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# TAKING STOCK: THE ENDANGERED SPECIES ACT IN THE EYE OF A GROWING STORM

Michael J. Bean<sup>1</sup>

On the eve of the twentieth anniversary of the Endangered Species Act (the Act),<sup>2</sup> the most serious political assault ever on its future is being launched. “Scores of interest groups — including ranchers, developers, and manufacturers — have become allies in a ‘wise-use movement’ to fight what they see as the extremism of those who put wilderness protection and the rights of endangered animals before the welfare of humans.”<sup>3</sup> This paper takes stock of the claims being made for and against the Act and examines several likely key issues in the forthcoming congressional battle.

## I. HAS THE ACT WORKED?

Somewhat surprisingly, nearly two decades after the Act’s passage, one of the hotly disputed issues is whether the Act has worked at all. Critics of the Act simultaneously maintain that it hasn’t worked and that it’s far too tough. Frequently, they don’t explain how relaxing the Act will make it work better, but that is a subject to be addressed later. For now, the key question is how to measure the Act’s effectiveness.

One measure — embraced by many critics — is the number of species that have fully recovered and been removed from the Act’s protection. To date, only five species fall in this category, and the “recovery” of some of these reflects the discovery of previously unknown populations more than any real improvement in the species’ well-being.<sup>4</sup> That low number is touted by the Act’s critics as conclusive proof of the Act’s failure.

Recovery is, of course, the Act’s clear goal. That goal is embedded in the Act’s definition of the term “conservation,” which means “the use of all

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2. 16 U.S.C. §§ 1531-44 (1988).

3. Charles P. Alexander, *Gunning for the Greens*, *TIME*, Feb. 3, 1992, at 50.

4. The five species are the American alligator, Southeastern population of the brown pelican, Palau dove, Palau fantail, and Palau owl. See GENERAL ACCOUNTING OFFICE, *ENDANGERED SPECIES: MANAGEMENT IMPROVEMENTS COULD ENHANCE RECOVERY PROGRAM*, REPORT NO. RCED-89-5 (December 1988) at 18 (hereinafter *GAO REPORT*). The American alligator, although fully recovered biologically, remains classified as “threatened by similarity of appearance,” a classification authorized by Section 4(e) of the Act, 16 U.S.C. § 1533(e), and intended to ensure that products derived from other protected species of crocodylians do not enter commerce mislabeled as alligator products. Authority to treat the Southeastern population of brown pelicans differently from other brown pelicans derives from the Act’s definition of “species,” which includes species, subspecies, and “distinct population segment[s]” of vertebrate species. See 16 U.S.C. § 1532(15).

methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary”<sup>5</sup> Ultimately, without significant numbers of recovered species, the Act cannot be judged a great success. But is that the appropriate measure today? For many species facing the threat of extinction, the factors contributing to that threat have been operating for a century or more; reversing declines of such long duration and achieving security of survival is not likely to be accomplished with a simple, quick fix.

If we are to be held to the “full recovery” standard touted by many critics, then the dramatic increase in bald eagle numbers throughout most of the lower forty-eight states over the past two decades cannot be counted as a success because the eagle is still listed as threatened or endangered.<sup>6</sup> Neither can the restoration of the peregrine falcon as a breeding bird in the eastern United States, from which it had been extirpated at the time of the Act’s enactment. The slow but steady increase in the number of whooping cranes, of which there are now more in the wild than at any time in the past half century, cannot be reckoned a success either, because the whooping crane, like the bald eagle and peregrine falcon, is still listed as endangered. And what of the California condor, black-footed ferret, red wolf, and Guam rail, for all of which ongoing reintroduction programs have been made possible by highly successful captive breeding programs? None of these species shows up in the success column of the critics’ ledger because all are still listed as endangered. The fact that fewer dead sea turtles were found stranded on South Carolina’s beaches in all of 1991 than had been found there in the first two weeks of the 1987 shrimping season is powerful evidence of the impact that “turtle excluder device” requirements have had in reducing sea turtle mortality. Yet, because no sea turtle has yet fully recovered and been taken off the protected list, this accomplishment too is overlooked when the critics tally the Act’s successes.

These examples, and many others like them, ought to reveal that a myopic focus on the number of species that have fully recovered and been delisted is an inadequate measure by which to judge the Act’s success. A far better measure takes into account the recoveries in progress. Many species are recovering. A recent report to Congress by the U.S. Fish and Wildlife Service identifies nearly fifty species that are improving in numbers or range; three times that number are judged stable and no longer

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5. 16 U.S.C. § 1532(3). For a case exploring the Act’s conservation standard, see *Sierra Club v. Clark*, 577 F. Supp. 783 (D. Minn. 1984), *aff’d*, 755 F.2d 608 (8th Cir. 1985), *on remand*, 607 F. Supp. 737 (D. Minn. 1985).

6. The Fish and Wildlife Service published an advance notice of a proposed rule to reclassify or delist the bald eagle in 1990, but has taken no further action since then. See 55 Fed. Reg. 4209 (1990).

declining.<sup>7</sup> About 200 species are judged to be still declining. Even these declining species include many, like the Hawaiian goose and red-cockaded woodpecker, that would undoubtedly have declined even further, but for the Endangered Species Act.

The above represents a substantial record of success, far greater than the Act's critics typically acknowledge. At the same time, however, there have been substantial failures. At least four species were delisted because they became extinct notwithstanding the Act's protection; three others have been delisted because of extinction that may have occurred either before or after their listing under the Act.<sup>8</sup> At least twelve species still on the protected list are probably extinct, though some of these extinctions may also have occurred prior to listing.<sup>9</sup> For still other species, it is unclear whether their declining populations have been slowed by the Act or slowed enough to avert eventual extinction.

Thus, a candid assessment of the Endangered Species Act nearly twenty years after its enactment yields a decidedly mixed conclusion. Much has been accomplished, but much more remains to be accomplished.

## II. IS THE ACT "BALANCED"?

The core of the forthcoming debate about the Act's future will undoubtedly focus on the question of "balance." Critics maintain that the Act puts species protection ahead of all other social and economic concerns. What is needed, they argue, is a "rule of reason" under which decisions about species protection reflect a weighing of competing values. Only if the costs associated with protective measures are not "substantial" or if the species at risk is one with "significant value," should those measures be imposed.<sup>10</sup> Two bills reflecting this point of view have already been introduced in the House of Representatives.<sup>11</sup>

Is the Act a rigid, inflexible instrument through which species

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7. U.S. FISH AND WILDLIFE SERVICE, REPORT TO CONGRESS: ENDANGERED AND THREATENED SPECIES RECOVERY PROGRAM (December 1990).

8. The four species that have been delisted because they apparently became extinct sometime after their listing as endangered species are the dusky seaside sparrow and three fish: the longjaw cisco, blue pike and amstad gambusia. Three species that have been delisted because of extinction that may in fact have occurred prior to their listing are the Tecopa pupfish, Santa Barbara song sparrow, and Sampson's pearly mussel. GAO REPORT, *supra* note 4, at 19.

9. Ten of the likely extinct species are the Mariana mallard, Mariana fruit bat, Palos Verdes blue butterfly, Scioto madtom, Bachman's warbler, giant anole, tubercled-blossom mussel, turgid-blossom mussel, yellow-blossom mussel, and eastern cougar. GAO REPORT, *supra* note 4, at 21. The ivorybill woodpecker, identified by the GAO as likely extinct, has recently been rediscovered in Cuba. A species that apparently has gone extinct since the GAO Report is the Maryland darter.

10. See B. Fein, *Theses for Endangered Species*, LEGAL TIMES, Dec. 9, 1991, at 24.

11. See H.R. 3092, 102d Cong., 1st Sess. (1991) (statement of Mr. Hansen) and H.R. 4058, 102d Cong., 1st Sess. (1991) (statement of Mr. Dannemeyer).

protection has been pursued at all costs? In *TVA v Hill*,<sup>12</sup> the Supreme Court described the Act in terms that arguably validate this view; the "plain intent" of the Act, reflected "in literally every section of the statute," is to "halt and reverse the trend toward species extinction, whatever the cost."<sup>13</sup> If the Court's prose were all that was available to assess the Act, one might be tempted to concede that the Act was blind to all other social values.

Fortunately, the actual record of implementation of the Act suggests a different conclusion. If the Act were the iron dragon that its critics maintain, causing what one critic has labelled "endangered species gridlock," one might expect that the economies of Hawaii, California, and Florida, which together harbor nearly half of all the species in the United States that the Act protects, would long ago have been brought to a halt and their citizens persuaded to start a mass exodus in search of opportunities elsewhere. The fact that the three states with the largest number of endangered species are also among the fastest growing and economically healthy states clearly indicates that the picture the Act's critics have painted is not necessarily accurate.

#### A. Section 7 A History of Accommodation

Section 7, the provision at issue in *TVA v Hill*, is regarded by most observers as the Act's most potent club, requiring federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the continued existence of listed species.<sup>14</sup> It gives the U.S. Fish and Wildlife Service (and the National Marine Fisheries Service) the considerable responsibility of advising other agencies as to whether their planned actions comply with this duty. The Service's advice, while not binding, is accorded considerable weight in the event that a suit challenging the action is filed.<sup>15</sup>

In a typical year, between 10,000 and 20,000 federal actions with the potential to affect one or more listed species receive some level of scrutiny under Section 7. More than 95% of these are given a "green light" by the appropriate Service after cursory review in a process known as "informal consultation." The remainder, because they require more detailed evaluation, are considered at greater length in a "formal consultation" process that ends with the Service's issuance of a "biological opinion." During the five-year period between 1987 and 1991, 2248 formal consultations

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12. 437 U.S. 153 (1978).

13. *Id.* at 184.

14. 16 U.S.C. § 1536(a)(2).

15. See *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359 (5th Cir. 1976), *cert. denied sub nom., Boteler v. Nat'l Wildlife Fed'n*, 429 U.S. 979 (1976).

occurred. A total of 353 of those consultations resulted in a determination that the federal action was likely to cause jeopardy — roughly 15% of the total. This figure includes the somewhat anomalous results of a programmatic consultation over the Environmental Protection Agency's pesticide program (resulting in 169 separate jeopardy opinions) and a similar consultation regarding Bureau of Land Management timber sales (resulting in fifty-two separate jeopardy opinions). Putting these aside, the five-year total of jeopardy opinions is 129, or about 6% of all consultations.<sup>16</sup>

The consultation process does not stop with a jeopardy determination, however, and neither necessarily does the federal action. Instead, the Act requires that a searching inquiry be made to determine whether there are any modifications or other "reasonable and prudent alternatives" that can be pursued to avoid jeopardy. In most cases, such alternatives exist. Indeed, during the most recent five-year period, only 18 of the 353 actions which received jeopardy opinions were abandoned or halted as a result of Section 7 of the Endangered Species Act. Eight of the eighteen were timber sales for which the Bureau of Land Management elected not to seek an exemption pursuant to Section 7(g) of the Act. An exemption request for 44 other sales is currently pending.<sup>17</sup>

#### B. Section 9: "Taking" Wildlife; "Taking" Property

If Section 7 has seldom been a barrier to federal actions, what of Section 9, which restricts private activity? Section 9, among other things, prohibits the "taking" of endangered wildlife.<sup>18</sup> The term "taking" includes not only hunting and trapping, but other actions that "harass" or "harm" an endangered animal.<sup>19</sup> "Harm," in turn, has been defined to encompass significant habitat modification which "kills or injures wildlife by significantly impairing essential behavioral patterns"<sup>20</sup> This definition has been upheld in *Palila v Hawaii Dep't of Land and Natural Resources*<sup>21</sup>, but is currently being challenged in *Sweet Home Chapter of Communities for A Greater Oregon v Lujan*.<sup>22</sup>

The potential scope of the Act's taking prohibition is behind the specter of the Endangered Species Act itself causing widespread "takings"

16. D. BARRY ET AL., FOR CONSERVING LISTED SPECIES, TALK IS CHEAPER THAN WE THINK: THE CONSULTATION PROCESS UNDER THE ENDANGERED SPECIES ACT (February 1992).

17. *Id.*

18. 16 U.S.C. § 1538(a)(1)(B)-(C).

19. 16 U.S.C. § 1532(19).

20. 50 C.F.R. § 17(3) (1991).

21. 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988). *See also* *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd sub nom*; *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

22. Civ. No. 91-1468 (D.D.C. filed June 14, 1991).

of another sort — the taking of private property through regulatory action for which property owners have a constitutional right to fair compensation. This issue has recently become a highly charged one, both politically and emotionally. For that reason, it warrants careful examination.

First, the Act's taking prohibition applies only to animals. Plants, which comprise about 40% of all the currently listed species in the United States, are unprotected by the taking prohibition.<sup>23</sup>

Second, whatever the potential for an expansive application of the Act's taking prohibition, the actual enforcement practice, by both the government and citizen-suit plaintiffs, has been remarkably restrained. According to the Chief of the Justice Department's Wildlife and Marine Resources Section, the government has yet to sue a private property owner for "taking" a listed species incidental to otherwise lawful land development activities absent "dead body" evidence of a killed specimen of an endangered species or the felling of a known active nesting tree of an endangered bird.<sup>24</sup> Private party suits against nongovernmental landowners on such legal theories have also yet to occur.

Third, since 1982, private landowners have had the opportunity to seek "incidental taking permits" that authorize otherwise prohibited takings.<sup>25</sup> This authority, added to the Act at the behest of development interests, was sparingly used at first, but has recently enjoyed an explosion of interest.<sup>26</sup> The availability of a permit (and the fact that, to date, only one permit application has been denied) makes it unlikely that the Act's taking prohibition will give rise to many successful claims against the government for an unconstitutional taking of private property through the application of the Endangered Species Act.

Finally, amid all the recent clamor over the protection of "property," the fact has largely been overlooked that there are two quite different property interests at stake in conflicts arising under the Endangered

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23. The only exception to this statement is when state law prohibits the taking of a listed plant, as a few state laws do; in such cases, the Act makes such taking a federal offense as well. 16 U.S.C. § 1538(a)(2)(B).

24. Personnel communication from James Kilbourne. The government did sue the City of Rancho Palos Verde, California, for the taking of an endangered butterfly as a result of a land clearing project that destroyed the last known site for the butterfly. *United States v. City of Rancho Palos Verde*, 841 F.2d 329 (9th Cir. 1988). The court's holding, that municipalities were not "persons" subject to Section 9, has since been legislatively overruled. 16 U.S.C. § 1532(13) (1988 & Supp. 1991).

25. 16 U.S.C. § 1539(a)(1)(B).

26. See, M.J. BEAN, S.J. FITZGERALD, & M.A. O'CONNELL, *RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE* (1991); R. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL L. 605 (1991); J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 Sw. L.J. 1393 (1991).

Species Act. The property interest of a landowner in the unfettered use of his or her land is one that sometimes differs from the *property* interest of the public in the wildlife that may live on that land. It is a well established principle of American law, as old as the Constitution itself, that a landowner does not own the wildlife on his or her land. Wildlife represents a public resource, in a unique sense “owned” by the public at large, and managed by the state and federal governments in trust for the benefit of the public.<sup>27</sup> As such, restrictions on private land use to protect wildlife are of a different character entirely from restrictions aimed at enhancing aesthetic values, preserving historic amenities, or promoting public access. Unlike those other restrictions, restrictions aimed at protecting endangered wildlife are designed to keep the exercise of one property right (the landowner’s) from destroying another property right (the public’s). To date, American courts have not embraced the view that the Fifth Amendment protects a private right to destroy a publicly owned resource, nor could they without abandoning long settled principles.

### III. ENDANGERED SPECIES AND ENDANGERED ECOSYSTEMS

An oft-heard refrain is that the Endangered Species Act’s focus on species conservation overlooks the need, and opportunity, to achieve more substantial benefits through “ecosystem” conservation. Put simply, some argue that instead of an Endangered Species Act, an “Endangered Ecosystem Act” is needed. Proponents of this view can be found almost anywhere along the spectrum of conservation opinion. They include serious conservation biologists like the Fish and Wildlife Service’s J. Michael Scott, who observed that endangered species conservation efforts “suffer a lack of perspective when measured against the objective of preserving overall biological diversity on the planet.”<sup>28</sup> Even Interior Secretary Manuel Lujan reportedly ascribes to the view that the Endangered Species Act should be changed to protect entire ecosystems rather than individual

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27. The notion that the states, rather than individual landowners, “own” the wildlife within their borders was given its most forceful expression in *Geer v. Connecticut*, 161 U.S. 519 (1896). In *Geer*, the U.S. Supreme Court held that a state, because of its ownership of wildlife, could restrict interstate commerce in lawfully taken wildlife as an incident of its ownership. The ownership basis for this holding was gradually eroded over the ensuing decades and eventually became “regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” *Toomer v. Witsell*, 334 U.S. 385, 402 (1948). The narrow holding of *Geer*, that a state could altogether prohibit interstate commerce in lawfully taken wildlife was overturned in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The authority of a state to fix the conditions under which wildlife may be taken in the first instance, however, was not at issue in *Hughes*, and it is that authority that distinguishes cases involving wildlife from cases involving other types of natural resources that, unlike wildlife, are not part of the property owned by a landowner.

28. J. M. Scott, et al., *Species Richness: A Geographic Approach to Protecting Future Biological Diversity*, 37 BIOSCIENCE, Dec. 1987, at 782.



species.<sup>29</sup>

When people from such differing viewpoints all say they favor "ecosystem conservation" it is likely that they are not really talking about the same thing. Moreover, the distinction between species conservation and ecosystem conservation turns out, upon closer examination, to be unclear.

Except in the rare case when a species survives only in captivity, its conservation necessarily requires the conservation of its habitat. Even for species that exist only in captivity, any possibility of successful reintroduction to the wild (and thus of recovery) also requires conservation of its former habitat. The Endangered Species Act recognizes and requires this.<sup>30</sup>

Species conservation and habitat conservation, therefore, are two inseparable sides of the same coin. Suzanne Winckler contrasted the supposedly limited benefits of single-species conservation efforts against the more extensive benefits of "ecosystem" conservation. Ms. Winckler cites the example of the Sacramento National Wildlife Refuge in California, where some 257 vertebrate species have been recorded.<sup>31</sup> She failed to recognize, however, that nearly a third of that refuge has been acquired under the authority of the Endangered Species Act and that habitat acquisition is an essential part of the endangered species program. During the past two decades at least thirty-six national wildlife refuges have been established primarily for the purpose of protecting endangered species. Nearly as much money has been spent by the U.S. Fish and Wildlife Service for endangered species habitat acquisition as for all other acquisition purposes during the past twenty years. Those refuges, like the Sacramento National Wildlife Refuge, provide habitat for a great diversity of endangered and nonendangered species.

If more than just acquisition of wildlife refuges is contemplated by "ecosystem conservation," then other vexing problems arise. How, for example, are we to define ecosystems and determine which are endangered? Defining "species" has often been a contentious issue under the Endangered Species Act; defining ecosystems under a hypothetical Endangered Ecosystems Act would be even more so. The recent controversy over defining "wetlands"<sup>32</sup> is but one example of what would likely be an

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29. See, *Hearings on the Spotted Owl Begin*, NEW YORK TIMES, Jan. 9, 1992, at A1.

30. In the lawsuit challenging the Fish and Wildlife Service's decision to capture all remaining wild California condors in order to start a captive breeding program, the plaintiff contended that by removing the condor from the wild, the Fish and Wildlife Service would be unable to protect condor habitat. The Fish and Wildlife Service disputed that contention and ultimately prevailed in court. *Nat'l Audubon Soc. v. Hester*, 801 F.2d 405 (D.C. Cir. 1986).

31. Suzanne Winckler, *Stopgap Measures*, 269 THE ATLANTIC 74, 78 (January 1992).

32. The controversy over how to define wetlands was touched off by proposed changes in the

ongoing problem with such legislation.

If we could agree that a given ecosystem was endangered, how would we know whether we were successful in conserving it? One measure, a minimal measure to be sure, would focus on whether the species within that ecosystem were being maintained. An ecosystem that no longer supports the species that once inhabited it can hardly be considered a "saved" ecosystem. We are thus driven back to a narrow focus on species to determine whether our larger aims are being met.

One of the arguments for ecosystem conservation over species conservation is the public's hesitancy to make sacrifices on behalf of an owl, or fish, or other creature. Proponents of ecosystem conservation contend that if the public perceives the full array of benefits associated with protecting an ecosystem, it may accept sacrifices it is unwilling to accept for a mere species. This is not intuitively obvious, however, and assumes a level of scientific sophistication on the part of the public that is unlikely. A substantial segment of the public is moved by the plight of individual animals; for them, species conservation is a fairly abstract concern. Ecosystem conservation moves a long step further toward abstraction and away from the concerns that are emotional anchors for the public.

Certainly, the sacrifices necessary to save endangered ecosystems are no less than those necessary to save endangered species. If protecting the spotted owl will cause the loss of thousands of jobs, protecting the ancient forest ecosystem will cost no less. Indeed, protecting the full range of ancient-forest associated species (i.e., protecting the ecosystem) would require timber harvest reductions to levels even lower than those needed to protect the owl.<sup>33</sup>

Finally, acquiring habitat and declaring it off-limits to logging or other damaging uses is no assurance of protection for that ecosystem or the species in it. Land acquisition would not have saved the bald eagle, peregrine falcon, or brown pelican. Regulatory action to control the use of pesticides was essential to the survival of these species. Protecting the nesting beaches of sea turtles will not save that species if incidental capture in shrimp nets continues.<sup>34</sup> The forests of the Northeast cannot be protected simply by public acquisition and the cessation of harmful activities within them; air pollution threats from beyond the region must be addressed as well. The apparent recent decline in many species of

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"Federal Manual for Identifying and Delineating Jurisdictional Wetlands" in August 1991. 56 Fed. Reg. 40446 (1991). As of this writing, it remains unresolved.

33. K.N. JOHNSON ET AL., ALTERNATIVES FOR MANAGEMENT OF LATE-SUCCESSIONAL FORESTS OF THE PACIFIC NORTHWEST: A REPORT TO THE AGRICULTURE COMM. AND MERCHANT MARINE AND FISHERIES COMM. OF THE U.S. HOUSE OF REPRESENTATIVES (Oct. 8, 1991).

34. See NATIONAL RESEARCH COUNCIL, DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION (1990).

amphibians has occurred both within and outside of nominally "protected" reserves.<sup>35</sup> Hence, arresting that decline will require strategies beyond mere land acquisition. These examples, and many others that might be offered, serve merely to make the point that "ecosystem conservation" through vastly expanded land acquisition will not necessarily avoid the need for sometimes costly and controversial regulation. Neither does ecosystem conservation imply a radically different approach than that which is currently pursued under the Endangered Species Act.

#### IV CONCLUSION

Nearly twenty years after its enactment, the Endangered Species Act is at the center of a growing political storm. Curiously, though, the main charges made against it rest upon a shaky foundation. If it has not turned the tide of imminent species extinctions in the United States into a tide of species recoveries, it has at least bought a measure of insurance against imminent extinction for many species and demonstrated that recovery is indeed possible. Moreover, it has done so without frequent conflict of a draconian nature. How much any of these facts will matter in the forthcoming political debate is the key, unanswerable question.

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35. *Scientists Confront an Alarming Mystery: The Vanishing Frog*, N.Y. TIMES, February 20, 1990.