

Essential Question: Who has ownership and control over the earth's resources?

The Endangered Species Act: Making Innocent Species the Enemy

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Introduction

"It is increasingly clear that Congress will amend the Endangered Species Act. For one thing, property rights groups, who are important constituents of the new Republican Congress, are outraged at the power the Act gives federal agents to control landowners' use of their property. For another, the Act isn't working well to save species.

Although many improvements could be made, the Endangered Species Act does not need massive changes; rather, it needs a few fundamental ones. "Takings" legislation that requires compensation when the federal government takes control of landowners' property, already embodied in a bill passed by the House, would go a long way toward correcting the ESA's major flaws. It would reduce the animosity of landowners, encourage cooperation, and force the government agencies that administer the Act to weigh their priorities. Such a law would probably spur Congress to make additional changes in the Act, but, even without further legislation, it would change the way the Act is administered.

To understand why change is needed, and why a few changes will have multiple benefits, we need to understand why the Endangered Species Act has aroused such hostility. That is the chief purpose of this paper.

The Paradox of the Act

The Endangered Species Act, which was passed in 1973, poses a paradox. On the one hand, it is enormously powerful. "In other laws," writes Rocky Barker in his book *Saving All the Parts*,⁽¹⁾ "federal agencies are required to provide protection 'where practicable.'" But the Endangered Species Act "elevated protection of all species to one of the U.S. government's highest priorities." This protection is "absolute. No equivocation." Others agree with Barker's description. The Act is "widely regarded by its proponents as one of this country's most important and powerful environmental laws and an international model," wrote M. Lynne Corn in a Congressional Research Service report.⁽²⁾

Yet evidence of its effectiveness is weak. Only 27 species have been taken off the endangered or threatened list ("threatened" species are those that are likely to become endangered; their treatment under the Act is about the same). Some of these delistings were for errors in the original listings.⁽³⁾

At most, only eight species can be described as recovered: the brown pelican, three Palau Island birds, the American alligator, the Rydberg milk-vetch, the gray whale, and the Arctic peregrine falcon, although some others that remain listed are doing well. In his 1993 book, Rocky Barker refers to five "official success stories," but discusses at length only two successes: bald eagles and peregrine falcons (not the Arctic peregrine falcon but the Eastern peregrine falcon, which is still on the list but largely recovered).

And it is difficult to give the credit for these recoveries to the ESA. Most people believe that the ban on the pesticide DDT has helped large raptors such as the bald eagles, the brown pelican, and the peregrine falcon. Furthermore, the falcon's recovery was accomplished almost singlehandedly by Tom Cade and the private organization he created, The Peregrine Fund (now called the World Center for Birds of Prey). Using techniques developed by falconers, Cade painstakingly bred peregrines in captivity. The gray

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whale, another apparent success, has been increasing in numbers ever since 1946, when an international treaty prohibited commercial hunting for that species of whale. It is doubtful that the Endangered Species Act had an important role. The few successes should be compared with a total of more than 1400 plant and animal species on the endangered or threatened list.⁽⁴⁾

How can such a powerful tool have such inadequate results? The answer is that the Endangered Species Act ignores the fundamental economic problem, the problem of scarcity. Resources for saving species are inevitably limited. They are scarce. For example, it is obvious that we can't set aside the entire acreage of the United States for wildlife habitat, and we can't set aside even a large part of that acreage without interfering with other uses. But the current Endangered Species Act, as it is now interpreted, represents an effort to avoid or disregard this fact. Government agents--primarily the U.S. Fish and Wildlife Service--have too often acted as though there are no limits, as though they are exempt from the problem of scarcity. Their actions have had perverse results.

The ESA, as interpreted by the Fish and Wildlife Service, calls for FWS biologists to control how land is used any time they consider it important for listed species. They decide whether farming, or logging, or building or even walking the land will be allowed. On such land, private or public, the FWS biologists become, in effect, land managers on behalf of the listed species. (The National Marine Fisheries Service has the responsibility for ocean-going fish.)

When a northern spotted owl, red-cockaded woodpecker, or other species listed as endangered or threatened is found on private property, the owners are required to meet the demands of the Fish and Wildlife Service biologists. Yet the biologists have no economic incentive to limit their demands. Since they have no requirement to compensate the owners of the land they control, other people's land has no budgetary cost to them; it is available free of charge.

In fact, however, land *is* a scarce good. The landowner who has listed species on his or her land, or who has habitat that might attract listed species, may not willingly offer it up free simply because Fish and Wildlife Service officials think they need it. Yet according to the law, the government has no obligation to consider the wishes of the owner or compensate the owner for taking control away.

The result is not only animosity on the part of landowners, animosity that is fully justified. It is also damage to the species that the biologists want to protect. This ability to control how property is used makes an enemy out of even the most harmless of birds or other listed species. In other words, by focusing the enormous power of the federal government on the supposed protection of rare species, the Act has made rare species unwanted and has even encouraged some people to get rid of them. This explains the paradox of the Act's enormous power and minimal results.

Like other dedicated people, Fish and Wildlife officials would like to believe that their mission transcends all others. And, at least as currently interpreted, the law appears to support them. It appears to authorize the protection of endangered species as "trumping" all other missions. But until the conflict between the fact of scarcity and the apparent ability to disregard scarcity is resolved, the ESA will not work effectively to save species.

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An Illustration of the Paradox

The case of Ben Cone illustrates what happens when the government ignores the fact of scarcity.⁽⁵⁾ In 1982, Benjamin Cone, Jr., inherited 7200 acres of land in Pender County, North Carolina. He has managed the land primarily for wildlife. He has planted chuffa and rye for wild turkey, for example, and the wild turkey has made a comeback in Pender County partly due to his efforts. He has also frequently conducted controlled burns of the property to improve the habitat for quail and deer.

In the 1970s, Ben Cone and his caretaker noted a couple of red-cockaded woodpeckers on the property. Red-cockaded woodpeckers are listed as an endangered species. They nest in the cavities of very old trees and are apparently attracted to places that have both old trees and a clear understory. By clearing the understory to protect quail and deer and by selectively cutting small amounts of timber, Cone may have helped attract the woodpecker. In the 1970s, however, the birds posed no obvious problem, because Cone did not want to log their habitat at that time.

In 1991, when Cone did intend to sell some timber from his land, the presence of the birds was formally recorded. Cone hired a wildlife biologist to determine the number of birds, which is now believed to be 29 birds in 12 colonies. According to the Fish and Wildlife Service's guidelines then in effect for the red-cockaded woodpecker, a circle with a half-mile radius had to be drawn around each colony, within which no timber could be harvested. If Cone harvested the timber, he would be subject to a severe fine, and/or imprisonment under the Endangered Species Act.

Based on biologists' estimates of the presence of the birds and the Fish and Wildlife rules, it appears that 1560.8 acres of Cone's land are now under the control of the Fish and Wildlife Service. But Cone is still required by law to pay taxes on the land's previous value.

Cone has made several changes in the way he manages the wildlife and timber. In the past, he clearcut a 50-acre block every five to ten years. That created edge for the wildlife and roughly simulated the effect of a small, intense fire, the kind that would start the cycle of succession again every five to ten years. The whole of his property was thus attractive to a variety of wildlife on a sustained basis.

But since the woodpeckers were found, and the logging stopped on more than 1560 acres to help them, Cone has clearcut 300-500 acres every year on the rest of his land. He told an investigator, "I cannot afford to let those woodpeckers take over the rest of the property. I'm going to start massive clear-cutting. I'm going to a 40-year rotation, instead of a 75- to 80-year rotation."⁽⁶⁾ Cone's new rotation will do away with old trees on the areas he can still harvest, preventing the woodpecker from nesting in the tree cavities that would have appeared there. Eventually, the acres that have been set aside for the woodpecker will rot or burn, and his land will be free of the woodpecker.

Ben Cone is a relatively wealthy man, and to many people may not be a sympathetic figure. But we don't have to have sympathy for him personally to see that he faces a genuine problem and that his experience teaches a lesson to all landowners who learn about his situation. They may be in for similar treatment unless they do something about it. Indeed, after Cone informed the owner of neighboring land about possible liabilities in connection with the red-cockaded woodpecker, he noticed that the owner, a firm, clear-cut the property.