifications. Finally, we should work to change the rule on economic analysis to one that accurately reflects the real economic and human costs of the designation of critical habitat.