THE ENDANGERED SPECIES ACT: THE "900-POUND GORILLA" OF ENVIRONMENTAL LAWS

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The Endangered Species Act is lengthy—39 pages in small print—inordinately detailed, and difficult to fully comprehend. A working understanding requires repeated detailed readings.

In 1972, President Richard Nixon called upon Congress to address preservation of species facing extinction in the United States. Congress quickly and overwhelmingly passed the Endangered Species Act, or ESA, on December 28, 1973. Given its track record over the last 35 years, it is likely that neither Congress nor the president conceived of the impact the ESA would have on land management, both public and private. Yet, no serious efforts have taken place to significantly revise the ESA.

The ESA was a follow up to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This international agreement restricted international commerce in plant and animal species (or parts) likely to be harmed by trade. This agreement has affected those who hunt in foreign lands and wish to import trophies (i.e., animal parts).

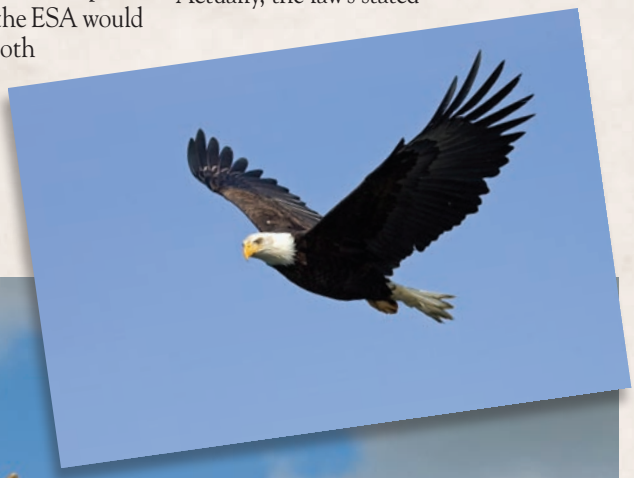
The following discussion illustrates significant portions of the ESA and presents a case history that deals with the listing and management of "threatened" species. It demonstrates the interactions of science, economics, court decisions, impacts on society, supplies of raw materials, and politics that can and did emerge in complying with the law.

What Is Protected?

Many believe the primary purpose of the ESA is protection and enhancement of the welfare of species of plants and animals determined to be threatened or endangered (the shorthand way of saying that is "T&E" species). Actually, the law's stated purpose is "…to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved…." Species to be considered for protection include vertebrates, invertebrates, and plants.

As of April 2007 there were 1,326 species on the T&E species list. Several high-profile T&E species have been declared recovered, including the bald eagle and the Yellowstone population of the northern grizzly bear. Grey wolf numbers have so increased in Montana, Wyoming, and Idaho that delisting appears imminent.

The ESA forbids any action by federal agencies that may jeopardize the existence of T&E species. Actions that "take" such species ("harming, harassing, or killing") are prohibited without a permit. The agencies responsible for listing species and enforcing plans and regulations are the U.S. Fish and Wildlife Service (FWS), which deals with terrestrial species and freshwater species, and the National Marine Fisheries Service (NMFS), which is responsible for marine species (including those that deposit eggs and rear young in freshwater and migrate to saltwater to mature). Once a species is determined to be threatened or endangered (i.e., "listed"), the responsible agency must delineate "critical habitat(s)" which include areas necessary for "recovery" and removal from the list of T&E species. Federal agencies



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must not take action that "destroys or adversely modifies" critical habitats.

Citizens may use the federal courts to challenge perceived failures to enforce the ESA. The first such challenge was related to the Tennessee Valley Authority's failure to act to prevent extinction of the snail darter. The ensuing legal, economic, social, scientific melee was the first dramatic and well-covered dispute over the application of the ESA.

Listing decisions (declarations that a species is either threatened or endangered) are made by the FWS or NMFS. Such decisions may be challenged by any who disagree—first by appeal and, then, in federal court. Such challenges prompt scientific review by the responsible agency. Endangered species differ from threatened species in that they are deemed significantly closer to extinction. There is a third category called "candidate species," whereby the FWS or NMFS determines that listing is "warranted but precluded" due to mitigating circumstances (e.g., limited time or resources). This loophole provides a political escape hatch that can limit, at least temporarily, the consequences of a listing as threatened or endangered. And, it puts pressure on agencies, administrations, and the courts to provide additional time and resources to deal with the species in question.

Penalties

The ESA describes violations that may be prosecuted and penalties that may be imposed. Penalties are most severe for those who "knowingly" violate the ESA related to "trafficking in" or "taking of" T&E species. Penalties range up to $50,000 or imprisonment for one year or both. In addition, civil penalties of up to $25,000 per violation may be imposed.

Those having a previous record of violations are subject to the more severe penalties. Rewards can be paid to persons providing information leading to an arrest, conviction, or revocation of licenses and permits. Fines paid by convicted violators are the source of funds for such rewards.

No penalty may be imposed if the balance of evidence indicates that the defendant acted to protect a human from bodily harm. Likewise, there are no penalties for accidentally harming a listed species in the process of standard farming or ranching activities.

Protecting T&E Species in Advance

Individuals may apply to the FWS or NMFS to be allowed to prepare a Habitat Conservation Plan (HCP) to adequately protect T&E species that could potentially be harmed in the development or alteration of an area harboring such species. Such plans must simultaneously minimize and mitigate anticipated impacts.

Some 14 years have passed since the adoption of the Northwest Forest Plan. Considering what happened in the case of the owl, only three alternatives seem rational in future application of the ESA: complete, immediate, and willing compliance; prompt recourse to the God Squad; or revocation or significant alteration of the law.

The FWS or NMFS must prepare a "Recovery Plan" for T&E species that outlines goals, tasks, costs, and timelines to recover the species to a condition justifying removal ("delisting") from the list of T&E species. FWS policy calls for such plans to be in place within three years of listing.

"Critical Habitats" must be determined for T&E species and must contain "all areas essential to the conservation." Such habitats may be in public or private ownership or both. "Essential Areas" necessary to accommodate critical human activities may be excluded where economic and/or other costs exceed the benefits of inclusion to the T&E species in question. The ESA does not specify how such costs and benefits are determined or how they are weighed in the decision. Critical habitats must be designated within a year of listing. In practice designated timelines are rarely met and there are no adverse consequences to the responsible landowner. The Reagan Administration (1986) issued regulations under the ESA limiting the protective status of critical habitats. That relief was short lived. In the late 1990s and early 2000s, several federal court decisions discredited those regulations.

Federal agencies must not authorize, fund, or carry out actions that "destroy or adversely modify" critical habitats. Such requirements do not apply directly to non-federal landowners. However, large-scale developments such as mining or large-scale logging operations on non-federal lands involving critical habitats can require a federal permit. In that case those lands become subject to federal regulations relative to critical habitats. Voluntary mitigations of impacts such as land purchases of suitable replacement habitat, grants for restoration of deteriorated habitats, and establishment of reserves are allowed, and encouraged, to lessen the impacts of critical habitat designations assuming such are cost effective.

Conservation Plans

In 1982, Congress modified the ESA to allow effected private landowners to prepare "conservation plans" that met ESA requirements. In such cases, private landowners could be granted "incidental take permits" that allowed otherwise prohibited impacts on T&E species to occur. Conservation plans must spell out impacts to species, actions to minimize and/or mitigate any "incidental take" that might occur, alternative approaches considered, and actions considered necessary and appropriate. After review, the FWS or NMFS may issue an incidental take permit if they judge that there will be no appreciable reduction in the likelihood of "survival and recovery of the species in the wild."

Regulations issued pursuant to the ESA allow the FWS or NMFS to specify "terms and conditions" included in incidental take permits. Assurances can then be given to private landowners. Such assures that "unforeseen circumstances" will not trigger a need for additional requirements or restrictions.

Weighing Costs

The ESA provides a means of relief from consequences of adherence to an approved recovery plan if the impacts on

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the economy or society are considered too great. The Endangered Species Committee (commonly called the "God Squad") is composed of the secretaries of Interior (who chairs the committee), Agriculture, and Army, plus the Chairman of Council of Economic Advisors, the administrator of the National Oceanic and Atmospheric Administration, and a representative from each affected state. The committee's purpose is to consider petitions for exemptions to Recovery Plans.

The ESA's Reach

The following illustrates why the ESA is justifiably called "the 900-pound gorilla" of environmental laws and laws governing management of federal lands. Perhaps the most important thing to realize about ESA is this: citizens must comply with ESA strictures over the requirements of other laws.

For example, the purposes of the National Forests were spelled out in the Organic Administration Act (1897) as "improve the forests," "secure favorable conditions of water flows," and "furnish a continuous supply of timber…" The Bureau of Land Management (BLM) manages lands in Oregon and California that were once transferred to a railroad company to pay for construction of a north-south railroad through highly productive forest lands. The company failed, and the land reverted to federal ownership. The direction in law was that the BLM would manage those lands to provide a continuous timber supply with a significant portion of revenues going to involved counties for public schools and roads.

With stage set, the most dramatic, drawn-out, and controversial impact application of the ESA involves the ongoing saga of protection of the habitats (associated ecosystems) of northern spotted owl (henceforth "the owl") in the Pacific Northwest. Management, by political instruction, focused primarily on the national forests managed by the U.S. Forest Service and the "O&C Railroad Lands" managed by the BLM. The owl is primarily associated with pristine "old-growth" forests (strategically referred to as "ancient forests" by environmental groups). Such stands are disproportionately valuable for timber and are increasingly rare and fragmented by logging—usually involving clearcuts. Most cuts occur on lands managed by the Forest Service, BLM, and National Park Service.

By the late 1980s, it seemed increasingly likely that the owl would be listed by the FWS as "threatened." And it was obvious that management actions to protect the owl and associated ecosystems would have dramatic negative economic and social impacts. The management arms of the federal land management agencies had failed to come to grips with the issue. As a result, drawn out, uncoordinated, and technically inadequate attempts to skirt the growing issue had exhausted the credibility of both federal land management and regulatory agencies.

The matter eventually came before the federal court in Seattle, Washington. The judge ordered cessation of all logging in old-growth stands on federal lands in Washington, Oregon, and northern California within the range of the owl until a plan to assure the owl's survival was in place.

In early 1990, the chief executive officers of the Forest Service, FWS, BLM, and National Park Service jointly assigned a top-level research wildlife biologist from the Forest Service to assemble a team of research scientists and technical experts from the federal and state Governments, academia, and the private sector to devise a "creditable management plan for the owl" for the federal lands within its range. That team operated free of oversight to assure credibility. The result of the six-month effort was widely praised for its technical credibility.

However, the heads of the various agencies were initially stunned by the impacts of the plan on timber programs. They initially agreed to accept the team's recommendation. Then, the head of the BLM—with support of the secretary of Interior to whom he reported—withdrew and promised an equally credible plan. That alternative was quickly produced, but it applied only to the BLM lands.

Then, the environmental community brought a suit in federal court in Seattle. Environmental groups sought a shutdown of all harvest of old-growth forest on federal lands within the range of the owl, pending adoption of a credible plan to deal with the owl/old-growth issue, which had just been declared "threatened" by the FWS. The trial dragged on for several weeks. BLM attorneys, with the help of the timber industry, had the unenviable job of trying to discredit the government's own senior scientists.

After the hearing in Seattle, the federal judge declined to alter his order until answers to the following questions were provided. Would the plans to be followed by the Forest Service and National Park Service mesh with the proposed BLM plan? And what would be the effect on other species that might be dependent on the same old-growth stands (e.g., the old-growth ecosystem)? At that moment, it

became clear that question was not solely about a single species. The judge clearly understood the purpose of the ESA was "… to provide a means whereby the ecosystems upon which threatened or endangered species depend…."

The technical team assigned to answer the judge's questions found that the two proposed plans did not mesh and would be inadequate to sustain the owl. Further, they concluded that there were some 400 species that were likely closely tied to or confined to the ecosystem in question. The actions related to ESA were forever changed.

Shutdown Continues

The judge lost patience at this point and continued the shutdown of all harvest of timber from old-growth stands on federal lands pending the adoption of a credible recovery plan, and he made it clear that he would be the judge of credibility. This was yet another humiliation for the government and clear evidence that the requirements of the ESA were not to be evaded, skirted, or manipulated. It was a hard lesson with lasting consequences.

In the meantime, elected officials decided to engage the owl issue. The chairman of the Agriculture and Natural Resources Committee in the House of Representatives formed another panel of scientists to prepare a series of alternatives for recovery of the owl's habitat. Those alternatives were to contain full consideration of impacts on the economy and jobs. The team of scientists, three of them being senior scientists from prestigious universities, provided the requested alternate plans and assessments of impacts within allotted time lines. Hearings were held before the sponsoring committee. The committee clearly and quickly recognized a "hot potato" when they saw one and let the matter drop. The federal court injunction remained in place.

The BLM still didn't get the message and came forth with a face-saving plan to release 44 timber sales involving old-growth forests. This was aimed to tide over the timber industry until a final decision on a plan was made. This approach had the blessing of the Secretary of Interior (who was also chairman of the God Squad, whose approval would be required). Without exempting himself from the proceedings or the voting, he asked the God Squad to consider authorizing the 44 timber sales cleared by him and, presumably, by the White House. Understandably, politics were running strong. All of the members of the God Squad, except those appointed from affected states, were Cabinet-level appointees of the administration. The 44 BLM timber sales looked like a sure thing.

That was not what ensued. The God Squad started off by holding private meetings, which are expressly prohibited by the ESA. There was persistent pressure on technical experts in the civil service to provide support for the 44 timber sales, which they did not do. When the final vote came, the Secretary of Interior was one vote short of the number required for approval. Wheeling and dealing produced a face-saving compromise, whereby 12 timber sales would go forward. But the price of getting the swing vote was that a detailed study as to effects on the owl and the ecosystem would be conducted. To accept that proviso meant more delay and the likelihood of further embarrassment.

More Politics

The presidential election was approaching. The decision was to simply accept the status quo until after the election. The controversy over the owl and associated ecosystems became significant in the 1992 election. President George H.W. Bush and third-party candidate H. Ross Perot promised to revise the ESA after their election and framed the issue as "owls vs. jobs." William Clinton promised to convene a "forest summit" to give all concerned a chance to tell their stories. Then he would appoint a new committee of technical experts to produce a new array of alternatives, including social and economic impacts, that could be the basis of a recovery for the owl, plus the marbled murrelet and salmon (which had just been determined to be "threatened") and would comply fully with the ESA. Clinton won Oregon and Washington with a minority of the vote (George H.W. Bush and Ross Perot split the remainder) and was narrowly elected president.

Option 9

Later, President Clinton convened the promised "summit" meeting (which he, Vice-President Gore, and a number of cabinet secretaries attended. At the close of the summit meeting, he appointed the top-level research scientists in the federal government and academia—including biologists, social scientists, economists, foresters, and ecologists—to develop and evaluate impacts and array of alternative plans. Full attention was to be paid to economic and social impacts and impacts to the old-growth ecosystem. Impacts were to be absorbed on federal lands to the extent possible. The team was given 90 days to complete the assigned task. The president chose so-called Option 9 from an array of 10 approaches.

Subsequent modifications in Option 9 made though preparation of necessary "rules and regulations," bickering between agencies, and failures of managers to utilize opportunities for experimentation combined to produce, a significant shortfall in attaining the projected timber yields. Timber yields from BLM and Forest Service lands dropped by some 80 percent with associated additional economic and social distress. However, such drops in timber production from federal lands were mirrored, albeit for various other reasons, across the entire National Forest System, largely due to increasing environmental constraints and competition from cheap imports. Such declines also occurred in the private sector and, subsequently, corporate forest land holdings—one by one—were diverted into other more financially lucrative uses.

Three separate efforts by various teams of scientists and technicians produced quite similar approaches to preserving the ecosystems upon which the owl (and salmon and the marbled murrelet that were listed as years passed without a solution) depended. As the years went by without a legally acceptable solution, the ecological, economic, social, legal, and political factors worsened.

Compliance—Just Barely

The federal judge in Seattle judged the final plan (the so-called Northwest Forest Plan) to be in full compliance with the ESA—but just barely. Application of the plan had the projected significant economic and social impact on the timber industry, and associated employment.

The conclusion, in the end, demonstrated that the ESA is the most powerful of the environmental and federal land management laws. The consequences of compliance, and certainly non-compliance, can be dramatic.

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Clearly, the ESA remains the "900 pound gorilla" of federal laws dealing with wildlife of all forms. ■