

Public Lands Foundation

Position Statement: 2010-15

Endangered Species Act Amendment

August 27, 2010

Executive Summary

Amid widespread continuing support for the goals of the Endangered Species Act of 1973 (ESA), there is a broad-based concern that the implementation of the act is generally inefficient and has fallen far short of achieving all of its intended purposes. The Public Lands Foundation (PLF) believes the ESA must be amended, and Federal Regulations for implementation of the Act modified. This must be done so that the Federal public land agencies can, with appropriate budget support and in cooperation with the States and public land users, efficiently and effectively manage the public lands and resources under the principles of multiple use and sustained yield, which includes responsible care for endangered species and the ecosystems in which they exist.

Background

In January 1999, the Public Lands Foundation issued a Professional Perspective Paper on the reauthorization of the ESA. That paper proposed a number of changes in the law, its enabling regulations, and procedures.

PLF's 1999 recommendations emphasized the need to focus on ecosystem and bioregional habitat protection rather than on single species management; the importance of realistic multi-agency planning for recovery at the time of listing; the need for harmony between the ESA, NEPA, and Federal Public Land Laws; and the critical need for cost-effective strategies that could lead to actual species recovery. Those recommendations, as yet unrealized, are still valid.

The Public Lands in the National System of Public Lands administered by BLM are, among their many values and uses, important living places for many threatened and endangered species. Planning for and managing the habitat of these species is a significant, and often frustrating effort for BLM because of the conflicting public interests and procedural difficulties involved in decisions where endangered species are affected. There are presently about 400 listed threatened and endangered species found on the Public Lands. There are an additional 1,500 "sensitive species" found on Public Lands, some of which may be potentially listed species. BLM is involved in more than 200 Recovery Plans and in more than two dozen Candidate Conservation Agreements, some of which, like the Desert Tortoise Recovery Plan, affect decisions on millions of acres of Public Land. There have been innumerable appeals of BLM decisions filed related to ESA matters, and there are numerous law suits affecting BLM filed with federal courts that involve ESA issues.

Discussion

The intent of the ESA is to identify species that are threatened with extinction, and to take action to manage those species and maintain their habitat so as to avoid extinction. The difficulties with implementing the ESA arise from two fundamental reasons: habitat ownership and species subdivision. The frustrations that attend implementation result from a failure to recognize and meet its costs, and the inadvertent creation of a procedural and legal quagmire.

Habitat Ownership

Much of the habitat important to the conservation of listed endangered species is privately owned. The issues that result from conflicts between private property rights and endangered species habitat protection are recognized and should be addressed in revising the ESA. This paper is concerned primarily with the management of the Public Lands administered by BLM and is equally applicable to the National Forest lands. Unlike private lands, the provisions of the ESA are applicable to all decisions regarding the use or management of the Public Lands. However, as a matter of law and public policy these Public Lands are mandated for a wide variety of multiple uses. These include commodity production, minerals, timber, livestock, recreation, hunting, fishing, camping, exploring by foot or vehicle, amenity protection, wilderness, scenery, cultural, and fish and wildlife habitat management. All of these values and uses must be considered and provided for in Public Land management decisions under a sustained yield approach that gives no absolute priority to any one use, but to the combination of uses that assures the conservation of resources for public use and enjoyment over time. The ESA, on the other hand, gives absolute priority to listed species and their habitat over any other uses or values, which creates a complex legal dichotomy for those who must make public land management decisions. If a responsible recovery plan based upon peer-reviewed science and reasonable social and economic analysis were required at the time a species was proposed for listing, it would go a long way to resolving this dilemma. Species listing should result from, not precede, recovery planning. Where essential habitat for the proposed species is on public land, the appropriate agencies must be full partners in the analysis and planning process.

Species Subdivision

The degree to which population segments, environmentally significant units, and other sub-species taxonomic distinctions have come to complicate the ESA was not anticipated when the Act was passed. The idea that some populations of a species of animal or plant should be given absolute protection from take or habitat modification while other populations of that same species clearly do not need that protection overextends the legitimacy of the ESA's draconian legal power. The ESA has served magnificently in raising the public understanding of the essential importance of healthy habitat for the survival of wild species, as well as the concepts of ecosystems and biodiversity. What was not realized at the time of its passage was the extent to which the ESA would be used by interest groups as the ultimate tool to stop land management practices they opposed. Timber harvests have been blocked by spotted owls, housing developments by butterflies, and dams by snail darters. Where the existence of an entire species is immediately at stake, the power of the ESA in the decision process may be necessary. But, where that is not the case, particularly where a species as a whole is not in terminal jeopardy, the ESA should provide for a more balanced role in a public

decision process.

Realistic Budgets

The evident fact that Federal budgets do not come close to covering the costs of implementing the ESA demonstrates that we have bitten off more than we can chew. The responsible Federal Agencies, the Fish and Wildlife Service (USF&WS) and National Oceanic and Atmospheric Administration (NOAA) Fisheries, are hopelessly under-funded and understaffed for the task. Other Federal agencies such as BLM are spending far more than they have Endangered Species budgets for in planning, analysis, appeals and litigation related to listed species in order to try to carry out their other mandated responsibilities. State fish and wildlife agencies are similarly stressed by the ESA with totally inadequate financial support from the Federal budget. The national budget situation would indicate this is unlikely to change in the foreseeable future. What this means is that the ESA and its regulations must provide for a responsible prioritization of resource expenditure. Unrealizable expectations and demands can only result in a growing level of antagonism toward the ESA and its otherwise praiseworthy goals.

Procedural Problem

The ESA and its regulations are structured today in such a way as to assure that major endangered species decisions are being made in the courts at a huge expense to the public agencies involved, the general public, and the courts themselves. The only visible result is a significant cut into resources that could better be spent on the ground in support of projects and activities that actually might help in the recovery of some species. A clear example is the petition process for listing, which, if not responded to as desired by the petitioners, leads to litigation, the result of which may well be the listing - without a recovery plan or even the information to develop a reasonable recovery plan - of a species or population which, regardless of its merits, cannot hope to receive a priority for costly recovery efforts in any time certain. On top of this is the requirement for the designation of "Critical Habitat" before recovery planning is undertaken. Often this means that the USF&WS and NOAA Fisheries propose such designations, under threat of litigation if delayed, by a staff biologist's best guess based upon no firsthand knowledge of the territory. Combined with the present definition of critical habitat as essentially all habitat presently occupied, historically occupied, and even potentially occupiable, this often means that such designations affect many thousands of acres of public land. Furthermore, recovery plans are often not developed for many years after listing a species, and those plans, as well as consultations and opinions, often fail to focus on specific and reasonable actions that can do the most, with realistic means, to recover the listed species. The resulting additional procedural burden before any use, management, or even protection decisions can be made is immense, and the result is either a failure to act or action immediately halted by appeal and litigation. The Federal public land management agencies already have complex collaborative public planning processes which, coupled with National Environmental Policy Act and other environmental protection requirements, are consuming major portions of the agencies' budgets. The additional process requirements of the ESA and its regulations, as presently constructed, create situations in which appeals and litigation, or the threat thereof, can bring sound and needed professional land management decisions to a grinding bureaucratic halt.

The PLF supports the purposes of the ESA, "...to provide a means whereby the ecosystems upon which the endangered species depend may be conserved, to provide a program for the conservation of such endangered species..."

The PLF specifically recognizes the BLM's major role in achieving the purposes of the act. The Public Lands under BLM jurisdiction include a significant portion of the habitat in the western United States and Alaska that are key to maintaining or returning species to healthy populations. BLM also has the scientific skills, policies, procedures, regulation and mission to support the ESA. What BLM does not have, nor will ever have, is the funding that would be required to carry out the provisions of the ESA and its regulations as presently constituted.

The PLF believes the wise management of habitat, ecosystems and bioregions will achieve the purposes of the ESA; much more so than the present focus on individual species, or sub-populations of species. Wise management across widely varying landscapes and land ownerships can only be achieved through a cooperative and collaborative process. The answer for public land agencies and for the States is for the ESA to recognize and require counterpart regulations under which those agencies and the States, with full technical and scientific competence, can implement the ESA directly without the interminable delay and bureaucratic avoidance processes that are currently bogging down effective implementation of the Act. ESA amendments must be designed to eliminate as far as possible the appellate and litigate bottlenecks created by the ease with which the ESA can be used in pursuit of broader social or environmental goals. This must be coupled with the kind of incentive based system that will bring private landowners into willing partnership in achieving the purposes of the ESA. The PLF believes that the ESA will only be truly effective when a widely supported cooperative process replaces the present conflict-laden approach.

Rescission of Decisions

Over the last several decades, various Administrations have made what appear to be arbitrary decisions to rescind regulations, critical habitat designations, recovery plans and other actions taken by a previous Administration. Two recent examples are the rescission of the final rule amending regulations governing interagency cooperation under the ESA and the final rule for designating critical habitat for the northern spotted owl.

These examples, as others in the past, had undergone a lengthy, exhaustive public input process before final rulemaking decisions were made. To rescind final actions with little or no explanation and without further public input is an injustice to the previous decision-makers and the public in general. And, it ignores the countless hours, months and years of agency and public involvement that went into the decision-making process. The PLF believes that an amendment to the ESA should include provisions that require the Administration to provide an open and public process before final decisions are rescinded.

Support for Reform

The PLF is only one of many organizations recognizing the value of an effective Federal Endangered Species law with efficient and constructive implementing regulations. The PLF suggests that close attention should be paid to the reform recommendations made

by two important organizations: The Western Governors Association (WGA) and the International Association of Fish and Wildlife Agencies (IAFWA).

PLF Position

The ESA and its implementing regulations should be amended to:

1. Establish petitioning requirements including scientific standards, peer review, and economic analysis before the petition can be made. The petitioner should have the burden of defending the quality of the petition.
2. Require that quantifiable recovery plan goals be agreed upon and a recovery plan outlined with the cooperation of affected States and agencies at the time a species is listed as endangered. Recovery plans should, where possible, cover more than a single species and incorporate habitat plans that examine environmental needs more broadly in terms of ecosystems and regional biodiversity. However, the mandated actions in these plans should be specifically those shown to be essential in resolving the problems causing the decline of the listed species with a realistic expectation of success upon implementation.
3. Redefine “critical habitat” more precisely and establish it concurrently with the completion of a recovery plan.
4. Ensure the use of good science in ESA decisions, and responsible social and economic issue analysis and consideration in recovery planning.
5. Require counterpart regulations for federal land managing agencies, particularly BLM and the Forest Service, and the States, aimed at eliminating interagency delay and procedural wrangling.
6. Provide for incentives to encourage cooperative involvement of private landowners in endangered species habitat protection.
7. Establish ways to prioritize the use of resources in carrying out ESA recovery actions that assures funding to the appropriate Federal Agencies, States, and private landowners in support of the most urgent needs.
8. Place a lower level of priority and protection on sub-species level populations or other sub-species groupings.
9. Require the Administration to first provide an open, public process before considering the withdrawal or cancellation of regulations, critical habitat designations, recovery plans and other Endangered Species Act decisions.

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