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**THE FUTURE OF THE ENDANGERED SPECIES ACT:  
SUBSTANTIVE STATUTE WITH TEETH OR PROCEDURAL PAPER TIGER?**

by

**Scott M. Stearns**

**B.A. The University of Notre Dame, 1995**

**J.D. The University of Montana, 1998**

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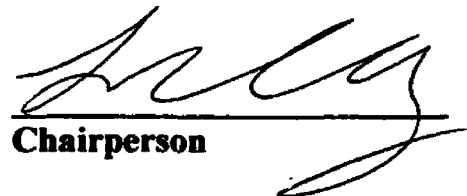
**for the degree of**

**Master of Science**

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**1998**

**Approved by:**

  
**Chairperson**

  
**Dean, Graduate School**

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What is the future of the Endangered Species Act (ESA)? While the future of the Act is uncertain, it is certain that it will be decided in Washington D.C. This paper will explore the future of the ESA during and after the reauthorization process, especially the two most disputed sections of the ESA: section 9 which prohibits private actions that adversely affect endangered species and section 10 which provides an exception to the ESA through Habitat Conservation Plans (HCPs).

To predict how these disputed sections might fare in the reauthorization process, I will look specifically at

- a. the Babbitt v. Sweet Home Chapter of Communities for a Great Oregon decision, especially the dissent's strong language in favor of property rights rather than species protection;
- b. the political makeup of Congress as members of the majority Republican party have, like the dissent in Babbitt, keyed on protecting property rights through reauthorization; and
- c. the possibility of Congress' failure to reauthorize the ESA and how this failure might lead to a role for the Administration in shaping the debate over the future of the ESA.

## **I. Introduction**

Species protection comes about in many ways. Here in the United States, we all do our part to protect species: as landowners allowing species to live and thrive on our property; as activists advocating for the protection of a particular species; as consumers in a global marketplace, choosing not to buy certain products such as ivory. Another way

we protect species is by voting. Citizens of this country can (and sometimes even do) vote for the elected representatives who serve for us in our democracy. These politicians represent many interests while serving as United States Senators, Representatives, and President in Washington D.C. These elected representatives play important roles in protecting species by enacting laws, and thus, we can protect species by voting for or against these representatives.

The law synonymous with species protection is the Endangered Species Act. Given current concerns over how the ESA affects private property rights, the political makeup of Congress, and the Administration's expanding role in species protection, it is likely the ESA will change through the reauthorization process. The question then becomes, will this change cause the ESA to remain a substantive statute with the teeth to require compliance with its mandates? Or, on the other hand, will the Act become more procedural in nature through the reauthorization process, a list of lofty goals rather than a set of hard and fast rules?

My prediction is that the ESA will become less of a forceful law as opposing groups are going to have to compromise on species protection in order to achieve reauthorization.

## **II. History and Background of the ESA**

The Endangered Species Act is the most significant and substantive set of laws designed to protect endangered plant and animal species ever produced by Congress. The United States Supreme Court went so far as to describe the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any



nation.”<sup>1</sup> Since it was signed into law in 1973, the ESA has matured into a powerful federal wildlife conservation mandate. This strong mandate has alarmed many private landowners who fear that their lands may be annexed by government regulation in order to realize habitat conservation. The very nature of the ESA’s powerful conservation mandate and the public controversy that it has caused may endanger the Act’s future.

#### **A. 16 U.S.C. § 1531: The Purpose of the ESA**

The ESA is codified at 16 U.S.C. §§ 1531-1544 . The purpose of this Act is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] to provide a program for the conservation of such endangered species and threatened species . . . .”<sup>2</sup>

“Endangered species” is defined as “any species which is in danger of extinction throughout all or a significant portion of its range . . . .”<sup>3</sup> “Threatened species” is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>4</sup>

With the enactment of the ESA, Congress for the first time recognized that there is value in protecting threatened and endangered species. Whether these species somehow provide a cure for cancer or are just pretty to look at, the Act served as a confirmation of

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<sup>1</sup>TVA v. Hill, 437 U.S. 153, 180 (1978).

<sup>2</sup>16 U.S.C. § 1531(b) (1996) (hereinafter, all statutory cites to the ESA will be abbreviated. Using this example: ESA § 2).

<sup>3</sup>ESA § 3.

<sup>4</sup>ESA § 3.

America's inherent belief that living species are more valuable than extinct species. In its present form, the ESA provides tangible provisions that requires all of us to do what we can to conserve threatened and endangered species.

#### **B. Section 9 of the ESA: Protection Against Private Action**

A cursory study of the ESA and its case law suggests that the Act applies mainly to federal actions taken on federal lands. Section 7 of the ESA supports this assumption as it applies strictly to federal actions.<sup>5</sup> Much of the case law surrounds federal projects or major projects taking place on federal lands.<sup>6</sup> While the focus of the ESA may be on federal actions, the Act's species conservation mandate also implicates private actions taken on private lands.

More than 50 percent of the listed plant and animal species are found only on private land.<sup>7</sup> Section 9 of the ESA prohibits private action that would adversely affect threatened or endangered species.<sup>8</sup> The ESA makes it unlawful for any person to take any listed species of plants or animals.<sup>9</sup> "Take" means to harass, harm, pursue, hunt, shoot,

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<sup>5</sup>See generally ESA § 7.

<sup>6</sup>For examples, see TVA v. Hill, 437 U.S. 153 (1978), Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), and Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

<sup>7</sup>Hank Fisher & Wendy Hudson, Building Economic Incentives into the Endangered Species Act, in Defenders of Wildlife i, vii (1993).

<sup>8</sup>ESA § 9.

<sup>9</sup>Id.

wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.<sup>10</sup>

“Take” is also expansively defined to prohibit takings of listed species, even when that taking is incidental to other actions.<sup>11</sup>

### **C. Section 10 of the ESA: Habitat Conservation Plans**

Though Section 9 was rarely enforced against incidental takings by private actions, Congress created an exception to this prohibition.<sup>12</sup> In 1982, Section 10(a) was added allowing the Secretary of the Interior to issue incidental take permits to private actors.<sup>13</sup> In order to receive an incidental take permit, the private actor had to submit a Habitat Conservation Plan (HCP) to the Secretary.<sup>14</sup> An HCP must state how the private actor plans to minimize the impact of the taking and assure the Secretary that the private action “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.”<sup>15</sup>

Lack of enforcement aside, the mere possibility of enforcement of the incidental take prohibition led to a legal challenge concerning a definition promulgated by the Secretary of the Interior.<sup>16</sup> Under the Secretary’s expansive definition of “take,” “harm”

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<sup>10</sup>ESA § 3.

<sup>11</sup>Robert V. Percival, Alan S. Miller, Christopher H. Schroeder, & James P. Leape, Environmental Regulation: Law, Science, and Policy 1220 (1996) (hereinafter Percival).

<sup>12</sup>Id. at 1221.

<sup>13</sup>Id.

<sup>14</sup>Id.

<sup>15</sup>ESA § 10(a)(2)(B)(iv).

<sup>16</sup>Percival at 1221.

was interpreted to mean an act which kills or injures wildlife, including actions that would modify or degrade habitat that would result in the death of or injury to wildlife.<sup>17</sup> This expansive definition caused some private landowners to worry that the prohibition against habitat degradation may affect their property rights and possibly the value of their land. These worries led to the Sweet Home Chapter of Communities for a Great Oregon v. Babbitt litigation.<sup>18</sup>

### **III. The Application of the ESA to Private Actions**

The U.S. Fish and Wildlife Service made the decision to list the northern spotted owl under the ESA on July 23, 1990.<sup>19</sup> This decision to protect the owl also served to protect the range of the spotted owl. Following the listing of the owl, 6.9 million acres of the old-growth forest that it called home was placed off-limits to logging.<sup>20</sup> The listing of the spotted owl and the protection of its habitat led to litigation that has had a lasting effect on the reauthorization debate.

#### **A. Babbitt v. Sweet Home Chapter for a Great Oregon**

In 1992, a group of private landowners, logging companies, and some other groups challenged the regulatory definition of “harm” promulgated by the Secretary of the

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<sup>17</sup>Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2407-09 (1995) (hereinafter Sweet Home).

<sup>18</sup>Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 806 F. Supp. 279 (1992).

<sup>19</sup>Determination of Threatened Status for the Northern Spotted Owl; Final Rule, 55 Fed. Reg. 26114-194 (1990).

<sup>20</sup>Determination of Critical Habitat for the Northern Spotted Owl; Final Rule, 57 Fed. Reg. 1796-838 (1992).

Interior.<sup>21</sup> These organizations specifically challenged the application of 50 C.F.R. § 17.3 to the endangered red-cockaded woodpecker and to the threatened northern spotted owl.<sup>22</sup> These groups argued that the protection of these species on their private lands harmed them financially.<sup>23</sup> The District Court granted the defendants' motion for summary judgment declaring that Congress wanted the Secretary's expansive interpretation of "harm" in the definition of "take" to include habitat modification.<sup>24</sup>

In July 1993, a panel of the Court of Appeals for the D.C. Circuit initially rejected the challenge to the District Court's ruling.<sup>25</sup> However, six months later, one judge changed his mind and reversed the panel's earlier decision.<sup>26</sup> Applying the legal principle of *noscitur a sociis*, where the meaning of a word is determined by reference to the meaning of other words associated with it in the statute, the panel determined that the word "harm" could not be interpreted to include habitat modification.<sup>27</sup>

The government's petition for rehearing en banc was denied, forcing them to seek

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<sup>21</sup>Sweet Home at 2408.

<sup>22</sup>Id. at 2410.

<sup>23</sup>Id.

<sup>24</sup>Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 806 F. Supp. 279 (1992).

<sup>25</sup>Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), vacated on petition for reh., 17 F.3d 1463 (1994).

<sup>26</sup>Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).

<sup>27</sup>Percival at 1221.

review from the United States Supreme Court.<sup>28</sup> The Supreme Court granted review and issued the Sweet Home decision on the last day of its 1994-95 term.<sup>29</sup>

In Sweet Home, the Supreme Court reversed the Court of Appeals holding that the Secretary did not exceed his authority under the ESA in promulgating § 17.3 and that the Secretary's definition of "harm" was in accord with Congressional intent and with the ESA's text, structure, and legislative history.<sup>30</sup>

The majority of the Supreme Court made the technically correct legal determination in holding that the Secretary's definition was compatible with the intent of the ESA. Habitat modification can lead to the extinction of threatened and endangered species, therefore the Secretary had to include this language in the section having to do with the taking of species. Degradation of habitat may have more of an effect on listed species than hunting and killing. It takes far longer for a modified ecosystem to regenerate than it does for plants and animals to reproduce. Regardless of the logic behind the majority's decision, the dissent took issue with the holding arguing that private landowners would bear the burden of this definition promulgated by the Secretary.

#### **B. The Sweet Home Dissent: Impacts on Private Landowners**

Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas in the dissent, wrote that the ESA "(1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds for the acquisition of

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<sup>28</sup>Id.

<sup>29</sup>Id.

<sup>30</sup>Sweet Home, 115 S. Ct. at 2412-16.

private lands, to preserve the habitat of endangered animals.”<sup>31</sup> The dissent went on to say that the majority’s holding that the prohibition against hunting and killing incidentally preserves habitat on private lands “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.”<sup>32</sup>

Justice Scalia also wrote that the ESA “is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species.”<sup>33</sup> Translated, this means that if private property is to be affected by the ESA, the individual landowner should not have to shoulder the entire financial burden. Taxpayers should have to pay for preserving habitat on private lands, perhaps through the land acquisition program specified in Section 5 of the Act.

While this issue was resolved in the courts, much to the frustration of the more conservative element of the Supreme Court, the battleground has now shifted from the halls of justice to the halls of Congress. The disagreements in the judicial branch of government were harbingers of disagreements taking place in the legislative branch. Disagreements over the ESA are in the process of being remedied by Congress through reauthorization.

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<sup>31</sup>Id. at 2421.

<sup>32</sup>Id.

<sup>33</sup>Id. at 2431.

#### **IV. Congressional Reauthorization of the ESA**

Since Congress enacted the ESA in 1973, no other act has protected threatened and endangered species with such force. Some acts incidentally protect species but no other law directly conserves endangered species like the ESA.<sup>34</sup> Whether protecting a three inch snail darter perch at the expense of a major federal dam project (albeit for only a short time) or conserving the habitat of the northern spotted owl by limiting the logging of old-growth forests, the ESA continues as a powerful tool for species conservation and protection.<sup>35</sup>

But the ESA may be as endangered as some of the plant and animal species it is designed to protect. The ESA's authorization to spend money expired on October 1, 1992.<sup>36</sup> The last four Congresses have tried and failed to reauthorize the ESA. Instead, Congress has appropriated money to the ESA ensuring that the Act remains operational while only delaying its inevitable and necessary reauthorization.<sup>37</sup> Once again, the pressure is on Congress to reauthorize the ESA, especially in the wake of the Sweet Home holding and the effects of ESA enforcement on private landowners.

The ESA's success as a strong statute has led to calls from private property

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<sup>34</sup>There are many examples, but see generally the National Environmental Policy Act (42 U.S.C. §§ 4321-4370d) and the Clean Water Act (33 U.S.C. §§ 1251-1387).

<sup>35</sup>See generally TVA v. Hill, 437 U.S. 153 (1978) and Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

<sup>36</sup>Tanya L. Godfrey, The Reauthorization of the Endangered Species Act: A Hotly Contested Debate, 98 W. Va. L. Rev. 979 (1996) (hereinafter Godfrey) (footnote omitted).

<sup>37</sup>Id. at 980.



advocates for significant changes that would weaken the Act.<sup>38</sup> Developers of private land have supported weakening the ESA because compliance can lead to the cancellation of projects or significant changes to their proposals.<sup>39</sup> Any time there is the potential for the take of a threatened or endangered species, projects can be stopped regardless of the amount of time and money that has been invested.<sup>40</sup> Perhaps Assistant Secretary of the Interior George Frampton best summarized how some private landowners feel about the ESA: "From a private landowner's point of view, the Endangered Species Act looks like a nuclear weapon."<sup>41</sup>

Because of the criticisms the ESA is receiving from the private property rights' perspective, the reauthorization process has, and will certainly continue, to spark a very contentious debate in Congress. Precious little of this debate will focus on federal agencies' and private landowners' duties to conserve threatened and endangered species. Instead the debate has primarily centered on reducing the burden suffered by private landowners at the hands of the ESA.<sup>42</sup> Each private landowner who opposes the ESA represents a vote to those in Congress currently tasked with the reauthorization of the

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<sup>38</sup>Id.

<sup>39</sup>M. Neil Browne & Nancy K. Kubasek, The Endangered Species Act: An Evaluation of Alternative Approaches, 3 Dick. J. Env'tl. L. & Pol'y 5 (1994) (footnote omitted).

<sup>40</sup>Eric Fisher, Habitat Conservation Planning Under the Endangered Species Act: No Surprises and the Quest for Certainty, 67 U. Colo. L. Rev. 371, 377 (1996).

<sup>41</sup>William K. Stevens, Future of the Endangered Species Act in Doubt as Law Is Debated, N.Y. Times, May 16, 1995, at C4.

<sup>42</sup>Major Ayres, Endangered Species Act Update, Army Law., Dec. 1995, at 84.

Act. Advocates for private landowners have mobilized. Groups, such as Defenders of Property Rights,<sup>43</sup> the National Endangered Species Act Reform Coalition (NESARC),<sup>44</sup> and Citizens for Private Property Rights<sup>45</sup> oppose many of the provisions of the ESA and will almost certainly influence the future of the ESA as they work to ensure policies favorable to their interests. These individual landowners and their advocates could play the biggest role in shaping the future of the ESA under the reauthorization process as any and all public disapproval surrounding the ESA may endanger the Act's Congressional reauthorization.

#### **A. Past Congressional Reauthorization Bills**

A number of reauthorization bills were introduced in previous Congresses.<sup>46</sup> Some of them called for weakening the ESA while others suggested only minor changes to an

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<sup>43</sup>Richard Carelli, Endangered Species Act Cuts Both Ways, Missoulain, March 20, 1997, at A1, A10.

<sup>44</sup>See the National Endangered Species Act Reform Coalition Internet site: <http://www.nesarc.org>. NESARC holds itself out as a broad-based coalition of over 200 member organizations representing millions of individuals across the United States, dedicated to bringing balance back to the Endangered Species Act. Their membership includes rural irrigators, municipalities, farmers, electric utilities and other individuals and organizations directly affected by the ESA.

<sup>45</sup>See the "Citizens for Private Property Rights" Internet site: <http://members.aol.com/proprts/cppr/ESA.html>. This group argues "that ESA reform is long overdue and absolutely essential because in its present form it fosters and engenders moral corruption, such as leading people to not adhere to the "Thou shalt not steal" concept. It is also leading people to help destroy our Constitution and our Constitutional Rights and the Country itself! No life of any insignificant creature is worth that!"

<sup>46</sup>For examples, see Common Sense Amendments for All Endangered Species Act, S. 1152, 104th Cong. (1995); Endangered Species Act Reform Act of 1995, S. 768, 104th Cong. (1995); Endangered Species Improvement Act of 1993, H.R. 1992, 103rd Cong. (1993); Endangered Species Protection Act of 1991, H.R. 61, 103rd Cong. (1991).

otherwise effective act. Several bills addressed private landowners' concerns with the ESA.<sup>47</sup> All of them failed.

For instance, in the 104th Congress, bills were introduced with provisions that would have expressly overruled the Sweet Home holding, compensated private landowners for restrictions placed on their land because of compliance with the ESA, and provided incentives for landowners if they took steps to comply with the ESA.<sup>48</sup> But the bill that seemed to receive the most attention reflected the point made in the Sweet Home dissent: that private land should not be "conscripted to national zoological use" under any circumstances.

#### **H.R. 2275: Endangered Species Conservation and Management Act of 1995**

H.R. 2275 was a high profile bill in the 104th Congress. The "Endangered Species Conservation and Management Act of 1995," also known as the Young-Pombo bill, was submitted by Representative Don Young (R-Alaska) and Representative Richard Pombo (R-California).<sup>49</sup> Though the bill was unsuccessful, the popularity of the bill could be inferred by its large number of co-sponsors, 127,<sup>50</sup> and the degree of media attention it received for its proposed sweeping changes to the ESA.<sup>51</sup>

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<sup>47</sup>For example, see the Private Property Owners' Bill of Rights, S. 953, 105th Cong. (1997) (introduced in the last three sessions under the same title).

<sup>48</sup>Godfrey at 1004.

<sup>49</sup>H.R. 2275, 104th Cong. (1996).

<sup>50</sup>Id.

<sup>51</sup>Godfrey at 1005.

Like other bills, the Young-Pombo bill would have required the government to compensate private landowners who were adversely affected by the ESA.<sup>52</sup> Its compensatory requirements would go into effect when an agency action under the ESA diminished the value of affected private property by at least twenty percent.<sup>53</sup> If the property value were diminished by more than 50 percent, the government would be required to pay the fair market value for the land at the request of the landowner.<sup>54</sup> This statutory compensation requirement was more reaching than the takings clause of the Constitution which only compensates landowners when the government takes most, if not all, of the possible economic use of the land.<sup>55</sup>

Another provision in the Young-Pombo bill would have overturned the holding in Sweet Home that confirmed the Secretary's definition of "harm" as an act which kills or injures wildlife, which may include habitat modification that results in the killing or injuring of wildlife.<sup>56</sup> The bill would have changed the definition of "harm" to be "a *direct action* against any member of an endangered species . . . that actually injures or kills a member of the species."<sup>57</sup> Habitat modification would not be considered a "direct action"

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<sup>52</sup>H.R. 2275, 104th Cong. Title I (1995).

<sup>53</sup>Id.

<sup>54</sup>Id.

<sup>55</sup>See generally the U.S. Const. amend. V ("private property [shall not] be taken for public use without just compensation") and Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

<sup>56</sup>See generally Sweet Home at 2407-09.

<sup>57</sup>H.R. 2275, 104th Cong. § 202 (1995) (emphasis added).

against an endangered species. Thus, this provision would have severely restricted an important means of habitat conservation on private land.

While receiving the support of private landowners' advocates, many others thought the Young-Pombo bill too extreme. Secretary of the Interior Bruce Babbitt said that the Young-Pombo bill "would effectively repeal the ESA."<sup>58</sup> With the focus of this bill on compensating private landowners for complying with the ESA, it is no surprise that there was intense debate over this proposed legislation. As was the case in previous sessions of Congress, partisan debate over bills like H.R. 2275 led to the stalemate of the reauthorization process.<sup>59</sup> The reauthorization process did not proceed any smoother in the 105th Congress as Congress again failed to reauthorize the ESA .

#### **B. Reauthorization Bills in the 105th Congress**

With the failure of the ESA to be reauthorized in the previous three Congresses, expectations were high for the 105th Congress to be more successful. The ESA sparked heated debate in the 105th Congress, with both praise and harsh words coming from the Congressmen and women charged with reauthorizing the Act:

"The ESA is our most important law to protect our Nation's natural resources and biological diversity, and has often been referred to as the "crown jewel" of environmental laws." Senator John Chafee (R-Rhode Island)<sup>60</sup>

"The [Endangered Species Act] can be improved, both for the species it is

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<sup>58</sup>Godfrey at 1008.

<sup>59</sup>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 Env'tl. L. 1107, 1153 (1995).

<sup>60</sup>143 Cong. Rec. S9421 (daily ed. September 16, 1997) (statement of Sen. Chafee).

designed to protect and for ranchers, farmers, and other private landowners.” Senator Max Baucus (D-Montana), Ranking Democrat, Senate Environment and Public Works Committee<sup>61</sup>

“The Endangered Species Act -- when it comes to the protection of life and property -- really needs a second look.” Senator Dianne Feinstein (D-California)<sup>62</sup>

“I am sorely disappointed in the way that [the ESA], with its good goal, has been abused by environmentalists . . . who use this law not to protect wildlife and endangered species, but to control the use of lands.” Congressman Don Young (R-Alaska)<sup>63</sup>

“Groups that are way out here on the fringe...have figured out a way to use [the ESA] to now impose power, their personal agenda, over communities across the country.” Congressman Henry Bonilla (R-Texas)<sup>64</sup>

“When it comes to a garter snake versus somebody's home and property and life and limb, I really think we need to get our priorities straight.” Senator Dianne Feinstein (D-California)<sup>65</sup>

With such divisive language, especially from critics of the ESA, it is not surprising that the ESA again failed to be reauthorized in the 105th Congress. With the failure of Congress to reauthorize the ESA, it is now the job of future Congresses to reauthorize the ESA. By looking at the bills introduced in the 105th Congress and why they failed, one can gain an idea of how the ESA may be reauthorized in the 106th Congress.

#### **S. 1180: The Endangered Species Recovery Act of 1997**

On September 16, 1997, in the first session of the 105th Congress, United States

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<sup>61</sup>143 Cong. Rec. S9423 (daily ed. September 16, 1997) (statement of Sen. Baucus).

<sup>62</sup>143 Cong. Rec. S4177 (daily ed. May 8, 1997) (statement of Sen. Feinstein).

<sup>63</sup>143 Cong. Rec. H2283 (daily ed. May 7, 1997) (statement of Rep. Young).

<sup>64</sup>143 Cong. Rec. H2298 (daily ed. May 7, 1997) (statement of Rep. Bonilla).

<sup>65</sup>143 Cong. Rec. S4177 (daily ed. May 8, 1997) (statement of Sen. Feinstein).

Senators Dirk Kempthorne (R-Idaho), John Chafee (R-Rhode Island), Harry Reid (D-Nevada), and Montana's own Max Baucus (D-Montana) introduced the "Endangered Species Recovery Act of 1997."<sup>66</sup> Senate Bill 1180 was a popular bill as inferred by its bipartisan support and 18 co-sponsors, including powerful Republican Senators like Orrin Hatch (R-Utah) and Jesse Helms (R-North Carolina).

The Endangered Species Recovery Act made a number of compromises between conflicting interests. It required the Secretary of the Interior or Commerce, as appropriate, to use the best scientific and commercial data available in making determinations as to whether a species should be listed as threatened or endangered, giving greater weight to peer-reviewed, field-tested, or empirical data when evaluating comparable data.<sup>67</sup> It would have set up a framework to de-list a previously threatened or endangered species when the goals of the recovery plan had been met.<sup>68</sup> It would have also implemented a private property owners educational and technical assistance program to help them preserve threatened and endangered species<sup>69</sup> and would have provided grants to private landowners who create, restore, or improve threatened and endangered species habitat.<sup>70</sup>

Probably the most contested provision of S. 1180 was the "no surprises" clause.

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<sup>66</sup>S. 1180, 105th Cong. (1997).

<sup>67</sup>Id. at § 3.

<sup>68</sup>Id. at § 2.

<sup>69</sup>Id. at § 7.

<sup>70</sup>Id. at § 5.

The no surprises clause would have ensured that a landowner who entered into an HCP would “not be required to undertake any additional mitigation measures for species covered by [the HCP] if such measures would require the payment of additional money, or the adoption of additional use, development or management restrictions on any land . . . without the consent of the [landowner].”<sup>71</sup> The no surprises clause was a concession to private landowners who participate in the HCP process. When the government and a landowner commit to an HCP, it is similar to a contract between the two parties. Like a contract, the parties want the promises contained in the HCP to be binding on the other party.

Landowners that receive an HCP from the government in order to develop their lands want to ensure that the government puts no further restrictions on their property than those already contained in the HCP.<sup>72</sup> Essentially, once landowners have entered into a deal with the government, they want “no surprises” to come up later. According to Interior Secretary Babbitt, “Landowners with private or commercial land have a legitimate concern. They want some assurance that once they agree to be a party to an HCP and to mitigate the effects of their activities on listed species, we won’t come back later for a second bite from the apple.”<sup>73</sup>

The problem with HCPs and assuring landowners that there will be no surprises is

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<sup>71</sup>Id. at § 5(c)(5)(B).

<sup>72</sup>John H. Cushman, Jr., The Endangered Species Act Gets a Makeover, N.Y. Times, June 2, 1998, at D2.

<sup>73</sup>Id.



that the situation may change for threatened and endangered species in the future. HCPs remain effective for a long time with some HCPs not scheduled to expire for 80 years.<sup>74</sup> If an HCP fails to provide for any harmful changes that occur in those 80 years, the government would not be able to intervene and help threatened and endangered species that were adversely affected by those changes. The no surprises clause effectively repeals the ESA on lands covered by an HCP for the time-period it specifies. Those lands would stay open to development under the HCP at the expense of endangered species even if the HCP failed to mitigate impacts on a species or even directly leads to its extinction. Developers would get all of the benefit of their development while the public would get all of the risk in the form of species extinction.<sup>75</sup> But as Secretary Babbitt has said, "A deal is a deal."<sup>76</sup>

Like every other reauthorization bill before the 105th Congress, Senate Bill 1180 failed. This was somewhat surprising though given the bipartisan support that this bill enjoyed. How a popular bill such as this one failed offers perhaps the best glimpse as to why Congress has had no success reauthorizing the ESA.

### **The Failure of S. 1180**

Senate Bill 1180 had little difficulty passing through the Senate Environment and

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<sup>74</sup>John H. Cushman, Jr., The Endangered Species Act Gets a Makeover, N.Y. Times, June 2, 1998, at D2.

<sup>75</sup>An idea also reflected in Kristin Shrader-Frechette & Earl D. McCoy, Method in Ecology 161-62 (Cambridge University Press 1993).

<sup>76</sup>John H. Cushman, Jr., The Endangered Species Act Gets a Makeover, N.Y. Times, June 2, 1998, at D2.

Public Works Committee by a 15-3 vote.<sup>77</sup> The bill was supported by every Republican member of the committee, a majority of the Democratic members, and was also strongly supported by the Clinton administration.<sup>78</sup> With so much support and so little opposition, why did this bill fail to pass? The main reason is that the Senate never really had the chance to debate and vote on this bill.

Senate Bill 1180 was on the Senate calendar for about a year and did not get considered.<sup>79</sup> In an attempt to have it be heard, Senator Kempthorne (R-Idaho) planned to offer the bill as an amendment to the Interior Appropriations Bill.<sup>80</sup> But the Senate stopped considering the Interior Appropriations Bill and thus Senate Bill 1180 could not be offered as an amendment.<sup>81</sup> Senator Baucus then asked the Senate to take up Senate Bill 1180 as a freestanding bill.<sup>82</sup> The Senate again did not hear it.

This bill was not considered because the Republican leadership did not allow the Senate to consider this bill. Until very late in the session, Senate Majority Leader Trent Lott (R-Mississippi) did not want to bring this bill up for a vote on the Senate floor as it did not have certain provisions that he wanted to see.<sup>83</sup> In the words of a member of

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<sup>77</sup>144 Cong. Rec. S10577 (daily ed. September 18, 1998) (statement of Sen. Baucus).

<sup>78</sup>Id.

<sup>79</sup>Id.

<sup>80</sup>Id.

<sup>81</sup>Id.

<sup>82</sup>Id.

<sup>83</sup>Telephone Interview with Brian Kuehl, Senator Baucus' Legislative Aide for Natural Resource Issues (November 3, 1998).

Senator Baucus' staff, Senator Lott did not like Senate Bill 1180 because it "did not weaken the ESA enough."<sup>84</sup> Senator Lott's main sticking point with this piece of legislation and all legislation having to do with the ESA is the effect of the ESA on private property rights.<sup>85</sup>

Senator Baucus said he would oppose any amendments that would disrupt the delicate balance of the bill under an agreement he reached with the very divergent group with whom he had put the bill together: Senators Kempthorne, Chafee, Reid and Interior Secretary Babbitt.<sup>86</sup> With people representing differing interests having drafted the bill, it is not surprising that Senator Lott disrupted this tenuous balance in insisting on amendments that would weaken the bill by staunchly protecting private property rights. When the coalition that put the bill together disagreed with Senator Lott, he exercised his authority by not allowing Senate Bill 1180 to be voted on by the Senate.<sup>87</sup>

Senate Bill 1180 was probably the 105th Congress' best chance of reauthorizing

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<sup>84</sup>Id.

<sup>85</sup>See his Fifth Amendment rhetoric in an ESA debate: The Constitution "is very clear and unambiguous. It says: ' . . . nor shall private property be taken for public use without just compensation.' The Constitution is very clear. And yet all across this country, privately owned property, including a lot of farmers' private property, and the private property of businessmen and individuals, is being taken pursuant to government action without just compensation. In many instances for so-called good and valid reasons--for example, to preserve wetlands or to protect endangered species. Such takings may, upon examination, be legitimate, but not if private property is taken from the property owner in an inappropriate way and without just compensation." 144 Cong. Rec. S7929 (daily ed. July 10, 1998) (statement of Sen. Lott).

<sup>86</sup>144 Cong. Rec. S10577 (daily ed. September 18, 1998) (statement of Sen. Baucus).

<sup>87</sup>Telephone Interview with Brian Kuehl, Senator Baucus' Legislative Aide for Natural Resource Issues (November 3, 1998).

the ESA. Any group interested in the reauthorization of the ESA in the future must learn from what happened to Senate Bill 1180. In the case of this bill, the Senate Majority Leader had the ability to ensure it never was voted on by the Senate. While Senator Lott had initial concerns with the bill, once those concerns were allayed, it was too late to consider it as Congress was consumed with passing the Omnibus Appropriations Bill.<sup>88</sup>

Given the popularity of Senate Bill 1180, it may be reintroduced in the 106th Congress with little, or only minor changes.<sup>89</sup> There is a major problem in reintroducing Senate Bill 1180 though as Senator Kempthorne, the lead Republican sponsor of the bill, is now Governor of Idaho. Senator Kempthorne was the driving force in the Republican party on Senate Bill 1180 and there does not appear to be a Republican to step in to take his place as lead sponsor.<sup>90</sup> Supposedly Senator Kempthorne had brought in Senator Chafee begrudgingly as a lead sponsor and Senator Chafee will be unwilling to be the lead Republican sponsor on his own.<sup>91</sup> Without a strong Republican to be a lead sponsor of Senate Bill 1180, the bill would probably have little chance of passing.

Senate Bill 1180, with its bipartisan support, struck a very delicate balance between those concerned with maintaining a relatively strong ESA and those owning private land.<sup>92</sup> Because of this delicate balance, even the slightest of problems, real or

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<sup>88</sup>Id.

<sup>89</sup>Id.

<sup>90</sup>Telephone interview with Jack Mingus, lobbyist for NESARC (November 12, 1998).

<sup>91</sup>Id.

<sup>92</sup>Id.

perceived, caused this bill to fail.<sup>93</sup> Even if Senate Bill 1180 is reintroduced in the 106th Congress now that Senator Lott's concerns have been met, passage is not assured as even the slightest problems seem to be able to upset the balance.

Besides the possibility of seeing Senate Bill 1180 reintroduced, we can also expect to see bills introduced in the 106th Congress with the primary goal of protecting property rights. Here is a sampling of bills that may be reintroduced:

**S. 953: The Private Property Owners' Bill of Rights**

For the past three sessions, bills were introduced to specifically protect the interests of private property owners. The 105th Congress was no different as four Senators, including Senator Jesse Helms, cosponsored Senate Bill 953: the "Private Property Owners' Bill of Rights." This legislation would have required Federal agency heads to administer and implement the ESA and Federal Water Pollution Control Act (FWPCA, otherwise known as the Clean Water Act) in a manner that least affects private property owners' constitutional and other legal rights.<sup>94</sup> The bill also included common-sense points such as requiring Federal agencies to obtain the consent of property owners and provide notice before entering privately-owned property in order to collect information on it.<sup>95</sup> If a property owner was deprived of \$10,000 or 20% of the fair market value of their land as a consequence of an agency enforcing the ESA or FWPCA,

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<sup>93</sup>Id.

<sup>94</sup>S. 953, 105th Cong. § 4 (1997).

<sup>95</sup>Id. at § 5.

the property owner would be entitled to compensation.<sup>96</sup> And finally, the Act would have given private property owners the ability to dispute any data collected on their land before the data could be used in implementing either the ESA or FWPCA on the private land.<sup>97</sup>

Senate Bill 953 would have allowed private property owners the right to an administrative appeal whenever their land would be affected by a government action.<sup>98</sup> These government actions would include a determination that the property is critical habitat of a threatened or endangered species; the denial of an incidental take permit; the imposition of an administrative penalty; and the imposition of an order that prohibits or limits the use of the property.<sup>99</sup>

The Private Property Owners' Bill of Rights was little more than a declaration of a fundamental Constitutional right. This bill was clearly grounded in the Fifth Amendment principle that prohibits the taking of private property without the payment of just compensation. Obvious problems with this bill were the ability of landowners to effectively choose not to comply with the ESA by not allowing Federal agencies the opportunity to come on to their land. Further, the power to dispute government data would have given landowners the ability to stall enforcement of the ESA for months and possibly years. Given that the goal of the ESA is to protect endangered species, stalling the mandates of the Act could stall a species out of existence.

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<sup>96</sup>Id. at § 9.

<sup>97</sup>Id. at § 6.

<sup>98</sup>Id. at § 8.

<sup>99</sup>Id.

## **S. 1181: The Endangered Species Habitat Protection Act of 1997**

Senate Bill 1181, known as the Endangered Species Habitat Protection Act of 1997, primarily would have amended the tax laws to provide tax incentives to owners of environmentally sensitive lands to enter into conservation easements that would provide for species protection. Under this bill, sponsored by Senator Kempthorne, if landowners agreed to manage their land in a manner that preserves endangered species, the landowners would be entitled to a tax credit of up to \$50,000.<sup>100</sup> If this bill were to be reintroduced, it would have to be reintroduced by another Congressman as Senator Kempthorne was elected Governor of Idaho in the 1998 election.

As was the case in previous sessions, there were dozens of bills introduced in the 105th Congress to reauthorize and change the ESA. Just as before, none of these bills were enacted. While there is no concrete answer for why Congress has continually failed to reauthorize the ESA, one possibility is that Republicans and Democrats disagree on environmental issues to such an extent that major environmental legislation is almost impossible to pass. The majority Republican party has experienced difficulties with its environmental agenda.<sup>101</sup> This being one of the Republican's few weaknesses, perhaps Congressional Democrats have decided to take a stand on environmental issues. The Republicans, in a power display, may be unwilling to show weakness on any issue. While disagreements over legislation is nothing new in the two-party system, I believe that the

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<sup>100</sup>S. 1181, 105th Cong. § 3 (1997).

<sup>101</sup>Brent Walth, Environment in Congress Has Changed Since '94, The Oregonian, March 17, 1997, A1, A7.

debate over reauthorization has been, and will continue to be, especially contentious. The contentious nature of the debate will almost surely lead to the use of backlash politics by the political parties.

### **C. Backlash Politics and the Effects on the Reauthorization Debate**

The ESA is not being reauthorized in a vacuum. The ESA is being reauthorized in Congress where many interests figure in any legislative debate. To understand how the ESA may be reauthorized, one must look at Congress in the context of its dealing with environmental issues. While this section generalizes environmental stances of Republicans and Democrats in ways that do not always hold true, it is useful to look at where the political parties typically fall on environmental issues in order to gain insight as to the future of the ESA.

The fact that the two political parties have failed to agree on environmental issues should not come as a shock. The Democrats and the Republicans have disagreed on issues for years. Environmental issues are no exception. Disagreements between the two parties may lead, or have already led, to the use of backlash politics in the debate over the reauthorization of the ESA. Backlash politics could possibly stall chances to forcefully reauthorize the ESA if Republicans concerned with property rights use the strategy. On the other hand, the environmental movement through the Democratic party may be able to use backlash politics to force the Republican leadership to reauthorize the ESA in its present substantive form.

Backlash politics is not a defined type of politics. The idea of backlash politics refers to a strategy that the political parties and opposing groups sometimes employ



against each other on certain issues. Backlash politics, under my definition, is a political strategy used by an advocate to foster resentment against an opposing advocate. Instead of confronting opponents on real issues using conventional political debate, the opponents are attacked. By portraying opponents in a negative light on a particular issue, all other issues they stand for begin to carry the negativity that has become synonymous with that particular issue. Therein lies the strategy: lash out against an unpopular plank in a group's platform, not against the entire platform. The attacked group comes to be associated with the unpopular issue and the entire group is guilty by association.

While political partisanship is found in many Congressional debates, the backlash position seeks to gain a broader political advantage by exaggerating the differences between the parties, demonizing adversaries, and hampering compromise. Perhaps the reason for this is that perpetuating the controversy is considered more politically valuable than any compromise or settlement.

I argue that backlash politics is conspicuous in the debate over environmental issues in Congress and specifically in the process to reauthorize the ESA. Democrats and Republicans employ backlash politics when one party attacks the other party on a particular issue. For instance, private property advocates within the Republican party are attacking Democrats concerned with forcefully reauthorizing the ESA by portraying the Democrats as "takers" of private land without just compensation.<sup>102</sup>

One of the Republican party's goals in the reauthorization process is to protect

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<sup>102</sup>As reflected in the Private Property Owners' Bill of Rights, S. 953, 105th Cong. (1997) and in comments by Senate Majority Leader Lott, *supra* note 84.

private land and developers of those lands.<sup>103</sup> Republicans may be representing the interests of those who argue that “environmental protection can come only at great economic cost to the American people”<sup>104</sup> and that the ESA is a tool used “illegitimately” by environmentalists to prevent development.<sup>105</sup>

Republican use of the politics of backlash is most noticeable in a bill like the “Private Property Owners’ Bill of Rights.”<sup>106</sup> This bill prioritizes property rights, private land, and development over the ESA’s true goal of species protection. Have the Republicans prioritized private land and development based on a perceived public outcry to protect property rights? Or, on the other hand, are Republicans just waving a property rights flag in order to use backlash politics against the Democrats?

In supporting property rights and development as opposed to a strongly reauthorized ESA, Republicans do not seem to be representing the prevailing American opinion. Almost half of the respondents in a recent opinion poll felt that the ESA is too weak and needs to be strengthened.<sup>107</sup> Only roughly one in five believed that the Act is too powerful in its protection of endangered species at the expense of property rights.<sup>108</sup>

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<sup>103</sup>Id.

<sup>104</sup>Jeffrey C. Ellis, On the Search for a Root Cause: Essentialist Tendencies in Environmental Discourse, *in* Uncommon Ground 263 (William Cronon ed., 1995).

<sup>105</sup>Rebecca Trounson and Mark I. Pinsky, Gnatcatcher Taken Off Threatened Species List, *Los Angeles Times*, May 3, 1994, at A1, A20.

<sup>106</sup>See generally S. 953, 105th Cong. (1997).

<sup>107</sup>See the poll found at the Appendix.

<sup>108</sup>Id.

After the Republican party came to power in 1994, 55 percent of Republican voters felt their party could not be trusted to protect the environment.<sup>109</sup> Because it apparently enjoys little public support on this issue, the Republican party may be championing property rights in order to employ backlash politics against the Democratic party and Democrats' usual pro-environmental stances.

I believe that backlash politics have been effective against the environmental movement and thus, environmental objectives such as a forcefully reauthorized ESA. The environmental movement is susceptible to backlash politics because it has, at times, alienated important segments of society: blue-collar workers employed in extractive industries and some private landowners whose lands have been "taken" for species protection under the ESA.

For example, many environmentalists think of work, especially blue-collar work, carried out in nature as environmentally damaging.<sup>110</sup> The obvious examples include logging and mining. By opposing these certain types of work, environmentalists have opened their cause up to the politics of backlash. In alienating blue-collar workers, the environmental movement in turn alienates those workers' families, friends, and the entire community as each depend on logging and mining dollars. These alienated communities lash out at the environmental movement in conversation, in the media, and in bumper

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<sup>109</sup>David Maraniss & Michael Weisskopf, "Tell Newt to Shut Up!", 14 (Touchstone Books 1996).

<sup>110</sup>Richard White, "Are You an Environmentalist or Do You Work for a Living?" Work and Nature, in Uncommon Ground 172 (William Cronon ed., 1995).

stickers such as “Are You an Environmentalist or Do You Work for a Living?”<sup>111</sup>

Soon, politicians take notice of the discontent with environmentalism within their districts and begin to participate in what has become popular: lashing out at environmentalists. This backlash comes about not because the environmentalists are wrong that the industries are bad for the environment, but because it is popular to lash out at what has become such an unpopular movement. All of a sudden, “environmentalists have ceded to the so-called wise-use movement valuable cultural terrain.”<sup>112</sup> Some Republican politicians start running on a platform with planks that call for responsible resource development, instead of calling for more stringent environmental laws that environmentalists would like to see.<sup>113</sup> These Republicans are able to use environmentalists’ beliefs as fodder to get elected in districts where environmentalism has become unpopular.

I feel that environmentalism has become an unwitting pawn in the game of backlash politics. People that advocate for resource conservation are branded “environmentalists” like it was a bad thing and are portrayed as wanting to take your blue-collar job away. This carries over to the ESA reauthorization. Members of Congress calling for a forcefully reauthorized ESA are portrayed as wanting to take your land away. So far, concern over private property rights has hindered the reauthorization process as

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<sup>111</sup>Id. at 171.

<sup>112</sup>Id.

<sup>113</sup>See for example, Congressman Rick Hill’s (R-Montana) 1998 political advertisement calling for responsible resource development interposed with pictures of oil and gas pipelines and his flyfishing.

Republican leaders concerned about property rights have been able to stop legitimate reauthorization bills that enjoyed tremendous bipartisan support.<sup>114</sup>

Why is this the case when it appears that the Republicans' concerns over private property rights enjoy little public support?<sup>115</sup> The answer is unclear and therefore, it may be possible for the Democratic party and the environmental movement to use backlash politics against the Republican party and private property rights advocates.

#### **D. The Use of Backlash Politics Against Property Rights Advocates**

To counter the Republican party's and private property interests' use of backlash politics, Democrats and the environmental movement may be able to employ backlash politics against the Republican agenda. By portraying the Republican party as against the environment, the Democratic party might force a vote on the reauthorization of the ESA. For instance, since the Democrats lost majorities in Congress in 1994, President Clinton (and the Democratic party by association) have made a steady comeback on the Republican party by defining themselves to be "in opposition to the Republicans on a set of specific issues, the environment prime among them."<sup>116</sup>

The environment became a difficult issue for the Republican party in the 104th Congress and the 105th Congress was no different. This can be explained in part because the Republican majority that came to power in 1994 tried to make too many big changes

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<sup>114</sup>As reflected in what happened to S. 1180 (discussed earlier).

<sup>115</sup>See poll results in the Appendix.

<sup>116</sup>David Maraniss & Michael Weisskopf, "Tell Newt to Shut Up!", 14 (Touchstone Books 1996).

to the environment too quickly.<sup>117</sup> Perhaps the results of this Democratic comeback are no better reflected than in the results of the 1998 mid-term elections. While the Republican party maintained majorities in Congress, Republicans lost members in the House of Representatives causing Representative Newt Gingrich (R-Georgia) to step down as Speaker of the House.

Backlash politics may prove to be a successful strategy for the Democratic party in the reauthorization debate. Because the environment has become such a difficult issue for the Republican party, the Democratic party may attempt to keep the pressure on the Republican party by using backlash politics in painting the Republican party as “anti-environmental.”<sup>118</sup> By employing this strategy, the Democrats may have a chance in reauthorizing the ESA in its present forceful form by swaying public opinion on the issue away from the Republican party and toward the Democratic party.

#### **E. Issues to Incorporate into a Compromise Reauthorization Bill**

The future of the ESA is going to depend on opposing groups’ ability to compromise on the conflicting issues that will come up in the reauthorization process. Environmental conflicts between business/industry and government agencies charged with managing the environment have been going on for years. Over time, these two groups

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<sup>117</sup>Brent Walth, Environment in Congress Has Changed Since ‘94, The Oregonian, March 17, 1997, A1, A7.

<sup>118</sup>To some extent, Democrats have already used backlash politics claiming that Congressional Republicans are “anti-environmental” and are conducting a “backdoor assault” on the environment. White House Denounces “Anti-Environmental” Amendments, Missoulian, September 30, 1998, at A4 (taken from the Washington Post).

have learned the art of compromise.<sup>119</sup> However, the conflict between private landowners and government agencies over the mandates of the ESA could be far more contentious. Landowners have little motivation to compromise their private lands in order to protect species as called for in the ESA.

Realizing the contentious nature of this debate, Congress is in the difficult position of having to reauthorize an act that is opposed by some private landowners. Given the Act's unpopularity with this important group and the Republican majority's stance in favor of protecting private property rights,<sup>120</sup> the ESA could be significantly weakened under the reauthorization process. While many Americans generally think of themselves as environmentalists, most supporters of the environment do not feel so strongly about one particular environmental issue that they feel compelled to call or write their representatives in Congress to express their opinion on the environment. There will also probably be a lack of public involvement in the reauthorization process.

Few Americans probably know that the ESA is up for reauthorization. Fewer still understand the reauthorization process. This lack of public knowledge leaves the ESA susceptible to attacks from small special interest groups such as advocates for private property interests, industry, or even influential private landowners. These special interest

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<sup>119</sup>See generally the New World Mine land exchange where Crown Butte Mining, Inc. has made a compromise with the government to not mine near Yellowstone National Park in exchange for money and lands.

<sup>120</sup>See generally S. 953 and Senate Majority Leader Lott's comments, *supra* note 84.

groups come together to further their common economic interests.<sup>121</sup> They also assemble to counter opposing interests.<sup>122</sup> In the case of the reauthorization of the ESA, private property rights advocates share the belief that they could be adversely affected by the ESA.

In order to build consensus among the competing groups in the ESA reauthorization process, Congress should continue to introduce bills such as Senate Bill 1180 that are co-sponsored by Republicans and Democrats and are compromises between disputing groups. President Bill Clinton's administration has tried to build consensus between supporters of the ESA and supporters of private property rights and has succeeded in some cases.<sup>123</sup> Instead of negotiating these deals like the Clinton administration, Congress should propose compromise reauthorization bills. Once a piece of legislation musters overwhelming support from various interested parties, the Congressional leadership will have little choice but to allow for this bill to be voted on and passed.

A compromise ESA reauthorization bill should have a number of characteristics. First, the bill should continue to realize the policies of the ESA as it was enacted in 1973. Congress declared the ESA's policy: "Federal departments and agencies shall seek to

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<sup>121</sup>Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups, 1 (Schocken Books 1971).

<sup>122</sup>Id.

<sup>123</sup>See generally Species Swaps: Environmentalists Decry Deals on Protecting Critical Habitat, Missoulian, May 5, 1997, A1, A3 (the Administration is encouraging the use of HCPs to pacify developers of private lands on critical habitat) (this article was taken from the Associated Press wire).



conserve endangered species and threatened species and shall utilize their authorities in furtherance of [these] purposes . . . .”<sup>124</sup> Second, a model bill should balance the interests of private landowners with the mandate of protecting species’ habitat in the name of species preservation.

To ensure that both of these goals are achieved, the reauthorized ESA should keep the substantive provisions requiring species and ecosystems conservation while working in partnership with landowners to realize that conservation. Instead of granting administrative appeals to deny government access to private land, the government should offer property owners incentives to conserve and develop habitat for threatened and endangered species.

A possible means of encouraging private landowners to conserve habitat would be to offer them tax incentives.<sup>125</sup> It can be cheaper for the property owner to develop habitat themselves than to have the state or federal government mandate and manage the conservation action.<sup>126</sup> Giving a tax reduction to landowners who develop a portion of their property as habitat benefits all parties involved, especially the plants and animals.

I believe that increasing funding to compensate those owning lands adversely affected by the ESA promotes an acrimonious relationship between those trying to save habitat and those that own the habitat. There is never enough money to make everyone

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<sup>124</sup>ESA § 2.

<sup>125</sup>William J. Snape, III & Heather L. Weiner, Recipe for Reauthorization of the Endangered Species Act, 5 Duke Envtl. L. & Pol’y F. 61, 63 (1995) (footnote omitted).

<sup>126</sup>Id.

happy. However, working with the landowner to conserve species and habitat fosters better relationships with the owner while doing what is best for species. As the groundbreaking conservationist Aldo Leopold once wrote, we should “[e]xamine each question in terms of what is ethically and esthetically right, as well as economically expedient. A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.”<sup>127</sup>

While working in partnership with a landowner is not something that can be legislated, it is something we all should work toward in order to protect threatened and endangered species. Developing habitat in partnership with property owners is less contentious than requiring them to comply with the mandates of the ESA. Becoming partners with landowners in protecting species gives them a stake in species conservation. Including landowners may give them a sense of pride for doing something good as opposed to “buying them off” using a compensation plan. For a strategy to be truly effective, the majority of landowners will have to be willing participants in protecting species.

If a particular property owner is adamantly opposed to protecting species by complying with the ESA, a model reauthorization bill should include a provision that allows the use of alternative dispute resolution (ADR) in cases of irreconcilable differences. ADR is a means for disputing parties to resolve their conflicts creatively and

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<sup>127</sup> Aldo Leopold, A Sand County Almanac 224-25 (Oxford University Press 1968) (1949).

effectively without the contentiousness inherent in the litigation process.<sup>128</sup> Mediation, a type of ADR, has proven to be a very effective means of resolving environmental disputes.<sup>129</sup> This would certainly hold true for a dispute arising under the ESA. Going through an ADR process is far less contentious, costly, and time-consuming than taking someone to court.<sup>130</sup>

If developing habitat in partnership with landowners is impossible, the next best thing is to resolve conflicts using ADR. One of the bills introduced in the Senate had provisions calling for the use of ADR. Senate Bill 1181 would have given landowners a choice of remedies if the government were to fail to compensate them for diminishing the use or value of their land.<sup>131</sup> Landowners could have elected to solve their disputes using binding arbitration instead of resorting to litigation.<sup>132</sup>

Senate Bill 1181 was a step in the right direction by providing the means to resolve disputes amicably through the ADR process. The bill did not go far enough though as it only made ADR an option, disputants still had the choice to resort to civil litigation.

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<sup>128</sup>American Bar Association, Alternative Dispute Resolution: An ADR Primer 1 (1989).

<sup>129</sup>See generally Eric R. Max, Confidentiality in Environmental Mediation, 2 N.Y.U. Envtl. L. J. 210-223 (1993) and Raymond E. Tompkins, Mediation, the Mediator, and the Environment, 11 Natural Resources and Environment 27-30 (Summer 1996) (hereinafter Tompkins).

<sup>130</sup>Tompkins at 27.

<sup>131</sup>S. 1181, 105th Cong. § 8 (1997).

<sup>132</sup>Id.

Further, the type of ADR called for was binding arbitration.<sup>133</sup> Mediation may be more effective in achieving the goals of both parties, and is typically more flexible than the binding decision handed down in arbitration.

It is important to note that ADR is not suited for all disagreements that come up under the ESA. Some limitations to the ADR process include the lack of public participation, the inability to set legal precedent, and the fact that there is no judicial review of ADR decisions. While ADR is a less-contentious means of solving smaller disputes, as between an individual landowner and a government agency, more complex legal issues that come up under the ESA should probably still be resolved in court.

A final means of balancing the interests of private landowners with the mandates of the ESA is to increase the protection of threatened and endangered species on Federal land in order to compensate for the development of private lands. Development of private lands is always going to be at odds with species protection. When possible though, if contiguous private land and Federally-owned land both provide habitat for threatened and endangered species, the Federal land should be less developed and have more stringent species protection regulations than private land. The government already owns Federal lands. Therefore, under this proposal, the government can avoid paying market prices in purchasing private land to use for species protection. This would save the government money and pacify private landowners whose lands will not have to be “conscripted to national zoological use” whether they were compensated for the use of their land or not. The Clinton Administration has endorsed this strategy of relying on Federal lands first in

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<sup>133</sup>Id.

protecting species.<sup>134</sup> This compromise allows for species protection without private property interests having to shoulder the entire burden or any of the cost.

The thing to remember with the enforcement of the ESA on private land is that some parties are always going to be inconvenienced. The trick in the reauthorization process is reducing that inconvenience on private landowners while still ensuring the protection of threatened and endangered species.

## **V. Future Possibilities in the Reauthorization Process**

It is difficult to predict the future of the ESA. Currently, the ESA's Congressional authorization to spend money has expired and is in need of reauthorization.<sup>135</sup> To reauthorize the ESA, a number of scenarios could come about with Congress and the Administration both playing central roles.

### **A. The Congressional Reauthorization Process**

One possibility is that the Senate Bill 1180 will be reintroduced and will pass in the 106th Congress. Senator Lott's concerns have supposedly been met and if a Republican is willing to be the lead sponsor of the bill in place of now-Governor Kempthorne, the bill may be popular enough with enough bipartisan support to pass in the Senate.

A second possibility in the reauthorization process is that the Republican majority will be swayed by the demands of advocates for private property rights and reauthorize the ESA in a very different form. If private landowners were to get their way, they would

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<sup>134</sup>William K. Stevens, Future of the Endangered Species Act in Doubt as Law Is Debated, N.Y. Times, May 16, 1995, at C4.

<sup>135</sup>Godfrey at 979.

have every reason to want to see the ESA weakened if it ensured that their property rights were not infringed upon in the name of species or habitat conservation.

The third, and what I believe to be the most likely, possibility is that the ESA will not be reauthorized anytime soon. Congress has shown little inclination to actually reauthorize the Act short of introducing numerous bills that have had little chance of passing. Some say that the 106th Congress will not attempt to tackle such a big environmental issue as reauthorization before the Presidential election in the year 2000.<sup>136</sup> With Vice President Al Gore, one of the nation's most recognized environmentalists, a leading candidate to be the next President, Congressional Republicans may not want a major piece of environmental legislation to pass as it might help Gore's chances.<sup>137</sup> For the same reason, President Clinton and his Administration will be likely to continue to advocate for big environmental issues such as a reauthorized ESA if it would help keep a Democrat in the White House.

Congress has been appropriating money to the ESA keeping it in its current substantive form. This will likely remain the status quo until the 107th Congress if the 106th Congress chooses not to reauthorize the ESA.

#### **B. The Administration's Role in Species Protection**

President Clinton's Administration is becoming more involved in the debate over

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<sup>136</sup>An idea reflected by both members of Senator Baucus' staff and the staff at NESARC. Telephone interview with Brian Kuehl, Senator Baucus' Legislative Aide for Natural Resource Issues (November 3, 1998) and Telephone Interview with Jack Mingus, lobbyist for NESARC (November 12, 1998).

<sup>137</sup>Telephone Interview with Jack Mingus, lobbyist for NESARC (November 12, 1998).

the reauthorization of the Act, especially Interior Secretary Babbitt who is becoming a powerful figure in every environmental debate.<sup>138</sup> To have any success with environmental issues, Congressional Republicans are now finding it necessary to temper their stance on the environment and to seek and get the approval of Secretary Babbitt before legislating.<sup>139</sup> This state of affairs possibly signals a power shift in the ESA reauthorization debate: the failure of the two political parties to meaningfully compromise on environmental issues in Congress may signal a larger role in species protection for the Administration.

The process by which legislation becomes law in the United States is set forth in the Constitution; Congress enacts legislation and the President signs it into law. At times though, laws are made without using this process. There are a number of ways for a President or Congressional leadership to circumvent the usual legislative process. A recent example is the budget bill passed in the last days of the 105th Congress.<sup>140</sup> Instead of going through committee and being debated in both houses of Congress, the spending bill “was compiled in closed-door meetings attended by a handful of lawmakers and top administration officials.”<sup>141</sup> Senator Baucus described the process of passing this bill as

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<sup>138</sup>Brent Walth, Environment in Congress Has Changed Since '94, The Oregonian, March 17, 1997, A1, A7.

<sup>139</sup>Id.

<sup>140</sup>See generally H.R. 4328, 105th Congress (1998).

<sup>141</sup>Baucus Votes Against Spending Bill After Working to Secure Funds, Missoulain, October 22, 1998, at A4.

**“oligarchy, not democracy.”<sup>142</sup>**

The passage of this spending bill, with the Administration playing a large role, may signal the need for the Administration to play a large role in securing the reauthorization of the ESA. As then-Speaker of the House Newt Gingrich said, “If [Congress and the Administration] don’t work together on big issues, nothing gets done.”<sup>143</sup>

President Clinton’s Administration has already played a large role in reforming the ESA. By allowing the increased use of HCPs, the Administration has struck a balance between species protection and private land rights. While Congress authorized the use of HCPs in 1982, it was not until 1994 when the Administration encouraged their use on private land that HCPs became common.<sup>144</sup> Before 1994, there were only 20 active HCPs, at the end of 1997 there were more than 200.<sup>145</sup>

Another example of the Administration taking the lead role in the reauthorization debate is its role in championing the “no surprises” clause. While it was Senate Bill 1180 that called for a “no surprises” clause and the increased use of HCPs, this bill would have merely codified the Administration’s ESA reforms. Congress’ best reauthorization bill was made up of Administration proposals.

Given the Administration’s role and Congress’ lack of a role in the reauthorization

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<sup>142</sup>Id.

<sup>143</sup>Katherine Q. Seelye, By Wide Margin, House Passes \$500 Billion Budget Bill, N.Y. Times, October 21, 1998, at A20.

<sup>144</sup>John H. Cushman, Jr., The Endangered Species Act Gets a Makeover, N. Y. Times, June 2, 1998, at D2.

<sup>145</sup>Id.



debate, any group seeking beneficial change to the ESA should focus its lobbying efforts on the Administration and especially Secretary Babbitt. If Congress waits or fails to reauthorize the ESA until after the next Presidential election, then all changes to the ESA will have been made by the current Administration. This Administration has shown a willingness, and has had some success, reforming the ESA. Groups concerned with the future of the ESA should focus on how the Administration might continue to reform the ESA.

## **VI. Conclusion**

The Endangered Species Act is the most significant and substantive set of laws designed to protect endangered plant and animal species ever enacted. The law is a powerful species conservation mandate. This powerful mandate has alarmed many who believe that the needs of plants and animals are being put before the needs of humans. Whether it be the short-term shutting down of a dam project as in TVA v. Hill or the conservation of spotted owl habitat leading to the reduction of a timber harvest in Sweet Home, the ESA has made as many enemies in the name of species protection as it has friends.

Because this powerful law has a number of detractors, reauthorizing the ESA has been a troublesome process. There are no easy answers as to how to solve the most difficult issues in reauthorization. I would submit that whatever the answer, the ESA must stay true to the original purpose and policy of the Act as enacted by Congress: the ESA should remain a substantive act that conserves threatened and endangered species. At the same time, the needs of private landowners adversely affected by species preservation

must also be met.

Is it possible to preserve species while protecting private property interests? Can these seemingly contradictory goals be achieved through the reauthorization process? The only viable answer is “yes,” or at least, “hopefully.” A politically acceptable solution will require balancing species protection with property rights. Private landowners whose lands are affected by the ESA will likely vote with their pocket books. These people, and thus their representatives in Congress, are not going to sit idly by allowing Congress to “conscript” their private lands in the name of species protection.

Many scientists maintain that the world is in the midst of a mass extinction of plant and animal species due to humans, the most dominant species on Earth.<sup>146</sup> To protect endangered species effectively, especially from humans, these species must be protected on both public and private lands. Plant and animal species cannot tell the difference between public and private land, arbitrary social boundaries, they live and grow wherever they can thrive. However, the reauthorized ESA will have to make certain allowances for private landowners as individual citizens cannot be expected to shoulder the entire burden of making their land suitable habitat for threatened and endangered species. The reauthorized ESA will have to be a compromise that protects the interests of these private landowners while also protecting the nation’s threatened and endangered species.

In order to reauthorize the ESA, Congress and/or the Administration have to produce a compromise bill or deal that enjoys broad, bipartisan support. Senate Bill 1180 is probably the best option for a future Congress to reauthorize the ESA. Another means

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<sup>146</sup>Marjorie Connelly, To Many, Out of Sight . . ., N. Y. Times, June 2, 1998, at D8.

to realize compromise is for the Administration to take a lead role in the reauthorization debate and make a deal on the ESA. Whatever the case, compromise on the ESA should not come at the expense of the species protection.

While we as Americans rely on the government to ensure species protection through laws like the ESA, I believe species protection must become a goal for everyone. Perhaps Aldo Leopold said it best almost 50 years ago:

There is a clear tendency in American conservation to relegate to government all necessary jobs that private landowners fail to perform. . . . At what point will governmental conservation, like the mastodon, become handicapped by its own dimensions? The answer, if there is any, seems to be in a land ethic, or some other force which assigns more obligation to the private landowner. . . . When the private landowner is asked to perform some unprofitable act for the good of the community, he today assents only with outstretched palm. . . . [A] system of conservation based solely on economic self-interest is hopelessly lopsided. It tends to ignore, and thus eventually eliminate, many elements in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning. . . . An ethical obligation on the part of the private owner is the only visible remedy for these situations.<sup>147</sup>

Maybe the real answer to the question of how to save species has little to do with the reauthorization of the ESA. The job of true species protection might not lie only with the government. If endangered species are to be truly protected forever, the job is not just the government's, it is all of ours.

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<sup>147</sup>Aldo Leopold, A Sand County Almanac 213-14 (Oxford University Press 1968) (1949).

## **APPENDIX**

### **The Netizen**

#### **Daily Poll Results**

**KEY: percentage | raw votes**

**Total responses: 298**

**Certain members of the US Congress are pushing for major changes to the Endangered Species Act (ESA), arguing that the act protects wildlife habitat at the expense of private property owners' rights. What's your take on congressional and lobbyist proposals to weaken the ESA?**

<b>44.1   130 . . .</b>	<b>The act is too weak and needs to be broadened</b>
<b>19.0   56 . . .</b>	<b>The act is too broad and needs to be weakened</b>
<b>16.9   50 . . .</b>	<b>What's the difference? We're all doomed</b>
<b>15.3   45 . . .</b>	<b>Pass the monkeywrench</b>
<b>04.7   14 . . .</b>	<b>The notion of "endangered species" is a radical environmentalist hoax</b>

**SOURCE: <http://www.hotwired.com/netizen/netizenpoll/96/25/index2a.html>**