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The Evolution of the Endangered Species Act

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INTRODUCTION:

The Endangered Species Act is often considered to be one of the most far-reaching, and patently assertive federal statutes ever to be implemented by Congress. In fact, at its passage, "the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[1] While its effects are arguably widespread and varied, its goal is decidedly singular—to curb the rate of extinction of the planet's endangered and threatened species. While Section 7 of the Act applies to federal agencies and actors and their potential to jeopardize endangered species, Sections 9 and 10 reach private actors as well.[2] Despite the Act's clearly valuable goals, its initial application provoked a deluge of backlash and outrage. Criticisms of the Act not only led to a damaged public perception, but also to insubstantial and inconsistent application, potentially to the detriment of the endangered species the Act aims to protect.

In this paper, I will explore the history and evolution of the Endangered Species Act, from its early years of stringent application, the resulting backlash, and finally to the Acts transformation into an adversary of industry and the general public. Through this paper, I will seek to elucidate why the Act's strict, comprehensive prohibitions ultimately

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[1] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).
[2] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (current version at 16 U.S.C. § 1531 (1988).

overshadowed its vital intent with an examination of the downfalls of federal prohibitive policy.

BACKGROUND:

1. **The Act's History and Construction**

The Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969 both predated the Act as it is understood today.[3] While all three statutes were designed with the intent to preserve endangered species, it wasn't until the Endangered Species Act of 1973 that a practical tactic for the preservation of endangered species was formulated.[4] Specifically, Congress agreed that the two prior acts did not provide "the kind of management tools needed to act early enough to save a vanishing species." [5] The Endangered Species Preservation Act of 1966 intended to create a program for the "conservation, protection, restoration, and propagation" of endangered species. [6] In contrast, the Endangered Species Conservation Act of 1969 was concerned with halting "the importation of and interstate commerce in endangered species." [7]

The inadequacy of the 1966 and 1969 acts stimulated the development of the Endangered Species Act of 1973. While both prior Acts attempted a kind of voluntary preservation of endangered species, the 1973 Act, with its Section 9 takings prohibition,

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[3] *See* Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973); Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).
[4] *See* 16 U.S.C. § 1538 (1988).
[5] S. Rep. No. 93-307, at 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991.
[6] Endangered Species Preservation Act §2(b).
[7] *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 Harv. Envtl. L. Rev. 209, 235 (2000)

is prohibitive in nature. A prohibitive policy outlaws certain activity outright. The difficulty with this kind of policy occurs when the costs of prohibition are not balanced against any discernable benefit. To Congress, of course, these benefits were obvious—the preservation of endangered species had the potential for great positive value for the planet as a whole. But for those tasked with assuming these prohibitions, especially private individuals, these benefits that Congress identified were not clearly ascertainable. It is of particular curiosity that regulated industry—those who would be most burdened by the Act's application—made no protests during the Act's legislative process.[8] As a result of this, as one scholar put it, "Congress defined the law prohibitively because no one told them not to."[9]

The Endangered Species Act implements its overall directive through a complex series of mandates and prohibitions. An "endangered species" under the Act is any species of plant, fish or wildlife "which is in danger of extinction throughout all or a significant portion of its range."[10] A "threatened species" is "any species of plant, fish, or wildlife which is likely to become endangered species within the foreseeable future throughout all or a significant portion of its range." [11] It is the primary responsibly of the Secretary of Interior or the Secretary of Commerce to designate animals as either

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[8] *See generally Endangered Species Conservation Act of 1972: Hearings Before the Subcomm. On the Environment of the Senate Comm. on Commerce,* 92d Cong., 2d Sess. (1972).
[9] S. Yaffee, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 17-18 (1982).
[10] 16 U.S.C. §1532(6) & (20) (1988).
[11] *Id.*

"endangered" or "threatened."[12] Any interested person may petition to have a species designated as endangered, or removed from the list.[13] A petitioner must present substantial scientific evidence in order to support an endangered designation.[14] Once a species has been identified as endangered, it is also the responsibility of the Secretary of the Interior to, concurrently, "designate any habitat of such species which is then considered to be a critical habitat."[15] The Act defines a critical habitat as:

> [T]he specific areas within the geographical area occupied by the species, at the time it is listed in accordance with section 4…on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and…specific areas outside the geographical area occupied by the species at the time it is listed…upon a determination by the Secretary that such areas are essential for the conservation of the species.

In addition, "[t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." [16] A final regulation designating critical habitat of an endangered species is published concurrently with the final

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[12] 16 U.S.C.A. §1533 (1988).
[13] *Id.*
[14] *Id.*
[15] 16 U.S.C.A. § 1533(3)(A) (1988).
[16] 16 U.S.C.A. § 1533 (1988).

regulation determining that a species is endangered or threatened.[17] Section 7 of the Act states that federal agencies must not let their actions jeopardize endangered or threatened species or their critical habitats.[18] While Section 7 is targeted at federal agencies and federal projects, Section 9 prohibits private "takings."[19] This section makes it unlawful for any person subject to the jurisdiction of the United States to "take", within the meaning of the Act, any species within the United States designated as endangered, and considerably broadens the prohibitions of Section 7.[20] To take within the meaning of the Act is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." [21] The Fish and Wildlife Service has defined "harm" to be "an act which actually kills or injures wildlife.[22] Such act may include significant habitat modification or degradation where it actually kills or injures the endangered specie.[23]

Section 10 also provides for various ways in which the Secretary may issue a permit or allow for an exemption in order to circumvent the taking prohibition.[24] According to this section of the Act, "[t]he Secretary may permit…any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[25] The petitioner requesting

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[17] *Id*.
[18] 16 U.S.C. § 1536 (1985).
[19] 16 U.S.C. § 1539(a)(2)(A) (1985).
[20] 16 U.S.C. §1536 (1985).
[21] 16 U.S.C.A. §1532 (1988).
[22] *Id*.
[23] *Id*.
[24] 16 U.S.C.A § 1539 (1988).
[25] 16 U.S.C.A. § 1539(a)(1)(B) (1988).

a permit must submit to the Secretary a conservation plan that outlines the steps the applicant will take to mitigate whatever impact results from the taking, what alternatives the applicant considered and why those alternatives are not possible.[26] The Secretary can issue the permit after an opportunity for public comment. The Act also includes an exemption for hardship, and provides:

> If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 1538(a) of this title to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of section 668cc-3 of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen

[26] *See* U.S.C.A. § 1539 (1988).

listed in Appendix I of the Convention which is to be used in a commercial activity.[27]

Together these provisions form the basis of the Act's mechanism in protecting endangered species. While Section 4 is tasked with identifying those species that are endangered, Sections 7 and 9 provide substantive protections by prohibiting certain human conduct, subject only to the exemptions in Section 10. As a result, Sections 7 and 9, those Sections that are seen as prohibitive, have stimulated the most criticism.

2. The Act's Legislative Intent

The stated purpose of the Endangered Species Act of 1973 is "to provide for conservation, protection and propagation of endangered species of fish and wildlife by Federal action and by encouraging the establishment of State endangered species conservation programs." [28] Congress also recognized, with considerable alarm, that half of the recorded extinctions of animals in the past two thousand years had occurred in merely the past fifty years.[29] Congress acknowledged the importance of these species, not only for their aesthetic qualities, but also for their importance in maintaining balance and health within Earth's ecosystems. "In hearings before the Subcommittee on the Environment it was shown that many of these animals perform vital biological services to maintain a 'balance of nature' within their environments. Also revealed was the need for biological diversity for scientific purposes." [30] Congress at this time also acknowledged

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[27] 16 U.S.C.A. § 1539(b) (1988).
[28] SR No. 93-307, US Code Cong & Adm News 2989 (1973).

[29] *See* 119 cong. Rec. 30, 165 (1973) (statement of Rep. Grover).
[30] S. Rep. No. 93-307, at 2, *reprinted in* 1973 U.S.C.C.A.N. at 2990.

that the two major causes of species extinction were hunting and habitat destruction, and as a result, the Act focused on maintaining habitat in order to protect endangered or threatened species.[31] In fact, many of the legislative proceedings during 1973 convey this need to protect threatened wildlife. The Report of the House Committee on Merchant Marine and Fisheries on H.R. 37 (a bill that included many of the fundamental attributes of the 1973 Act) stated:

> From the most narrow possible point of view, it is the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, any may provide answers to questions which we have not learned to ask…Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?...Sheer self-interest impels us to be cautious.[32]

It is clear from this passionate appeal that for Congress, this was not simply about preventing the extinction of singular, innocuous animal and plant species. It was instead intended as a comprehensive solution to the planet's continued degradation— an Act that the very survival of the human race, and the planet, depended on. On the other hand, there is no evidence in the legislative history that Congress considered the practical effects of protecting, and in doing so, prohibiting a taking of, every single species in

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[31] *Id.*
[32] H.R.Rep.No.93-412, pp. 4-5 (1973).

danger of extinction. Despite this, it is apparent that Congress had a dire concern for the conservation of species and "deemed the extinction of any species intolerable."[33]

3. Stringent Application and Amendment of the Act: *Tennessee Valley Authority v. Hill* and *Palila v. Hawaii*

Among the many cases interpreting the Endangered Species Act, *Tennessee Williams Authority v. Hill* and *Palila v. Hawaii* both stand out as key examples of the Act's potential power with stringent application. Both cases also prompted considerable amendment of the Act by Congress.

Tennessee Valley Authority v. Hill, often considered to be the most significant piece of Endangered Species Act litigation, stands as a testament to Section 7's powerful potential. In that case, environmental groups brought action against the Tennessee Valley Authority to enjoin them from completing an impoundment and dam (Tellico Dam Project) on the Little Tennessee River.[34] The area that the Authority intended to dam had been designated as the "critical habitat" of a species of fish called the snail darter.[35] Environmental groups claimed that the actions of the Tennessee Valley Authority in completing their dam would result in the extinction of the snail darter, and therefore, was in violation of the Endangered Species Act.[36] The Tennessee Valley Authority, in contrast, argued that the Act did not "prohibit the completion of a project authorized,

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[33] *See* Cameron Coggins and Irma S. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433, 1460 (1982).
[34] *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).
[35] *Id.*
[36] *Id* at 153.

funded, and substantially constructed before the Act was passed."[37] Thus, the key issue before the court was whether it was required to enjoin the operation of a nearly completed dam.[38] The district court, despite the Act's strong language, concluded that Congress could not have possibly intended the Act's prohibitions to apply to almost complete federal projects.[39] Thus, the court at the trial level refused to enjoin completion of the dam, and in doing so, utilized a kind of equitable balancing test. The Sixth Circuit, in contrast, reversed the district court's decision.

The Supreme Court's decision, in affirming the Sixth Circuit, both emphasized and solidified Congress' strong intent. The Court began its analysis by reiterating the Act's authorization of the Secretary "to issue such regulations as it deems necessary and advisable to provide for the conservation of such [endangered] species"[40] and that the Secretary had promulgated regulations declaring the snail darter endangered, "whose critical habitat would be destroyed by the creation of the Tellico Dam."[41] The court then held that the Endangered Species Act specifically requires that construction of the dam be enjoined in order to prevent the extinction of the snail darter. The court goes on to explain that there is nothing in the plain terms of § 7 of the Act that mentions that it cannot apply to federal projects that were already underway at the time of the Acts enactment.[42] The Court went even further to note that, "Congress intended endangered

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[37] *Id* at 162.
[38] *Id*. at 156.
[39] *Hill v. Tennessee Valley Authority*, 419 F. Supp. 753 (E.D. Tenn. 1976).
[40] 16 U.S.C. § 1533(d) (1976 ed.)
[41] *Tennessee Valley*, 437 U.S. at 172.
[42] *Id*.

species to be afforded the highest of priorities" and barred any use of the district court's balancing approach to limit the force of the Act.[43]

Tennessee Valley is considered a landmark case for many reasons. First, as one of the very first cases challenging the authority of §7 of the Act, it is indicative of the Act's sheer force. Second, this case lays out the essential conflict that will come to plague the Act for years to come—the battle between the apparent power of the Act and its stated aims, and the economic interests that appear to contradict those aims. The court even acknowledges the perhaps illogical nature of the Act in noting: "[i]t may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more that $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter."[44] Yet it is clear from the Court's that economic considerations will not stop the Court from implementing Congress' intent.

In 1978, in reaction to *Tennessee Valley*, Congress amended the Act in an attempt to alleviate its severity.[45] Most of these amendments revolved around Sections 4 and 7 and a revamp of the definition of critical habitat. The amendments also created an Endangered Species Act committee to grant exemptions to the Section 7 prohibition.

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[43] *Id* at 173.
[44] *Tennessee Valley*, 437 U.S. at 172.
[45] H.R. Rep. No. 1625, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9453.

Despite these amendments, at this time, Congress remained committed to the Act's premise, even defeating three proposed amendments in the Senate that threatened to immobilize the Act.[46]

In 1988, Congress further amended the Act in an attempt to deal with the effects of their 1978 amendments, where the listing process was significantly halted in a reaction to the *Tennessee Valley* case.[47] Congress noted that "nearly 1,000 new species have been identified for candidates that warrant listing and protection under the Act" and yet, "only about 50 species are being added to the Act's lists every year…"[48] Thus, Congress ordered the Secretary "to monitor the status of all candidate species" and to "make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species." It is clear from the back and forth of these amendments, that Congress was grappling with how to best effectuate its purpose in the face of growing opposition to the Act after the *Tennessee Valley* case.

While *Tennessee Valley* serves as the landmark interpretation of Section 7 of the Act, *Palila v. Hawaii Department of Land and Natural Resources* demonstrated Section 9's power, and, like *Tennesee Valley*, engendered its own set of reforms.

The Palila, a bird found only in Hawaii, was listed as an endangered species in 1967 and the Fish and Wildlife Service designed a critical habitat for the Palila in 1977.[49]

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[46] *Endangered Species Act Oversight: Hearings Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works,*95th Cong., 1st Sess. 542 (1977).
[47] Endangered Species Act Amendments of 1988, Pub.L. No. 100-478, 1988.
[48] *Id*.
[49] *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

The habitat is located in the mamane-naio forest on the slopes of Mauna Kea.[50] For thirty years prior to this habitat designation, Hawaii had maintained herds of feral sheep and goats in a game management zone on the same slopes of Mauna Kea.[51] The game management area is maintained by the Hawaii Department of Land and Natural Resources and the sheep and goats are used for sport-hunting purposes.[52] The problem with the presence of these feral animals, was that they had "a destructive impact on the mamane-naio ecosystem."[53] Because of this, the Fish and Wildlife Service concluded "that the eradication of the sheep and goats were necessary to achieve the regeneration of the forest and restoration of the Palila."[54] The Sierra Club and others brought action on behalf of the Palila, alleging that Hawaii's practice of maintaining these sheep and goats was in violation of the Endangered Species Act.[55] The court was primarily concerned with determining whether the State's action constituted a taking under the Act.[56] The District Court, and then Ninth Circuit, ultimately held that defendants had violated Section 9 of the Act by maintaining feral sheep and goats in the Plila's critical habitat.[57] The Ninth Circuit stated that "defendants' action in maintaining feral sheep and goats in the critical habitat is a violation of the Act since it was shown that the Palila was

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Palila v. Hawaii Dept. of Land & Natural Resources*, 639 F.2d 495, 496 (9th Cir. 1981).
[54] *See id.*
[55] *Id.*
[56] *Id.*
[57] *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

endangered by the activity."[58] In essence, the Court, through its holding, adhered to a broad interpretation of a Section 9 taking, finding that a taking had occurred despite the fact that plaintiffs failed to show that the Palila population was declining.[59]

In response to the court's interpretation in *Palila* of Section 9 of the Act, Congress once again undertook a series of reforms. Yet similar to the reforms that occurred after the *Tennessee Valley* case, these amendments sought to merely clarify the Act, not degrade it. In 1982, the Fish and Wildlife Service revised its definition of the term "harm" and Congress enacted a limited set of exceptions to Section 9's taking prohibition. Similar to the amendments of Section 7 in 1978 following *Tennessee Valley*, the 1982 amendments were not intended to dismantle the Act in any way.

ANALYSIS:

1. Public Criticism and Congressional Backlash Against the Act

The regulation of endangered species through Section 7 and, in particular, Section 9 of the Act has generated an enormous amount of controversy and criticism. Yet beneath this controversy, there exists a genuine problem. "Ninety percent of the listed endangered species on private land…[and] two-thirds of listed species have more than 60 percent of their total habitat on private land."[60] Despite these realities, Section 9 has often been criticized as merely a tool with which the federal government controls private

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[58] *Palila*, 639 F.2d at 497.
[59] *See Palila*, 471 F.Supp. at 985.
[60] D. Wilcove et al., *Rebuilding the Ark: Toward a More Effective Endangered Species Act for Private Land*, 28 ENVTL. L. REP. (Envtl. L. Inst.) 10,701 (1998).

land use. Many have even argued that "Section 9 of the ESA is one…incremental step in the federalization of land use regulation."[61]

While the seed of criticism was certainly planted with high profile cases that showcased the Act's power, like *Tennessee Valley* and *Palila,* the backlash surrounding the Act skyrocketed into the public consciousness through a series of highly publicized incidents in the 1990s. In 1992, in a speech to the logging community in Colville, Oregon, President Bush, in assailing the Act it as a "broken" law that "will not stand", captures the essence of the public sentiment at this time:[62]

> The Endangered Species Act was intended as a shield for species against the effects of major construction projects like highways and dams, not a sword aimed at the jobs, families and communities of entire regions like the Northwest…It's time to put people ahead of owls.[63]

The controversy that inspired this statement—the conflict between defenders of the Northern Spotted Owl and the logging industry—shot the Endangered Species Act into a state of both prominence and contention. The Northern Spotted Owl makes its home in the forests of the Pacific Northwest. These same trees that the owls live in are the source of the billion dollar logging industry. In 1986, a concerned environmental group petitioned the Fish and Wildlife Service to list the owl as endangered, largely, they argued, due to the decimation of the owl's habitat by heavy logging.[64] The FWS listed

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[61] Michael Wines, *Bush, in Far West, Sides With Loggers*, N.Y. TIMES, Sept. 15, 1992, at A25.
[62] *Id.*
[63] *Id.*
[64] *Id.*

the owl as threatened in 1990.[65] Subsequently, logging in the critical habitat of the Northern Spotted Owl was halted in 1991 after the Court in *Babbitt v. Sweet Home Chapter of Communities* held that the "Secretary's definition of 'harm', within [the] meaning of the ESA provision defining 'take', as including 'significant habitat modification or degradation that actually kills or injures wildlife' was reasonable."[66]

The response of the logging industry was pure outrage. Experts within the industry predicted that approximately 30,000 jobs would be lost because of the Supreme Court's holding. In turn, the controversy pitted both industry and individuals associated with the logging community against environmentalists. In response, and in a hope to compromise, the Clinton administrative enacted the Northwest Forest Plan in 1994, which was intended to protect the majority of owls, while still allowing for some harvest of timber.[67] While the results of the ESA's taking prohibition, and even the Northwest Forest Plan was certainly much less logging, and the loss of jobs; as of this year, the Northern Spotted Owl population continues to decline by 7.3 percent per year.[68]

In 1988, the FWS determined the Kangaroo Rat to be an endangered species for purposes of the Act.[69] The Kangaroo Rat is native to the Perris and San Jacinto Valleys in western Riverside County and the San Luis Rey and Temecula Valleys in northern San

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[65] Determination of Threatened Status of Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990).
[66] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).
[67] *See generally* U.S. Forest Serv. & Bureau of Land Mgmt., Record of Decision for Amendments to Forest Serv. and Bureau of Land Mgmt. Planning Documents Within the Range of the Northern Spotted Owl (1994) (hereinafter Record of Decision).
[68] Olympic Peninsula Audubon Society, available at olympicpeninsulaautobon.org.
[69] 53 Fed. Reg. 38.

Diego County in the state of California. In its determination, the FWS noted that that "[t]he lands now held in public ownership are not sufficient to ensure the maintenance of the species in perpetuity. Consequently, the preservation of many presently privately owned parcels likely will be necessary."[70] In October of 1993, a wildfire near Riverside, California led to the destruction of 29 homes. Many homeowners alleged that the spread of the fire and loss of homes was caused by the Department of the Interior's U.S. Fish and Wildlife Service's protection of the kangaroo rat. Homeowners further claimed that their inability to build firebreaks around their homes was due to the required conservation of the kangaroo rat's habitat. "Specifically, the homeowners alleged that a prohibition of 'disking' for weed abatement—an annual process of reducing the amount of vegetation around homes to provide a protective barrier from wildfires—precluded them from adequately protecting their homes."[71] The prohibition against disking in the Riverside area was adopted because of the County's concerns about violating the terms of the Endangered Species Act.[72]

Unsurprisingly, this tragic event and its connection to the provisions of the Endangered Species Act engendered significant outrage and media coverage. It also caught the attention of Congress. Former Louisiana House Representative W.J. "Billy" Tauzin lamented:

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[70] *Id.*
[71] GAO Report. Impact of Species Protection Efforts of the 1993 California Fire.
[72] *Id.*

> Something is fundamentally wrong in our country when a rat's home is more important than an American's home. At the rate we're going, it won't be long before we're forced the add people to the Endangered Species List.[73]

Both the public, and crucially, Congress, had lost sight of the Act's initial purpose as a result of these, and several other less high-profile incidents. Through this sentiment, the Act became a matter of humans versus animals; dire economic interests versus amorphous environmental concerns; life versus death.

2. Consequences of Stringent Application and Backlash

The Act's power and subsequent backlash has created the perverse incentive for landowners to preemptively destroy habitats in fear of the Act's prohibitions. This startling result casts doubt on the effectiveness of the Act, and ultimately, its prohibitive regulatory scheme.

In the pine forests of Boiling Spring Lakes, North Carolina, often home to the red-cockaded woodpecker, a bird listed as endangered by the Fish and Wildlife Service, landowners routinely cut down trees when they notice the beginnings of infiltration of the nesting woodpeckers.[74] In other words, "when a landowner felt that his property was turning into the sort of habitat that might attract a nesting pair of woodpeckers, he rushed in to cut down the trees."[75] In Tucson, Arizona, landowners waged a similar war against

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[73] W.J. Tauzin, *'If You Take It, Pay For It': Something's Wrong When a Rat's Home is More Important than an American's Home*, Roll Call, July 25, 1994, *available in* LEXIS, Nexis library, CURNWS File.
[74] Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003).
[75] Stephen Dubner and Steven Levitt, *Unintended Consequences*, NEW YORK TIMES MAGAZINE, Jan. 20, 2008.

the cactus ferruginous pygmy owl. In that region, landowners are also clearing their land in order to prevent a critical habitat designation, and thus, effective federal control over their land and economic loss. This kind of preemptive behavior is all too common throughout the United States. In fact, a 1996 developers' guide from the National Association of Home Builders advises: "[t]he highest level of assurance that a property owner will not face an E.S.A. issue is to maintain the property in such a condition that protected species cannot occupy the property."[76] The prohibitive nature of the Act incentivizes landowners to simply get rid of the problem instead of having to deal with expected losses. These harmful incentives, coupled with the Act's poor public perception, have rendered a once powerful measure significantly damaged. These growing rebellions by landowners represent a failure of the prohibitive nature of the Act—without discernable benefits or incentives, most landowners' priorities understandably remain those which are most imminent, principally economic survival.

3. The Act and Prohibitive Policy: What Went Wrong?

The Endangered Species Act seemed to have everything in place at the outset to become a successful federal policy—unlike its predecessors, it not only had a clear goal, but also the management tools needed to enforce such a scheme. And yet, why has the Act engendered such backlash, and then, as a result, failed to accomplish its initial purpose? Part of the problem, of course, is the altered perception of the Act through continued criticism. As Federico Cheever puts it, in his article Road to Recovery: A New Way of Thinking About the Endangered Species Act, "[w]hen discussion focuses on

[76] National Association of Homebuiders, *Developer's Guide to Endangered Species Regulation*, (1996).

whether section 9 prohibits logging in the Pacific Northwest or section 7 prevents construction of a federal dam, the underlying justification for the Endangered Species Act—that prudence dictates that we preserve the biological diversity on which we depend—is obscured."[77] It is clear that public and political discourse has dominated the commendable intentions of the Act.

The problem may also lie in the federal prohibitive regulatory scheme in general. It is clear from the Act's predecessors that voluntary approaches to wildlife preservation have failed. Therefore, it seems natural that the Act would contain strong substantive mandates and prohibitions. Yet in a way, the application of the Act's prohibitions has been its downfall, and has, in effect, overshadowed its crucial purpose. Steven Yaffee has argued in his book, Prohibitive Policy: Implementing the Federal Endangered Species Act, that prohibitive policy is at its most effective when it is clear that the risks involved in engaging in the prohibited policy are very large.[78] While experts understand the grave risks involved in the extinction of species, it is difficult for an average citizen to comprehend these risks, especially when the Act effectively prohibits activity that's benefits are immediately apparent. In turn, without any tangible, comprehensible benefits accrued from a regulatory scheme that is prohibitive, the prohibitions simply do not seem worth it—in contrast, they feel intrusive, even dangerous. Indeed, "law, if not a part of morality, is limited by it."[79] While the context of these words by Oliver Wendell Holmes

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[77] Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1 (1996).
[78] STEPHEN YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT (1982).
[79] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

is more extreme, they still have some application here—the public will instinctively balk at prohibitive regulation that does not align with its own ideas of what is important. Holmes continued by noting that, "…this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time."[80] As evidenced from the pervasive preemptive destruction of critical habitats, landowners, in weighing the risks of engaging in the Act's prohibited policy, are choosing to engage. They are choosing to engage because, to them, the risks involved in *not* engaging appear dire.

CONCLUSION:

In order for the Act's prohibitive nature to be effective, the general public needs to be educated about the intrinsic benefits of species preservation. The general public needs not only to be educated, but it also needs to be *excited*, it needs to be filled with the kind of anxiety and drive that supports the most successful of government initiatives. Yet our current public perception of the Act and its prohibitive mandates stands as a significant roadblock to this pursuit of enlightenment, so to speak. At its core, the controversy surrounding the Endangered Species Act begs a larger question. Who is the Act protecting? Of course, on its surface, the Act protects those species designated as endangered by the Fish and Wildlife Service. But when viewing the Act in its larger sense, and acknowledging its legislative history, it is clear that its concerns are much greater. The extinction of Earth's plant and animal species has an everlasting effect on

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[80] *Id.*

Earth's ecosystem, and ultimately, on our survival as human beings. In a deteriorating environment, we deteriorate. The suffering is far greater than the loss of some obscure, innocuous creature, or the loss of superficial aesthetic appeal—it is systemic.