The Heritage Foundation
Backgrounder
Executive Summary

No. 1234 November 13, 1998

Reforming the Endangered Species Act to Protect Species and Property Rights

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In October, Congress considered attaching the Endangered Species Recovery Act of 1997 (S. 1180) to the fiscal year 1999 omnibus appropriations bill. To the relief of private landowners and the future benefit of America's endangered species, Congress ultimately abandoned that proposal.

Although supporters of S. 1180, including the Clinton Administration, touted it as offering solutions for the problems with the Endangered Species Act (ESA) originally enacted in 1973, it fell far short of that goal by not addressing its most serious flaws. For example, its non-specific definition of "harm" to a species allows the Department of the Interior to include any "habitat modification," even when there is no proof that such modifications would harm a particular species. The costly results of this interpretation were seen in California, when the government stopped the construction of a hospital because it found eight endangered desert sand flies on the property. The estimated cost to set aside the "habitat" for the fly? About $400,000 per fly.

The original intent of the ESA was to conserve and protect American species of plant and wildlife that are threatened with extinction. Species would be taken off the list when their numbers recovered. According to the Department of the Interior's Fish and Wildlife Service (FWS), during ESA's 25 years, over 1,154 animals and plants were listed as endangered or threatened; yet only 27 species have been removed from the list. Moreover, an analysis by the National Wilderness Institute shows that not one of those 27 species was removed because its improved numbers could be attributed to specific ESA activity. In fact, 7 of the 27 species were delisted because they were found to be extinct, and 16 because erroneous data had been used to justify their original listing.

On May 5, 1998, Secretary of the Interior Bruce Babbitt announced that another 33 endangered and threatened species were ready for delisting. He touted these delistings as proof that the ESA was working. The director of the FWS, Jamie Clark, later disputed that claim in a letter to Representative Richard Pombo (R–CA), who chairs the Endangered Species Task Force.

Produced by
The Thomas A. Roe Institute for Economic Policy Studies

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
20002–4999
(202) 546-4400
http://www heritage org

Clark noted that she was embarrassed personally by his claim, which was an "unfortunate error." Clark also pointed out that Secretary Babbitt's list includes species the agency believes to be extinct.

Unfortunately, not only does the evidence fail to show that the current ESA recovers species; it also shows that the ESA negatively affects the species it hopes to protect as well as the people who could best assist in their preservation. How?

- The ESA allows the federal government to prohibit landowners from modifying their property simply because the land *could* provide suitable habitat for an endangered species without supplying proof that such modifications indeed would "harm" the species;

- The ESA allows the federal government to confiscate or regulate private property that has a listed species on it or that offers suitable habi-

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To fix the ESA so that it fulfills the public's desire to protect endangered species and at the same time honors the constitutional property rights of Americans, Congress should ensure that (1) the ESA's definition of "harm" clearly denotes actions that cause death or physical injury to listed species; (2) landowners are compensated justly for government takings of their property to protect an endangered species; (3) the Department of the Interior's agencies use sound, objective, and unbiased science in determining listings and delistings of species; and (4) incentives are included that make landowners partners in the effort to save wildlife and plant species from extinction; that is, so that landowners understand the consequences of their actions in making their decisions.

DOES THE ESA HELP SPECIES TO RECOVER?

In passing the ESA,[1] Congress demonstrated its intent to conserve and protect plant and wildlife species in the United States that are threatened with extinction. Listed species would receive special protection under the law and would be taken off the list when they recovered. In the 25 years after the ESA became law, 1,154 animals and plants have been listed as endangered or threatened;[2] yet only 60 have been targeted for delisting—and, of those, only 27 have been delisted.[3]

According to the National Wilderness Institute, the reasons for delisting these species had little to do with the ESA's efforts to recover them:[4]

- 7 species were delisted because they are extinct—the Tecupa pupfish, the longjaw cisco, the blue pike, the Santa Barbara song sparrow, Sampson's pearly mussel, the Amistad gambusia, and the dusky seaside sparrow;
- 16 species were delisted due to data errors—the Mexican duck, the Pine Barrens tree frog, the Indian flap-shelled turtle, the Bahama swallowtail butterfly, the purple-spined hedgehog cactus, the Tumamoc globeberry, the spineless hedgehog cactus, the Mckittrick pennyroyal, the cuneate bidens, the Eastern brown pelican, the Palau fantail, the Palau dove, the Palau owl, the American alligator, the Rydberg milk-vetch, and the gray whale;
- The Arctic peregrine falcon, which was decimated by the pesticide DDT, was delisted because it recovered after the 1972 ban on DDT; and
- The Eastern gray kangaroo, the Red kangaroo, and the Western gray kangaroo were delisted as a "response to Australian policies."

As editor Alan Moghissi of *Environmental International* observes in summarizing the National Wilderness Institute report:

> a disheartening part of the [NWI report] is their conclusive evidence that the deletion of essentially every species from the endangered species list was not caused by implementation of the ESA.... [It provides] a picture in which the USFWS [U.S. Fish and Wildlife Service] lists a species and either removes it or reduces its severity of endangerment, solely because afterwards it finds that it made an error.[5]

Secretary Babbitt announced in May that another 33 species on the endangered species list were ready for delisting—which he claimed was a

1. 16 USCS §1532 (1973).
2. U.S. Fish and Wildlife Service, "Box Score, Endangered Species," at *http://www.fws.gov/r9endspp/boxscore.html*.
3. National Wilderness Institute, "Species Removed from the Endangered Species List (Delisted) thru February 20, 1997," at *http://www.nwi.org/EndangeredSpecies/Delisting.html*. "Delisted" refers to animals removed from the list of endangered or threatened species.
4. *Ibid*.
5. National Wilderness Institute, "Executive Summary, Groundbreaking Study Determines Endangered Species Act to Be a Failure," May 20, 1997, p. 1. See *http://www.nwi.org/PressReleases/97May20.html*.

sign of the ESA's success. But after studying the new list of species, Brian Seasholes of the Competitive Enterprise Institute notes, "[D]espite such pronouncements, the facts indicate that the ESA has done little, if anything, to help most of these...species."[6] (See page 4 for the reasons the species are to be delisted.)

Three months after Secretary Babbitt announced plans to remove these 33 species from the endangered species list, the director of the Department of the Interior's Fish and Wildlife Service, Jamie Clark, wrote to Representative Richard Pombo (R–CA), chairman of the Endangered Species Task Force, that she was "personally embarrassed by this unfortunate error."[7] She noted that Secretary Babbitt's list of successful recoveries "included species which we believe to be extinct and those for which we have new scientific information concerning their taxonomy or abundance."[8]

Evidence that such delistings do not prove the ESA is working also can be found in an August report from the National Center for Policy Analysis: Of the 60 species delisted or proposed for delisting since 1973, 12 species were delisted because they were extinct, 24 species were delisted because erroneous data were used to justify their original listing, 9 exist solely on federal lands and are federally protected without the ESA, 3 that had been decimated by the pesticide DDT recovered after the DDT ban in 1972, and 12 are conserved by state agencies or private organizations.[9]

Further evidence can be found in various published reports:

- According to a 1997 Hoover Institution report, most of ESA's activity involved *listing* species instead of instituting methods that would help listed species to recover. For example, of the $171,811,000 that federal and state agencies spent to "protect" the 639 endangered species listed in 1991, 50 percent went to just 7 species, and 90 percent was spent on 54 species. The remaining species had to fend for themselves. [10]
- The U.S. General Accounting Office (GAO) reports that, by 1992, the government had designated critical habitat for only 16 percent of the listed species and a recovery plan was in effect for 61 percent.[11]
- A report in *Land Economics* notes that, "Of the more than 3,600 candidates proposed for listing by the Fish and Wildlife Service in 1993, there was insufficient scientific information to make a decision on about 3,000."[12]
- A 1998 report in the *Journal of Economic Perspectives* notes that, of the 1,104 species in the United States listed as threatened or endangered by July 1997, slightly more than 40 percent have approved recovery plans in place.[13]

6. Brian Seasholes, "Information on Babbitt's 'Proof' the Endangered Species Act Works," Competitive Enterprise Institute, Washington DC, 1998.
7. Letter from Fish and Wildlife Service Director Jamie Clark to Representative Richard Pombo, August 14, 1998.
8. *Ibid*.
9. Sterling Burnett and Bryon Allen, "The Endangered Species Act: First Step Toward Fixing a Costly Failure," National Center for Policy Analysis *Brief Analysis* No. 276, August 6, 1998, p. 1.
10. Randy T. Simmons, "Fixing the Endangered Species Act," in Terry Anderson, ed., *Breaking the Environmental Policy Gridlock* (Stanford, CA: Hoover Institution, 1997), p. 82.
11. U.S. General Accounting Office, "Endangered Species Act: Types and Number of Implementing Actions," *Briefing Report to the Chairman, Committee on Science, Space, and Technology,* GAO/RCED–92–131BR, May 1992, pp. 29, 33.
12. Andrew Metrick and Martin L. Weitzman, "Patterns of Behavior in Endangered Species Preservation," *Land Economics,* Vol. 72, No. 1 (February 1996), p. 6.
13. Gardner M. Brown Jr. and Jason F. Shogren, "Economics of the Endangered Species Act," *Journal of Economic Perspectives,* Vol. 12, No. 3 (Summer 1998), p. 6.

HOW 33 MORE SPECIES FELL FROM ESA GRACE

On May 5, 1998, Secretary of the Interior Bruce Babbitt announced that an additional 33 species on the Endangered Species list would be considered for removal or delisted to threatened status. Of the 33 species proposed for delisting,

5 of the species are extinct:*

- Guam broadbill
- Mariana mallard
- Oahu tree snail (3 species)

12 are delisted because of faulty or incomplete data:

- Tinian monarch
- Truckee barberry
- Hawaiian hawk
- Chamaesyee skottsbergii
- Dismal Swamp southeastern shrew
- Lloyd's hedgehog cactus
- Tidewater goby
- Running buffalo clover
- Virginia northern flying squirrel
- Virginia round-leaf birch
- Hoover's wooly-star
- Missouri bladder-pod

1 is not being considered by the Fish and Wildlife Service for delisting:

- Pahrump poolfish

3 recovered as a result of the banning of the pesticide DDT in 1972:

- American peregrine falcon
- Bald eagle
- Brown pelican

9 exist solely on federal lands and are federally protected:

- Ash Meadows Amargosa pupfish
- Island night lizard
- Ash Meadows plants (3 species)
- Eureka Valley plants (2 species)
- Robbins' cinquefoil
- Heliotrope milk-vetch

And 3 could be conserved by other state and federal wildlife laws:

- Aleutian Canada goose
- Columbian white-tailed deer
- Gray wolf

**Note:* These five extinct species have been removed from the U.S. Fish and Wildlife Service's list of species on its Web site at: *http://fws.gov/rx9exstaff/delstvnt.html.*

Source: Brian Seasholes, "Information on Babbitt's 'Proof' the Endangered Species Act Works," Competitive Enterprise Institute, Washington D.C., 1998.

- According to the Environmental Defense Fund, fewer than 10 percent of the listed species have exhibited an improved status, and the status of four times that amount is declining.[14]

THE ESA ENDANGERS PROPERTY OWNERS

Jonathan Adler, director of environmental studies at the Competitive Enterprise Institute in Washington, D.C., believes the "ESA tramples on private property rights more than any other statute."[15] In an article in *Forest Landowner,* Adler writes:

> Under the ESA, individual Americans have been prevented from building homes, plowing fields, cutting trees, clearing brush and repairing fences—all on private land. The federal government has even barred private landowners from clearing firebreaks to protect their homes from fire hazards.[16]

In a speech to the Society of Environmental Journalists, Secretary Babbitt describes how the listing of species prohibits the owners of species' habitat from using their property, at least for some time: "[W]hen a species is listed, there is a freeze across all its habitat for two or three years while we construct a habitat conservation plan which will later free up the land."[17] The financial loss caused by this freeze, which prohibits private landowners from activities like farming, timbering, mining, building homes, or even enhancing their property, can be devastating. Even the possibility of such losses creates a perverse incentive for property owners to keep endangered species off their land.

But the ESA carries a serious legal threat as well. As a GAO report notes, the

> Fish and Wildlife Service prosecuted 126 alleged violations of the Endangered Species Act on private lands between 1988 and 1993. Of the 126 cases, 86 were brought criminally, and 40 were brought as civil prosecutions.[18]

Of the 71 criminal prosecutions for which results were available, fines ranging from $25 to $50,000 were levied in 59 instances, and of $1,000 or more in 21 instances; jail sentences ranging from 10 days to 1,170 days were doled out in 18 instances; and probation ranging from 182 days to 1,825 days was given in 33 instances.[19]

The extent to which the Department of Interior will go to implement the objectives of the ESA can be seen from these reports of cases around the country. Consider:

- "Taung Ming-Lin, a Chinese immigrant, bought land in Kern County, California...to grow Chinese vegetables for sale to the southern California's Asian Community. Lin claims to have been told by the county the land was already zoned for farming and that no permit was needed. When Lin began farming, his tractor allegedly disturbed the habitat of the endangered Tipton Kangaroo rat...[and] ran over some of the rats. Lin was charged with federal civil and criminal violations of the Endangered Species Act.... The criminal

14. Brown and Shogren, "Economics of the Endangered Species Act," p. 10.

15. Jonathan H. Adler, "Promote Conservation without Regulation," *Forest Landowner,* Vol. 56, No. 4 (July/August, 1997), p. 21.

16. *Ibid.*

17. As cited in Testimony of Jonathan H. Adler before the Senate Committee on the Environment and Public Works, 104th Cong., 2nd Sess., July 12, 1995. See Thomas Lambert, "The Endangered Species Act: A Train Wreck Ahead," Center for the Study of American Business, October 1995, p. 4.

18. See Nancie G. Marzulla and Roger J. Marzulla, *Property Rights*: *Understanding Government Takings and Environmental Regulation* (Rockville, MD: The Government Institute, 1997), p. 78.

19. *Ibid.*

charges carry penalties of up to a year in jail and $100,000 fine."[20]

- "In 1973 Margaret Rector bought 15 acres of land on a busy highway west of Austin, Texas. In 1990 the golden-checkered warbler was listed as endangered, and the United States Fish and Wildlife Service says her property is suitable habitat. The land, in the fastest-growing part of the county, is now unusable. Its assessed value falls from $831,000 in 1991 to $30,000 in 1992. USFWS says she might be able to get a permit to develop, but this would require her to finance extensive studies and to mitigate any impact on the warbler."[21]

- "[T]he Central Valley of California, Kern County produces huge crops of vegetables, nuts, fruit, and cotton with water that is brought southward from Sacramento-San Joaquin Delta through a series of natural and man-made structures known as the California Water Project. This multi-billion-dollar water project is financed by assessments upon all of those who use the water; in turn, state law allocates the right to receive and use specified quantities of water to farmers, rangers, cities, and industrial users. These water rights are recognized as a property right under California State law. Beginning in 1992, the federal government started limiting the amounts of water which could be sent south to Kern County and other parts of California in order to maintain in-stream flows to protect the habitat of two endangered fish—the delta smelt and the winter run of Chinook salmon. As much as two million acre-feet of water—enough to cover two million acres to a depth of one foot—have been held back annually from municipal and agricultural use in order to maintain certain levels in streams and lakes which constitute the habitat of these fish. Farmers and ranchers have suffered many millions of dollars in lost crops and, in some instances, have lost their property as it has become unproductive."[22]

- "In Southern California an endangered fly in Riverside County held up the building of a hospital.... It's a flower-loving desert sand fly, a bit larger than a common housefly, but it was an endangered fly, and they found eight of them. The cost to set aside this habitat for the fly: about $400,000 per fly."[23]

- "In August 1997, U.S. District Judge Michael Hogan issued a moratorium on logging on 94 acres of privately held land near Eugene, Oregon. The two spotted owls actually make their nest about one mile away from the privately held parcel of land that is managed by the federal government. But because the land may be part of the owls' 'home range,' the judge determined that logging should be stopped...without knowing if the owls in fact even used it."[24]

- The FWS "threatened to fine a Utah man $15,000 for farming his land and allegedly posing a risk to the prairie dog, a protected species.... [T]he USWFS told the man that he should hire an outside expert to determine if there are prairie dogs on his land. The expert prepared a report, which indicated that there were no prairie dogs. The farmer proceeded to work his land. However, the USFWS has told him that they will fine him anyway."[25]

20. John K. Carlisle, *1998 National Directory of National Environmental and Regulatory Victims,* National Center for Public Policy Research, Washington, D.C., p. 16.

21. *Ibid.,* p. 7.

22. Marzulla and Marzulla, *Property Rights,* p. 87.

23. Representative Richard W. Pombo, "This Land Is Our Land," Heritage Foundation *Lecture* No. 598, July 29, 1997, p. 3.

24. Carlisle, *1998 National Directory of National Environmental and Regulatory Victims,* p. 8.

25. *Ibid.,* p. 15.

THE ESA DOES MORE HARM THAN GOOD

The ESA's fundamental flaws interfere with its successful protection of endangered species. Specifically:

Flaw #1: It does not clarify when a property owner's actions "harm" a species.

Section IX of the ESA provides the legal basis for the FWS to determine which species should be protected and what authority it has to implement a recovery plan to protect them from "harm." On June 29, 1995, the Supreme Court handed down a landmark decision in *Sweet Home Chapter of Communities for a Great Oregon* v. *Babbitt* when it ruled that "harm" to a species included the modification of suitable habitat for a species.[26] The Supreme Court also upheld the Department of the Interior's regulatory right to "take" private property in instances in which a landowner makes "significant habitat modification or degradation."[27]

As analysts at the Government Institute note:

> The challengers [to this ruling] argued that a "take" of an endangered species required actual harm to an identified individual animal (e.g., killing, wounding, injuring, harassing or capturing) while the Interior Department argued that its regulation should be upheld because habitat modification could generally affect a species without actually causing harm to an identified creature.[28]

Because of the Supreme Court ruling, the ESA empowers the federal government to regulate any land that is *thought* to provide "suitable habitat" for an endangered species—without proof of death or injury to an identifiable animal that was caused by the landowner. Secretary Babbitt goes even further, interpreting this ruling to mean that a bird nesting as far away from private property as 2.7 miles is close enough to prevent the landowner from modifying the property.[29]

Unfortunately for landowners, the most recent GAO report on the ESA (released in 1994) shows that about 73 percent of the 712 species on the 1994 ESA list have over 60 percent of their habitat situated on nonfederal lands, and that about 37 percent of the 712 species are completely dependent on private land for their habitat.[30] Secretary Babbitt's interpretation of the Supreme Court's definition of "harm" allows the federal government great discretion in determining when regulatory action is required to protect a species.

Consequently, as Environmental Defense Fund attorney Michael Bean observes, there is "increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems."[31] He emphasizes these actions are "not the result of malice toward the environment," but are "fairly rational decisions, motivated by a desire to avoid potentially significant economic constraints."[32] He adds that they were a predictable response to the familiar perverse incentives that sometimes accompany regulatory programs. Instead of encouraging landowners to create or enhance

26. *Sweet Home Chapter of Communities for a Great Oregon* v. *Babbitt* (*Sweet Home*), 115 S. Ct. 2407 (1995).

27. *Ibid*.

28. See Marzulla and Marzulla, *Property Rights,* p. 80.

29. Ike Sugg, "Endangered Species Reform Dangers," *The Washington Times,* November 10, 1997, p. A14.

30. U.S. General Accounting Office, "Endangered Species Act, Information on Species Protection on Nonfederal Lands," December 20, 1994, p. 5.

31. Transcript of a presentation by Michael Bean at a U.S. Fish and Wildlife Service seminar at Marymount University in Arlington, VA, November 3, 1994. In Richard L. Stroup, "The Endangered Species Act: Making Innocent Species the Enemy," Political Economy Research Center *Policy Series* PS–3, Bozeman, MT, April 1995, pp. 8–9.

32. *Ibid*.

habitat on their property, this federal empowerment means the ESA creates a perverse incentive for owners to rid their land of habitat in order to preserve its economic viability.

Flaw #2: The ESA is used primarily as a means of "free" land-use control by federal agencies, rather than as a means of protecting and reviving endangered species.

Under the ESA as it currently stands, the government is entitled to take control of all or part of a landowner's property without regard to the financial burden this places on the landowner if the government feels the property is needed to protect an endangered species. Consequently, regulators can set aside large amounts of land at no cost to their agency. This formula inevitably will lead them to take control of private property even when its contribution to efforts to save an endangered species is low and the cost to the landowner is high.[33]

In these cases, the unlucky landowner bears the total burden of species protection. This system sends the wrong message to landowners. For example:

- After a farmer in Florida discovered a bald eagle nesting in one of his trees, federal bureaucrats ordered him not to operate his tractor within one-half mile of the tree. The message to farmers: Keep eagles from nesting on your property.[34]
- After a rancher in southern Oregon turned one of his fields into a marshland for wildlife, the state declared his artificial marsh a "wetland" and prohibited him from altering it. The message to other farmers and ranchers: Don't create wetlands or other wildlife habitat.[35]

Such occurrences would not be so offensive to Americans if the government compensated them for their loss of use of this property, but that is not the case. By threatening landowners with the taking of their land without compensation, the government fosters the "shoot, shovel, and shut-up" syndrome, which means landowners can see wildlife and plant life as economic liabilities.[36] The better stewards of the environment and species that landowners become and the more wildlife habitat they maintain, the more likely that today's ESA will punish them and force them to forfeit reasonable use of their property.

Because an overwhelming percentage of endangered species live on private land, Section X of the ESA creates habitat conservation plans (HCPs) that allow the federal government to address land development efforts that conflict with its efforts to protect a listed species. These legal agreements between landowners and the FWS permit the use of land for activities that the ESA might prohibit otherwise.

HCPs are voluntary in the sense that landowners who do not choose to enter into an HCP agreement will not be forced to do so. But many landowners, when faced with this decision, fear that the federal government will restrict the use of their land to an even greater extent if they do not enter into the agreement. Many property owners feel compelled to agree to an HCP solely to mitigate or minimize a possible government "taking." HCPs give landowners a "choice" that is voluntary in name only.

THE CASE FOR JUST COMPENSATION

The Framers of the U.S. Constitution recognized that the right to own and make reasonable use of one's property is fundamental to freedom.

33. See Richard L. Stroup, "The Economics of Compensating Property Owners," *Contemporary Economic Policy*, Vol. XV (October 1997), p. 56.

34. Richard L. Stroup, "Progressive Environmentalism: A Pro Human, Pro Science, Pro Free Enterprise Agenda for Change," National Center for Policy Analysis *Task Force Report*, April 1991, p. 19.

35. *Ibid*.

36. See R. J. Smith, "Protecting Property Rights and Endangered Species," Competitive Enterprise Institute, undated, p. 2.

The Fifth Amendment states, "Nor shall private property be taken for public use without just compensation." The Framers specified "without just compensation" for two primary reasons: they had witnessed British troops, appointed judges, and the colonial government unfairly confiscate private property; and they understood there would be times in which the government must use private property for official, legitimate purposes.

The ESA codifies the protection of endangered species as such an official, legitimate purpose. The country as a whole, then, should be expected to pay the costs of implementing its provisions to make sure the goals of the ESA are achieved. Unfortunately, under the ESA as it currently exists, individual property owners who happen to have endangered species on or near their property must bear the full burden of protecting them.

The ESA prevents property owners from developing and using the land for which they pay mortgages and taxes. Under their Fifth Amendment rights, they should receive compensation for the economic loss they suffer by this confiscation of property, and it should come at fair market value. Adopting a provision to ensure just compensation would reverse the ESA's incentive to rid land of habitat and species and instead create an incentive to develop or enhance habitat for endangered species.

HOW THE ESA'S COSTS ENDANGER ITS SUCCESS

Under the Government Performance and Results Act (GPRA), federal agencies must issue annual performance plans on the program activities included in their budgets. These plans should establish the "performance indicators that are to be used in measuring or assessing the relevant outputs, service levels, and outcomes of each program activity."[37] The FWS's performance plan for the protection of endangered and threatened species under ESA includes as performance measures (1) "By 2002, the status of 183 candidate (to be considered for listing as threatened or endangered) species has been resolved";[38] and (2) "By 2002, 40% of endangered and threatened species populations are stabilized or improved."[39]

Although these goals seem reasonable, they do not take into consideration the biological value of the species under consideration. There is no explicit recognition of the relative costs and benefits of stabilizing one species over another. A species that involves a high economic cost of recovery and possible low economic benefits receives the same standing as a species with large economic benefits and low costs.[40] Such arbitrary performance measures create an incentive for FWS officials to dedicate their limited resources to those species that require the least effort or have the most special interest or political support.

It is difficult to estimate the cost of implementing the ESA. In addition to the public resources that go to its efforts to protect endangered species, there are other costs associated with foregone opportunities from restrictions on the use of the property. For example, in 1995, the GAO reported on 57 approved recovery plans. The total estimated cost to implement 34 of the plans was about $700 million, and the estimate for the initial three years of recovery for 23 plans was $350 million.[41] Yet these amounts do not include the millions of dollars that would be lost from restricted or altered development projects; in agriculture production, timber harvesting, mining extraction, and recreation activities; the lost wages

37. U.S. Fish and Wildlife Service, "GPRA Act Background" at *http://www.fws.gov/r9gpra/gpract.html*, p. 1.

38. U.S. Fish and Wildlife Service, "Goal 1. Sustainability of Fish and Wildlife Populations," Performance Measures 1.5, available at *http://www.fws.gov/r9gpra/mg1.html.*

39. *Ibid.* See Performance Measures 1.6.

40. See Brown and Shogren, "Economics of the Endangered Species Act," p. 6.

41. U.S. General Accounting Office, "Correspondence to Representative Don Young on Estimated Recovery Cost of Endangered Species," B–270461, 1995b, as cited in Brown and Shogren, "Economics of the Endangered Species Act," p. 14.

of displaced workers who went unemployed or became re-employed at lower wages; or the lower consumer surplus resulting from higher prices and lower capital asset value.[42]

The government estimates that recovering all currently known endangered species would cost more than $4.6 billion.[43] According to the National Center for Policy Analysis, this estimate is misleading because it includes solely recovery costs; it does not include the $2.26 spent on consulting with scientists and stakeholders for every $1.00 spent on recovery; or the lost jobs, foregone wages, and social costs of the recovery effort.[44]

WHAT CONGRESS SHOULD DO

As it currently stands, the ESA is bad for species and bad for people. Endangered species receive better protection through voluntary conservation efforts than through the federal government's regulatory imposition of limits on the use of private land. Therefore, Congress should take steps to improve the ESA. Specifically, it should:

1. **Clarify the definition of "harm."** To protect landowners from the "taking" of private property in the name of protecting endangered species, Congress must change the definition of what constitutes "harm" to a species as interpreted by the Supreme Court in the *Sweet Home* case. For "harm" to be assessed, the ESA should require the use of sound, objective, and unbiased scientific evidence that proves the actions of an individual caused death or physical injury to a physically identifiable endangered species present on the property. The cutting down of a few trees, for example, does not necessarily constitute harm to a species; nor does a landowner necessarily injure a bird by modifying its potential habitat.
2. **Ensure that property owners are compensated in full for any loss that results from a "taking" to protect an endangered species.** If the country as a whole decides the protection of endangered species is worthy of federal attention, it should assume responsibility for the cost of protecting those species. Under the current ESA, however, the cost of protecting endangered species is borne only by unlucky private property owners whose land is home to endangered species.

The ESA should be an on-budget, voluntary, and non-regulatory incentive-based program that requires agencies to help landowners to develop mutually compatible conservation plans for their property. In the words of R. J. Smith of the Competitive Enterprise Institute, the government

> could rent land, lease it, purchase conservation easements or even purchase land. It could pay tree farmers or foresters to delay harvest for a certain number of years in order to allow species utilizing those trees time to produce more young. It could pay landowners to plant and grow certain types of habitat necessary for particular species. And it could pay landowners to produce wildlife by erecting nest boxes or creating specific types of habitat for wildlife reproduction.[45]

Instead of building bureaucracy or defending the types of lawsuits that its regulatory overreach encourages, the federal government should set aside funds to pay landowners who agree to maintain endangered species habitat on their property or who agree not to use their property in a manner that endangers and threatens listed species. This type of action would ensure that endangered species are recovered and the property rights and prosperity of landowners are protected.

42. Brown and Shogren, "Economics of the Endangered Species Act," p. 13.

43. Burnett and Allen, "The Endangered Species Act," p. 1.

44. *Ibid*.

45. Smith, "Protecting Property Rights and Endangered Species," p. 5.

A Model of Success. The success of the Wetlands Reserve program, Ducks Unlimited, Trout Unlimited, and the North American Waterfowl Management Plan (NAWMP) demonstrates that this approach works well. These programs take advantage of the economic and social value people place on the presence of wetlands. Under the NAWMP, the federal government offers grants and matching funds to local and regional groups to purchase conservation easements on privately owned wetlands, restore areas that once were wetlands but have been drained, and enhance existing wetlands.

This type of system does not discourage landowners from having wetlands on their property; it encourages them to maintain them. Jonathan Adler notes that:

> not only do nonregulatory programs produce real results where regulatory programs fail, they are also more cost effective. Under the Wetland Reserve Program and the North American Waterfowl Management Program, the federal government spends less than $1,000 per acre restoring wetlands. Yet [Clean Water Act] Section 404 mitigation costs the federal government nearly $4,000 per acre.[46]

A program that is voluntary and nonregulatory could promote the same type of success story for endangered species.

3. **Demand that Department of the Interior agencies employ sound, objective, and unbiased science and examine the economic consequences of their actions in the decision-making process.** Although recovering every endangered species to levels they may have had at one point in history is desirable, it is also impossible. Further, not every single member of an endangered species can be saved. But the ESA protects rare species as well as rare subspecies:7(o7(n)-Mdan)10(dwı˝[I-3(rwı˝[of ebrti ceesh r ewildleh in(n)eribedde

often, these decisions are made on questionable scientific data that have had no independent peer review. Reform of the ESA should include the requirement that all listings, delistings, and evaluations of conservation plans be based on the most sound, objective, and peer-reviewed scientific information available. And those scientific findings should be open to public scrutiny. A framework should separate scientific fact-finding aspects from decision-making aspects; otherwise, the science on which federal policy makers rely to make their decisions will continue to be driven by the balance of power among special interests or political motives. Furthermore, a rational examination of the costs and benefits of protecting one particular endangered species versus another, and of instituting various recovery plans, must be performed to ensure that Americans get the most significant environmental benefit from the resources invested.

The Role of the States. States also should be considered partners in the listing and implementation of recovery plans because they may have relevant information on which to base decisions. States can prioritize the risks to endangered species, target resources more precisely to meet their needs, and be more responsive to landowners than distant federal regulators can. And states can adopt legislation to ensure the rights of property owners under the Fifth Amendment. The American Legislative Exchange Council, for example, developed model legislation entitled "The Private Property Protection Act," which targets

> the establishment of reasonable standards for takings and a method of relief for landowners whose rights have been taken by excess regulation. Key components of the bill include: a definition of a regulatory taking, governmental compensations for property rights infringement, inverse condemnation procedures, regulatory rollback procedures, legal challenges and tax adjustments.[51]

4. Create incentives that make landowners

property rights and just compensation, both endangered species and landowners will continue to suffer.

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