The Endangered Species Act

Saving Species or Stopping Growth?

Robert J. Smith

Throughout the United States industry and agriculture are closing down. In the Pacific Northwest millions of acres of federal, state, and private forestlands can no longer be used to produce lumber and pulp. Not only are timber companies and sawmills shutting their doors, but their closure is crippling entire communities as wages and taxes disappear. Studies by Oregon and Washington universities as well as by industry economists suggest a total loss of as many as 100,000 jobs.

In parts of northern Florida lands have been closed to mining for phosphates. Over the past few years much of the Texas hill country west of Austin and San Antonio has been closed to virtually all development and much agriculture. Even clearing brush along fencerows carries the risk of criminal prosecution. Consequently, property values in Travis County have plummeted by more than $358 million.

Throughout the vast arc of southern pine forests extending from southern Virginia to northern Florida and west into eastern Texas, large areas of loblolly pine stands have been set aside from any harvesting. The protected area includes federal, state, and private forestlands. Plans are underway to limit and perhaps ban any development or land clearing along the California coast from greater Los Angeles to the Mexican border. Dam construction has been halted in Maine; interstate highways have been diverted in Mississippi; on military bases and lands, everything from bombing range practice to amphibious landings has been curtailed, restricted, or cancelled.

The source of all this land-use control is the Endangered Species Act, which has been called by many the single most powerful law ever passed. In theory it takes precedence over all other laws—perhaps even the takings clause of the Constitution. The act can lock up government and private lands and stop government and private projects and activities. Presumably, in the event of war, the act could prevent Polaris submarines from leaving their berths if endangered California gray whales or blue whales were migrating nearby. The act is up for reauthorization in 1992.

History of the Act

Systematic federal protection of endangered species of wildlife (as opposed to the general protection of wildlife and the protection of a few named species) began with the passage of the Endangered Species Preservation Act of 1966. That act was very limited in scope, applied only to U.S. species, and entailed little more than authority for modest land acquisi-

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tion to protect habitat. The Endangered Species Conservation Act of 1969 supplemented the 1966 act by expanding the land acquisition authority, broadening the definition of fish and wildlife to include invertebrates, requiring the listing of all species or subspecies "threatened with worldwide extinction," and prohibiting the importation of those foreign species, except for very precisely specified scientific purposes.

The Endangered Species Act of 1973 and its subsequent amendments extend protection to all wildlife ("any member of the animal kingdom") and plants ("any member of the plant kingdom"). The act defines species so as to include subspecies, races, and even distinct geographic populations. In addition, it removes limits on the amounts of money that can be taken from the Land and Water Conservation Fund to buy habitat for endangered species.

Section 7 of the act mandates that federal agencies ensure that the actions they authorize, fund, or carry out neither jeopardize the continued existence of such endangered or threatened species nor destroy or modify the habitat of such species that is designated as "critical." Section 9 states that no person may take an endangered species. *Take* is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The U.S. Fish and Wildlife Service's implementing regulations define *harm* as "an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of 'harm'."

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If a species is listed as threatened or endangered, a series of exceedingly stringent protections, prohibitions, and penalties follows. The second step is designating critical habitat, if and when it is appropriate. The third step is preparing a recovery plan, detailing what steps will be necessary for the species to recover. Finally, there is delisting, when the recovery plan has built up a population that is no longer threatened by extinction.

What has happened over twenty years? The most telling observation is that the major emphasis is on the listing phase of the process while little has been accomplished with recovery. Currently, there are 1,071 listed species (581 in the United States), 108 critical habitat designations, 275 recovery plans, and 16 delisted species. An examination of the delisted species is also informative. Seven were delisted because they became extinct. Five species were delisted because of errors in the original data; they did not qualify for listing. Of the remaining four delisted species, three are birds in Palua in the Western Pacific and one is a plant in Utah. Apparently all four could have been delisted for errors in the original data. For at least some of the four the original population estimates were low. In addition, they were healthy and fast breeding species and recovered with little if any assistance.

Thus, after two decades, very little has been accomplished. To be fair, a few species have been rescued from extinction by strictly protecting breeding and wintering grounds, educating hunters to reduce the chances that the endangered animals are hunted or accidentally shot, adopting complicated, expensive captive breeding programs, and occasionally using specialized techniques for protecting very small, localized populations. But a number of those successes predate the environmental era and are the result of genuine wildlife conservation, protection, and management efforts. Moreover, such enormously expensive and highly visible recovery programs as those involving the whooping crane and California condor have been for species that were in serious decline long before modern man evolved. It is highly unlikely that those species will ever survive without constant daily intervention and manipulation. Nevertheless, some claim that it is necessary to spend whatever it takes to save the crane and condor because they are so spectacular that they capture the public imagination and thus make possible the entire endangered species program.

The Game: List, List, List

Not only does most of the endangered species program focus on the listing phase with relatively little attention to recovery, but another 4,000 species are waiting to be listed. That has become the game: list, list, list, and bring the system into gridlock. It is a cost-free, unchallengeable method that stops growth, development, and the use of natural re-

sources in America. Once a species is listed, it is protected wherever it goes.

If one is genuinely concerned about protecting and recovering rare, threatened, and endangered species, he will find that the Endangered Species Act's thrust is misguided. The act is characterized by negative incentives instead of providing positive ones for protecting endangered species. Indeed, the negative incentives are especially destructive. The jeopardy section and the taking section of the act are a warning to any government land manager or private landowner that the presence of an endangered species on his lands—or even the existence of habitat that might be used by a listed species—will likely result in a change in how he can use the land or in a regulatory taking of those lands. No one has any incentive to make his land attractive for endangered species. The perverse incentive structure of the act accelerates destruction of the very habitat the act was designed to protect. For example, spotted owl habitat is being cut at an accelerated rate on public and private lands by managers or owners of trees who face the prospect of not ever being able to harvest those trees and not receiving any compensation for the closing or taking. There is nothing in the act to promote or encourage the production of more wildlife habitat; not a word encourages landowners to increase the population size of any threatened or endangered species. If the intent of the act were to help species recover, one would expect such provisions.

The Potential for Recovery

A century's experience with wildlife conservation and management illustrates that many wildlife species respond readily and rapidly to efforts to help expand their populations. Scores of species have come back from the seeming brink of extinction or from seriously declining populations through noncompulsory efforts by the public sector, and even more commonly, through private-sector activities.

There is no more compelling proof than the remarkable recovery of the peregrine falcon. The rapid decline and near disappearance of the world's peregrine falcons, especially those populations in the Northern Hemisphere south of the Arctic, happened with such rapidity in the 1960s and 1970s that many thought the species was doomed. DDT was banned in 1972, and it was hoped that this would at least eventually provide a clean environment if a recovery effort could be launched. The recovery program was exceptional. It was essentially "privatized"—taken on by a group of ornithologists and falconers who had long admired, owned, and flown the birds. Making no attempts to shut down the coal mining industry, shackle the electric utility industry, halt oil exploration, or prevent timber harvesting in public or private forests, they used the techniques they had learned to breed birds of prey in captivity and then released the falcons into the wild to restore them to their ancient haunts. Today, throughout much of the East the peregrine is back, and it is undergoing rapid recovery elsewhere. Sometime in the near future the peregrine falcon will qualify for successful removal from the endangered species list.

Who Will Protect the Spotted Owl?

But under the current Endangered Species Act's incentives, who would attempt to aid the recovery or expansion of the spotted owl? To do anything to make one's lands attractive to a threatened or endangered species would subject the owner to the strong likelihood of having the use of his property restricted and its economic value reduced. If he successfully attracted a spotted owl to his property and it were harmed (harassed, watched too closely by neighborhood birdwatchers, or disturbed by a photographer, for example), he would be subject to the provisions and penalties of the taking section. And if he built an artificial nest box with a hole just slightly too small so that the female owl could squeeze in but would be unable to get back out and died, he could face a substantial fine and a prison term.

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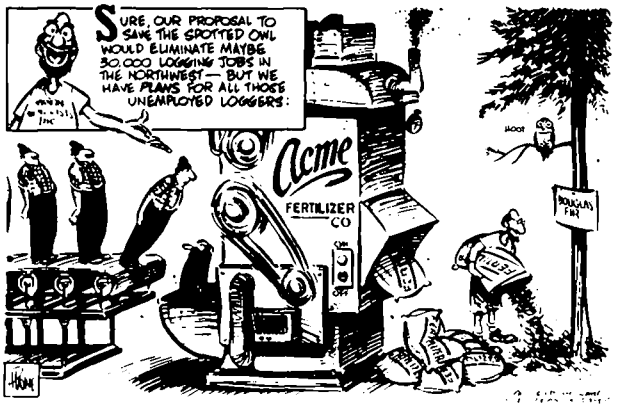
Changing the Incentives

If the Endangered Species Act is to actually save endangered species, protect their habitats, and encourage people to increase populations of those species, drastic changes will have to be made. First,



all of the perverse incentives built into section 7 (jeopardy) and section 9 (taking) will have to be eliminated. Land managers and owners must not be penalized for having prime habitat or rare species on their lands. Much wildlife can easily tolerate considerable amounts of human activity—and even disturbance—without deleterious effect. People can build homes and offices all over the Texas hill country without harming the golden-cheeked warbler—provided that they leave the cedar thickets on hillsides and in ravines and gullies that the birds require. If landowners and developers were secure in their property rights and received full compensation for any of their land that was taken, they would have no reason to remove habitat from their property in anticipation of the species' being listed.

Requiring that any property acquired to preserve endangered species be purchased is cost effective because the federal government will make much more efficient decisions about which endangered species to protect and in which locations.

The most productive approach would be to return to the general structure of the 1966 and 1969 acts. Those acts authorized the federal government to *purchase* easements or full title to land to protect endangered species but did not create the uncompensated regulatory taking of property rights that has been the dominant pattern since the 1973 act. From 1967 through 1990 the Department of Interior purchased only about 220,000 acres for $172 million under that authority, generally to enlarge existing wildlife refuges. Those purchases were financed from a designated share of the Land and Water Conservation Fund plus some general revenues at the discretion of the secretary of the interior.

Requiring that any property acquired to preserve endangered species be purchased is cost effective because the federal government will make much more efficient decisions about which endangered species to protect and in which locations. For example, the federal government is not likely to deny Sacramento Delta water to Southern California to preserve the Delta smelt or to prohibit development of about 390 square miles in Southern California to preserve habitat for the California gnatcatcher. And spotted owls can be more efficiently protected by prohibiting logging in low-value rather than in high-value forests.

The savings from requiring the government to purchase acquired property would be enormous. Preserving the Delta smelt and the California gnatcatcher by the measures now used could cost tens of billions of dollars. One 10,000-acre forest in Washington that is a spotted owl habitat has timber valued at $113 million; the timber value of the entire current spotted owl habitat is vastly larger. One hundred million dollars have already been set aside to retrain timber workers, yet the timber value of just one spotted owl territory can exceed the entire retraining budget. Shifting the cost of all uncompensated takings onto the federal budget is the most effective strategy to protect the spotted owl.

A direct federal payment to purchase rights or to pay property owners to preserve habitat is also much more just than the current practice of uncompensated taking. For those species then determined to be worth preserving, the cost should be borne by the general taxpayer rather than by those who own the relevant (and changeable) habitat. The alternative is a property owners' revolt, the destruction of regional economies, and the continued erosion of the constitutional protection of property rights.

The 1966 and 1969 endangered species acts had two other desirable provisions. The Land and Water Conservation Fund is financed by revenues from oil leases in the outer continental shelf—a measure that encourages environmentalists to approve environmentally responsible oil exploration and development of the outer continental shelf. Those two acts also put the several types of environmental interests in competition with each other, because the Land and Water Conservation Fund could be used for a range of environmental objectives. That approach leads to a better balance of environmental objectives than if different funds are used to finance the several objectives.

Land need not be taken or even purchased in fee simple. Conservation easements could be purchased for the absolutely critical habitat or the development rights could be purchased. There are many innovative ways to protect lands, open space, and wildlife habitat if one is sincerely interested in finding them. Landowners could even be encouraged to plant additional critical habitat on their property if the presence of the species or habitat were not used to take their property and there were an incentive to make it worthwhile. For example, such incentives could range from direct payment to tax credits or lower property taxes to changes in depreciation allowances.

The definition of *taking* must be revised as well. If endangered species occur naturally on someone's land, or if they are deliberately attracted to that land to aid in their recovery, inadvertent harm to the species should not be considered a violation of the act and a crime in any sense.

Finally, not only must the negative incentives be removed, but the act should be amended to provide positive incentives. To increase the populations of threatened and endangered species, the government should pay rather than penalize people to produce them. Such a program would be infinitely cheaper that taking billions of dollars of timber and private property, eliminating hundreds of thousands of jobs, and forcing huge numbers of people onto unemployment and retraining rosters.

With such a system, people would have an incentive to erect spotted owl nest boxes all across Washington, Oregon, and California. Landowners would be encouraged to harvest their trees on a longer cycle so that more suitable habitat would be available over a longer period of time. People would be encouraged to use forest products more efficiently and sparingly. Under that system Americans would preserve nature and have freedom as well.

Most Americans share some concern about preserving many endangered species. The Endangered Species Act should be reauthorized, however, only if it is amended to forbid explicitly any form of taking of private property without compensation. The most efficient and just approach to meet those shared concerns would be to reauthorize the general provision of the 1966 and 1969 acts to pay for takings, to add revenues from the Arctic National Wildlife Refuge oil leases to the Land and Water Conservation Fund, and possibly to add some general revenues to that fund. That fund should be the *sole* federal instrument to acquire rights to preserve endangered species, wetlands, historic properties, and other shared and developing environmental concerns.

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Selected Readings

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