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An Update on Endangered Species Act Reform

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Senior members of Congress, including Representative Richard Pombo (R-Calif.), Chairman of the House Resources Committee, and Senator James Inhofe (R-Ok.), Chairman of the Senate Environment and Public Works Committee, have once again begun talking about reforming the Endangered Species Act of 1973 (ESA). Repeated failures over the past decade to enact any ESA reforms at all suggest that this isn't going to be easy. And it is not yet clear whether the reforms to be proposed are going to be worth the heavy lifting needed to push them toward enactment.

Before discussing the prospects for reform in the 109th Congress, it is worth considering how we got to where we are now.

The ESA is the most sacred of the environmental movement's sacred cows. I use the word "sacred" literally. In the mid-1990s, then-Interior Secretary Bruce Babbitt gave a number of speeches and interviews in which he said that the ESA was the translation into public policy of God's commandment in the Book of Genesis to Noah to save two of every species in the Ark. Anyone who wanted to reform the ESA, said Babbitt, was refusing to hear "the command of our Creator."

The intensity of this faith-based commitment to the ESA may explain why the decade-long efforts to reform the ESA have been completely unsuccessful so far, but it is nonetheless puzzling. The ESA has inspired such fanatical devotion despite the fact that it is a colossal failure. The ESA has done very little to help recover populations of more than a handful of the 1200-plus animal and plant species listed as endangered or threatened, while at the same time it has done an immense amount of harm.

There is one fundamental reason why the ESA does a lot more harm than good. The ESA penalizes people for being good stewards of their land. Landowners whose management practices create and preserve habitat for an endangered plant or animal open their land to being regulated under

ESA. And contrary to what many environmental pressure groups claim, ESA regulation does not simply prevent development or changes in land use. Customary land uses and practices, such as farming, livestock grazing, and timber production, have regularly been prohibited, even when such practices help to maintain the species' habitat.

Naturally, faced with the regulatory taking of their property, people sought compensation under the Fifth Amendment to the Constitution. Unfortunately, although compensation is due whenever government physically seizes even an inch of private property, the Supreme Court has ruled that compensation is not required for a regulatory taking as long as the property retains any possible use and any value. An ESA listing can destroy 90 percent or more of the value of a piece of property and prohibit its traditional use without triggering the Fifth Amendment's just compensation clause.

The ESA thus encourages landowners to take the steps necessary to ensure that their land does not contain suitable habitat for any endangered or potentially endangered species. Since around 80 percent of listed species depend largely on private land for their habitat, the effects of this perverse incentive clearly continue to be catastrophic for endangered animals and plants. Given the logic underlying the ESA, it is not entirely fanciful to imagine that rural America will eventually be paved over.

The fact that the ESA is bad for wildlife because it is bad for people suggests some obvious, if politically difficult, solutions. It is the political difficulties that have dominated the past fifteen years.

Calls to reform the ESA began soon after the 1990 listing of the northern spotted owl began to shut down the Northwest's timber industry. (The most productive forests in the world are now off limits to harvesting and active timber management. Between one hundred and two hundred mills have closed as a result. And in-

stead of being harvested and replanted, the great Douglas Fir forests will succumb to disease and insects and eventually catastrophic fires. How this outcome will be good for spotted owls or any other wildlife has not yet been explained.) The spotted owl train wreck sparked significant opposition to the ESA throughout rural America. People could see that their local industry and consequently their livelihood could be the next target.

So when the Republicans took control of Congress in 1995, they moved quickly to take advantage of this growing public dissatisfaction with the damage the ESA was doing and threatened to do. These efforts took three forms.

First, the House passed a bill to provide for compensation for regulatory takings under the ESA and several other land-use laws, such as the Clean Water Act's section 404 wetlands regulations. Takings compensation would not provide positive incentives to landowners to provide habitat, but it would at least take away most of the perverse incentive to avoid regulation by destroying habitat. Although the House passed takings compensation bills twice more, its backers have never been able to force a vote on it in the Senate.

The second approach taken by the then-Chairman of the House Resources Committee, Representative Don Young (R-Ak.), was comprehensive reform. Young and Rep. Richard Pombo put together a bill that weakened every provision of the ESA that had been identified as being a problem for people. Despite 127 co-sponsors, the Young-Pombo bill never came to the House floor for a vote, largely because then-House Speaker Newt Gingrich was a Sierra Clubber before he was a Republican. Its prospects were doubtful in any case. Environmental pressure groups had convinced the public that the Young-Pombo bill would gut the ESA.

The third approach to fixing the ESA was simply to replace it with a non-regulatory, incentive-based conservation program. Instead of fearing being regulated by the ESA, landowners would be encouraged to preserve and create critical habitat by a variety of incentive programs. This idea was developed by the Grassroots ESA Coalition and found legislative form in a bill introduced by Representative John Shadegg (R-Az.). The Shadegg bill never attracted much attention, but to my mind it remains by far the best as well as politically most feasible solution to the ESA's failure to put the interests of landowners to work to serve the interests of saving species. (I must disclose that my judgment is not entirely objective here—I helped found and have served on the steering committee of the Grassroots ESA Coalition and

worked on the congressional staff of Rep. Shadegg when his bill was being written).

The reality that all of these fixes for the ESA have been stymied for a decade is bad enough. But In 1997 and '98, the situation grew much worse. Senator Dirk Kempthorne (R-Id.) came close to gaining Senate passage of a bill to re-authorize the ESA that he described as a reform bill. In fact, Kempthorne's bill would have helped big timber and development companies make deals to escape ESA regulation and left small landowners to bear the full brunt of the law's limitless regulatory reach. The bill was so moderate that even then-Interior Secretary Babbitt gave it an enthusiastic thumbs up. The Grassroots ESA Coalition rallied opposition to Kempthorne's bill, Rep. Pombo opposed it, and it died in the Senate.

Since 1998 the Congress has mostly tried to avoid looking at the ESA. There are three good reasons for this, in addition to a glaring lack of congressional leadership on the issue.

First, Babbitt managed to deflate pressure for reform by cutting deals with many big corporate landowners. Although a federal court has ruled that these "safe harbor" agreements are not legally binding on the federal government and therefore that the federal government can demand more acres be set aside as habitat whenever it wishes, these deals have not yet been overturned in reality.

Second, there have not been any more train wrecks of a magnitude similar to the spotted owl. The Bush Administration is trying to keep it that way by administering the ESA so as to minimize damage to people's economic interests and property rights.

Third and finally, much of rural America has experienced significant economic decline during the past fifteen years (some of it, especially in the West, caused by federal lands policies). Consequently, rural victims of the ESA have fewer resources with which to wage the political fight for reform.

Given this history, what can be expected from the 109th Congress? Although House and Senate leaders are talking about co-operating on "improving and strengthening" (these are the words that apparently have done best in polling and focus groups) the ESA, it's hard to see how they are going to come to any sort of agreement on significant reforms any time soon. On one side, Chairman Pombo has often said that if changes to the ESA don't help small property owners whose property rights are being violated, then it isn't real reform. On the other side, the new Chair-

man of the Senate subcommittee with jurisdiction is Senator Lincoln Chafee (R-R. I.), a committed environmentalist who is becoming known for blocking conservative or free market environmental initiatives in the Environment and Public Works Committee. When Chafee sides with the committee's eight Democrats, any motion will fail on a 9-9 vote. The previous subcommittee Chairman, Senator Mike Crapo (R-Id.), has left the committee, but has vowed to stay active. Unfortunately, Senator Crapo has apparently forgotten that he was a sponsor of the Shadegg bill when he served in the House and in recent years has been working with Environmental Defense, which specializes in developing "market mechanisms" to coerce people into doing what government wants. Chairman Jim Inhofe undoubtedly favors far-reaching reform, but it's hard to see what he can do given the make-up of his committee.

Some members are talking about incremental reform. Get some small reforms passed this Congress and thereby build momentum for further reform in future Congresses. Two incremental reform bills are left over in the House from last year. Representative Greg Walden's (R-Oreg.) bill would raise requirements for the quality of scientific procedures and information used during the listing and recovery planning processes. Representative Dennis Cardoza's (D-Calif.) bill would require that recovery planning involve consultation with local people affected and consideration of the economic impact.

Governor Bill Owens (R-Colo.), Chairman of the Western Governors' Association, has also actively advocated some sensible reforms that would concentrate much more effort on recovering endangered species populations and less on listing species. Owens has also tried to put his State in a leadership role in the recovery process.

It may be that these two bills and Governor Owens's proposals form the starting point for modest incremen-

tal reforms that can be enacted by this Congress. My own view is that such an approach is well worth pursuing, but only if it can be done without provoking a knockdown fight with environmental pressure groups. Perhaps Chafee and Crapo can talk some environmental groups into not strenuously opposing some minor modifications to the ESA, although past experience suggests that proposing to change a comma provokes charges of trying to gut the ESA.

At the same time that these incremental reforms are being pursued, I think that leaders need to step forward to promote takings compensation and to resurrect the non-regulatory, incentive-based habitat conservation approach of the Shadegg bill. The idea that people should be paid whenever the use of their property is taken by government does resonate with voters. Last November, 61 percent of Oregonians voted in favor of an initiative, Measure 37, to compensate property owners when state zoning regulations reduce the value of their property if they owned it before the regulation took effect. And it is likely that majorities in both the House and the Senate would support takings compensation if it were proposed this year.

Enacting a replacement for the ESA that would work by putting the interests of people and endangered wildlife on the same side will require a long-term effort. It is not clear that there are leaders in the Congress willing to make the commitment (Rep. Shadegg long ago left the Resources Committee for the Energy and Commerce Committee). If not, then perhaps there are state legislators ready and able to lead. Although it would indeed require sustained effort over a number of years, I continue to believe that the only politically feasible way to fix the ESA so that it doesn't rob people of their property is to replace it with a program that would actually work to recover populations of endangered wildlife. It would be a lot of work, but I think it's worth doing.

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