Western Caucus Endangered Species Act Roundtable
September 24, 2019
Remarks of Alan M. Glen

Good afternoon members, staff, representatives of the Department of the Interior, and fellow stakeholders. My name is Alan Glen and I am a partner in the Austin law firm Smith Robertson. I will limit my remarks to the important issue of the proper application of the best available science standard under the Endangered Species Act.

As we know, although the Endangered Species Act requires that the applicable agencies use the best available science in several contexts, nowhere does the law define this critical term. The agencies have adopted guidelines and procedures aimed at the implementation of the best science standard, but these have proven insufficient. The ESA needs to be amended to provide a clear, reliable, and enforceable definition of best available science. Such a definition must stress that science must be objectively evaluated and must eliminate any notion of "erring on the side of the species," as that concept is hopelessly vague, non-scientific, and as often as not results in the agencies not erring on the side of the species, but plainly committing error.

Indeed, in my experience, errors are often made in the field when the agencies consider important decisions, such as whether or not to list a species. Moreover, the problems associated with implementation of the best available standard are exacerbated by the fact that many actions that the agencies take under the Endangered Species Act are subject to highly deferential review provided by the Administrative Procedure Act. Thus, the deferential approach of "erring on the side of the species" is compounded and confounded by the overlay of further deferential review in the courts.

Allow me to provide one example of the difficulty with the best available science standard. There is a tiny cave creature of the same taxonomic order as the ubiquitous "daddy long legs" called the Bone Cave harvestman. The Fish and Wildlife Service originally listed this species in the late 1980's on the basis of its known occurrence in only five or six caves in Travis and Williamson Counties, Texas. The listing of the species and the Service's poorly supported and overly conservative implementation of the Act with respect to the Bone Cave harvestman have resulted in significant economic disruption, causing both public and private entities countless millions of dollars. Critically important projects, such as schools, roads, energy, and utility infrastructure, have been significantly delayed as a result of the listing of this species.

In its listing decision, the Service made little mention of the fact that the low number of known locations of this species was the artifact not of the species' rarity but of the lack of reliable scientific information, coupled with bald speculation concerning almost every aspect of the species' actual status. During the more than 30 years since the species was listed, it is now known to occur in more than 200 locations. In short, this species was listed as the result of serious errors and speculation, which a rational person would not make in the absence of the perceived dictate to "err on the side of the species."

Over the last few years, I have been involved in an effort to correct this error and obtain delisting this species. Highly qualified experts prepared a petition for delisting that left virtually no room for doubt. Nevertheless, the Service has now twice ruled against the petition. Most recently, the Federal District Court in Austin ruled that "[t]he court concludes that the petition presents available, substantial scientific and commercial information indicating that delisting of the harvestman may be warranted. As a result, the court finds that the Service's conclusion to the contrary is arbitrary [and] capricious …." The Service is now required, by the middle of October, to make yet a third finding on the petition. I do trust that with this dictate from the

Court that the Service will see that this species should not be taking limited attention and funds away from species actually deserving of the protections of the Act. All of this three-decade waste, however, could have been avoided under an amended ESA specifying the meaning and application of the best available science standard.

I appreciate the opportunity to share my remarks. I commend you for this laudable effort and I look forward to following your progress.