
ENVIRONMENTAL LAW AND PROPERTY RIGHTS

THE THREATENED AND ENDANGERED SPECIES RECOVERY ACT OF 2005

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I. The Problems with the Endangered Species Act

In its 32 years of existence, the Endangered Species Act (ESA) has not lived up to its billing as America's "premier environmental law."¹ It has had little success at achieving its potential of conserving and recovering species. Unfortunately, it has been more successful at creating deep divisions between landowners and federal regulators. Of the 1,264 species listed under the act as of early 2005, only 10 domestic species have been recovered and delisted.² The relationship between the ESA and those recoveries is doubtful, at best.³ Although there are those who claim great success for the ESA because fewer than 1% of listed species have actually gone extinct,⁴ that seems to be a rather defeatist benchmark. Considering the costs the ESA has imposed, one would hope for a more robust measure of success.

And the costs have been enormous.⁵ In the period from 1989 to 2000, the United States Fish and Wildlife Service has estimated the costs of the ESA to be \$3.5 billion.⁶ Others have suggested that these costs are vastly underestimated because the United States Fish and Wildlife Service has ignored costs of administration, costs to other federal agencies, costs backed out when money is spent on both endangered and nonendangered species, and underestimation of actual monies spent.⁷ Indeed, in the year 2000 alone, the Property and Economy Research Center estimates total costs to be closer to \$2.4 billion than the estimated \$610 million.⁸ Moreover, in 2001 the Bonneville Power Administration estimated that lost power generation caused by ESA compliance to be \$1.7 billion.⁹

In addition, these cost estimates ignore costs to state and local governments such as the costs of Habitat Conservation Plans. Three such plans in California and Texas cost \$650 million (San Diego), \$45 million (Riverside County for Stephens Kangaroo Rat), and \$160 million (Balcones Canyonlands, Texas).¹⁰ Finally, the cost to private landowners in mitigation, unuseable land, and lost opportunity costs are staggering.¹¹ PERC estimates the annual costs from the listing of one animal: the California gnatcatcher to be \$300 million per year,¹² the costs to farmers in the Klamath basin for salmon and other endangered fish to be \$54 million in 2001,¹³ and the costs of the spotted owl listing in the Pacific Northwest to be 130,000 jobs.¹⁴

Approximately 75% of all listed species have habitat on private property.¹⁵ But rather than being a fortuitous event, the discovery of an endangered plant or animal on private property is a cause for concern and consternation. "Taking" that species—which could mean anything from killing it to damaging its habitat¹⁶—may result in substantial fines or incarceration.¹⁷ This has led to the infamous maxim that landowners in pursuit of their own survival will "shoot,

shovel, and shut up." More often, landowners will take less drastic, but equally effective means of reducing populations. An example is the red-cockaded woodpecker (RCW), an endangered species that prefers to nest in cavities of mature pine trees. It is at full maturity when the trees are most valuable for harvesting and when these nest-suitable cavities are most likely to form. Not surprisingly, in a study of RCW habitat, it was found that "the closer a landowner is to known populations of RCWs, the more likely the landowner will take action to destroy the habitat for RCWs, primarily by 'prematurely' cutting their pine forest."¹⁸ The authors of this study also cited to the documentation of preemptive habitat destruction, or a "scorched-earth policy," for the golden-cheeked warbler in Texas, the black-capped vireo also in Texas, and the northern spotted owl in the Pacific Northwest.¹⁹

The problems caused by the ESA for property owners are exacerbated for smaller property owners of modest means. Their problems include the disproportionate costs of obtaining an Incidental Take Permit (ITP) and Habitat Conservation Plan (HCP) and the inability of obtaining a "final" agency decision regarding what can and what cannot be done on a parcel without running afoul of the ESA. This has put landowners to a very uncomfortable choice: they can either attempt to use their property—and run the risk of violating the ESA with its attendant penalties—or expend substantial resources to participate in an HCP or, if appropriate, an ITP. Unfortunately, for the small property owner seeking only a modest use of his property, the costs of such an HCP or ITP may exceed the value of the project or even the property.

For example, Robert Morris sought to cut five trees on his property near Philippsville, California—where removal of the five trees was a permitted use under state law and the only economic value of the property.²⁰ When the National Marine Fisheries Service indicated that the cutting of these trees *might* violate the ESA by removing shade from the aquatic habitat for endangered salmon, his only option was to seek an HCP—at an estimated cost that exceeded the value of the trees. He filed a claim against the United States for a regulatory taking, but lost on ripeness grounds because he had not applied for permits that he alleged cost more than the underlying property.²¹

Another failing of the ESA is with the designation of critical habitat. "Concurrently" with the listing of a species as threatened or endangered, the Fish and Wildlife Service is required "to the maximum extent prudent and determinable" to designate "critical habitat."²² For a number of years, the agency was reluctant to do this, both because of costs and limited efficacy. However, in recent years groups such as

the Center for Biological Diversity (CBD) began a litigation campaign to force the designation of critical habitat.²³ In an exercise more akin to spearing fish in a barrel than engaging in cutting-edge litigation, an exercise not coincidentally for which the ESA allows for substantial attorneys fees, CBD has sued repeatedly to force the agency to designate critical habitat, whether or not such habitat is needed.²⁴ At present, Fish and Wildlife Service's entire management of the ESA is being driven by litigation. To make matters more difficult, in response to lawsuits, the Fish and Wildlife Service began to designate wholesale vast stretches of real estate without adequately determining whether the land was indeed habitat and without doing the prerequisite economic analysis. As a result, property rights oriented industry associations such as ranch and homebuilding entities together with nonprofits such as Pacific Legal Foundation have embarked on a campaign to sue the Fish and Wildlife Service over its hasty and allegedly unlawful critical habitat designations.²⁵

For example, when the Fish and Wildlife Service designated over 400,000 acres of critical habitat for the Alameda whipsnake in four California counties, in response to a court challenge, the Agency openly acknowledged it included areas that were not essential to the conservation of the species:

We recognize that not all parcels within the proposed critical habitat designation will contain the primary constituent elements needed by the whipsnake. Given the short period of time in which we were required to complete this proposed rule, and the lack of fine scale mapping data, we were unable to map critical habitat in sufficient detail to exclude such areas.²⁶

The deficiencies did not stop there, however. The Agency also failed to adequately consider the economic impacts of the critical habitat designation. Although the critical habitat included highly populated areas of the State of California in the midst of a housing shortage, and costs associated with critical habitat were estimated at \$100 million for the University of California, and a like amount for the mining industry, and state and local agencies identified severe limits that would flow from critical habitat affecting fire and flood protection activities, the Service concluded the designation of critical habitat for the Alameda whipsnake would have no significant economic effect.²⁷

Recently, Pacific Legal Foundation attorneys filed suits in federal court challenging the critical habitat designations of 42 species in 42 counties of the State of California, covering almost 1.5 million acres.²⁸ Each of these designations was promulgated as a result of a court action and suffers from the same deficiencies as the critical habitat for the Alameda whipsnake—the designations are over broad and the economic analyses are inadequate.

Thus, the ESA critical habitat requirement is, at best, inefficient, and, at worst, wasteful, on two fronts. First,

according to the very agency tasked with the responsibility for protecting listed species, the designation of critical habitat provides no meaningful protection to the species beyond the protections already provided by other provisions of the Act, such as the Section 9 take provision which prohibits anyone from harming a listed species. This was also the conclusion of the district court in *Home Builders*.²⁹ And, second, the critical habitat requirement breeds endless litigation that diverts limited resources from true conservation efforts.

The Fish and Wildlife Service agrees. In a Federal Register document related to the designation of critical habitat for the Bull Trout, the Fish and Wildlife Service expressed its frustration:

In 30 years of implementing the Act (16 U.S.C. 1531 *et seq.*), we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. Our present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. We believe 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.

....
We have been inundated with lawsuits regarding critical habitat designation, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected us to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves us with little ability to prioritize our activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.³⁰

This is no way to run a recovery effort.

The ESA requires that “best available” data be employed in reaching listing and critical habitat decisions.³¹ At present, however, both the implementing agencies and the courts have interpreted “best available” to mean any evidence whatsoever. This has resulted in unnecessary listings and overly broad “critical habitat” designations. For example, in a July 15, 1998, study entitled *Babbitt's Big Mistake*, the National Wilderness Institute documented the

following:

Historically data error has been the most common actual reason for a species to be removed from the endangered species list. Species officially removed because of data error include: the Mexican duck, Santa Barbara song sparrow, Pine Barrens tree frog, Indian flap-shelled turtle, Bahama swallowtail butterfly, purple-spined hedgehog cactus, Tumamock globeberry, spineless hedgehog cactus, McKittrick pennyroyal and cuneate bidens. While officially termed “recovered”, the Rydberg milk-vetch and three birds species from Palau owe their delisting to data error (*see Delisted Species Wrongly Termed Recovered* by FWS, p. 16). Many other currently listed species have been determined to be substantially more numerous and to occupy a much larger habitat than believed at the time of listing (*see Environment International, Conservation Under the Endangered Species Act, 1997*).³²

“Best available” data is often not peer reviewed. Currently, the agencies use peer review on an informal, ad hoc basis. This has proven inadequate as events in the Klamath area have shown. In 2001, the Biological Opinion for the Klamath Project concluded that any water diversions for irrigation purposes would jeopardize listed salmon and sucker fish, although numerous claims were made that the Biological Opinion ignored more reliable data that showed that water diversions would not jeopardize the fish. Based on this conclusion, the Bureau of Reclamation prohibited all water diversions from the Klamath Project to Klamath area farmers who depend on irrigation water from the project. A firestorm of protests followed calling on the Administration to take a closer look at the data for 2002. In response, the Administration subjected the data to “peer review” by the National Academy of Sciences. An expert scientific committee of that body subsequently determined that the 2001 Biological Opinion was faulty because the “best scientific and commercial data” showed that water diversions for irrigation would not jeopardize the listed fish.³³

This is not the end of the flaws with the implementation of the ESA. From listings based on inadequate, faulty, or biased science³⁴ to policy driven absurdities³⁵ the ESA has mutated from America’s “premier” environmental statute to the paradigm of what happens when good intentions go bad. It is not illogical to suggest that a regulatory scheme that has been only marginally successful in the recovery of species might have its effectiveness improved if perverse incentives were replaced with positive incentives whereby landowners would have an economic justification for increasing and improving endangered species habitat, where litigation driven “critical habitat” considerations are replaced with efforts at actual recovery.

II. The Threatened and Endangered Species Recovery Act of 2005

The Threatened and Endangered Species Recovery Act of 2005, H.R. 3824 (TESRA), passed by the House of Representatives on September 29, 2005, seeks to change the dynamics of the ESA. In a nutshell, it seeks to refocus the resources of the federal government from a litigation-driven agenda that focuses on critical habitat and other actions of questionable benefit to one where resources are more directly applied to recovery efforts. Moreover, it is designed to enlist the support of property owners by transforming the present adversarial relationship into one of cooperation.

The remainder of this article will focus on the major substantive changes to the ESA found in TESRA, primarily portions of Section 9 (Species Recovery Agreements), Section 12(d) (Written Determination of Compliance), and Section 13 (Private Property Conservation fund).

A. Section 9(c): Species Recovery Agreements and Species Conservation Contracts

Section 9(c) amends Section 5 (16 U.S.C. § 1534) and provides for voluntary species recovery agreements and species conservation agreements. These species recovery agreements of not less than five years will allow property owners to voluntarily work to protect and restore habitat, contribute to the conservation of listed species, and implement a management plan.³⁶ In exchange for these agreements, the Secretary will make annual payments or provide other compensation. This section will, therefore, enlist the support and cooperation of property owners by making them active partners in the recovery of listed species.

In addition to species recovery agreements, Section 9 also provides for species conservation contracts.³⁷ This will promote property owners’ use of conservation practices for the conservation of species and their habitat. Property owners who enter into long-term contracts of 30 years will be entitled to contract payments equal to the actual costs of the conservation practices; property owners who enter into shorter contracts of 20 or 10 years will be entitled to 80% and 60% of the costs, respectively. This provision will encourage property owners to enter into long-term agreements for the long-term conservation of listed species, but it may discourage shorter-term agreements even if they will help conserve the species and it may, therefore, discourage some property owners altogether from entering into agreements.

It is important to stress that these contracts and agreements will be *voluntary*. New Subsection 5(1)(2)(A) provides, in part, that the Secretary “may not require a person to enter into an agreement under this subsection as a term or condition of any right, privilege, or benefit.” By making these agreements strictly voluntary, property owners are much more likely to be enthusiastic and willing partners of the recovery and conservation efforts promoted by this Act.

B. Section 5: Critical Habitat

Section 5 repeals existing provisions providing for the designation of critical habitat. Despite inflated claims of certain professional critical habitat litigation mills, there is no evidence that the designation of any critical habitat has contributed to the recovery of any threatened or endangered species. As in Section I, *supra*, what critical habitat designations have done is make the use of millions of acres of nonfederal land especially difficult, with property owners facing severe risks if they move forward with projects or even if they merely continue a traditional use of their land.

C. Section 12(d): Written Determination of Compliance

Property owners need a meaningful way to determine whether a particular activity on their property *will* or *will not* violate the ESA before they are required to go through the time and expense of seeking an HCP or ITP. Section 12(d) provides such a mechanism. It adds a new subsection 10(k) to 16 U.S.C. § 1539.

Under this section, property owners have the option of applying to the Secretary for a written determination as to whether a particular activity will be in compliance with the ESA. To obtain a determination, property owners must submit a written description of the activity that is lawful under state and local law (including the nature, specific location, lawfulness, and duration), a description of any adverse impact to a listed species that the requestor reasonably expects to occur as a result of the proposed action, and any other information the requestor chooses to include.³⁸ Upon receipt of a submission with the required information, the Secretary shall, within 180 days, provide the requestor with a written determination of whether the proposed use will comply with Section 9(a) of the ESA.³⁹ The Secretary may extend this time period by an additional 180 days if seasonal or biological considerations make a determination impossible during the initial 180 days.⁴⁰ If the Secretary fails to provide a timely written determination, “the Secretary is deemed to have determined that the proposed use complies with Section (9)(a) [regulating ESA takes.]”⁴¹

A written determination of compliance will remain effective for 10 years, a default determination of compliance (caused by Secretarial inaction) is effective for 5 years.⁴² Requiring the Secretary to adhere to a timetable is especially important so that property owners will not face endless delay—delay that otherwise could last for years. Finally, the Secretary may withdraw a determination if there are changed circumstances.⁴³

Under this provision, it is anticipated that the following scenarios may occur:

1. A property owner who seeks to cut trees on a certain portion of his property during a certain period of time may request a determination as to whether the activity will violate Section 9(a). By examining the information submitted by the

requestor, and any other available information, the Secretary will be able to inform the property owner whether the proposed activity will comply with Section 9(a).

2. A property owner seeking to develop land that is the potential habitat of a threatened or endangered species will know within six months to a year whether he may proceed without fear of prosecution under the ESA. A written determination of compliance will provide the property owner with a “safe harbor” within which he may proceed, so long as he is in compliance with state and local law.

With this provision, property owners will no longer be kept in eternal limbo, afraid to act and unable to afford a way of determining whether their activities will, in fact, violate the ESA.

D. Section 13: Private Property Conservation

The next most significant provision of the proposal is Section 13, Private Property Conservation. This section, through grants and aid, will foster collaborative efforts between property owners and the federal government.

Section 13 of TESRA amends Section 13(a) of the ESA and establishes that the Secretary may provide conservation grants to promote the “voluntary conservation of endangered and threatened species by the owners of private property.”⁴⁴ Amended Section 13(b) requires that grants, among other things, “must be designed to directly contribute to the conservation of an endangered species or threatened species by increasing the species numbers and distribution.”⁴⁵ In addition, amended Subsection 13(c)(i) gives the highest priority to grants that “promote the conservation of endangered species or threatened species while making economically beneficial and productive use of the nonfederal property on which the conservation activities are conducted.”⁴⁶ This is especially important, because if property owners are able to make economically beneficial use of their property *while at the same time* conserving a threatened or endangered species, the antagonism that currently exists between some property owners and the federal government may be ameliorated. Through the HCP process and other cooperative ventures, property owners have demonstrated their ability and willingness to manage their land uses for species conservation and recovery, especially where compensation and regulatory certainty are provided. This reform may further encourage property owners. For example:

1. Grants may be used to develop forestry techniques that preserve habitat while allowing economically productive timber management activities.

2. Grants may help develop farming techniques that better allow a coexistence between

threatened and endangered species and farming.

3. Grants may help provide ways of addressing mining activities in areas that are the habitat for threatened and endangered species so that mining activities will enhance species habitat through innovative mining and reclamation techniques.

The most critical and, not surprisingly, most controversial element of TESRA is amended Subsection 13(d). That section provides relief to property owners who have been unable to receive a determination under Section 12(d) (amended Subsection 10(k)) that a proposed activity will not violate Section 9(a). Through financial incentives, TESRA converts those property owners into partners for conservation and recovery. If a property owner agrees to forego the use of his property that would result in a violation of Section 9(a), the property owner will be entitled to aid equivalent to the fair market value of the foregone use.⁴⁷ In this way, property owners will no longer be forced to bear the entire cost of the preservation of a threatened or endangered species when the conditions that have led to the precarious state of the species are not the result of activities of the property owner. To receive aid, a property owner must first request aid within 180 days of the issuance of a written determination that a proposed use will not comply with Section 9(a) and, second, agree to forego the proposed use.⁴⁸ The proposed use must be lawful under state and local law and the property owner must demonstrate that he has the means to undertake the proposed use.⁴⁹

TESRA establishes a procedure for the Secretary and property owner to reach an agreement as to how to document the agreement to forego a proposed use. Such an agreement may be in the form of a contract, lease, deed restrictions, easement, or transfer of title, with a preference for the documentation that has the least impact on private title.⁵⁰

It is important to note that amended Subsection 13(d)(3) makes it clear that if the Secretary can determine that the proposed use would constitute a nuisance under a state's long-standing law of property, then the property owner will not be eligible for aid. Thus,

1. If a property owner proposes to destroy riparian habitat in a manner that is prohibited by a state's law of nuisance and public-trust doctrine, then the property owner will not be entitled to aid;
2. If a property owner seeks to develop property on a steep hillside in a manner that constitutes a nuisance under state law, the property owner will not be entitled to aid;
3. But if a property owner seeks to put his property to a traditional lawful use, such as placing a home on a lot in a residential

subdivision, or engaging in normal farming activities, the property owner will be entitled to aid if the owner decides to forego the use.

TESRA also provides a mechanism for determining the value of the foregone use. In an effort to keep the government's liability to a minimum, and the impact on the ownership interests of property owners, TESRA is designed to compensate only for the lost use, not the entire fee of the property owner. In amended Section 13(g), TESRA provides a mechanism for determining the fair market value of the foregone use, as documented per Section 13(f), through the use of licensed appraisers.⁵¹ TESRA follows well-established federal precedents which hold that fair market value is defined as "what a willing buyer would pay in cash to a willing seller." *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). This means what knowledgeable buyers will pay voluntarily for property based on its existing uses and those uses that are reasonably foreseeable in the future. This will not include purely speculative uses that have no basis under current market conditions. Likewise, the existence of state and local regulations is relevant to a determination of fair market value. Thus,

1. A property owner who proposes to engage in a timber harvest in accordance with state and local law will be able to claim reasonably that the fair market value of the use is the reasonably anticipated profit from the harvest after all expenses are accounted for;
2. If a property owner seeks to develop land in a manner that is prohibited by the zoning laws of a local municipality, then that prohibition will affect the determination of fair market value (and may preclude any consideration of aid in the first place). The same considerations would apply if a property owner seeks to harvest timber in a manner prohibited by a State's forestry laws, or seeks to fill tidal wetlands that are protected by a State's public trust doctrine;
3. A property owner who proposes to build a single-family home in accordance with state and local law will be able to claim that the fair market value of that use is the value attributed to a lot by virtue of the ability to build that single-family home. The property owner may not claim that the value of the foregone use includes uses not allowed by state or local law, such as housing that exceeds local density requirements when there is no reasonable chance of obtaining a variance;
4. A property owner who proposes to build a skyscraper in a corn field (assuming such were allowed by local law) will not be able to claim that fair market value of the use includes such an unrealistic and speculative project—and one

that he cannot demonstrate an ability under TESRA's Section 12(d) to undertake in the first place;

5. A property owner who has already agreed to set aside land under an HCP will not be eligible for aid for foregoing a use on the land previously set aside, because any enforceable agreement to set the subject land aside will be accounted for in the fair market value;

6. A property owner seeking aid for foregoing a frivolous use will not gain by this provision as the time and costs of proceeding with administrative process and then gathering adequate evidence of fair market value will likely exceed any aid available for the frivolous use;

7. A property owner who deliberately falsifies data or an estimation of fair market value would be engaging in fraud, actionable under federal law.

E. Other Provisions

Other technical, but potentially quite important, reforms include changes to the way data are collected and used, and the manner in which species are listed.

1. Best Scientific Data

Section 3(a) defines "best available scientific data" to be the data the Secretary deems most accurate, reliable, and relevant. Moreover, this data will be made public for review by affected members of the public. As noted in Part I, *supra*, there have been too many instances where data relied upon by the agency has proven to be unreliable and, remarkably, unavailable to the public for review. For example, in the listing of the California gnatcatcher, the determination that the California gnatcatcher was a separate species from the common Mexican gnatcatcher was a scientifically controversial decision—and one for which the underlying data was unavailable for public review.

The proposed reform requires that the Secretary promulgate regulations that will "establish criteria that must be met to determine which data constitute the best available scientific data."⁵² This should help establish minimal standards of reliability for scientific data relied upon by the agencies.

2. Better Supported Listing Decisions

Section 4 requires that the "best available scientific data" be used in listing decisions. Factors to be considered include the inadequacy of existing regulatory mechanisms. This should include private conservation efforts. This provision also refers to "other natural or manmade factors." This would allow the existence of hatcheries and similar programs will be taken into account in a listing decision. One of the problems with some of the salmon listings in the Pacific Northwest is that they failed to include the populations

of hatchery salmon.⁵³ This provision does require that the use of "distinct population segments" be used "only sparingly."

This section also requires that the Secretary conduct, at least once every five years, a review of listed species "based on the information collected for the biennial reports to Congress." The data in these reports, however, can be weak and subjective. It may be more efficacious not to limit the reviews to this data.

3. Posting of Data

Section 6 requires that data supporting a petition to list a species must be provided to the Secretary and must be posted for public review on the Internet. This will avoid the perception that some listing decisions have been based on a paucity of reliable evidence. Advocates of listing a particular species should welcome the opportunity for a full public review and discussion of the data upon which listing petitions are based.

III. Conclusion

Meaningful reform of the ESA has been a long time coming. TESRA stands as a vital first step to reform. While the Senate is presently considering TESRA and similar reform measures, it is doubtful that any reform will be successful unless it enlists the voluntary cooperation of landowners. By making landowners partners in conservation, meaning that property owners have a financial incentive to promote species conservation on their land, the long-term prospects of species recovery will remain clouded.

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Footnotes

¹ This is the de facto appellation given to the Act. *See, e.g.*, Brad Knickerbocker, *A Growing Regional Divide Over Species Act*, CHRISTIAN SCI. MON., Oct. 5, 2005, available at <http://www.csmonitor.com/2005/1005/p02s02-uspo.html>.

² *Implementation of the Endangered Species Act of 1973*, Report to the Committee on Resources, May 2005, at 7, reprinted in *Threatened and Endangered Species Recovery Act of 2005*, House Report 109-237, at 129 (2005).

³ *Id.* at 9-16.

⁴ *See Regional Divide, supra* note 1.

⁵ *See Implementation, supra* note 2, at 41-57, House Report 109-237, at 163-79 (discussing ESA expenditures).

⁶ RANDY T. SIMONS & KIMBERLY FROST, PROPERTY AND ECONOMY RESEARCH CENTER (PERC), ACCOUNTING FOR SPECIES: THE TRUE COST OF THE ENDANGERED SPECIES ACT 3 (2004), available at <http://www.perc.org/perc.php?subsection=10&id=600>.

⁷ *Id.* at 3-7. *See also Implementation, supra* note 2, at 51-53, House Report 109-237, at 173-75.

⁸ *Id.* at 7.

- ⁹ *Implementation, supra* note 2, at 41, House Report 109-237, at 163.
- ¹⁰ *Id.* at 9.
- ¹¹ *Id.* at 10-11.
- ¹² *Id.* at 11.
- ¹³ *Id.* at 13.
- ¹⁴ *Id.* at 14 (citing Press Release, House Committee on Resources, Forest Subcommittee Examines Job Loss in Forest Industry (Feb. 2004)).
- ¹⁵ *Id.* at 10 (citing ENVIRONMENTAL CONSERVATION ONLINE SYSTEM (ECOS), THREATENED AND ENDANGERED SPECIES SYSTEM (TESS): DELISTED SPECIES REPORT, (2004), available at http://ecos.fws.gov/tess_public/TESSWebpageDelisted?listings=0).
- ¹⁶ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (direct and indirect takes covered by ESA); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981) (habitat modification is unlawful take).
- ¹⁷ 16 U.S.C. § 1540.
- ¹⁸ Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act* (Apr. 2000), available at <http://ssrn.com/abstract=223871>.
- ¹⁹ *Id.* at 4.
- ²⁰ *Morris v. United States*, 392 F.3d 1372, 1374 (Fed. Cir. 2004). Mr. Morris was represented by attorneys for Pacific Legal Foundation.
- ²¹ *Id.* at 1376-77.
- ²² 16 U.S.C. § 1533.
- ²³ Peter Aleshire, *A bare-knuckled trio goes after the Forest Service*, HIGH COUNTRY NEWS, Mar. 30, 1998, available at http://www.hcn.org/servlets/hcn.Article?article_id=4040.
- ²⁴ *Id.*
- ²⁵ *See, e.g., New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001) (critical habitat for Southwestern Willow Flycatcher rejected because of failure to adequately consider economic impacts); *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 268 F. Supp. 2d 1197 (E.D. Cal. 2003) (same for the Alameda whipsnake critical habitat).
- ²⁶ 65 Fed. Reg. 58,933, 58,944 (Oct. 3, 2000).
- ²⁷ *See* 268 F. Supp. 2d 1197.
- ²⁸ Details available on Pacific Legal Foundation's website: www.pacificlegal.org.
- ²⁹ *See* 268 F. Supp. 2d 1197.
- ³⁰ UNITED STATES FISH AND WILDLIFE SERVICE, CRITICAL HABITAT LISTING FOR THE BULL TROUT, 69 Fed. Reg. 59,996 (2004).
- ³¹ 16 U.S.C. § 1533(b).
- ³² Publications, Studies, Reports, Legislative Briefs at <http://www.nwi.org>.
- ³³ *See* Press Release, National Academies, Broader Approach Needed for Protection And Recovery of Fish in Klamath River Basin (October 22, 2003)(located at <http://www4.nationalacademies.org/news.nsf/isbn/0309090970?OpenDocument>).
- ³⁴ *See, e.g., Endangered Species Committee of Bldg. Industry Ass'n of Southern California v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994)(Secretary of Interior required to make available, as part of rule-making process in which California gnatcatcher designated as threatened species, raw data underlying taxonomist's report on which Secretary's decision was based, where taxonomist reached two different conclusions from same underlying data). *See also* HOUSE RESOURCES COMMITTEE, FIELD OR EMPIRICAL DATA OFTEN PROVES ORIGINAL DATA INACCURATE (TAKEN FROM RECOVERY PLANS), available as pdf link titled "Data Errors in the Endangered Species Act", at <http://resourcescommittee.house.gov/issues/more/esa/esa.htm>.
- ³⁵ *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001), *appeal dismissed, sub nom. Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004) (In a challenge to the listing of a "wild" salmon when there was a huge population of hatchery salmon, the court wrote, "the NMFS listing decision creates the unusual circumstance of two genetically identical coho salmon swimming side-by-side in the same stream, but only one receives ESA protection while the other does not. The distinction is arbitrary.").
- ³⁶ H.R. 3824, § 9, amending ESA Section 5.
- ³⁷ H.R. 3824, § 9, adding ESA Section 5(m).
- ³⁸ H.R. 3824, § 12(d) adding new Section 10(k)(1)-(k)(3).
- ³⁹ H.R. 3824, § 12(d) adding new Section 10(k)(5).
- ⁴⁰ H.R. 3824, § 12(d) adding new Section 10(k)(11).
- ⁴¹ H.R. 3824, § 12(d) adding new Section 10(k)(6).
- ⁴² H.R. 3824, § 12(d) adding new Section 10(k)(9).
- ⁴³ H.R. 3824, § 12(d) adding new Section 10(k)(10).
- ⁴⁴ H.R. 3824, § 13, amending ESA Section 13(a).
- ⁴⁵ H.R. 3824, § 13, amending ESA Section 13(b).
- ⁴⁶ *Id.*
- ⁴⁷ H.R. 3824, § 13, amending ESA Section 13(d).
- ⁴⁸ H.R. 3824, § 13, amending ESA Section 13(d)(2)(A)-(B).
- ⁴⁹ H.R. 3824, § 13, amending ESA Section 13(d)(2)(C).
- ⁵⁰ H.R. 3824, § 13, amending ESA Section 13(f).
- ⁵¹ H.R. 3824, § 13, amending ESA Section 13(g).
- ⁵² H.R. 3824, § 3.
- ⁵³ In December, 2005, Pacific Legal Foundation filed suit in Salem, Oregon, over the listing of 14 salmon species that did not account for hatchery populations. *See* www.pacificlegal.org.