Book Reviews

Rebuilding the Ark: New Perspectives on Endangered Species Act Reform

Jonathan H. Adler, Editor

*Reviewed by James S. Burling**

In 2005, Congressman Richard Pombo engineered the passage of the most sweeping reform of the Endangered Species Act (ESA) since it was passed in 1973. HR 3824 would have required more workable habitat restoration and better peer review science for listings. Most intriguingly, it contained a compensation mechanism that would have rewarded landowners for maintaining endangered species habitats rather than the current practice of punishing landowners with a massive devaluation of their land values. While it passed the House with bipartisan support, it failed in the Republican-controlled Senate. To thank Representative Pombo for his efforts, the environmental community labeled Pombo an "eco-thug" and flooded his district with attack ads and volunteers in order to ensure his defeat at the 2006 election.

In many segments of the environmental community, the notion of touching the ESA is akin to skinning baby harp seals alive. So it is with some boldness that Jonathan Adler, a Professor of Law and Director of the Center for Business Law and Regulation at Case Western Reserve University School of Law, has pulled together a collection of essays centered around proposals to reform the ESA.

Why reform the ESA? After all, it has been around for decades, and several industries, most notably in the Pacific Northwest and California's central valley, have complained that it has been used as a tool to their destruction. The Act also supports a cottage industry of environmental lawyers—both those in favor of returning the earth to Gaia by any means necessary and those who have a more anthropocentric world view. But aside from these dubious accomplishments, has it actually saved any species? Is it doing more harm than good for plants and animals it is supposed to protect? Do we actually have a clue what the real state of most threatened and endangered species is? Is whatever good it is doing worth the "at any cost" mandate of the Act.[1] Is there a better way?

The essays in this volume attempt to answer these questions, especially the last one. Sadly, we really do not know the answers to most of these questions. Whether the ESA has saved any species may depend on what we mean by "saved." Has the ESA allowed the "recovery" of a meaningful number, or at least a nonzero number, of species? Or has it prevented the slide of species into the abyss of extinction? By the recovery standard, most acknowledge that the ESA hasn't done much. But the ESA's defenders posit that it has met the "slide into the abyss" standard—though this is more through supposition than any hard evidence. After all, we don't have a spare Earth handy to test the efficacy of the ESA against the parallel universe Earth that lacks an ESA.

On whether the ESA does any *harm* to endangered and threatened species, there have always been whispered, but for obvious reasons, largely unverified tales of landowners who deal with their endangered species "problem" with the "shoot, shovel, and shut-up" trifecta. But there are more plausible, and documented, stories of landowners "preplanning" for the arrival of endangered species by rendering land unfit for nonhuman habitation. Owners of Southern pine plantations are thought to be harvesting trees early and before the trees are mature enough to develop cavities that red-cockaded woodpeckers are wont to interpret to be an "open house" invitation.

As to whether we even know enough about the state of most species, the answer is clearly not because the science is incomplete and access to much of America's land is restricted. Various levels of government own over one-half of the nation's land mass, where access by government biologists is reasonably easy. But, for now, that leaves one-half of the nation's land mass—and habitat—in private hands. And those private hands are not very keen on inviting NGO and government biologists onto their property to look for species that are or might become endangered—after all, a positive finding could ultimately sterilize the use and value of the land. More importantly, if we are to be serious about protecting species, then protecting them on private land is essential. But landowners are reluctant to cooperate so long as that means drastic and uncompensated reductions in the use and value of their land.

So, what to do? The nine essays in this compilation each focus on a different problem and a potential solution. While in agreement that the current regime is lacking in its efficacy, the range of solutions is diverse. Ranging from tax relief to free market reforms and to more workable regulatory programs, the common theme of most of the essays is that there must be a better way than regulatory fear and loathing to encourage landowners to preserve and even improve habitats for endangered species.

Northwestern Professor David Dana suggests we improve the process of creating Habitat Conservation Plans (HCPs). HCPs began as a reform from the Clinton Administration that sought landowner cooperation in preserving ecosystems for multiple species in exchange for regulatory certainty. It was then, and remains today, a creative interpretation of the ESA, and any major changes will need statutory authorization. Large-scale HCPs have often been beset with political controversy as multiple landowners have sought to protect their interests, sometimes at the expense of other landowners. Dana's primary criticism of the current HCP process is that the process is less than transparent and there is no standard or reliable measurement of success or even compliance. Congress should, Dana contends, at a minimum mandate a complete database on existing HCPs, mandate the collection of meaningful information, and mandate compliance reporting. Next there should be mandatory review by a scientific advisory board. He proposes that in order to encourage landowners to agree to meaningful biological goals, we should institute an insurance program to protect against a "conservation-failure." Finally,

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where a smaller scale program is needed, Dana suggests conservation banking could be a more viable alternative. What Dana does not address, is whether the HCP process, existing or as imagined, will provide enough incentives for landowners to voluntarily and readily enter into the process. It is one thing to "encourage" landowners to join because of a fear that the heavy hand of government could become heavier; it is another to actually provide enough incentives so that landowners will actually desire to join HCPs.

Texas A&M Professor of Wildlife Neal Wilkins picks up on the need to provide more landowner incentives. He points to the example of landowners in Texas who may wish to contribute to efforts to preserve the lesser prairie chicken, but may have reservations because of an ongoing boom in wind farms. Reforms could include more in the way of "recovery crediting" wherein landowners who make positive contributions to a species' recovery can be rewarded by landowners who need to affect other habitat. Land use lawyers are quite familiar with the concept of transferable development credits—including the fact that many of them are little more than glorified shell games where some landowners are required to compensate others for takings that might otherwise be assessed to government. If recovery crediting is to be a meaningful reform, it will need to avoid the skepticism engendered by TDR programs.

Wilkins has some additional innovative suggestions. In order to foster more landowners' cooperation with information gathering, he suggests that enforcement functions of government be separated from the science, monitoring, and recovery duties. He also suggests that NGO third parties be authorized to work with private landowners. While not all landowners trust the NGOs, they may well trust some NGOs more than government agents. Other reforms Wilkins proposes are more in the way of market-based conservation programs and more defined recovery goals when species are listed.

In the wake of the Tellico Dam controversy, the ESA was amended to allow for a so-called cabinet level "God Squad" to grant exemptions and "incidental-take permits" to allow for some activities to proceed, even if they might impact an endangered species. Pennsylvania State law professor Jamison Colburn characterizes these amendments, designed to add some flexibility in the ESA, as "notorious," as is pretty much anything that requires meaningful consideration of costs. Colburn suggests instead some alteration in our understandings of the line between permits and property. However, it is uncertain that Colburn's ideas will readily translate into policy prescriptions (assuming that were a desirable outcome) in an essay replete with sentences like, "Yet, even supposing unprecedented computational or coordinative breakthroughs were to make globally scaled cognition practicable, we will still face the normative frictions generated when political power is limited by a polity's democratic traditions and geographic boundaries."[2] Not only is the rhetoric obtuse, but the suggestion leaking through these words—that to save species we must transcend democracy and national sovereignty—is not likely to gain traction in the near term.

Another commonly used mechanism for enlisting landowners' cooperation in species protection is through tax-deductible donations of conservation easements. But there well may be an inefficient allocation of resources with this practice. To a rancher, losing the ability to use 100 acres through a conservation easement may have the same economic consequences whether the habitat is extraordinarily valuable to a critter or simply of marginal biological utility. And because the economic consequences are the same, the government's tax expenditure in allowing the deduction will be the same. In other words, the rancher writes off the same amount in each case. While a receiving entity will be happy to take both marginal and valuable habitat, should government pay the same amount for both?

Emory University School of Law Professor Jonathan Remy Nash has a better idea: "[T]he value of the donation of a conservation easement [should be] based not upon the economic value of the donated easement but rather upon the value of the easement to the ecosystem."[3] This would skew the incentives such that landowners may have added incentive to improve habitat in order to increase its value *to the landowner*. Shoot, shovel, and shut-up could be replaced by restore, improve, and donate. While Nash admits that the valuation of land from economic utility to ecosystem utility may be difficult, it should not prove to be impossible. As with any new proposal, Nash also admits that it may be difficult to craft a program that isn't too costly or that doesn't have unintended consequences.

Unasked and unanswered by Nash is the related vexing and somewhat philosophical question of how much land should ultimately be encumbered. We are entering a brave new world where the utility of vast holdings of land are being stripped from the fee in perpetuity (for to be tax-deductible, easements must be perpetual). While Nash's proposal makes great sense in terms of better targeting government tax expenditures, and it beats the notion that oppressive land use regulation is the best way to achieve ecosystem preservation, it leaves unanswered what the final destination of this journey ought to be. How much land can the nation afford to remove forever from productive use? Further, the common law has always been resistant to attempts of one generation to control the resources of future generations. Will this attempt fare any better?

Today in the Central Valley of California there is a new water war. In the Klamath Basin there has been a water war for over a decade. Unlike previous water wars between ranchers and farmers, or between rural and urban interests, this one is between fish and people. Or, perhaps more accurately, there is war between people who value fish for ecological and commercial purposes and people who value water more for urban and agricultural purposes. Unlike prior water wars fought with guns or *Chinatown* intrigue, this one is being fought with biological opinions and lawsuits. Professor James Huffman at Lewis and Clark Law School understands well the difficulties of creating positive ecosystem incentives among water users who, at present, are feeling rather put upon. And the challenges of water rights, creatures of state law (some would say archaic state laws) but respected by federal law and, more importantly, protected by the federal constitution, is fiendishly complex.

There are several water-rights based challenges to the implementation of the ESA being litigated now in the courts. Huffman argues that the Takings Clause is the most substantial challenge, but that "a strong takings clause does not necessarily

obstruct achievement of the species protection objectives of the ESA."[4] This is not because, Huffman argues, property rights in water are or ought to be malleable (meaning capable as some argue of being defined out of existence). Instead, Huffman suggests, there needs to be *better* understanding of water rights, an understanding that allows greater marketability—such as with water transfers and a greater ability to allocate water to conservation purposes without risking the loss of rights under the regime of "use it or lose it" that is common in many Western states. Huffman concludes that the magnitude of the water wars can be reduced—at least from "all-out warfare to isolated skirmishes—if both sides take a more practical and less principled approach."[5] So long as there is weather—and too much rain falls in one place and not enough in another—people will fight over water. Huffman is optimistic that out of today's controversy we will reach an accommodation that will serve both fish and man; let us hope he is right.

Science and politics are like the East and West. Rudyard Kipling once wrote of the East and West that "never the twain shall meet." But like the East and West in modern times, science and politics are inextricably entwined. The biological sciences are used to justify what are essentially political land use questions. And politics are used to determine whether science is "junk" or gold-plated and peer-reviewed. But because the stakes are so high, both landowners and species advocates have tremendous incentive to ensure that science falls their way. Science also has its limitations. We can only know so much given our current state of knowledge and availability of resources to put into science. In his short piece on science and the ESA, economic consultant Brian Mannix puts a face on the extraordinary burden being placed on science to answer essentially unanswerable questions. For example, EPA has an obligation to consider the impacts of pesticide registrations on endangered species that could "provide *millions* of potential obligations to consult with the [federal regulatory] Services—each, based on experience, taking as much as ten years."[6] Mannix has a few suggestions to get us out of this mess, first and foremost of which is to distinguish between science and policy. In other words, make the ESA more like the National Environmental Policy Act, which demands an analysis of the impacts of a federal action—but does not mandate what should be done with that information. Thus the result of an environmental impact statement is to give federal agencies an option to change course, not to determine the course. The same would be the case in Mannix's new ESA. While eminently sensible and practical, Mannix's proposal to change the basic structure of the ESA may be about forty years too late. No one in Congress wants to be the next Richard Pombo.

It has become an article of faith with many that planet Earth is entering an unprecedented epoch of warming and we must act, and act quickly, to reverse anthropogenic global warming. How this can be achieved without putting an end to Western civilization (and Eastern civilization as well) is anybody's guess. But one way that will not work according to Florida State School of Law Professor J.B. Ruhl is a full-court press played by team ESA. Ruhl has no doubt that the crisis is real, but plenty of doubt that the ESA provides a workable solution. As he puts it, over the years the ESA has proven to be the pit bull of environmental statutes. But when it comes to global warming, he says this pit bull won't fly. Yes, Ruhl says, global warming will have a profound and largely devastating effect on species around the world. But the legal tools of the ESA were simply never designed to shut down emissions of carbon dioxide.

Some of the inherent flaws in using the ESA to combat global warming are being fought tooth and claw with the polar bear listing. The Fish and Wildlife Service listed the bear as threatened because of the potential impact warming will have on sea ice, which the bear uses for summer foraging. Logically, any federal action in any part of the United States that causes an emission of a greenhouse gas could now be made subject to the "consultation" requirement of the ESA with the whole panoply of action-stopping consequences. But that, to the chagrin of the ESA lawyers, was a bridge too far for the Bush II Administration, and it issued a ruling that the listing could *not* be used to trigger consultations in any state but Alaska. But to prove Ruhl's point about the limitations of the ESA, this was not simply a product of the so-called anti-environment Bush Administration. When given a chance to reverse, President Obama did no such thing.

As Ruhl puts it, the stop-carbon "mitigation litigation charge is leading the ESA away from its central mission of conserving ecosystems."[7] Its mission is suited well enough for "what is happening on the ground and in the water . . . rather than being concerned with what is happening in the troposphere."[8] The ESA could be modified, Ruhl suggests, to play a more meaningful and realistic role in combating the effects of climate change. These would include a specific category of listing for climate-threatened species and replacing the goal of species recovery with one of assisting the transition to a warmer climate—recognizing that some species may do better at the expense of others during the transition. But unlike the ESA of the past, which Ruhl calls "both noble and arrogant," he suggests instead that "the ESA must become noble and humble if it is to have any chance of helping species through the era of climate change."

Michael De Alessi, currently a post-doc scholar at Stanford who has long experience in environmental policy battles, concludes this book with a look at the interrelationship between the ESA and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Evolved from a conservation effort at the turn of the last century designed to protect megafauna from decimation through unrestricted poaching and trade, CITES restricts or prohibits trade in species from around the globe. But it is not an all-or-nothing proposition. As De Alessi notes, there have been some great successes where CITES has allowed the commercial utilization of species on the brink such as the Nile crocodile and African elephants. Commercial ranching of these species has brought their numbers back from the brink. Of course, this is not a panacea. The replacement of natural ecosystems with ranches is not the end goal, but can serve as a placeholder while ecosystems are restored.

But the ESA has the ability to list any species anywhere in the world. And the federal agencies sometimes do. But is this useful to the species? De Alessi thinks not. While a

listing may stop trade into the United States, and it may, in theory, discourage agencies from funding habitat-harming infrastructure projects, a listing under the ESA has no legal effect outside our borders. But it can hurt species. De Alessi notes that there once used to be 100,000 green sea turtles being ranched on the Cayman Islands for export to Europe. But after they were listed, it became illegal to transship them through the United States, once a necessary step to reach Europe. The farm is no more, having been replaced by a small, government-run eco-tourist operation with far fewer turtles.

There are other examples. As De Alessi points out, once a species is listed export licenses will be denied unless it can be proven that a commercial operation will *enhance* a species. This standard has stopped captive breeders of three African antelope species which are endangered in their native ranges. The ESA does nothing to protect foreign species or habitat, De Alessi contends. Without providing native villages a legal economic incentive to coexist with endangered fauna, especially valuable fauna like black rhinos, villagers might as well poach them. After all, it is hard to instill an environmental ethic in people who are many miles south of the poverty line.

Professor Adler has done a marvelous job collecting the essays in this book. Some are provocative, some are practical, and all are necessary to the debate about where we should go next with the protection of threatened and endangered species. The status quo has been played out. If the protection of species is to advance, the rules of the game need to be changed. And we'd better start recognizing that so long as a substantial percentage of habitat is on private land, landowners need to be encouraged rather than bludgeoned into working for the betterment of species.

Endnotes

1 Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

2 Pg. 100.

3 Pg. 123-24.

4 Pg. 143.

5 Pg. 159.

6 Pg. 168-69.

7 Pg. 191.

8 *Id.*