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The Endangered Species Act: An Opportunity for Reform

The Honorable John Shadegg and Robert Gordon

The goal of the Endangered Species Act—the conservation of species—is laudable. In practice, however, this Nixon-era command-and-control environmental law has proven itself to be a costly and ineffective conservation tool. The list of domestically endangered species has exploded and is now approaching 1,400; only 24 species have officially "recovered" and been "delisted." The law has been particularly onerous in Western states with a large amount of public land and has imposed substantial costs on the private sector. Unlike National Parks or National Wildlife Refuges, many of the costs of this national taxpayer-funded program are imposed on private property owners. Any attempts to reform the program should include increased reliance on the states, a redefining of applicable regulatory thresholds, and protection for property owners.

Since its enactment in 1973, the Endangered Species Act (ESA)[1] has been described as both the crown jewel and the pit bull of environmental law. Under the ESA, species[2] are added to an official "endangered" list if the government determines them to be threatened or endangered with extinction.[3] The government may initiate this determination process on its own or in response to a petition and, often, a lawsuit. At the time of listing or after, the government must also designate critical habitat for the species—specific geographic areas that are subject to additional regulation.[4]

Once an animal or plant is listed, the United States Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on the species in question, usually prepares a plan to recover the species. FWS and NMFS also enforce regulations against "taking"[5] (e.g., harming, harassing, killing) individual endangered species and against federal agencies taking actions that jeopardize a species or adversely modify said species' critical habitat.

In theory, the enforcement of these regulations and implementation of other ESA provisions should result in an endangered species being conserved. Under the ESA, conservation has been achieved when the act's provisions are no longer needed, and a species may be removed from the list—a process known as "delisting."[6]

1 Endangered Species Act of 1973 (16 U.S.C. 1531–1544, 87 Stat. 884), as amended, Public Law 93-205, approved December 28, 1973.

2 The term "species" is not used strictly in a biological sense. Under the ESA, it is defined to include species, subspecies, or a distinct population segment of a vertebrate species. The act also regulates any part, product, egg, or offspring as well as the dead body parts of an endangered species. By regulation, the National Marine Fisheries Service (NMFS) has incorporated the term "Evolutionarily Significant Units." *Federal Register*, Vol. 56, No. 224 (November 20, 1991), http://www.nmfs.noaa.gov/pr/pdfs/fr/fr56-58612.pdf (accessed June 1, 2012).

3 The government eliminated much of the legal distinction between endangered and threatened statuses by promulgating a rule that applied endangered species protections to threatened species except in those instances in which a specific rule was promulgated removing the protections. For simplicity, the term "endangered" will be used for both statuses here.

4 For many years, the government claimed it did not have to designate critical habitat. In the late 1990s, the courts opined differently, leaving few exceptions.

5 The Endangered Species Act, § 3 (8) and (16). Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. Of these terms, "harm" has been interpreted in a broad and tenuous manner.

6 Ibid., § 3 (3).

All Cost, No Benefit

Having been in effect for over three decades, the ESA has proven to be a one-way street: Species are continually added to the list but rarely removed. As of December 5, 2011, the FWS reported some 1,358 domestic species and some 590 foreign species on the list.[7] While the ranks of federally regulated species have swollen, only 24 species have been officially "recovered" and delisted.[8]

Even this relatively low number of successes is, regrettably, misleading and inflated. For example, erroneous data regarding population numbers, population trends, distribution, habitat threats, or reproductive potential led to an initially overestimated threat to numerous "recovered" species including the alligator, brown pelican, Concho water snake, Eggert's sunflower, gray whale, Hoover's woolly star, Tinian monarch, and, to a lesser extent, the Aleutian Canada goose.[9]

Given this poor record, ESA advocates have resorted to claiming that the law has "saved" species from extinction. In support of these claims, advocates often point to increases in the number of individual members of specific species.

The weakness of such arguments is revealed when some of the "saved" species like Johnston's frankenia, a Texas plant, are considered. At the time this plant was listed, the ESA believed that there were only 1,500 remaining individual specimens of Johnston's frankenia; in reality, there were more than 4 million.[10] In 2011, the FWS proposed to delist this misdiagnosed plant as "recovered"—despite knowing about this discrepancy for more than a decade. In a recent report to Congress, the agency trumpeted that Johnston's frankenia is "improving" and that 75 percent or more of its recovery objectives had been met.[11]

One recent "report" shilling the efficacy of the ESA would fail a middle-school science fair. The authors cherry-picked 110 endangered species specifically because the species—including some of the above-mentioned critters—"have advanced toward recovery."[12] From this anything but random sample, the authors meaninglessly conclude that 90 percent of species were meeting their delisting deadlines.

As the number of species "listed" continues to soar, the burden on taxpayers is also exploding. Specifically, in fiscal year 2010, federal and state expenditures on endangered species exceeded $1.4 billion[13]—a number that includes, for example, $2,495,323 on the valley elderberry longhorn beetle and still represents but a fraction of the annual cost of endangered species. Indeed, the "official" report of $1.4 billion spent in 2010 does not encompass all federal and state expenditures and reflects none of the costs imposed on lesser governmental units and the private sector.

These additional costs, however, must be taken into consideration if one is to understand the true financial impact of the ESA. Lost economic activity for communities in the western U.S. and the restrictions—and subsequent loss of value—imposed on private

7 U.S. Fish and Wildlife Service, "Species Reports," April 20, 2012, http://ecos.fws.gov/tess_public/ (accessed May 20, 2012). These counts may include some species more than once if, for example, there are two listings of the same species at different levels (endangered and threatened) or multiple distinct population segments of the same species.

8 U.S. Fish and Wildlife Service, "Species Reports: Delisting Reports," April 20, 2012, http://ecos.fws.gov/tess_public/pub/delistingReport.jsp (accessed May 20, 2012).

9 *Implementation of the Endangered Species Act of 1973,* Majority Staff Report to the Committee on Resources, U.S. House of Representatives, May 2005, http://www.waterchat.com/Features/Archive/050517_ESA_Implementation_Report.pdf at (accessed June 7, 2012).

10 *Federal Register,* Vol. 76, No. 206 (October 25, 2011), http://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-27372.pdf (accessed May 20, 2012). In its most recent recovery report to Congress, FWS entirely abandons the measurement of Recovery Objective Achieved.

11 U.S. Fish and Wildlife Service, *Report to Congress on the Recovery of Threatened and Endangered Species*, Fiscal Years 2007–2008, http://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_2008.pdf (accessed May 22, 2012).

12 According to the report, the authors "identified 110 threatened or endangered species that have advanced toward recovery since being protected under the Endangered Species Act." Kieran Suckling, Noah Greenwald, and Tierra Curry, "On Time, On Target: How the Endangered Species Act Is Saving America's Wildlife," Center for Biological Diversity, http://www.esasuccess.org/report_2012.html (accessed June 1, 2012).

13 U.S. Fish and Wildlife Service, *Federal and State Endangered and Threatened Species Expenditures, Fiscal Year 2010*, http://www.fws.gov/endangered/esa-library/pdf/2010.EXP.FINAL.pdf (accessed May 22, 2012).

property owners are just two of the secondary costs inflicted by the ESA. Yet these costs, regardless of the outcome or who must bear them, are no object under the act. According to the Supreme Court "Congress intended to halt and reverse the trend toward species extinction *whatever the cost.*"[14]

Since the ESA's inception, its defenders have dogmatically opposed changes in the act. Given this law's awesome power, such recalcitrance should come as little surprise. However, the act's abysmal conservation record, when considered in concert with the United States' profound spending challenges, skyrocketing debt, and anemic economy, offers lawmakers an opportunity to address the ESA's numerous flaws. And as almost any changes in the law will be opposed, those who would champion reform might as well undertake something significant. Additionally, the instinctive proclivity of the bureaucracy—as well as some in the judiciary—to expand the government's authority through regulation, policy, litigation, or opinion reduces the likelihood that lasting reform can be realized through legislative tinkering.

Therefore, this chapter will address two complementary possible courses of action:

- The focus of America's endangered species conservation efforts could be shifted to the states; and,
- For any species regulated at the federal level, meaningful thresholds both for determining endangered species and for regulating activities should be established along with changes to reduce or reverse the conflict between species and property owners.

Federal vs. State Authority

Any proposal to shift the responsibility for endangered species conservation from the federal government to the states requires an initial discussion regarding the authority to regulate wildlife. Despite the ESA's poor record, there is a presumption by many that, with regard to species conservation, the federal government is the most appropriate and effective authority.

Traditionally, however, matters pertaining to the management and regulation of wildlife have been the purview of the states. States' authority to regulate wildlife has rested on their police powers and under claim of ownership of wildlife within a state's borders—authority that reigned supreme until the 1900s.[15]

The assertion of federal authority over wildlife stems in part from the Property Clause of the Constitution that states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[16] While arguably a sufficient basis for regulation of wildlife on federal lands, this authority does not extend to species on land beyond the federal estate. The claim of federal authority to regulate other wildlife, as well as an additional basis for a claim regarding wildlife on federal lands, is grounded on the interpretation of other powers, such as the power to make treaties and the Commerce Clause.[17]

A precursor of the current ESA, the Endangered Species Conservation Act of 1969, directed that the government seek an international treaty on the conservation of wildlife, a mandate that resulted in the Convention on International Trade in Endangered Species of Fauna and Flora (CITES).[18] During debate over the current law, ESA proponents argued that the act is needed as a means of meeting the United States' obligations under CITES—obligations that Washington helped to manufacture.

14 *TVA v. Hill,* 437 U.S. 153 (1978). Emphasis added.

15 Phillip M. Kannan, "United States Laws and Policies Protecting Wildlife," The 2009 Colorado College State of the Rockies Report Card, http://www2.coloradocollege.edu/StateoftheRockies/09ReportCard/FacultyOverview.pdf (accessed May 21, 2012).

16 United States Constitution, art. 3, sec. 8, cl.

17. Territory in this context means those lands belonging to the United States that were not part of states. Property in this context applies to those lands owned by the United States.

17 *Missouri v. Holland*, 252 U.S. 416 (1920), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0252_0416_ZO.html (accessed May 21, 2012). In *Missouri v. Holland,* the Supreme Court struck down a challenge to the Migratory Bird Treaty Act by Missouri, which claimed that the law was an unconstitutional interference with states' rights.

18 Richard Little, *Endangered and Other Protected Species: Federal Law and Regulation* (Washington, DC: Bureau of National Affairs, 1992), p. 101.

Absent authorities accrued by treaty, the case can be made that constitutional authority for using the ESA to regulate many animals and plants not inhabiting the federal estate is questionable and, as a practical matter, would be more appropriately reserved for states. For example, ignoring the impracticality of such regulation, what reasonable constitutional grounds does Washington have to regulate an endangered invertebrate that is not an object of commerce and is found only within a single state? Only through painful contortions can the case be made—a feat accomplished by a U.S. Court of Appeals in affirming the government's authority to regulate cave-dwelling invertebrates in Texas:

> *[T]he FWS can prohibit the Cave Species takes because such regulation is essential to the efficacy of—that is, the regulation is necessary and proper to—the ESA's comprehensive scheme to preserve the nation's genetic heritage and the "incalculable" value inherent to that scarce natural resource, and because that regulatory scheme has a very substantial impact on interstate commerce.*[19]

With these mushy assertions, the government's Commerce Clause authority to "save" cave spiders and beetles by regulation on private property in one Texas county was upheld.[20] The need to reform the ESA is clear.

ESA Reform: Consistent with Key Conservation Principles

Implementing the reforms described below would substantially improve the ESA by transforming an unsuccessful, burdensome, and unsustainable instrument of land use control into a conservation tool that is consistent with several critical conservation principles: (1) that nature is resilient and dynamic; (2) that liberty is the key to effective environmental stewardship; and (3) that when considering environmental regulation, human beings are the most important species of all.

19 *GDF Realty Investments, Ltd. v. Norton,* 326 F.3d 622 (5th Cir. 2003), http://caselaw.findlaw.com/us-5th-circuit/1169742.html (accessed May 21, 2012).

20 On June 3, 2005, the U.S. Supreme Court declined to review this appeals court decision. The plaintiff in this case, GDF Realty, went bankrupt.

Recommendations

Congress and the Administration must recognize that the ESA, as currently implemented, is not working. The act's regulatory costs are immense and growing, and its record of saving endangered species is weak. Shifting as much species management as possible to the states is the most preferable course of action; any remaining federal endangered species program must be altered to fundamentally change agency behavior and program focus while ensuring protections for property owners.

Shift reliance to the states. Most, if not all, states have their own conservation programs and, unquestionably, more certain grounds to engage in conservation of many species.[21] States are well suited to manage most species including, for example, species limited to a state, resident species populations, and endangered plant species (plants comprise the bulk of the federal endangered species list). Such a shift could also include species on federal lands.

Moving conservation initiatives to the states would ensure that officials implementing the programs were closer to a particular site and situation. Further, while state regulation can be heavy-handed and create a counterproductive adversarial relationship between property owner (habitat owners) and species, advocates of protecting private property have, at the local and state level, greater access to officials and, therefore, a better opportunity to influence environmental policy.

Change federal agency behavior and program focus. For any species governed under a federal program, several aspects of the ESA need to be addressed: the listing process, the quality of science behind agency actions, and the two fonts of regulatory authority: the prohibition against "taking" a species and the consultation process for federal agency actions.

Focus federal efforts. The federal government should focus its conservation efforts on areas where such actions are firmly rooted in the Commerce Clause. This may be the case, for example, with many fish stocks that are commercially harvested. Using the Commerce Clause as a basis for federal regulation of wildlife was historically more justifiable when the specimens or parts or products thereof were commonly traded. This occurred, for example, with the millinery trade (feathers for women's hats), ivory, commercial sales of elk or deer meat, fur trapping, or mussel shells harvested for the production of buttons.[22] Today, determining species to be endangered because of commerce in actual specimens, parts, or products thereof would be the exception, not the rule.

Require a Commerce Clause basis for an "endangered" listing. A direct and demonstrable Commerce Clause basis should be required before any new species can be added to the endangered list.

Prioritize species. In determining both whether a species should be added to the endangered species list and what priority that species will receive, federal agencies should give preference to those species that are more taxonomically unique. Furthermore, higher-order species should be given preference over lower-order species. Several other factors such as recoverability and degree of threat could be incorporated. The FWS has employed a similar matrix to assign listing priority to species.[23]

However, the current approach does not differentiate between a bug and a bird, and the listing process is subject to constant litigation. To be effective the process

21 U.S. Fish and Wildlife Service, "USFWS Management Offices—State, Territorial, and Tribal," September 13, 2011, http://www.fws.gov/offices/statelinks.html (accessed May 21, 2012).

22 The Lacey Act, which preceded the ESA, made it federally illegal to cross state lines with wildlife taken in violation of state law.

23 *Federal Register*, Vol. 48, No. 181 (September 21, 1983), http://www.fws.gov/endangered/esa-library/pdf/48fr43098-43105.pdf (accessed May 21, 2012).

would need to restrict or eliminate the listing process from lawsuits seeking to add species to the federal list while giving increased weight to higher order taxa.[24] Doing so would both focus conservation initiatives on species that were more unique and recoverable and be more consistent with the public's expectations for the program—that is to say, a bird should generally be accorded more resources than a bug.[25]

Ensure compliance with relevant information quality guidelines. To reduce the "scientific" conjecture and speculation underlying many government actions, the Office of Management and Budget (OMB) should ensure that agencies' ESA actions comply with the Information Quality Act and related OMB guidelines; actions that fail to meet these standards must be rejected. Fostering more rigorous collection and consideration of scientific data provides a firmer footing for policies that should be informed by science and increases the likelihood that such policies will generate real environmental benefits.[26]

Prohibit the presumption that federal expertise supersedes that of states. Under the Chevron Doctrine, federal courts defer to reasonable regulatory decisions by federal agencies. In practice, this means that federal courts presume, where a state has come to a different regulatory conclusion than the FWS or NMFS, that the federal agency has a greater level of scientific expertise than similar state agencies.[27] The ESA should prohibit federal courts from making such a presumption. Greater expertise should not be presumed to reside within a federal agency; rather, the deference to expertise should be earned with facts on a case-by-case basis. Indeed, on a particular issue, state agencies' expertise may very well be equal to or greater than that of their federal counterparts.

In order to make this workable, federal appellate courts reviewing agency regulatory actions could appoint special masters to review the record and neutrally review the record evidence presented by federal and state government agencies and provide an independent assessment of the competing state and federal analyses and decisions. This proposed reform adheres to the principle that encourages a site- and situation-specific approach.

Refine the definition of "take." Reforming the government's nearly limitless power to thwart private property use at no cost, or to indefinitely and ethereally cast a shadow over such use, could be accomplished in part by more precisely defining the term "take." Such a clarification should include only those actions that result in actual physical harm to a member of the species at issue. With this redefinition as a threshold, a simple construct that would foster more cooperation between govern-

24 The term "species" under the ESA is an expansive legal term. A species can be ever more finely divided, magnifying the perceived threat to the relatively smaller and more subjective units such as a "distinct population segment." Under this construct, a minnow that is nearly identical genetically, morphologically, and behaviorally can be considered legally separate from minnows in a neighboring stream. Such critters are accorded the same legal status as something like the black-footed ferret or whooping crane. Additionally, over 36 percent of listed animals are invertebrates—insects, spiders, snails, clams, and such. When there may be in the neighborhood of over 30,000 different kinds of beetles in North America alone, the notion that the federal government can accurately catalogue and regulate nature with such precision begs credulity. Richard E. White, *Peterson Field Guides: Beetles* (Boston, MA: Houghton Mifflin Company, 1983).

25 A national survey by Professor Don Coursey at the University of Illinois at Chicago demonstrated significant difference in the value respondents placed on different animal species. At the top of the list "of mean importance" was the bald eagle, followed by animals such as the whooping crane, green sea and leatherback sea turtles, and the southern sea otter. At the bottom of the 246 species included in the survey were animals like the Tipton kangaroo rat, Tooth Cave spider, and Kretschmarr Cave mold beetle. Don Coursey, "The Revealed Demand for a Public Good: Evidence from Endangered and Threatened Species," University of Chicago, Harris School of Public Policy Studies, Working Paper Series No. 94.2, January 1994, http://harrisschool.uchicago.edu/About/publications/working-papers/pdf/wp_94_2.pdf (accessed May 21, 2012).

26 U.S. Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies," October 1, 2001, www.whitehouse.gov/omb/fedreg_final_information_quality_guidelines (accessed May 22, 2012).

27 There should be an exception for a federal agency's interpretation of its own regulations, setting of policies, and similar actions.

ment and landowner could be established with several key elements:

- Provide landowners "bright lines." Landowners need to be able to get a definitive answer from regulators as to whether the government would consider a particular use of their property lawful under the ESA. Landowners also need such answers to be provided in a timely manner. One means to provide for this is addressed in chapter 2 of this volume, "A Mechanism for Compensation of Regulatory Takings." Incorporating this mechanism would remove regulatory clouds and force agencies to focus on conservation priorities.
- Focus on contractual arrangements to achieve conservation goals. In those instances where an agency expects that a proposed use would unintentionally cause harm to endangered species (e.g., habitat destruction), the agency should seek contractual conservation agreements with private landowners for the conservation. Rather than being viewed as a constraint upon conservation, property rights should be embraced as a vehicle by which to find new ways to use market forces to further conservation.
- Provide compensation to affected landowners if their property is devalued or taken. Should the agency be unable to reach a contractual agreement with a landowner, it could then acquire the property through eminent domain or, alternatively, impose restrictions that would be compensable under the mechanism addressed in chapter 2. This construct would fundamentally alter the regulator's behavior by ensuring property owners just compensation and thereby prohibiting agencies from foisting the cost of a national conservation program on to individual property owners.

Fix the consultation process. One of the ESA's most cumbersome regulations is its requirement that federal agencies (e.g., the Bureau of Land Management or Federal Highway Administration) consult the FWS or NMFA before taking actions that may affect an endangered species. Under this mandate, there are two possible ways an agency risks violating the law: (1) The agency takes action without consulting the FWS or NMFS or (2) the agency proceeds without regard for one of these agencies' determinations.

The consultation requirement is a burdensome and bureaucratic process and is particularly onerous for Western states where federal lands are disproportionately located. Several changes could improve the process substantially:

- Refine the trigger for initiating consultation. The trigger for initiating consultation should be refined to "likely to jeopardize," which mirrors the language in the statute, as opposed to the agency regulations' lower standard of "may affect," thereby reducing the waste of already scarce resources.
- Reduce bureaucratic limbo. Once a federal agency requests ESA-mandated consultation, the FWS or NMFS should be required to make a determination within a set period of time (e.g., 90 days). If the FWS or NMFS fails to make a timely determination, the other agency requesting consultation should be able to proceed, and this failure to provide a timely decision should constitute a defense against violation of the ESA. Coupled with the refinement of the definition of "take," this reform would reduce the bureaucratic limbo often used to extract concessions.
- Create a meaningful appeals process. In the event that the FWS or NMFS determines that a proposed action would violate the law, the agency requesting consultation should be able to appeal to the President. The President could then either allow the action to proceed or uphold the FWS's or NMFS's determination. Given politicians' proclivity to

punt on “hot” issues, failure to make a timely determination (e.g., within 60 days) could constitute a granting of the appeal.