RETHINKING THE ENDANGERED SPECIES ACT:
PROTECTING PROPERTY RIGHTS AND ENDANGERED SPECIES

R. J. Smith

If one had deliberately set out to create a law which would have harmed wildlife, destroyed habitat, and discouraged private landowners from protecting wildlife on their lands, it would have been difficult to surpass the Endangered Species Act (ESA). The ESA is causing tremendous harm to the very species it was designed to protect.

The fatal flaw in the Act is that it has been used primarily as a means of cost-free national land-use control, rather than as a means of protecting rare species. In nearly every corner of the nation, landowners who happen to have threatened or endangered species on their lands, or who simply have habitat that might be used by endangered species, are routinely prevented from using their lands or property, harvesting their trees, planting their crops, or building a home.

The better a steward a landowner is, the more wildlife habitat one maintains on one's land—the more likely it is that he or she will be punished by losing the use of their private lands.

"The incentive is wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears," said Fish and Wildlife Service official Sam Hamilton. "We've got to turn it around to make the landowner want to have the bird on his property." The result of the ESA's perverse incentive was observed by Larry McKinney, Director of Resource Protection for the Texas Parks and Wildlife Department: "While I have no hard evidence to prove it, I am convinced that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the ESA at all."

This is the inevitable result of the ESA's punitive nature. By threatening landowners who make room for nature with the uncompensated loss of their land or crops, it encourages landowners to get rid of wildlife habitat and sterilize their lands. It creates the "shoot, shovel and shut-up syndrome," whereby wildlife is viewed as a liability—as a threat.

The result is, the ESA has become a disaster. It harms people and their property—and it harms species and habitat. It is bad for species and it is bad for people.

It doesn't have to be this way. Many of the most remarkable conservation success stories of this century were achieved through the willing cooperation of private landowners. They had no fear of maintaining species or habitat on their lands because they did not face the loss of the use of their lands as a result of their good stewardship.

Perhaps the most notable success story was the recovery of the wood duck, which was rapidly headed for extinction early in the century due to a loss of nesting habitat and over-hunting. Friends of the Wood Duck, in the best tradition of voluntary association and private conservation, spent the rest of

---

1Senior Environmental Scholar, Competitive Enterprise Institute, Washington, D.C., 20036.
the century asking the nation's private landowners to allow them to erect artificial nest boxes for the birds.

Most landowners were more than willing to help. There was no downside. If the ducks utilized the nest boxes, the landowners would not be prevented from using their lands. If we had had an ESA in 1920, the wood duck would most likely be extinct today—instead of the second-most common duck in the eastern flyway.

Similar efforts have worked for a wide range of species which can benefit from additional or improved nest sites—bluebirds, screech owls, barn owls, ospreys, American kestrels (sparrow hawks), purple martins, and even prothonotary warblers. And they have also worked for the creation and improvement of habitat for species such as wild turkeys, ruffed grouse, prairie chickens, various species of quail, and many species of ducks and geese. They all worked because the presence of the species or its habitat was not a liability to the landowner. The landowner was not penalized for doing good.

Over the past half-year, a vast amount of time and effort has gone into efforts to create positive incentives to place into the ESA in order to eliminate the Act's perverse incentives. These efforts are an implicit recognition of the fact that the Act is broken and is not working. But this is largely an illusory and self-defeating effort. Attempting to sprinkle a few incentives over a regulatory nightmare is a recipe for continued disaster. Firstly, it would be an enormously expensive undertaking. But more importantly, even substantial incentive payments would quickly prove marginal at best, if the final result were the loss of one’s land and crops. If a tree farmer in the Northwest were offered $5,000 to erect a northern spotted owl nest box and then, when the desired result occurred and an owl occupied the box, he was prevented from harvesting a half-million dollars worth of Douglas-fir—how many landowners would rush to partake of the opportunity?

Private landowners are not afraid of wildlife on their lands. But they are afraid of federal regulations and federal agents on their land. Eliminate that fear, and they will once again be willing to help protect wildlife and habitat.

The most important step Congress can take is to remove the perverse incentives in the Act and stop making stewardship a liability. This means no longer penalizing owners of habitat by preventing them from using their land. The key is to work with the nation's private landowners instead of against them.

The only way to make the Endangered Species Act work for both people and species is to replace the existing compulsory, regulatory Act with a voluntary, non-regulatory, incentive-based Act. Under such a law the government would have no power to take or regulate private property in order to protect endangered species and/or their habitat. If the government wanted to protect habitat on private lands, it would have to work out a mutually compatible, voluntary, contractual arrangement with the landowner. This would be very similar to how the Department of Agriculture “protects” highly erodible lands on the nation's farms by offering to pay farmers to place some of their land in the Conservation Reserve Program for a set term of years, and then paying the landowners for their cooperation. If we can do that for habitat for non-endangered wildlife, we should certainly be able and willing to do the same to protect habitat for endangered species. (It is important to remember that a number of existing federal and state laws prohibiting the killing or capture of most species of wildlife would remain in effect.)
The government would have the option of negotiating a full range of possible protective measures. It could rent land, lease it, purchase conservation easements or development rights, or even purchase land in fee. It could pay tree farmers or foresters to delay harvest for a certain number of years to produce more young. It could pay landowners to plant and grow certain types of habitat necessary for particular species. And it could pay landowners to produce wildlife by erecting nest boxes or platforms, or creating specific types of habitat for wildlife reproduction.

However, the truly significant aspect of a voluntary, non-regulatory law would be the elimination of the perverse incentives in the current Act. Landowners would no longer be afraid of doing good, of helping wildlife, or sharing their lands with wildlife. Thus, a great many landowners would be willing to voluntarily maintain wildlife habitat and take steps to help endangered species. Thus, the costs associated with a non-regulatory law would be far less than maintaining a draconian regulatory law and then requiring compensation for takings or loss of the economic use or value of private lands.

Landowners would once again be willing partners in helping wildlife, as they have been for most of this century—until the heavy hand of the ESA began to turn them against wildlife. Landowners would stop sterilizing their land and would again leave marginal land for wildlife: riparian habitat, hedgerows, windbreaks, borders along fencelines, tops of hills and outcrops, etc. And many landowners would be willing to allow friends of the red-cockaded woodpecker or the northern spotted owl place nest boxes on their land, because they would no longer have their lands shut down if these endangered birds began to utilize the nest boxes.

Thus, paradoxical as it may seem, a non-regulatory law would be the only endangered species protection law that would not be a budget buster, the only law that would not require a vast new source of funding.

Freshman Congressman John Shadegg (R-AZ), a noted champion of private property rights, recently introduced HR 2364, the "Endangered Species Recovery and Conservation Incentive Act of 1995," which is the only endangered species protection bill based on a completely voluntary, non-regulatory, incentive-based approach. The bill currently has seventeen co-sponsors: Representatives Roscoe Bartlett (R-MD), Joe Barton (R-TX), Helen Chenoweth (R-ID), Wes Cooley (R-OR), Michael D. Crapo (R-ID), Barbara Cubin (R-WY), Tom DeLay (R-TX), John Doolittle (R-CA), Robert K. Doman (R-CA), David Funderburk (R-NC), Steve Largent (R-OK), David McIntosh (R-IN), George Radanovich (R-CA), Joe Sken (R-NM), Lamar Smith (R-TX), Steve Stockman (R-TX), and Bob Stump (R-AZ).

This exciting concept holds promise of creating a new environmental paradigm, relying on the use of the institutions of a free society: private property rights, market prices, economic incentives and market mechanisms, instead of continuing to mandate government regulation, land-use controls and acquisition, and command-and-control approaches. This is a new conservation vision, growing out of the massive discontent with ever-growing environmental regulation expressed by voters all across the country in the November 1994 watershed elections. The Shadegg Bill, reflecting an effort by many in the freshman class—riding the tide of discontent with the heavy hand of government—to both protect and utilize private property, promises an exciting new era. This bill, and this bill alone, will protect people and their property and wildlife and wildlife habitat.