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# Whose Land Is It Anyway?

## *Private Property Rights and the Endangered Species Act*

by Jon H.  
Goldstein

**T**he Endangered Species Act (ESA) has come in for a lot of inflammatory rhetoric in recent years, primarily at the hands of property rights groups, land-intensive businesses, chemical manufacturers and users, and their associations. The act is up for reauthorization, providing the opportunity for amendment. This opportunity attracts the attention of special interest groups and focuses their efforts. Its detractors charge that ESA (a) protects listed species to the exclusion of human needs; (b) ignores economic considerations, imposing burdensome, inequitable costs on landowners, businesses, and workers; and (c) constitutes an unconstitutional "taking" of private property without compensation.

Further, reauthorization is being conducted in a supercharged atmosphere of intense congressional interest in property rights and regulatory relief for landowners. Since the 104th Congress convened in January 1995, more than one hundred bills have been introduced which address private property rights.

Here, I will try to distinguish legitimate concerns about the ESA from self-serving rhetoric. There are indeed costs to protecting endangered species. Be mindful, however, that the act's critics routinely misrepresent its effects and exaggerate the burdens on landowners and development. The resurgent property rights movement in this country is particularly prone to this offense. What one owns when one owns land, what one does and does not have title to, and what one's property rights are are all central to the issue of who should bear the burden of regulatory costs, whether from ESA or any other statute.

I shall examine ESA and the problems therewith, summarize the administration's and Congress's proposals for reform, and report on the prospects

for reauthorization. I begin, however, with a brief sojourn into legal history and the evolution of property rights.

### **Property rights and their evolution**

One does not have unfettered use of one's property. Property is always purchased subject to prevailing limitations. Property rights (called "the bundle of sticks" in the legal literature) are not inalienable, and never have been. They are a creature of society, and evolve with the changing nature of society. Indeed, most takings challenges are evolutionary exercises. They are attempts to redefine property rights rather than to preserve existing ones.

The property rights bills now before the Congress are archetypical. The bills profess to be protectors of constitutionally guaranteed rights, but they stand in sharp contrast to court doctrine, and are far from subtle in redefining property rights. At numerous junctures they dispense with limitations long in effect.

To varying degrees, property rights include the right to (a) exclude others from one's property (b) occupy and derive beneficial use; (c) convey; and (d) bequeath (McElfish). These attributes of U.S. property law have their roots in English common law, have evolved over centuries, and have never been absolute. The right to use and manage one's land as one saw fit was fundamental to eighteenth century England and colonial America. But rooted in both English common law of the time and property law in colonial America was the concept of protection from externalities. A landowner had "the power to prevent any use of his neighbor's land that conflicted with his own private enjoyment" of his property (McElfish). Inevitably, development and industrial society conflicted with the absolute nature of these prior rights to protection from harm.

Legal doctrines began to emerge which deferred less to prior rights and gave more emphasis to the balancing of beneficial uses.

Thus, the laws governing property have been abridged and modified regularly to reflect the changing nature of society. Sometimes the conditions inherent in existing contracts have been preserved, and new doctrines applied only to future transactions; sometimes changes have been applied retroactively. Sometimes constraints have been accompanied by compensation, sometimes not.

### Property rights and the ESA

The enactment of ESA in 1973 constituted an amendment to existing property rights. (See box for overview.) Undoubtedly, some property owners at that time suffered capital losses; in almost all cases they suffered partial losses. Congress could have compensated affected landowners in 1973. It chose not to.

This is standard practice; legislative compensation provisions are extremely rare. Most legislation affects people's income or wealth in one direction or another—some positively, some negatively. We do not generally compensate those who have their activities restricted by new laws or regulations, nor do we tax those who experience windfall gains as a result of government actions. To do so would make it virtually impossible to govern, rendering such basic local community protections as zoning, health and safety, and pollution control unmanageable. In the words of noted property rights lawyer Joe Sax, "We don't pay people not to do bad things to us." We don't pay them not to dump toxic waste in our waterways or to stop manufacturing CFC's which punch holes in the ozone layer or because zoning prohibits them from siting a chemical facility in a residential area. Under current law, destroying endangered species or their habitat is a bad thing, and as a property owner one does not have the right to engage in it.

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What about purchasers of land since 1973 or landowners whose property is affected when a new species is listed? Should they be compensated? Classical conservatives respond that investors should be mindful of the potential for government regulatory action, un-

## Overview of the Endangered Species Act

The purpose of the act is to protect endangered and threatened species by conserving the ecosystems upon which they depend. The biological services—the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS)—list species solely on the basis of biological status. Once listed, the act protects a species against "taking"—broadly, harming in some way, including degradation of its habitat. The take prohibition applies to all entities, private and public.

### Government actions

No federal agency may jeopardize a listed species or adversely affect its habitat. FWS and NMFS issue opinions regarding the impact of proposed federal actions on species. An administrative appeals process exists by which worthwhile economic projects may be granted exemptions.

### Private sector

FWS and NMFS may grant permits to project sponsors to take listed species. Sponsors must carry out an approved conservation plan. Protective measures range from limited management changes and prescriptions to land set-asides.

derstand that they take risks when purchasing property, and adjust their offering price accordingly.

Is any of this a violation of the Fifth Amendment to the Constitution—taking private property for public use without just compensation? In a word, no. The courts have taken a very cautious view of takings claims, requiring a near-total loss of value before compensation is due. In so doing, they have rejected the proposition that property owners are entitled to the *maximum* potential return on their investments.

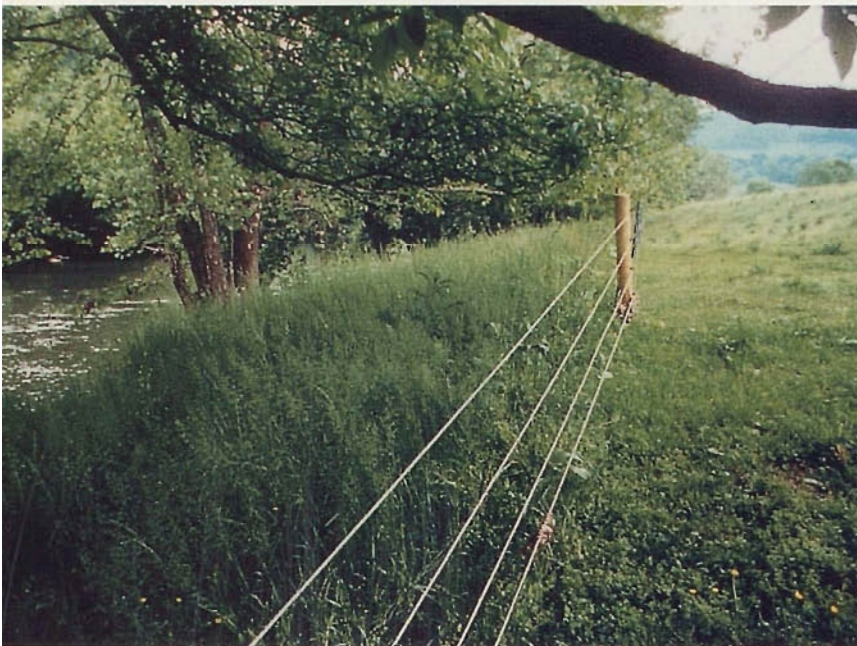
I cannot tell you how few converts one makes among landowners and property rights advocates with this pedantic recitation of the evolution and status of property rights law and its underlying ethic. The classically conservative stance notwithstanding, many thoughtful people are uncomfortable with the current law. Devising a compensation procedure which is fair by current community standards without creating the opportunity for excessive, contrived claims for remuneration is a formidable challenge, however.

### Perverse incentives and the true cost of ESA

Nothing within the scope of the Endangered Species Act is devoid of costs or inequities. Navigating the administrative process can take time and create uncertainty. The land-use restrictions may reduce income. As a result, landowners frequently try to avert the discovery of a species or its habitat on their property. Indeed, anticonservation incentives emerge well in advance of listing. Once a species is



Before—cattle-trodden riverbank.



After—fenced, seeded, and restored.

Endangered species protective measures can be costly, but many are not. Often the restrictions involve no land set-asides, only management changes with minimal costs.

proposed for listing, landowners may hire scientists, planners, lawyers, and lobbyists in an effort to escape the act's strictures. Because habitat conditions are generally inadequate once a species reaches the listing stage, the government is likely to impose strict conservation measures on the remaining habitat. This may reduce the opportunities for compatible commercial activities. Often landowners caught in such circumstances complain that it is unfair for them to bear such costs when other landowners degraded or destroyed habitat prior to listing.

## Grappling toward reform

### Administration proposals

Forced by the political sea change in Congress, the administration proposed a ten-point program for improving the ESA in the spring of 1995 (White House Office of Environmental Policy). Many of the changes, including the following, seek to reduce the regulatory and economic burden of the act and provide landowners with more certainty about their responsibilities and about government decisions.

- *Early identification of allowable activities.* In conjunction with listing, identify specific activities that are exempt from regulation.
- *Expedite habitat conservation planning (HCP).* The Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) have published a draft procedure for streamlining the permitting process, including simplified and expedited processing for activities involving low or medium threats to species.
- *"No surprises" policy.* Once an HCP is in effect, no additional land restrictions or financial contribution would be required from landowners if additional conservation measures prove necessary. The administration recommended that Congress enact similar assurances for landowners who cover candidate species in their HCP, indemnifying the landowner from additional mitigation requirements if the species are listed.
- *Small landowner exemption.* Exempts small landowners who want to disturb five acres or less or undertake activities that have a negligible effect on threatened species. The proposed rule covers new listings of threatened species, but the FWS is considering a corresponding exemption for species already listed. The administration has asked Congress for authority to extend the rule to endangered species.

The administration is also considering ways to use market mechanisms to achieve gains in conservation efficiency and equity. Incentives may help to induce the production of habitat, bring about land-use patterns that achieve habitat objectives at lower cost, and effect changes in the management of commercial lands consistent with conservation. It is not feasible, however, to rely primarily on markets for the preservation of ecological resources. Many critical conditions necessary for markets to function properly cannot be fulfilled for such resources. To function properly, market mechanisms for conservation must be used in conjunction with diligently enforced regulatory regimes. Finally, conservation incentive systems generally require funding (tax inducements, direct payment schemes), and

although they may achieve a given objective more cheaply than command and control, Congress is always wary of funding new programs. Witness the reluctance to renew the Conservation Reserve and Wetland Reserve programs.

### *Congressional bills*

Congress is considering several ESA reauthorization bills. All of the proposed bills would weaken conservation efforts for vulnerable species and their ecosystems, while easing regulatory constraints on private activities. In general they do this by (a) limiting the grounds for listing; (b) establishing numerous opportunities for procedural challenges to listing, including judicial review; (c) weighing economic considerations against conservation requirements for a listed species; (d) narrowing the definition of harm to a species, and hence the regulated offenses; (e) eliminating habitat protection on private land, relying instead on voluntary conservation efforts; (f) restricting habitat protection on federal land to designated preserves (parks, wilderness areas, and special refuges); and (g) requiring compensation for landowners for reductions in property values due to regulation. The bills are too numerous to summarize fully. I focus on the principal bill in the House, HR 2275, although S.768 is similar in most respects.

### *Conservation objectives and requirements*

- Deletes as a goal of ESA the conservation of ecosystems on which listed species depend.
- Abandons as the central goal of ESA the restoration of species to a recovered status. Instead, following listing, a task force would assess the conservation needs of the species together with the social and economic effects of such conservation. Based on this assessment, the secretary has broad discretion to craft a conservation objective for the species, ranging from only prohibiting deliberate killing of members of the species to complete recovery.
- Requires emphasis on captive breeding as a conservation technique, ignoring the National Academy of Science's warning that captive breeding is fraught with problems and not a substitute for habitat protection and other conventional conservation measures.

### *Diminished protections*

- Eliminates adverse modification of habitat as a violation of the act, reversing a recent Supreme Court decision.
- Defines "harm" only as the direct killing or injuring of a member of a listed species.
- Restricts critical habitat designations to areas occupied by a species at the time of listing, thereby

handicapping efforts to reestablish a species and achieve recovery.

### *Reduced protections on public lands*

- Allows federal agencies to self-regulate and determine whether their actions would jeopardize a species.
- Reduces the jeopardy standard from "likely to jeopardize the continued existence of the species" to "significant diminution of the likelihood of survival of the species by significantly reducing the...entire species."
- Absolves federal agencies from conservation responsibilities on federal lands, unless species are not adequately protected in "biological diversity reserves" (crafted from existing parks, refuges, wilderness areas, and areas offered by nonfederal parties).

### *Compensation*

- Requires full compensation of a landowner for diminutions in the value of any portion of his or her property by 20 percent or more due to federal actions taken under the ESA. The action agency would pay compensation from its current budget, thereby discouraging enforcement.

This last requirement deserves special attention. It is a radical provision which would expand property rights and the entitlement to compensation far beyond current court standards. Currently, if a regulation with a valid public purpose eliminates all economic use of an *entire piece of property*, a taking has probably occurred. In contrast, this bill authorizes segmentation: the federal action only has to diminish the value of a *portion* of the property by 20 percent to trigger compensation. In brief, the bill would expand the judicial standard for property rights and the entitlement to compensation by

- ignoring whether the action had a valid public purpose;
- focusing on the regulated portion of the property, i.e., specifically allowing segmentation; and
- lowering the threshold for eligibility for compensation from essentially 100 percent (the constitutional standard) to 20 percent.

The provision is a prescription for disaster—extensive litigation, concocted claims for compensation, endless bickering about changes in property values and their causes, and budgetary drains in the billions of dollars annually—far in excess of the true cost to landowners of regulatory compliance. If enacted, this bill will radically alter the relationship between the citizenry and its government, and set a precedent for legislation to come. The bill does nothing to address the acknowledged inequities and inefficiencies under ESA, opting instead for sweeping

compensation provisions and crippling the protections for endangered species and their ecosystems.

### Prospects for reauthorization

Clearly, gridlock and confrontation have not given way to bipartisan statesmanship. Secretary Babbitt has condemned the congressional proposals as irresponsible, and recommended a presidential veto. Although S.768 provides for compensation, compensation bills have fared less well in the Senate during this session than in the House, so the prospects for this particular feature are questionable. Congress would have to revise many of the other

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proposed provisions significantly before a bill would be acceptable to the administration. Presidents try to avoid controversial decisions during an election year. But unless a more responsible reauthorization bill is voted out, a veto is virtually certain, and likely can be sustained. With Republican pollsters warning of the public's increasing concern about

the thrust of the congressional environmental initiatives, the leaders may postpone a reauthorization vote until after the election and look to the results for guidance. ■

### ■ For more information

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