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## Externalization Of Federal Public Policy Costs: The Endangered Species Act

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# EXTERNALIZATION OF FEDERAL PUBLIC POLICY COSTS: THE ENDANGERED SPECIES ACT

*Congressman Bill Thomas\**

As we stand on the brink of the twenty-first century, we should ask how we can meet the needs of our economy and our environment. At the turn of the century, five percent of the world's people lived in cities with populations over 100,000.<sup>1</sup> Today an estimated forty-five percent, slightly more than 2.5 billion people, live in urban centers.<sup>2</sup> Agricultural advances have kept up with the growth of these megacities, as fertilizer, pesticides, irrigation, and improved seeds and root stocks have contributed significantly to food production increases.<sup>3</sup> Today's modern farmers throughout the world, and especially in the United States, however, are faced with an altogether different problem: a willingness of government to externalize the cost of its policies by forcing those costs onto private property owners. For example, to protect species under the Endangered Species Act of 1973 ("ESA" or the "Act")<sup>4</sup>, the government typically prohibits or constrains property owners from

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1. Eugene Linden, *The Urban Jam: 61 Percent of World Population Expected to Live in Cities by 2025*, *BUFF. NEWS*, Apr. 14, 1996, at F7.

2. *Id.*

3. Keith Schneider, *Scientific Advances Lead to Era of Food Surplus Around World*, *N.Y. TIMES*, Sept. 9, 1986, at C1.

4. 16 U.S.C. §§ 1531-44 (1988 & Supp. 1994).

using their property as they wish — for example, by forbidding them to build on their land.<sup>5</sup>

When the government wants to build a new federal facility, the property owner can be forced to surrender title through eminent domain.<sup>6</sup> Further, when the government wants to take privately held property for its own purposes, it has the power under the Constitution to force a sale of the property.<sup>7</sup> But in these cases, it at least has to pay the owners just compensation for their property.<sup>8</sup> However, when government regulates how private owners may use their land, it typically does so without any recognition of, or compensation for, the costs.

This de facto taking of property — the practice of restricting a person's right to use his property without compensating for loss — creates significant disincentives for farmers to help support this government-imposed public policy.<sup>9</sup> Under this type of regulatory

5. 16 U.S.C. § 1538 (a)(2)(B) (1994) (providing that "it is unlawful . . . [to] remove, cut, dig up, or damage or destroy any [endangered species listed pursuant to 16 U.S.C. § 1533] on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law"). See Albert Gidari, *The Economy of Nature, Private Property and the Endangered Species Act*, 6 *FORDHAM ENVTL. L.J.* 661 (1995); J.B. Ruhl, *Section 7 (a) (1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 *ENVTL. L.* 1107 (1995).

6. "The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good." *BLACK'S LAW DICTIONARY* 523 (6th ed. 1990).

7. U.S. CONST. amend. V: "Nor shall private property be taken for public use, without just compensation." Although the Supreme Court has handed down regulatory takings decisions since 1922, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it only began to articulate criteria and per se rules to guide the regulatory takings analysis in 1978 with its decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

8. The right of just compensation for property is closely guarded in the United States. See *Armstrong v. United States*, 364 U.S. 40, 49 (1963) (noting that one of the principal rationales for the Fifth Amendment's Just Compensation Clause is to "bar government from forcing some people alone to bear public burdens which, in all justice and fairness, should be borne by the public as a whole.").

9. See, e.g., *Babbitt v. Sweet Home Ch. of Communities for a Greater Or.*,

taking, property owners can face heavy financial burdens or even have their entire life savings wiped out.<sup>10</sup> Instead of accommodating endangered species<sup>11</sup> found on their land, these property owners may even act to prevent the species from establishing a habitat.<sup>12</sup> When otherwise reasonable farmers and ranchers in the West talk about dealing with endangered species in terms of “shoot, shovel, and shut up,”<sup>13</sup> it’s a sign of how

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115 S. Ct. 2407, 2421 (1995) (Scalia, J., dissenting). (“The Court’s holding . . . imposes unfairness to the point of financial ruin — not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.”).

10. Numerous examples exist of property owners being adversely affected by species protection in the western United States. See Gail Wesson, *Tribal Farmer Warned About K-Rat*, PRESS-ENTERPRISE (Riverside, Cal.), Nov. 26, 1992, at B1 (describing the plight of Native Americans who were recently prevented from farming their land because an endangered rodent had been found on their reservation); Juan C. Arancibia, *Group Forming to Fight Restrictions*, PRESS-ENTERPRISE (Riverside, Cal.), July 24, 1992, at B2 (reporting how a family of five in southern California can neither expand their one-bedroom house to accommodate the size of their family nor sell their affected property because of the existence of an endangered rodent on their property). See also *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), cert. denied, 490 U.S. 1114 (1989) (affirming \$2500 fine of a rancher by the Department of the Interior for shooting a grizzly bear after grizzly bears from a nearby national park killed 20 of his sheep worth at least \$1200).

11. An “endangered species” is defined as any species of fish, wildlife or plant “which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532 (6) (1994).

12. For an explanation of how the ESA actually thwarts species conservation by encouraging private landowners to destroy listed species, see Martin Van Der Werf, *Endangered Species Act “Gotta Be Fixed,” Foe Says*, ARIZ. REPUBLIC, July 1, 1995, at B1 (quoting Charles Cushman, executive director of the American Land Rights Association: “A private property owner is thinking to himself, ‘I find a spotted owl on my property, I’m going to lose everything I’ve worked for all my life.’ . . . I’ll tell you right now, that owl’s never going to show up on anyone’s census.”) See also Maura Dolan, *Nature at Risk in a Quiet War*, L.A. TIMES, Dec. 20, 1992, at A1 (citing numerous cases in which private landowners have killed endangered species or destroyed their habitats before the ESA could be invoked). For example, some California farmers in Riverside County have stopped rotating their fields to prevent endangered species from taking up residence on them. In another case, the potential listing of the California gnatcatcher prompted private landowners to shave their lands of coastal sage scrub, the bird’s natural habitat. *Id.*

13. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 294

intrusive and unrealistic this law has become. Since the challenge facing policymakers over the next century is to provide more incentives for farmers to voluntarily participate in habitat and species conservation, ESA reform is a good place to begin.

In my own Congressional district in California, the House of Representatives Resources Committee Task Force on the ESA held a hearing to seek public input for the reform of the Act.<sup>14</sup> Kern County was chosen because of its widely varying geography and the diversity of plant and animal species, that exist nowhere else, with small populations and limited ranges. The county is home to fourteen species listed as "endangered" or "threatened" under federal law, with another seventy-three species candidates for federal listing.<sup>15</sup> The citizens of the San Joaquin Valley of California support the preservation of America's rich natural heritage, but the ESA is not achieving its aim.

To environmental groups, the ESA is a monumental piece of legislation. The Act has been called one of the most ambitious and wide-reaching pieces of environmental legislation in the world.<sup>16</sup>

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(1995) (describing farmers' increasing trend of surreptitiously killing endangered species found on their land).

14. The hearing was held in Bakersfield, California on April 17, 1996. The 800-member audience heckled and jeered at any speaker who attempted to explain the workings of the Endangered Species Act. A few audience members are reported to have yelled, "Get a rope!" when a biologist made a case for protecting endangered species. Brent Walth, *Myth, Fact Collide in Kern County*, PORTLAND OREGONIAN, June 14, 1995, at A1.

15. *Id.* Indeed, the entire state of California has been termed the "endangered species capital of the United States" as it is the home of over 100 species currently listed as endangered or threatened and 162 awaiting classification. *Hearing on the ESA before the Comm. on Resources of the U.S. House of Representatives*, 104th Cong., 2d Sess. (1996) (testimony of John F. Stovall, General Counsel of Kern County Water Agency, on behalf of the Association of California Water Agencies).

16. See e.g., Virginia S. Albrecht & Thomas C. Jackson, *Battle Heats Up As Congress Begins Review of Endangered Species Act*, NAT'L L.J., May 18, 1992, at S1 (characterizing the ESA as "the most stringent environmental statute in the world."). One expert has gone so far as to describe the ESA as having the strength to "prevent Polaris submarines from leaving their berths' if certain endangered marine species were migrating nearby, even in the event of war." Ike C. Sugg, *Caught In The Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 2 (1993-94) (quoting

However for owners of private lands that deem the land critical for their *own* survival, it is a Trojan Horse packed with arrogant bureaucrats trying to effect national land-use planning. To these land owners, the reality is that it allows more for the taking of private property than for the “taking” of species.<sup>17</sup>

The fact is that if Congress knew in 1974 how the Act would have turned out, it never would have passed the legislation in the first place — at least not in this form. If society wants to protect species, then society should pay for it, and not lay the costs onto the backs of that segment of society that owns land on which endangered species live. Although Americans like animals and nature, something is fundamentally wrong when a person is paying property taxes to *local* government for property the *federal* government says he cannot use. The Act is making private property owners pay the societal costs of what amounts to an ideologically-driven biodiversity program.

The costs for this program have certainly not been distributed equitably along geographic lines. Although environmentalists nationwide will argue for the intrinsic value of these species to society, the burden of compliance has fallen largely on Western states.<sup>18</sup> This can be explained by examining the ESA from a

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Robert J. Smith, *The Endangered Species Act: Saving Species or Stopping Growth?*, REG., Winter 1992, at 83.). Sugg postulates that Smith's assertion “is technically correct” as § 7 of the ESA, 16 U.S.C. § 1536 (1994), states that:

[a]ll Federal agencies are required to consult with the Secretary about proposed actions; to utilize their authorities in furtherance of the act; and to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of critical habitat unless the agency has been granted an exemption under the ESA.

Sugg, *supra*, at n.3.

17. Land that is designated as critical habitat for an endangered species is, in effect if not in practice, taken away from its owner as agricultural production, resource extraction, and other forms of economic development may be deemed to be “threatening” to the species by the Fish and Wildlife Service. Michael Vivoli, *Shoot, Shovel and Shut Up*, WASH. TIMES, Nov. 27, 1992, at F1. See Bruce Bab-bitt, *The ESA and “Takings”*: A Call for Innovation Within the Terms of the Act, 24 ENVTL. L. 355, 366 (1994) (“When a species is listed under the terms of the ESA, there is an effective freeze across the habitat occupied by that species.”).

18. Laura Spitzberg, *The Reauthorization of the Endangered Species Act*, 13

historical perspective, as the 1973 law passed long after most in the East had driven out their native species and paved over habitat.<sup>19</sup> Yet this inequity makes the burden for Western property owners no less, as they continue to absorb the costs associated with protecting species for the entire nation.

The law, as currently written, does not adequately address the economic and societal costs associated with the preservation of species. Property owners nationwide have received the message that the government places more value on the existence of species like the fairy shrimp<sup>20</sup> and the blunt-nose leopard lizard<sup>21</sup> than on humankind. It is a message made explicit in the Act itself, which effectively precludes consideration of all factors other than the supposed "intrinsic value" of a species.<sup>22</sup> Congress declared in the Act that such species are of incalculable value,<sup>23</sup> prompting the Supreme Court to rule that the "plain intent of Congress was to prevent extinction, whatever the cost."<sup>24</sup> Is it any wonder that the Constitutional rights of people are relegated to a secondary status behind the non-Constitutional rights of rats and weeds?

The Act is broadly and badly defined, and it gives power to those who are not subject to democratic accountability. Bureaucrats are making decisions about the use of our land, in many instances agricultural land, and their decisions affect food production and economic viability of millions of acres of land.<sup>25</sup> The foundation

TEMP. ENVTL. L. & TECH. J. 193, 194 (1994).

19. Timothy Egan, *As Easterners Try to Save West, Westerners Blanch*, N.Y. TIMES, Aug. 29, 1993, at A1.

20. 50 C.F.R. § 17.11(h) (1997) (listing fairy shrimp as protected species); see Timothy Noah, *A Fairy Shrimp Tale*, WALL ST. J., Oct. 21, 1994, at A14; Ronald A. Zumbrun, *Landowners Threatened By Fairy Shrimp, Wetland Rules*, SACRAMENTO BEE, Nov. 26, 1992, at B7.

21. 50 C.F.R. § 17.11(h) (1997) (listing blunt-nose leopard lizard as protected species); see Jim Mayer, *Aqueduct Can't Leap Lizard Laws*, SACRAMENTO BEE, Sept. 21, 1991, at A1.

22. Determinations to list or not list a species as an endangered species must be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533 (b)(1)(A) (1994).

23. Congress declared that species facing extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3) (1994).

24. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

25. An example of how decisions affecting private lands are being made by a

of the San Joaquin Valley economy and its farmers, ranchers, and oilmen — people who were once encouraged to make a valuable product from raw natural resources — is facing a government trying to turn its land into virtual wildlife refuges.

Each new species listing which disregards proper economic and scientific data makes people more skeptical of the value of the Act and the integrity of its management.<sup>26</sup> If species protection benefits all of us, then we should be willing to compensate landowners whose land is effectively taken to protect endangered species. Until such steps are taken, the Act will continue to fail to achieve its goal of federal wildlife protection which reflects the will of the American people.

Small property owners have become endangered species under the ESA's draconian regulations. Unfortunately, they are rarely ever noticed. One reason for this is that they do not have the time nor the financial resources to defend their rights in court.<sup>27</sup> Thus, very few takings cases are ever brought to court, which means small property owners are rarely compensated for their losses.<sup>28</sup> In other words, landowners are faced with a dilemma: either give up your property rights or violate the Act outright. Given that most small property owners rely on the economic use of their land to put food on the table and pay taxes, both options are unbearable.

What must be done to restore some reasonableness to the process of saving endangered species is to not take the strictly legalistic

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select few is evident in the proposed rule change to the ESA made by policy-makers in the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, the agencies that administer the Endangered Species Act. In February 1996, a proposed rule change was quietly inserted into the Federal Register which would allow, at the discretion of agency "experts", the listing of hybrids deemed to "resemble" a threatened or endangered ancestor. So secret was the proposed rule change that many people within the agencies had never heard of it. Thus the comment period for this change expired virtually unnoticed. See Alston Chase, *Endangered Species Act Has Been Perverted*, DENVER POST, Apr. 22, 1996, at B7.

26. See *id.* (describing how changes to the ESA are being "motivated by politics, not biology").

27. Vivoli, *supra* note 17, at F1.

28. *Id.* See also Robert Meltz, *ESA & Private Property: Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369 (1994).



view, but rather to design laws to attain desirable outcomes. It is possible to craft a law that would create voluntary participation in preservation programs, involving farmers, ranchers and other land users who can serve as our nation's stewards in conserving species when they know their economic survival will not be threatened by species protection.

Already there exists a voluntary Critical Habitat Reserve Program administered by the Department of Interior.<sup>29</sup> Similar to the Conservation Reserve Program under the Department of Agriculture ("USDA"),<sup>30</sup> the Critical Habitat Program would allow land owners to enter into contracts to manage listed plants and animals on their lands that are designated as critical habitat by maximizing and enhancing habitat quality.<sup>31</sup> The landowners would implement management plans for listed species that focus on the active enhancement of the species instead of relying on blanket use prohibitions.<sup>32</sup> In exchange for undertaking this management plan and for foregoing land uses that conflict with species management, the government would provide the costs of the program.<sup>33</sup>

The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) are exploring the use of controlled propagation of species as a conservation tool — particularly with plant species that might be valuable for medical purposes.<sup>34</sup>

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29. *Conservation Efforts of Private Lands Relating to the Reauthorization of the Endangered Species Act: Hearings Before the Subcomm. on Clean Water, Fisheries and Wildlife of the Senate Environment and Public Works Comm.* 104th Cong., 2d Sess. (1994) (statement of the Texas Farm Bureau presented by Ned Meister, Director of Commodity and Regulatory Activities) [hereinafter *Hearings*].

30. USDA's Conservation Reserve Program was created as part of the 1985 farm bill. It allowed farmers to lease "highly erodible" land to the USDA for 10-year blocks of time, thus removing the land from cultivation and grazing. By 1992, the Conservation Reserve had signed up approximately 37 million acres. Joe Fohn, *Habitat Plan Offers Alternatives*, SAN ANTONIO EXPRESS-NEWS, Aug. 7, 1994, available in 1994 WL 3551983.

31. For a detailed explanation of the application of the Critical Habitat Reserve Program to endangered species habitat, see *Hearings*, *supra* note 29.

32. *Id.*

33. *Id.*

34. The Fish and Wildlife Service and the National Marine Fisheries Service have proposed a policy regarding controlled propagation in the conservation of

Farmers who know how to grow a bumper crop of wheat, soybeans and corn could raise endangered plants through propagation from seeds, spores, divisions, cuttings or other plant tissue in a controlled environment, thus increasing the availability of seed stocks.<sup>35</sup> If the goal of protecting species is to bring species back from the threat of extinction, this idea certainly has much to offer.

Creating incentives as opposed to disincentives should be the major goal of ESA reform. Refusing to compensate private landowners for restrictions on the use of their land only creates enemies of conservation instead of conservationists. Ultimately, this short-sighted view will benefit neither animal species or species of the human kind.

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species protected under the ESA. See *Draft Policy Regarding Controlled Propagation of Species Listed Under the Endangered Species Act*, 61 Fed. Reg. 4716-4801 (1996).

35. *Id.* at 4717.

