PUTTING PEOPLE LAST:
Endangered Species vs. People

by Mike Vivoli

Law-abiding, workaday Americans all across this once great country shoulder an increasingly heavy burden: their government. For some, the burden is even greater; they are forced to take care of the government's wildlife, at their own expense. As U.S. wildlife laws grant the government monopoly control, private property owners and rural land users are providing public goods and services free of charge. In return for their good stewardship, the Endangered Species Act (ESA) is taking away their land.

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Passed into law in 1973 and amended in 1979, 1982 and 1988, the ESA has been called one of the most ambitious and wide-reaching pieces of environmental legislation in the world. As it currently exists, any concerned citizen with a twenty-nine cent stamp and a post card can petition the Department of Interior's Fish and Wildlife Service (FWS) to list any population of plant, animal or microorganism under the ESA. Once on the list, the species and the habitat deemed critical for its existence are protected by the Federal Government against any potential harm. If "potential harm" sounds a little arbitrary or capricious, that is because it is. For example, FWS has determined that a birdwatcher could be guilty of "taking" a species simply by walking within a few hundred yards of habitat typically inhabited by protected species, but totally devoid of them in actuality!

To environmental groups, the ESA is a monumental piece of legislation. To those who own private lands they deem critical for their *own* survival, however, it is a Trojan Horse full of bureaucrats trying to effect national land-use planning. To these land owners, the reality of the ESA is that it allows more for the taking of private property than the "taking" of species.

Case in point: In Klamath Falls, Oregon, the shortnose and Lost River sucker fish were added to the Endangered Species list in July of 1988. After five years of drought in the region, the FWS declared that water levels had fallen low enough to threaten the continued existence of the suckers. They therefore announced, in the Spring of 1992, that the delivery of water from the Klamath Lake reservoir to its irrigation district was cancelled. The economic impact of this decision was not lost on the farmers, who promptly filed a complaint with FWS. In the words of one farmer, a "bureaucratic nightmare" ensued.

Infighting between the irrigation district, the FWS and the Army Corps of Engineers sparked turf wars, power struggles and jurisdictional disputes. By the time the FWS capitulated and allowed for a paltry 7,000 acre feet of water (the normal amount is 30,000 feet), delivery was a month late and over

20,000 acre feet had evaporated. Irreparable damage was done to crops and property owners were left to absorb the costs. At the Running Y Ranch in Klamath Falls, for example, crop production fell markedly and half of their 1,800 acres reserved for grazing had to be allowed to dry.

If that weren't enough, it turns out that the suckers may not even be in trouble. While the FWS estimated the sucker population at 2,000, biologists hired by the farmers have counted more than 50,000. Despite this evidence, and historical evidence demonstrating high populations of fish during low water levels, the FWS refuses to reconsider the suckers' status.

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Near San Diego, California, a rancher had been leasing a 100-acre meadow to graze his cattle for nine years. Three years ago, he was told by the forestry service that the Cuyamaca meadow-foam, a small white flower that flourishes on the meadow, had been placed on the Endangered Species list. As a result, he would no longer be allowed to graze his cattle there until two months after his usual release date. As this would result in the overgrazing of his other field, the rancher sought compromise with the FWS. He pleaded with them, arguing that the cattle and the flowers had always coexisted in the past, but to no avail. Finally, after months of argument, they struck a deal.

To comply with the ESA, the rancher built fences around the patches where the flowers were most abundant. He did so at his own expense. When construction was finished, an FWS representative came out to approve the renewed grazing of his cattle. When the official decided that the danger to the flowers had been eliminated, the rancher was permitted to bring his cattle back into the field. What happened next contradicted virtually everything the FWS had previously argued.

Inside the protective cover of the fence, the flowers diminished both in number and size. The unchecked grass had grown up to the extent that it blocked adequate sunlight from reaching the flowers. Outside the fence, however, the small patches of Cuyamaca meadow-foam left unprotected from the "deleterious" bovines flourished, and even spread, in the cattle-cultured grass. The end results of the whole ordeal: overgrazing of the rancher's other field while he wasn't allowed to graze his stock in the protected one; considerable time, money and energy spent needlessly complying with a Byzantine array of bureaucratic dictates; a purposeless, indeed harmful, fence; and fewer flowers than before the FWS applied the ESA.

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While such horror stories might not be the rule under the ESA, they do constitute a laundry list of exceptions. Small property owners in eastern Maryland cannot even set foot on their own land because of nesting bald eagles. Property owners along the Neosho River in Kansas can no longer pay their property taxes with revenue from river gravel because of the Mad Tom catfish, which no one ever has reported seeing. These small property owners

are the real victims of the ESA's draconian regulations, but rarely are they ever noticed. One reason why is that they haven't the time nor the financial resources to defend their rights in court. Thus, very few takings cases are ever brought to court, which means small property owners are rarely compensated for their losses. In other words, landowners are impaled on the horns of a dilemma: either give up their property rights or violate the ESA outright.

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If it is discovered that the ESA has been violated, they lose their property anyway. Given that most small property owners rely on the economic use of their land to put food on the table and pay property taxes, either option is unbearable. In this way, the ESA creates perverse incentives. The dim prospect of compensation for regulatory takings leads many rational landowners to "preempt" the problem. Or, as the sentiment is commonly expressed in the Pacific Northwest, "Shoot, Shovel and Shut-up." It shouldn't come as a surprise, then, if more than one tree hugger has inadvertently embraced the corpse of a northern spotted owl staked to the object of his affection.

Pitting property owners against species, by refusing to compensate the transfer of land from the owner to the listed species, creates enemies of conservation instead of conservationists. By doing this, the ESA has forced some property owners to make a conscious decision that certain species never appear on their land. The ESA has also prompted small timber companies in the Pacific Northwest to accelerate their timber harvesting projects for fear of losing the use of their lands and the value of their investments in them. The hostility and distrust bred by the ESA's perverse incentives have engendered a code of silent non-compliance that does nothing but thwart conservation.

Property owners nationwide are getting the message that government places more value on the existence of species like sucker fish and meadow-foam than on humankind. That message is conveyed by environmental groups and bureaucrats who are far too removed from the cost side of the equation. It is a message made explicit in the ESA itself, which precludes consideration of all factors other than the supposed "intrinsic value" of certain species. After all, Congress has declared that such species are of "incalculable" value, prompting the Supreme Court to rule that "the plain intent of Congress was to stop extinction, *whatever the cost*." Is it any wonder then that Constitutional rights of humans are relegated to a secondary status behind the non-Constitutional rights of meadow-foam? To land owners across the nation, the answer, quite understandably, is no.

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