



Jon Kyl, Chairman

Lawrence Willcox, Staff Director
347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
<http://rpc.senate.gov>

November 15, 2005

Better for Wildlife, Better for People

Enhancing Endangered Species Recovery

Executive Summary

- The purpose of the Endangered Species Act is the conservation and recovery of threatened and endangered species. Unfortunately, the Act can take little credit for saving species, but it can be blamed for imposing significant burdens on people.
- Of the 1,297 domestic species listed as threatened or endangered, a mere 33 have been removed from the list. Only 11 of the 33 were delisted due to recovery. The rest were delisted because they were either never endangered in the first place (13), or became extinct (9). For the 11 recovered species, factors other than the Act played a decisive role in recovery.
- Fortunately, the Act can be improved. The following issues need to be addressed to make the Act work better for wildlife and people:
 - Rampant litigation over mandatory listings and critical habitat designations diverts resources from species recovery and frustrates the government's ability to set sensible, scientifically based conservation priorities.
 - Landowners are treated as adversaries rather than allies in recovery efforts, even though 70 percent of all endangered species depend on private property for habitat.
 - The lack of good data on the status of listed species frustrates the ability to set priorities and determine the effectiveness of the Act.
 - The erroneous listing of species is costly and wasteful to both landowners and the federal government, diverting resources away from truly endangered species.
 - The current bias toward federal solutions fails to enlist the help of state and local governments, or private recovery efforts.

Introduction

The Endangered Species Act, created 32 years ago to achieve the recovery of threatened and endangered species, has had ample time to demonstrate success. Unfortunately, the Act has fallen well short of its goals for wildlife, while imposing significant burdens on people. The good news, though, is that the Act can be improved to meet the needs of both endangered species and private property owners.

The U.S. Fish and Wildlife Service, in its most recent report to Congress, noted: “The primary purpose of the Endangered Species Act of 1973 is the conservation of endangered and threatened species (listed species) and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these species so that they no longer need the protective measures of the Act.”¹ This “ultimate goal” is a laudable one; yet, curiously, it is not at all clear that federal efforts have moved the nation any closer to achieving it. Sadly, instead of species-recovery success stories, the law is most famous (or infamous, depending on one’s point of view) for instigating relentless litigation, which both diverts resources from species recovery activities and frustrates the Service’s ability to set sensible, scientifically based conservation priorities.

The courts cannot break the litigation cycle; it is Congress that must do so. As an appeals court judge explained, he was compelled to enforce the ESA’s statutory deadlines even while recognizing it would just lead to more lawsuits. Until Congress reforms the law, said the judge, “tax dollars will be spent not on protecting species, but on fighting losing battle after losing battle in court.”²

The debate for many years has been about means, not ends. Now, that is changing as interested parties find common ground on the real issue – ensuring clear progress toward species recovery in a way that benefits both wildlife and people. This readiness to consider reform comes after three decades of work in implementing and scrutinizing the program. There is now a way forward if Congress can muster the political will.

Key steps already have been taken. The House of Representatives passed an Endangered Species Act reform bill on September 29, and, in the Senate, Senator Mike Crapo has organized a working group to craft legislation, anticipated to be introduced before year’s end. Starting with the goal of “writing into the law what has worked on the ground,” the group is using success stories from the 32-year history of the Act to broker a breakthrough agreement that brings the law closer to meeting its original goals. The working group has been coordinating with the

¹U.S. Fish & Wildlife Service, *Recovery Report to Congress:Fiscal Years 2001-2002*. August 9, 2004.

²*Center for Biological Diversity v. Norton*, No. CIV 01-0258 PK/RLP (ACE).

chairman of the Committee on Environment and Public Works, Senator Inhofe, who has stated his intention to address the issue during this Congress.³

It is a propitious time to review the current law and examine the opportunities for improving it, which is what this paper will do.

ESA: Background and the Path Forward

In brief, the Endangered Species Act identifies which species are nearing extinction (the “listing” process), ensures that no action of the federal government pushes the species further toward extinction (the “consultation” process), and attempts to improve the viability of the species (the “recovery and delisting” process). In its first 15 years, the law was updated three times, but it has not been amended in the last 17 years.

In 1997, when attempts were made in the Senate Environment and Public Works Committee to improve the law, the committee report concluded, “First, the protection of endangered and threatened species continues to be a national priority; and second, the Act must be improved to be more effective.”⁴ Supporters of reform contend that those two conclusions remain valid today.⁵

Proponents of change point to conflicts over when protection and recovery unduly or unnecessarily impact people’s lives. Well-publicized examples include controversies over the spotted owl, the snail darter, and the red-cockaded woodpecker. A current example is the Eastern oyster, which may be added to the list because of low populations in the Chesapeake Bay (even though other populations on the East Coast are still productive).

Recently, landowners and other private interests have worked with the Fish and Wildlife Service to end years of wrestling over the difficulties of regulations and precautions. The Clinton Administration, for example, attempted to improve on so-called habitat conservation plans by implementing a “no surprises” component to guarantee that once an agreement was formed, landowners could count on no further regulations.⁶ Unfortunately, the “no surprises” policy was remanded on procedural grounds in 2004 in a suit by opponents who argued that the

³Statement by Senator Inhofe, September 29, 2005, <http://epw.senate.gov/pressitem.cfm?party=rep&id=246665>.

⁴Sen. Rept. 105-128, p. 6.

⁵Senator Mike Crapo, testimony before the Senate Subcommittee on Fisheries, Wildlife, and Water, May 19, 2005.

⁶A habitat conservation plan must be submitted with an application for an incidental take permit. Its purpose is to ensure minimal effects and adequate mitigation of the authorized incidental take.

Clinton Administration mishandled paperwork in establishing the policy.⁷ This is just one example of a practical solution that, to be allowed to work, must be incorporated into the law.

ESA: Success or Failure?

There remains even today, despite the greater consensus on reform, a dispute in some quarters about the extent to which the Act has failed to help threatened and endangered species. This is because interpretations differ as to the purpose of the Act. If its purpose is to recover threatened and endangered species (the Fish and Wildlife Service's interpretation), then it has clearly failed.

For example, over the lifetime of the Act, the Fish and Wildlife Service has listed 1,297 domestic species as threatened or endangered. According to the Service's most recent recovery report to Congress, 33 of those species have been removed from the list. Of the species removed from the list, 13 were removed due to original data error (i.e., the species were never endangered in the first place), 9 were removed due to extinction, and 11 were removed due to recovery.⁸ House Resources Committee Chairman Richard Pombo has noted that the small number of recoveries represents a mere one-percent success rate.⁹

On the other hand, those who argue that the purpose of the Act is merely to prevent species extinction have proclaimed it a success. For example, the environmental group Defenders of Wildlife points to the small number of extinctions among species listed by the ESA – and so claims a “99 percent success rate.”¹⁰ Another study, while acknowledging the “small number of officially recovered species,” still argues that the law “may have effectively prevented as many as 192 extinctions.”¹¹

Despite the wildly divergent estimates of 1 percent and 99 percent success rates, it is likely that most people can agree that an enhanced ability to recover threatened and endangered species under the Act is a good idea.

Studying the Roadmap to Reform

⁷*Greenwire*, “Future of HCPs Uncertain As Judge Strikes Blow to Popular Program,” December 12, 2003.

⁸U.S. Fish & Wildlife Service, *Delisted Species Report as of November 15, 2005*, http://ecos.fws.gov/tess_public/servlet/gov.doi.tess_public.servlets.Delisted?listings=0.

⁹Statement before the House Committee on Resources hearing, September 21, 2005.

¹⁰Jamie Clark, testimony before the Senate Environment and Public Works Committee, May 19, 2005.

¹¹Mark W. Schwartz, “Choosing the Appropriate Scale of Reserves for Conservation,” *Annual Review of Ecology and Systemics*, November 1999.

The good news about these mixed views is that, on some of the key issues, experts from usually competing sides of this debate have reached similar conclusions on how to improve the Act.¹² Because they cross over the traditional political lines, these conclusions are ripe for Congressional action. Six of them are described in detail below.

Recognize That Resources Are Limited

Because financial resources are limited, it is necessary to set priorities so that the available resources are not wasted on low-level priorities to the detriment of high-level ones. Recognizing this, the U.S. Fish and Wildlife Service has put into place priority systems to direct resources to those species most in need of conservation efforts. Unfortunately, nondiscretionary deadlines within the Act, regarding mandatory listings and designation of critical habitat, frustrate these priority systems. Lawsuits to enforce the deadlines in the statute routinely supplant priorities. Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, characterized the problem in the following way: “Imagine an emergency room where lawsuits force the doctors to treat sprained ankles while patients with heart attacks expire in the waiting room, and you’ve got a good picture of our endangered species program right now.”¹³ Manson has also stated,

For well over a decade, encompassing four separate Administrations, the Service has been embroiled in a relentless cycle of litigation over its implementation of Section 4 of the ESA. The underlying premise of those cases has been a dispute between the Service and numerous private litigants over the proper allocation of the limited funds appropriated by Congress to carry out the numerous petition findings, listing rules, and critical habitat designations mandated under the rigorous deadlines in Section 4. The Service now faces a Section 4 program in chaos – not due to agency inertia or neglect, but due to limited resources and a lack of scientific discretion to focus on those species in greatest need of conservation.¹⁴

This degree of litigation also frustrated the Clinton Administration. Clinton’s U.S. Fish and Wildlife Service Director called it a “biological disaster” that “turned our priorities upside-down. Species in need of protection are having to be ignored.”¹⁵

¹²For example, see the letter from the Western Governors’ Association to the Senate Environment and Public Works Committee, <http://www.westgov.org/wga/testim/epw-esa-ltr2-25-05.pdf>.

¹³U.S. Department of the Interior, *Endangered Species Act “Broken” – Flood of Litigation Over Critical Habitat Hinders Species Conservation*, May 28, 2003.

¹⁴Craig Manson, testimony before the Senate Subcommittee on Fisheries, Wildlife, and Water, April 10, 2003.

¹⁵Tom Knudson, “Litigation Central: A Flood of Costly Lawsuits Raises Questions About Motive,” *Sacramento Bee*, April 24, 2001.

Priorities have never stood up to the court-ordered enforcement of deadlines mandated in the statute. The courts have no leeway in these cases. Judge Paul Kelly of the 10th Circuit Court of Appeals, who, while ruling to uphold the deadlines in one case, highlighted the fact that Congress is the body that needs to solve the problem:

The court recognizes that the Secretary is caught in a quandary. Without sufficient funding or a change in the tasks required by Congress, the Service cannot fulfill the myriad of mandatory listing duties. . . . Lawsuits follow, requiring the Service to spend a greater portion of its already insufficient budget on litigation support. . . . More lawsuits will inevitably follow unless Congress recognizes the problem it has created and acts to solve the problem, either by appropriating additional funds, amending the time limits or by giving the Secretary the discretion to prioritize her workload. Until Congress does, tax dollars will be spent not on protecting species, but on fighting losing battle after losing battle in court. The solution to this problem lies not with the courts, but with Congress.¹⁶

Another problem that makes it difficult for those who administer the ESA to prioritize is that it requires the protection of distinct population segments of species even if the species is not endangered as a whole. This diverts scarce resources away from truly endangered species. For example, the gray wolf as a species is not endangered. There are thousands of wolves in Canada and Alaska, constituting a biologically viable population. Yet, the Act listed these animals in three distinct population segments in the coterminous United States as endangered.¹⁷ (Since then, two of the population segments have been downlisted to threatened status.) Moreover, while the gray wolf species is not endangered, it still ranks high in terms of expenditures among the 1,264 species listed. The Western distinct population segment ranks third in terms of FWS recovery fund expenditures and 29th in total federal and state expenditures.¹⁸

Treat Landowners as Allies Rather Than Adversaries

Landowners are vital to promoting species recovery because most of the habitat for listed species is private land. Indeed, more than 70 percent of all endangered species depend on

¹⁶*Center for Biological Diversity v. Norton*, No. CIV 01-0258 PK/RLP (ACE).

¹⁷68 Federal Register 15803-15875, April 1, 2003.

¹⁸Government Accountability Office, *Endangered Species: Fish and Wildlife Service Generally Focuses Recovery Funding on High-Priority Species, but Needs to Periodically Assess Its Funding Decisions*, April 2005. Although the GAO argues that the Fish and Wildlife Service “spent its recovery funds in a manner generally consistent with its recovery priority guidelines,” it noted that 25 species that were listed as high-priority received no recovery funding at all from 2000 to 2003, and that two species with low-priority rankings, the bald eagle and Canada lynx, received substantial funding. The GAO noted that, “We did not make a judgement about the adequacy or accuracy of the Service’s recovery priority system.” The House Resources Committee has criticized the Service’s priority system and pointed out that most funding is directed at high-priority species because most species are listed as high-priority. See, Pombo, May 2005.

private property for all or part of their habitat.¹⁹ However, the ESA forces landowners to choose between two alternatives: they may either “volunteer” to help through an expensive and time-consuming application process, or they may minimize their contribution and invite a heavy-handed regulatory process to impose itself on them.

For example, the Act prohibits the taking of a species listed as endangered. (To take here means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” The Supreme Court has held that significant habitat modification was a reasonable interpretation of “harm.”²⁰) *Thus, when an endangered species is found on private property, the landowner can be subject to land use prohibitions that can wipe out much of the value of his property.* The only other option the landowner has is to apply for a permit to allow the incidental take of species during otherwise lawful actions. To qualify, the landowner must negotiate a Habitat Conservation Plan with the Fish and Wildlife Service that shows the likely impact of the planned action, steps to minimize and mitigate the impact, funding for mitigation, alternatives that were considered and rejected, and any other measures the Service may require.²¹

This is a burdensome and expensive process and can impose major economic hardship on small landowners, including farmers, ranchers, and homeowners. As a result, landowners cannot be relied upon to actively manage their property to attract endangered species or to even seek assistance upon the discovery of an endangered species. Thus, landowners who wish to support wildlife may resist involvement in conservation. Indeed, the threat of ESA sanctions may even induce habitat destruction on private property to avoid such sanctions.²²

One of the most well-known endangered species cases, which illustrates the damaging effects the Act can have on both endangered species and property owners, involved Benjamin Cone, Jr., owner of 7,200 acres in North Carolina. Throughout the 1970s and 1980s, Mr. Cone managed his land in a wildlife-friendly manner, which attracted the endangered red-cockaded woodpecker. As a result, 1,560 acres of Mr. Cone’s property became subject to ESA restrictions, which prohibited him from harvesting his timber. The regulatory action reduced the value of the acres affected from \$2,230,000 to \$86,500, a 96-percent loss of value.²³ Fearing the

¹⁹Marshall P. Jones, Jr., Deputy Director, U.S. Fish and Wildlife Service, testimony before the Senate Subcommittee on Fisheries, Wildlife, and Water, July 13, 2005.

²⁰Congressional Research Service, *The Endangered Species Act (ESA) in the 109th Congress: Conflicting Values and Difficult Choices*, August 29, 2005.

²¹Congressional Research Service, August 20, 2005.

²²See, for example, Dean Lueck and Jeffrey A. Michael, “Preemptive Habitat Destruction Under the Endangered Species Act,” *Journal of Law and Economics*, April 2003; and Amara Brook, Michaela Zint, and Raymond De Young, “Landowners’ Response to an Endangered Species Act Listing and Implications for Encouraging Conservation,” *Conservation Biology*, December 2003.

²³Randy Simmons, “The Endangered Species Act: Who’s Saving What?” *Rethinking Green: Alternatives to Environmental Bureaucracy*, Robert Higgs and Carol P. Close (eds.), The Independent Institute, 2005.

possibility of attracting additional colonies of woodpeckers, Cone changed his management practices. Where previously he clear-cut 50-acre blocks every five to ten years – which simulated the effect of small intense fires and created a “cycle of succession” which benefits wildlife – he now clear-cuts 300 to 500 acres every year on the rest of his land. His neighbors have also changed their management techniques to avoid the liabilities of attracting woodpeckers.²⁴

Mr. Cone was offered a habitat conservation plan by the Fish and Wildlife Service but did not accept it because, by doing so, he would have relinquished the right to be compensated for the timber, valued at nearly \$1.5 million, on the affected acreage. The plan would have merely allowed him to harvest timber on the rest of his land, which he was already allowed to do. He would have preferred to continue the woodpecker-friendly activities that attracted the birds in the first place.²⁵ This example (by no means unique) shows that, as now constituted, the Act creates an adversarial relationship between landowners and endangered species. The Act should be improved to enlist the help of landowners, rather than penalize them for their good works. One way to do this is found in the recently passed House bill, which establishes an incentives program to encourage private conservation efforts. Existing conservation programs within the U.S. Department of Agriculture may also serve as a model for incentives that could be employed.²⁶

Improve The Quality of Status Reports

Another important step towards improving the Act’s ability to help threatened and endangered species would be to improve the quality of the Fish and Wildlife Service’s status reports and otherwise improve the ability to measure the Act’s effectiveness. As Governor (and former U.S. Senator) Dirk Kempthorne of Idaho, asked: “Has the ESA been successful in actually helping species? Do we have meaningful, measurable results? The answer is: it’s debatable and that’s exactly the problem.”²⁷

By improving the status reports, it allows a more accurate means to ascertain the status of species listed as threatened and endangered and to set appropriate priorities. Moreover, better information will help determine whether listed species merit listing or delisting.

Partisans and professionals both agree on the unreliability of current status data. One scientific study cautions that “the quality of these data is inconsistent and of questionable accuracy . . . because trends for some species are simply the best guesses of [U.S. Fish &

²⁴Richard L. Stroup, *Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series, April 1995.

²⁵Simmons, “The Endangered Species Act: Who’s Saving What?” 2005.

²⁶See, for example, the USDA’s National Resource Conservation Service, <http://www.nrcs.usda.gov/programs>.

²⁷Gov. Dirk Kempthorne, “Rx for the ESA: The Endangered Species Act at Thirty,” November 12, 2003, <http://gov.idaho.gov/2004Idaho/Speech/SupportDocs/ESA%20at%2030%2011-12.pdf>.

Wildlife Service] personnel.”²⁸ The Service’s recovery report noted that a majority of listed species are considered to be either of uncertain status (39 percent), declining status (21 percent) or are possibly extinct (3 percent) while only 36 percent are considered stable or improving. However, this data has limited value because of the way the status is assessed. For example, the House Resources Committee states, “The assignment of the status ‘stable’ or ‘improving’ for a species may . . . reflect factors other than actual increases in species’ numbers or distribution, or the reduction of accurately assessed threats.” Instead, such status “may indicate a reduction in perceived threats resulting from the establishment of ‘adequate regulatory mechanisms’ or even new data that shows earlier assessments or threats faced by species that were based upon an underestimated population or distribution are in error.”²⁹

Another defect is our current inability to measure what, if any, role the law plays in the successful recovery of a species. Policymakers ought to be able to answer the question: Is the law responsible for the recovery? This is a valid question because, of the species that have been “delisted” due to recovery, factors other than the ESA have been credited with that recovery. For example, the recovery of the Brown Pelican is credited to the banning of the use of the pesticide DDT.³⁰ Strict hunting regulations under the ESA may have been an important factor in aiding the recovery of the American alligator, but the decision in 1979 by the FWS to allow commercial foreign trade in American alligators spurred alligator farming, which became so successful that wild populations exploded.³¹ Even the peregrine falcon, which also benefitted from the ban on DDT, was not clearly aided by the Act. The private group that almost single-handedly recovered the falcon through captive breeding and reintroduction says, “We now work to recover species in spite of, rather than because of, the Endangered Species Act.”³²

Refuse to Rely on Insufficient Scientific Data

The ESA requires that endangered species listings be based on the “best scientific and commercial data available.” Unfortunately, the “best” available data is not always sufficient to find out the true status of an endangered species. According to the Congressional Research Service, “Many rare and endangered species are little studied.”³³ And as noted above, a large

²⁸J. Alan Clark, Jonathan M. Hoekstra, P. Dee Boersma, and Peter Kareiva, “Improving Endangered Species Act Recovery Plans: Key Findings and Recommendations of the SCB Recovery Plan Project,” *Conservation Biology*, December 2002. Both the majority of the House Resources Committee and the environmental group, Environmental Defense, agree with this general conclusion. See, for example, Richard W. Pombo, Chairman, House Resources Committee, *Implementation of the Endangered Species Act of 1973*, May 2005; and Michael Bean, Lecture to Continuing Legal Education Seminar: *Endangered Species Act & Habitat Conservation Planning*, October 14 & 15, 2004.

²⁹Pombo, May 2005.

³⁰Pombo, May 2005.

³¹Randy Simmons, “Fixing the Endangered Species Act,” *Rethinking Green: Alternatives to Environmental Bureaucracy*, Robert Higgs and Carol P. Close (eds.), The Independent Institute, 2005.

³²Bill Burnham, “Letter from the President,” *Peregrine Fund Annual Report*, 2005.

³³Congressional Research Service, August 29, 2005.

portion of listed species are of uncertain status. Gaps and shortcomings in the best available science are often unavoidable – especially when decisions must be made on deadline – and, so, sometimes professional judgment is substituted. These best guesses are reserved to agency personnel and are routinely challenged from all sides of the issue, creating a backlog of litigation and remanded decisions. Moreover, the Act deals with scientific uncertainty by erring on the side of the endangered species without regard to the effects this might have on people.³⁴ The erroneous listing of species is very costly and wasteful to both the affected landowners and to the federal government, diverting resources that could be used to recover truly endangered species.

A good recent example of the cost of implementing ESA policy in the absence of definitive scientific information is the Klamath River Basin controversy. This region is an area of wetlands, lakes, and farmland in Oregon and California drained by the Klamath River, which flows to the Pacific Ocean.

In 1988, two fish species – the Lost River sucker and short nose sucker – were listed as endangered by the Fish and Wildlife Service in the headwaters of the Klamath River, an area of lakes, wetlands, and farm fields. In May 1997, another fish species – the Southern Oregon/Northern California coast population segment of the coho salmon – was listed as endangered in the lower reaches of the Klamath River, downstream from the suckers. This set up a conflict between the salmon, the suckers, the waterfowl and other wetlands wildlife, and the farmers in the headwaters area that feeds the Klamath River.

In 2000, environmental organizations sued the Bureau of Reclamation for allegedly violating the Endangered Species Act, and sought an injunction ordering the Bureau to restore instream flows to the Klamath River to levels that it deemed necessary to protect the endangered salmon. In response, the Bureau prepared two biological opinions in 2001, one of which required the Bureau to maintain higher water levels in Upper Klamath Lake to benefit the sucker fish, and higher flow in the Klamath River below the Iron Gate Dam to benefit the salmon. To meet these requirements during the dry year of 2001, the federal government decided to drain water from the farm fields and wetlands.³⁵

This action had a devastating economic impact on 1,200 farms – but it later proved to have been unnecessary. A study found that withholding the irrigation water affected farm workers, tenant farmers, sharecroppers, agriculture input suppliers, landowners, and taxpayers (the latter group because government emergency programs shifted part of the burden to taxpayers). Net losses to the region were valued at up to \$46 million, with farmers suffering losses of approximately \$54 million in gross farm crop sales.³⁶

³⁴Congressional Research Service, *The Endangered Species Act: Consideration of Economic Factors*, April 15, 2003.

³⁵Oregon State University Extension Service, *Water Allocation in the Klamath Reclamation Project, 2001: An Assessment of Natural Resource, Economic, Social, and Institutional Issues with a Focus on the Upper Klamath Basin*, Special Report 1037, May 2003.

³⁶Oregon State University Extension Service, May 2003.

Upon further review of the evidence, the action of the Bureau of Reclamation turned out to be a mistake. The National Academy of Sciences published a report finding “no evidence of a causal connection between water level and water quality or [sucker] fish mortality” during the 1990s, concluding that “despite theoretical speculations, there is no basis in evidence for optimism that manipulation of water levels has the potential to moderate mass mortality of suckers in Upper Klamath Lake.”³⁷ Furthermore, the report found that maintaining higher water levels was unlikely to lead to the recovery of coho salmon, noting that it was the condition of the tributaries to the Klamath River that were of “paramount importance” to the health of the coho rather than the river’s main stem.

In addition, David Vogel, a fisheries scientist with Natural Resource Scientists, Inc., testified to Congress that the original estimates used to justify the listing of the two species of suckers were in error, noting that “the estimates used to justify an extremely low population in the 1980s were based on a very limited, inappropriate technique and an exceptionally small sample size.” Even so, he noted that it “was deemed adequate by the [U.S. Fish and Wildlife Service] to support listing the species.”³⁸ A decade later, a much more valid technique and a larger sample size, demonstrating a very high sucker population, were deemed unsuitable to justify delisting.

As it turns out, not only were the suckers wrongly listed as endangered, but the coho salmon were as well. Earlier this year, a federal judge ruled that the federal government violated the ESA when it failed to consider genetically indistinguishable hatchery fish in its assessment of coho salmon that led to the listing. Though the judge did not set aside the illegal listing, he did state that anyone harmed by subsequent federal enforcement action on the basis of the listing could ask the court to have the action stopped.³⁹

Give State and Local Solutions Precedence Over Centralized Approach

The ESA itself envisions strong cooperation between the state governments and the federal government in recovering species, but it focuses almost completely on centralized, one-size-fits-all ways to achieve it. An entire section of the law, Section 6, directs the Secretary of the Interior to “cooperate to the maximum extent practicable with the States.” As implemented, however, Section 6 receives little emphasis and little funding, and is overshadowed by other parts of the Act driven by the federal agencies.

This current bias toward federal solutions fails to take into account the specific local details of endangered species problems, and fails to enlist the help of state and local

³⁷National Research Council, *Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery*, (The National Academies Press, Washington, D.C., 2004).

³⁸David A. Vogel, testimony before the House Subcommittee on Water and Power, July 17, 2004.

³⁹California State Grange v. U.S. Dept of Commerce, ___ F. Supp. 2d ___, 02-6044 (D. Or. Jan 25, 2005).

governments, or private efforts, to recover endangered species. For example, the Klamath River Basin controversy came about in part because the federal government failed to recognize and incorporate local conservation efforts.

In 1993, the Klamath Water Users Association (KWUA) had published the Initial Ecosystem Restoration Plan – the first science-based ecosystem plan for restoring the Klamath Basin. The plan emphasized active, on-the-ground projects to recover endangered species. Although widely recognized as a meaningful assessment of necessary restoration activities, the plan was not used by the Fish and Wildlife Service in its official analyses.⁴⁰

The Service missed an opportunity to act upon the conservation initiative of the farmers who wrote a recovery plan in 1993, which they updated in 2001, to try to avert the loss of endangered fish species.⁴¹ Had the farmers' initiative been acknowledged then, the issue could have been steered toward a resolution. Some ideas from their recovery plans, and new ones developed since, have now been implemented including water banking and wetlands restoration in partnership with conservation groups like Ducks Unlimited and The Nature Conservancy. A partnership with the National Wildlife Refuge System, called "Walking Wetlands," coordinates wetlands management with farming in a compatible way.

The states, in fact, have also shown a remarkable willingness and ability to help endangered species recover. For example, irrigators in Colorado realized in 1988 that the upper Colorado River is home to four species of endangered and threatened fish. The irrigators joined forces with the Fish and Wildlife Service to restore river flows and protect fish from entrapment in irrigation ditches. They also started a hatchery program for the fish. The problem, however, was that the team required Congressional authorization for their program in order to assure its funding. It would be easier if the ESA encouraged and supported state-level innovations that promote recovery rather than require Congressional decisions for each innovative recovery initiative.

Take the example of the sage grouse. When a widespread decline in the population of sage grouse alarmed state fish and wildlife managers starting in the mid-1980s, several states responded with new conservation plans. Recently, when environmental activists began pushing to list the bird under the ESA as a strategy to restrict grazing on public lands,⁴² these states again upgraded their efforts to care for the bird without the need to invoke the ESA.⁴³ The problem

⁴⁰Dan Keppen, KWUA Executive Director, "Time For a New Approach to Species Recovery: Water User's Approach to Basin Restoration," KWUA Bald Eagle Conference, February 15, 2003.

⁴¹KWUA 2001. "Protecting the Beneficial Uses of Upper Klamath Lake: A Plan to Accelerate Recovery of the Lost River and Shortnose Suckers."

⁴²*Greenwire*, "Endangered Species: No Need to Add Sage Grouse to Federal List, BLM Says," March 16, 2004.

⁴³The Western Governor's Association and USDA– Natural Resources Conservation Service, *Conserving the Greater Sage Grouse: A Compilation of Efforts Underway on State, Tribal, Provincial and Private Lands*, June 2004.

was, and still is, that the Act is unclear about how to judge the adequacy of such state efforts. Even if states had the best possible plan, the Fish and Wildlife Service could be required to take over. A “Policy for Evaluating Conservation Efforts” has been published by the Fish and Wildlife Service as an attempt to solve this problem, but it must be written into law to assure that the federal agency need not take over a state’s efforts.

End Costly Litigation Cycle Over Habitat Designation

The ESA provides the Fish and Wildlife Service the quasi-discretionary authority to designate critical habitat for listed species. Both the Clinton and Bush Administrations determined that designation of critical habitat provided little additional protection for most listed species, and was often counterproductive in that it consumed significant amounts of scarce conservation resources and elicited a negative reaction from the public. For example, President Clinton’s Fish and Wildlife Service Director, Jamie Clark testified:

We firmly believe that attention to and protection of habitat is paramount to successful conservation actions and to the ultimate recovery and delisting of listed species. However, in 25 years of implementing the ESA, we have found that designation of official critical habitat provides little additional protection to most listed species, while it consumes significant amounts of scarce conservation resources.⁴⁴

In 2001, the former Secretary of the Interior under President Clinton, Bruce Babbitt, echoed Clark’s concerns, defending the Bush Administrations’s handling of critical habitat issues in the *New York Times*:

In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service’s present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.⁴⁵

The decision not to designate critical habitat for most species has led to “a relentless cycle of litigation”⁴⁶ from environmentalists who seek to force the government to make such designations. These suits are met by countersuits from landowners. This cycle of litigation consumes resources that could otherwise be used to help endangered species.

⁴⁴Jamie Clark, testimony before the Senate Subcommittee on Fisheries, Wildlife and Drinking Water, May 27, 1999.

⁴⁵Bruce Babbitt, “Bush Isn’t All Wrong About the Endangered Species Act,” *New York Times*, April 15, 2001.

⁴⁶Manson, April 10, 2003.

People on all sides of the debate are converging on the need for habitat policy under the Act to emphasize active habitat management instead of passive regulations. The bill passed by the House of Representatives would replace the current Critical Habitat Policy with a more active policy of habitat conservation.⁴⁷ In the Senate, some Members are reviewing a similar policy change.

Conclusion

The Endangered Species Act is in need of reform. As currently constituted, the Act emphasizes deadlines rather than species recovery, leading to wasteful litigation that harms both wildlife and people. Moreover, the Act treats landowners as adversaries rather than allies. As a result, it encourages habitat destruction and discourages private conservation efforts. It also allows data errors and misguided priorities to determine policy decisions, directing scarce resources from truly needy species. Finally, the act focuses too heavily on centralized, one-size-fits-all federal solutions, when local solutions would likely prove superior. Congress must remedy these problems by finding ways to gain the cooperation of states, local governments, property owners, and other private entities in efforts to protect endangered species. The laudable goals of the Act will be better served by removing barriers and providing positive incentives.

⁴⁷Even the failed amendment in opposition to the bill advocated a new habitat policy in place of critical habitat. Threatened and Endangered Species Recovery Act of 2005 (H.R. 3824), passed September 29, 2005.