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# THE ENDANGERED SPECIES ACT: ON A COLLISION COURSE WITH HUMAN NEEDS

Stuart Hardy<sup>1</sup>

The emerging debate on reauthorization of the Endangered Species Act (ESA) of 1973<sup>2</sup> has become one of the major environmental battles of the decade. Recent policy debates demonstrate fundamental disagreements about every key element of the Act, and little common ground for consensus building. It is, however, widely agreed that the Act harbors enormous scope and power. Unlike other federal environmental and natural resources statutes, the ESA does not afford the administering agencies<sup>3</sup> discretion in balancing competing values.<sup>4</sup> Rather, the ESA makes the preservation of all flora and fauna species an absolute imperative, taking precedence over all other human needs and claims, including jobs and property rights. The Supreme Court has interpreted the Act to mean that endangered species are to be afforded protection, "whatever the cost."<sup>5</sup>

The basic framework of the 1973 Act has survived largely intact, despite several spirited challenges.<sup>6</sup> The political dynamic, however, is beginning to shift as more species are listed or proposed for listing, and as more human activities, especially those providing jobs which sustain communities are hampered or prohibited by the "taking" prohibitions and "jeopardy" opinions. During debate concerning the 1973 Act, members of Congress repeatedly referred to a target group of several dozen endangered birds and mammals such as the whooping crane, bald eagle and grizzly bear.<sup>7</sup> The list now contains 675 United States species, with more than

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2. 16 U.S.C. §§1531-1543, (1988).

3. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

4. Predecessors to the 1973 act included the phrase "where practicable." Congress dropped this discretionary language from the 1973 statute in an effort to sharpen its teeth. Whether Congress understood the implications has been a matter of debate ever since. See L. Greenwalt, *The Power and Potential of the Act*; and S. Yaffee, *Avoiding Endangered Species/Development Conflicts Through Interagency Consultation* in *BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE* 31-6, 86-97 (Kathryn A. Kohm ed., Island Press, Wash. D.C., 1991).

5. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

6. Notably in 1978 Congress, reacting to the snail darter/Tellico dam dispute, amended Section 7 to create an exemption mechanism nicknamed the "God Squad." (16 U.S.C. § 1536(e)(1988)) See below for further discussion.

7. For a brief history of the 1973 Congressional debate, see Cathryn Campbell, *Federal Protection of Endangered Species: A Policy of Overkill?*, 3 J. ENVTL. L. 247 (1983), (hereinafter *A Policy of Overkill*).

3,500 official candidates for listing and dozens of petition candidates under review, most of which are plants, insects, reptiles, clams, snails and crustaceans (see Table 1). As the list grows at an accelerating rate and more land becomes "critical habitat," the effects of the ESA on economic growth will become increasingly apparent and controversial. Inevitably, conflicts will proliferate as a growing human population and world economy compete with plant and animal species for a finite natural environment.

The current policy of preservation 'at any cost' is politically unsustainable. Despite the mandate of the ESA, economic analysis will inevitably enter the equation and economic interests will be weighed against preservation concerns, whether or not the ESA provides it a role. Ultimately, the small increase in the probability of a species' survival will simply not justify the tremendous increase in the cost to society

Table 1

LISTING CANDIDATES

|                                | <u>Plant</u> | <u>Animal</u> | <u>Total</u> |
|--------------------------------|--------------|---------------|--------------|
| Proposed for listing           | 26           | 33            | 59           |
| as endangered                  | 17           | 21            | 38           |
| as threatened                  | 9            | 12            | 21           |
| Category 1*                    | 80           | 465           | 545          |
| Category 2*                    | 1,542        | 1,671         | 3,213        |
| Category 3*                    | 809          | 68            | 877          |
| Active petitions for listing** | —            | —             | 48           |

\*Category 1 and 2 species are official candidates for listing. Category 1 candidates are those for which there is substantial information to support a listing proposal, but the listing is precluded by other listing priorities. Category 2 candidates are those for which there is information indicating that a listing is appropriate, but for which more information is required. Category 3 species are those that had been considered for listing, but are no longer considered official candidates. A species in any category can move to another as more information becomes available.

\*\*As of January 9, 1992, according to U.S. Fish and Wildlife Service and National Marine Fisheries Service.

Sources: Review of Plant Taxa for Listing of Endangered or Threatened Species, (55 FR 6183) February 21, 1990.

Animal Candidate Review for Listing as Endangered or Threatened Species, (56 FR 58803) November 21, 1991.

The inherent contradiction of the Act is that its absolutist mandate is fundamentally incompatible with the democratic process. As Senator Slade Gorton (R-WA) stated in a recent speech: the ESA is "profoundly

undemocratic,. it considers only a single value. at the expense of all other values — human, economic and social.”<sup>8</sup> The Act’s uncompromising demands have put it on a collision course with human needs, and humans will have the last word. Political support for the Act, as presently structured, is eroding and a course correction is essential.

This article is an attempt to contribute to the policy dialogue by stating the business community’s perspective and by identifying amendments to facilitate species conservation and recovery programs while easing the burden on landowners, businesses and communities. The goals of species preservation and the protection of private property are not necessarily incompatible. Certainly, huge costs to society are involved in any effective species protection program. The way to minimize costs without jeopardizing flora and fauna is through a balanced policy of accommodation, mitigation and just compensation of the private sector. It is in everyone’s interest to work toward this goal.

**Table 2**

**Recovery Efforts**

|  |     |
|--|-----|
| Listed U.S. Species                    | 675 |
| endangered                             | 517 |
| threatened                             | 158 |
| Listed species with designated habitat | 105 |
| Listed species with recovery plan      | 382 |

Source: U.S. Fish and Wildlife Service, Division of Endangered Species, January 7, 1992.

**SHORTCOMINGS OF CURRENT PROGRAM**

At present, the Act is not accomplishing its stated purpose of conserving and recovering endangered and threatened species and the ecosystems upon which they depend.<sup>9</sup> Only five of the listed species have recovered, and three of these were found to be “recovered” only because additional populations were subsequently discovered, not because of any recovery measures under the ESA.<sup>10</sup> Six species have become extinct after

8. Address to the League of Conservation Voters (Oct. 24, 1991).

9. The Act’s core purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species. ” 16 U.S.C. § 1531(b)(1988).

10. U.S. General Accounting Office, *Endangered Species: Management Improvements Could*

being listed, and thirty-four more have become extinct while waiting to be listed.<sup>11</sup> Some two hundred species now on the list will probably never recover, according to the U.S. General Accounting Office,<sup>12</sup> and most listed species are closer to extinction now than when they were originally listed.<sup>13</sup>

The process of listing species has accelerated, but the other crucial elements in the program, namely the designation of critical habitat and the development and implementation of a recovery plan, have not kept pace with listings (see Table 2). While "critical habitat"<sup>14</sup> must be designated "to the maximum extent prudent" within one year of listing, it has been designated for only about one hundred species because it is expensive and controversial.<sup>15</sup> Similarly, when a species is listed, a "recovery plan" is supposed to be developed,<sup>16</sup> but more than 40 percent of listed U.S. species do not have a recovery plan, and for those that do, it can take years before the agencies begin substantive implementation.<sup>17</sup> Many listed species never get additional protection or special management consideration. Their situation has been compared to a patient whose doctor has diagnosed the disease but refuses to prescribe treatment.<sup>18</sup>

#### THE BUSINESS PERSPECTIVE

Any effective measure aimed at protecting threatened and endangered species will necessarily involve some degree of restriction on human activity. The issues, from the business perspective are: 1) whether economic impacts are taken sufficiently into account early in the process, 2) whether necessary prohibitions on private property use should be compen-

*Enhance Recovery Program*, Report to the Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries, House of Representatives. GAO/RCED-89-5, 18 (Dec., 1988) (hereinafter GAO).

11. U.S. Dep't. of the Interior, *Inspector Gen. Audit Rep.* 90-98 (Sept., 1990).

12. U.S. General Accounting Office, *supra* note 10, at 21.

13. Reed F. Noss, *From Endangered Species to Biodiversity*, in *BALANCING ON THE BRINK OF EXTINCTION*, 227 (Kathryn Kohn, ed., 1991).

14. Critical habitat is the geographical area with the physical or biological features essential to the species survival. It may include areas not occupied by the species.

15. See James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 *HARV. ENVTL. L. REV.* 311 (1990), for a discussion of the reasons why the U.S. Fish and Wildlife Service, in particular, has deemed it "imprudent" to designate habitat for a great majority of listed species. He concludes "when a species is denied critical habitat for political rather than biological reasons, the ESA has failed in its mandate to protect our nation's wildlife." *Id.* at 342.

16. A plan is required unless it would not help in the survival of the species. 16 U.S.C. §1533(f)(1) (1988).

17. U.S. General Accounting Office, *supra* note 10, at 24.

18. Much of the blame belongs to Congress. While federal agencies receive about \$50 million in appropriated funds each year, it may take at least \$4.7 billion to fully implement recovery programs for listed species over a ten year time frame. See Faith Campbell, *The Appropriations History* in *BALANCING ON THE BRINK OF EXTINCTION* 134-46 (Kathryn Kohn, ed., 1991).

sated, 3) whether the ESA should continue to preempt state and federal statutes, (especially those that permit multiple uses of federal lands), and 4) whether taxonomic classifications are being abused to block economic activities. These concerns have been raised repeatedly and with increasing urgency by a broad spectrum of businesses ranging from farmers and fishermen, to truckers, homebuilders and gas and electric utilities. A coalition of nearly forty national business organizations has been established with the goal of amending the ESA during the current reauthorization process.<sup>19</sup>

The business community has three major grievances against the Act as it is now being implemented. The first involves restrictions on the use of private property without compensation. The second involves restrictions on the use of federal lands through the ESA's preemption of state and federal resource management laws. The third involves the extension of the ESA's protective blanket to subspecies and even to distinct population segments of otherwise plentiful vertebrates. The following sections explore each of these grievances in turn.

#### "TAKING" HAS TWO MEANINGS

In the context of wildlife law, "taking" is understood to mean the harm or destruction to a listed species or to its habitat.<sup>20</sup> "Taking", however, may also refer to a landowner's loss of property or substantial reduction in property value. The listing of species often results in the taking of property values without compensation. In these instances, a few landowners or users are unfairly forced to bear the full burden of a program that is meant to benefit all citizens. Dean Kleckner, president of the American Farm Bureau Federation, recently articulated the problem: "Since the Endangered Species Act is primarily for the public benefit, we believe that costs for protecting these species must be borne by the general public, not by farmers or ranchers or by any one industry."<sup>21</sup>

Extensive land users, such as farmers, ranchers, loggers, miners and road builders, have been especially vocal, but the ripple effects of land use restrictions can extend to all businesses in affected communities. Such is the case in Travis County, Texas, where private landowners are being threatened with criminal prosecution for disturbing two listed songbirds by

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19. The Endangered Species Act Roundtable counts among its steering committee such diverse organizations as the National Cattlemen's Association, the American Mining Congress, the National Fisheries Institute and the U.S. Chamber of Commerce.

20. 16 U.S.C. §1532 (1988).

21. Herta Lund, *Farm Bureau Seeks Improvements to Endangered Species Act*, 70 FARM BUREAU NEWS 3 (Aug. 26, 1991).

such activities as clearing brush from around fences.<sup>22</sup> Property values have plummeted, economic development slowed, and some agricultural operations have been suspended.<sup>23</sup>

The Act imposes severe civil and criminal penalties<sup>24</sup> on anyone who "takes" a listed animal species.<sup>25</sup> All too often, federal agents apprise landowners of these sanctions in a manner guaranteed to engender fear and hostility.<sup>26</sup> A "taking" is defined to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>27</sup> Harm as defined in the definition of "take" may include "significant habitat modification or degradation."<sup>28</sup> In *Palila v Hawaii*, the 9th Circuit Court of Appeals held that habitat destruction which could drive the Palila to extinction was included within the definition of "harm."<sup>29</sup> Plant species were originally not covered by the "take" prohibition, but they have been given more protection under the subsequent amendments.<sup>30</sup>

Congress attempted to create needed flexibility in the "take" prohibition as part of the 1982 amendments. An "incidental take" exemption was provided whereby landowners or users may obtain permits to take a species incidental to some otherwise lawful activity so long as the species' viability is not threatened.<sup>31</sup> These permits however, must be obtained from the Secretary of the Interior; they are time consuming, expensive to obtain, and require the negotiating and funding of habitat conservation plans and Environmental Impact Statements.<sup>32</sup> Only ten habitat conservation plans

22. Letter from U.S. Fish and Wildlife Service office in Arlington, Texas to Mrs. Margaret S. Rodgers of Lago Vista, Texas (February 20, 1991) (on file with Resources Policy Department, U.S. Chamber of Commerce, 1615 H Street, N.W., Washington, D.C.).

23. See, *Post Oak Ridge Sought as Refuge for Songbirds*, AUSTIN AMERICAN-STATESMAN, May 13, 1991 at 1.

24. Fines can range up to \$50,000, and a criminal conviction can mean a year in jail. 16 U.S.C. §1540(b)(1)(1988).

25. The ESA prohibits any person from "taking" any endangered species. 16 U.S.C. §1538(a)(1)(B) (1988). Regulations extend this prohibition to threatened species 50 C.F.R. 17.31 (a) (1988).

26. For example, the Fish and Wildlife Service letter to Mrs. Margaret S. Rodgers of Lago Vista, Texas, *supra* note 22, included the following paragraph: "Destruction of endangered species habitat, without a permit, that results in take [sic] of a federally-listed endangered species could be held to be a violation of the Act and could expose a violator to the criminal penalties provided for under Section 11(b)(1) of the Act or to the civil penalties provided for under Section 11(a)(1) of the Act. Section 11(b)(1) provides for a fine of not more than \$50,000 or imprisonment up to one year, or both. Section 11(a)(1) permits assessment of up to \$25,000 as a civil penalty for each violation."

27. 16 U.S.C. §1538(a)(1)(B) (1988).

28. 50 C.F.R. 17.3 (1991).

29. *Palila v. Hawaii*, 852 F.2d 1106, 1108 (9th Cir. 1988).

30. The 1982 amendments, for example, prohibited private collecting of listed plants on federal lands. 16 U.S.C. § 1538(a)(2) (1988).

31. 16 U.S.C. §1539(a) (1988).

32. ESA Subsection 10(a) requires approval of a conservation plan along with adequate funding

have been accepted in the past 9 years and they have all been very expensive. Land acquisition for the Mississippi sandhill crane cost more than \$20 million, and the taxpayers of Riverside County, California will spend even more for measures to protect the Stephen's kangaroo rat.<sup>33</sup> A conservation plan for the Coachella Valley fringe-toed lizard will cost developers and others \$25 million, and two golf course developers in Clatsop County, Oregon have spent \$250,000 on a silverspot butterfly conservation plan that may never be accepted.<sup>34</sup>

#### PREEMPTION OF MULTIPLE USE

A second grievance is the Act's preemption of other laws governing the conservation and management of public lands and waters. Under Section 7, federal agencies must consult with the Secretary of the Interior to insure that any action authorized, funded or carried out by that agency does not "jeopardize" a listed species or "adversely modify" its habitat.<sup>35</sup> The Secretary of the Interior must then issue an opinion with respect to the project's impact on any listed species and suggest "reasonable and prudent alternatives"<sup>36</sup> to avoid jeopardizing the species or its habitat. Economic factors are not considered in jeopardy opinions, nor may an agency commit irretrievable funding to a project while requests for biological opinions are pending.<sup>37</sup>

This language places species protection among the highest priorities of the federal government and creates a conflict with the multiple use concept enshrined in other statutes. At risk are a large number of economic activities on the vast expanse of federal lands and waters (more than one third of the total acreage of the U.S.) including mining, grazing, timber harvesting, oil and natural gas production, and pipeline construction, to name just a few. Such is the case in the Pacific Northwest where the spotted owl conflict has plunged entire communities into economic crisis.

Moreover, Section 7 reaches well beyond public lands and federal construction projects to capture a host of private activities licensed or

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for its implementation by the applicant. 16 U.S.C. §1539(a) (1988). The costs imposed can be substantial. A second exemption from the "take" prohibition was also included in the 1982 amendments. It permits the taking of a listed species for the seeding of experimental populations. See Donald L. Soderberg, and Paul E. Larsen, *Obtaining Incidental Take Permits Under the Endangered Species Act: The Section 7 Alternative*, 20 REAL EST. L. J. 3 (1991). The authors suggest that private developers attempt to bring their projects within the scope of Section 7 as a means of avoiding the prohibitively burdensome requirements needed for incidental take permits. *Id.* at 20-21.

33. Charles C. Mann and Mark L. Plummer, *The Butterfly Problem*, ATLANTIC MONTHLY 48 (Jan. 1992),

34. *Id.* at 70.

35. 16 U.S.C. §1536(a)(2) (1988).

36. 16 U.S.C. §1536(g)(3)(A) (1988).

37. 16 U.S.C. §1536(d) (1988).

permitted by federal agencies. For example, pesticide use is registered by the U.S. Environmental Protection Agency (EPA) and is therefore subject to Section 7. In 1987, following a consultation and jeopardy finding, the EPA attempted to bring its pesticide program into compliance with the ESA by restricting the use of dozens of widely used pesticide products. According to the American Farm Bureau, the proposed ban involved two-thirds of all pesticides used in all or part of 900 counties.<sup>38</sup> The outcry was so overwhelming that Congress responded the same way it did during the Tellico Dam conflict and effectively exempted the pesticide program from the ESA.<sup>39</sup> The issue still has not been fully resolved.

Section 7 also preempts states' rights in such sensitive areas as water law and wildlife management. As more species are added to the list, the ESA will inevitably be used to preempt more and more water rights. As one expert has noted, the Act "has the potential to trump all existing allocations and to subordinate all water rights to a judicially mandated flow regime."<sup>40</sup> The reallocation of water rights can have a ripple effect of indirect costs extending throughout entire regions. Electricity consumers in the Pacific Northwest, for example, can expect rates to jump 4 to 8 percent due to the loss of 400 megawatts of generating capacity on the Snake and Columbia rivers resulting from the listing of sockeye and chinook salmon stocks.<sup>41</sup>

Similarly, preempting traditional states' rights to manage wildlife and cull populations through such methods as hunting and trapping makes states more hesitant to participate in recovery plans because once predators are reestablished, states no longer have the power to control them.<sup>42</sup> Preemption of states' rights always carries a high price. In these instances, the price is the withdrawal of state fish and game resources that are urgently needed to carry out any effective recovery program.

Congress took another look at Section 7 in 1978. The compromise outcome was the creation of a high level, interagency committee, nicknamed the "God Squad," empowered to grant exemptions to Section 7 and to permit activities on federal lands by federal licensees or permittees that may be inconsistent with the ESA. Before the God Squad grants such

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38. Ray Anderson, *Delay Sought for EPA Pesticide Plan*, 66 FARM BUREAU NEWS, 1 (October 19, 1987).

39. An amendment to this effect was inserted into the continuing funding resolution H.R.J. Res. 395, 100th Cong., 1st. Sess., 101 STAT. 1329-199, (Dec. 22, 1987).

40. See Tarlock, *Western Water Rights and the Act* in BALANCING ON THE BRINK OF EXTINCTION 169 (Kathryn Kohm, ed., 1991).

41. 20 ENERGY DAILY 2 (Jan. 13, 1992) (quoting Randy Hardy, CEO of Bonneville Power Authority).

42. See K. Bixby, *Predator Conservation* in BALANCING ON THE BRINK OF EXTINCTION 199-213 (Kathryn Kohm, ed., 1991).

an exemption, however, applicants must clear a number of hurdles. First, a three member Review Board must determine that the conflict is unresolvable and that the applicant agency consulted in good faith, attempted to consider all reasonable modifications or alternatives to the project, complied with the biological impact assessment and did not commit irretrievable resources to the project. Next, the Secretary of the Interior convenes the Endangered Species Committee (ESC), and the ESC sets about the time consuming task of gathering evidence and taking testimony. Months later, the ESC may grant an exemption only if it determines that there are no reasonable and prudent alternatives, that the benefits of the project outweigh those of the alternatives, that the action is of regional or national significance, and that irreversible commitments of resources have not been made.<sup>43</sup> The exemption process is costly, complicated and takes months to complete. Consequently, it has seldom been used.

#### USING THE ESA FOR OTHER ENDS

The sweeping legal powers of the ESA are being abused by groups opposed to economic growth. These groups seek to enjoin economic activities to which they object by "discovering" an endangered species in the locality. The snail darter is often cited as an example of such abuse because opponents of Tellico Dam embraced this tiny fish only after other attempts to block the dam had failed. A similar pattern of obstruction unfolded in Maine a year or two later when opponents of the Dickey-Lincoln hydroelectric project embraced the Furbish lousewort. Other instances of abuse abound. Recently, for example, opponents of a proposed highway in the Washington, D.C. area hired biologists to search for any listed species in the vicinity, hoping that a "discovery" could be used to kill the project.<sup>44</sup>

Abusing the ESA is made easier by the fact that subspecies and distinct population segments of vertebrates which may be plentiful elsewhere are protected. Critics also see a recent trend towards the classification of isolated populations as subspecies to justify endangered status when they cannot otherwise be determined to be threatened "within a portion of the historic range."<sup>45</sup> This may result in differing restrictions for the same species, depending on their location.

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43. *A Policy of Overkill*, supra note 7.

44. See M. Lynne Corn, *The Endangered Species Act: The Storm's Eye*, 40 *BIOSCIENCE* 637 (Oct. 1990).

45. See, e.g., S. J. O'Brien and Ernest Mayr, *Bureaucratic Mischief: Recognizing Endangered Species and Subspecies* (inadequate taxonomy and the periodic occurrence of hybridization between species and subspecies, have led to confusion, conflict and misinterpretation of the Act) 251 *SCIENCE* 1187, 1187-88 (March 8, 1991).

The ESA's authors never intended it to be a backdoor method of federal land use control. Abusing the Act to promote an antidevelopment agenda has been a major factor tending to erode public support for the endangered species program.

#### CORRECTIVE AMENDMENTS WILL ADD BALANCE

The following proposals will maintain the objectives of the ESA, without significantly diminishing its sweeping powers, or undermining the scientific integrity of listing decisions. These proposals are designed to assure that the public becomes more involved in the process, and that critical decisions are made early in the process and on the basis of the best possible science. Five amendments to the ESA are suggested, as follows:

##### 1 *Timely Designation Of Critical Habitat and Recovery Plan*

An amendment requiring designation of critical habitat and the promulgation of a recovery plan *at the same time* as the listing, tied to a requirement that a listing cannot be made until there is sufficient data to designate critical habitat, would accomplish several necessary objectives. First, the species would receive the added protection of a habitat designation and recovery plan as soon as it is listed. Second, people living and working in the locality would be informed sooner of the extent of economic sacrifice. Third, economic and social interests would get a hearing as part of the habitat designation and recovery plan process. Wildlife officials would be forced to think through the entire process and give some thought to the lowest-cost methods of recovering the species.

##### 2. *Establish a Scientific Peer Review Process*

A scientific peer review committee should be established at the national and/or regional level to review methodologies used to support listing petitions and assemble panels of appropriate professionals who can exercise independent judgment on the scientific sufficiency and completeness of a petition. One important function of the peer review process would be to review petitions to determine if proper taxonomic classifications are being used.

##### 3. *Bring the Public Into The Process*

The endangered species problem is essentially a land use problem; it can only be resolved by involving all affected parties in the decision making process. The public notification and hearing provisions of the current Act should be made mandatory, with expanded requirements for advertising, public meetings and direct notice to affected landowners as early in the process as practicable. Typically, landowners and businesses do not pay

much attention to listing proposals because they do not understand how the conservation and recovery processes will affect their activities. Affected parties should be informed as soon as possible what a listing means for them and what they must do to comply with the law

#### *4. Provide Landowners With Incentives for Mitigation and Habitat Conservation Plans*

At present, there is no mechanism in the ESA to compensate owners for the loss of their property value. In fact, the Act does not recognize property rights in any fashion apart from the Section 5 provision authorizing wildlife agencies to acquire land to protect a species.<sup>46</sup>

Landowners should be given financial incentives to engage voluntarily in mitigation and habitat conservation planning. This could be accomplished through tax incentives and/or cost share payments funded through the Wildlife Conservation Fund or the Land and Water Conservation Fund. In addition to conserving habitat for a single listed species, incentives could be offered for the conservation of entire ecosystems.

#### *5. Provide for Timely, Efficient Appeals Procedures*

The cumbersome "God Squad" mechanism is ineffective and should be replaced by a streamlined appeals procedure capable of rendering a decision at an early stage in the conflict. Similarly, Section 10(a) "incidental take permits" should be made more workable by establishing detailed regulations defining acceptable habitat conservation plans and by eliminating the need for an accompanying environmental impact statement.

### CONCLUSION

As presently structured, the ESA is incapable of fulfilling its ambitious mandate. The Act's uncompromising, absolutist provisions will eventually generate a powerful political backlash. Steps must be taken now to soften the Act's rough edges by introducing flexibility, balance and accommodation into the process.

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46. 16 U.S.C. §1534 (1988).

