

## THE ENDANGERED SPECIES ACT

The Endangered Species Act (ESA) was enacted in 1973 to protect plants and animals in danger of becoming extinct. The law is administered by both the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA). Once FWS or NOAA lists a species as “endangered” or “threatened,” that species is conferred special regulatory protection, including a ban on “takings”—any action that would kill, harm, or disturb the species in question (3). Additionally, the agencies have the power to designate certain habitat as “critical” to a listed species, triggering protections for that habitat (4).

The ESA is applied in two ways. First, it requires extensive review and alternate habitat planning for anyone trying to get a government-issued permit for an area that would affect a listed species. Second, the ESA contains criminal penalties for anyone subject to U.S. jurisdiction that takes, harms, or affects a listed species (5).

### ***ESA AND PRIVATE PROPERTY RIGHTS***

The ESA has sparked controversy because it brings government interventions into conflict with owners’ property rights. If a property owner has a protected species on their land, the government can limit or ban activities on that land which may harm the species. This includes an action “significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” or that disturbs a species’ habitat – a troublingly broad definition (6).

Property owners are not totally defenseless: according to the Fifth Amendment of the U.S. Constitution, the government cannot take private property unless it provides “just compensation” to the owner. If government agencies regulate property so intensively that it essentially equates to taking it away from the owner (called a “regulatory taking”) they must compensate the owner just the same as if they had taken the property outright. On the other hand, courts have frequently ruled that ESA restrictions and regulations fall short of completely stripping a property of its value, allowing the government free reign to regulate without providing any compensation for the affected owner.

Consider the recent federal court case *Good v. United States*. Lloyd Good, Jr. wanted to build a residential subdivision on a marshy 40-acre plot he owned in the Florida Keys, but his application for a permit to develop the property was delayed and eventually denied due to protections for the endangered Lower Keys marsh rabbit and the silver rice rat. Mr. Good sued, arguing that if he could not develop his property due to overly-restrictive regulations, it amounted to a “regulatory taking” for which he was due compensation from the government. A federal court saw things differently and eventually ruled that the property still retained some value and therefore did not require any “just compensation” for Mr. Good’s loss. A year later the Supreme Court declined to hear an appeal, allowing the lower court’s decision to stand (7).

### QUICK FACTS

- The ESA’s stated purpose is to help endangered species recover. However, of the approximately 2,000 species of plants and animals listed as “endangered” or “threatened” since the law’s enactment, only 22 have seen their populations recover to satisfactory levels (1).

### NOTABLE & QUOTABLE

“...the [Endangered Species] Act has dragged landowners into endless conflicts and litigation. Its vague classifications allow private property to be declared “critical habitats,” almost arbitrarily, resulting in many use restrictions and seizures.”

- **Nancy Marano and Ben Lieberman**, The Heritage Foundation (2)

## **ECONOMIC IMPACT OF THE ESA: THE CASE OF THE SPOTTED OWL**

*Hidden in the Act's wildlife protections are property rights violations just waiting to happen.*

Locking up land and preventing development in the name of species protection can impose immense costs on the economy. Perhaps the best-known example is the government effort to protect the northern spotted owl in the forests of the Pacific Northwest. The spotted owl was listed as a "threatened" species in 1990 under the guise of species protection. However, the real target was the region's logging industry. The ESA regulations resulted in serious damage to the region's economy. In the state of Oregon alone timber production has collapsed, falling from 8.7 billion board feet in 1986 to just 3.2 billion in 2010 (8). More than a hundred sawmills have closed, eliminating jobs and lowering income in rural communities and contributing to the state's above-average 9.1 percent unemployment rate (9).

What's worse, more than twenty years of federal protections for the spotted owl have done little to aid in the species' recovery. The FSW released a revised "recovery plan" in June 2011 indicating that de-listing is still at least 30 years off. The range of protected habitat would need to be expanded even further, putting even more strain on the region's timber industry. And perhaps a larger threat to the species has arisen not from manmade factors, but from competition with a more adaptable (and nearly identical) owl species called the barred owl. Key to the new recovery plan: "experimental removal" (i.e. shooting) of barred owls (10). This is a classic example of government regulations getting ahead of common sense and having serious impacts for decades.

## **CONCLUSION**

Protecting endangered wildlife is an important and laudable goal, but too often ESA regulations go much too far in putting the interests of plants and animals above economic growth and the wellbeing of American citizens. Moreover, hidden in the Act's wildlife protections are property rights violations just waiting to happen. As the Competitive Enterprise Institute's Myron Ebell explains:

It's really less about protecting endangered species and more about putting on federal land use controls, shutting down economic activity on federal lands, and telling rural landowners what they can and cannot do with their land (11).

Such concerns will continue to be at the core of public opposition to the ESA in the years ahead.

Endnotes:

1. HOUSE COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY, Written Testimony of Jonathan H. Adler, professor, Case Western Reserve University School of Law, The Endangered Species Act: Reviewing the Nexus of Science and Policy, at 7 (October 13, 2011) (online at [http://science.house.gov/republicans.science.house.gov/files/documents/hearings/101311\\_Adler.pdf](http://science.house.gov/republicans.science.house.gov/files/documents/hearings/101311_Adler.pdf)).
2. Nancy Marano and Ben Lieberman, Improving the Endangered Species Act: Balancing the Needs of Landowners and Endangered Wildlife, THE HERITAGE FOUNDATION (September 23, 2005) (online at <http://www.heritage.org/research/reports/2005/09/improving-the-endangered-species-act-balancing-the-needs-of-landowners-and-endangeredwildlife>).
3. Palila v. Hawaii Dep't of Land & Natural Resources, 639 F.2d 495 (9th Circuit 1981)
4. Babbitt v. Sweet Home Chapt. Comms. for Ore, 515 U.S. 687 (1995).
5. Endangered Species Act, Section 7 and Section 9.
6. 50 CFR 17.3, 50 CFR 222.102
7. Kristen M. Fletcher, Landowner Expectations Dashed in the Florida Keys, WATER LOG JOURNAL, Vol. 20, No. 1, at 6-7 (2000) (online at <http://masglp.olemiss.edu/Water%20Log%20PDF/20.1.pdf>).
8. OREGON DEPARTMENT OF FORESTRY, Oregon Annual Timber Harvest Reports: 1986-2010 (online at [http://www.oregon.gov/ODF/STATE\\_FORESTS/FRP/annual\\_reports.shtml](http://www.oregon.gov/ODF/STATE_FORESTS/FRP/annual_reports.shtml)) (accessed January 18, 2012).
9. BUREAU OF LABOR STATISTICS, Regional and State Employment and Unemployment: November 2011 (December 20, 2011) (on-line at [http://bls.gov/news.release/archives/laus\\_12202011.pdf](http://bls.gov/news.release/archives/laus_12202011.pdf)).
10. U.S. FISH AND WILDLIFE SERVICE, Revised Recovery Plan for the Northern Spotted Owl, at III-64 (June 30, 2011) (online at <http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/Recovery/Library/Documents/RevisedNSORecPlan2011.pdf>). See also James L. Huffman, Environmentalist Wisdom: Shoot One Owl to Save the Other, WALL STREET JOURNAL (July 30, 2011) (online at <http://online.wsj.com/article/SB10001424053111903554904576458421294580328.html>).
11. SPAN WASHINGTON JOURNAL, Interview with Myron Ebell and Bill Snape on the Endangered Species Act (May 14, 2011) (online at <http://www.c-spanvideo.org/program/299520-4>).

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