PACIFIC LEGAL FOUNDATION

Litigation Backgrounder

U.S. Fish and Wildlife Service Regulation Undermines Species Conservation and Imposes Illegal Restrictions on Property Owners

(*Washington Cattlemen's Association v. U.S. Fish and Wildlife Service*)

The Endangered Species Act allows the federal government to protect two classes of species: endangered and threatened. An endangered species is currently at risk of extinction, whereas a threatened species is merely likely to become endangered in the future. The act imposes very severe penalties for the "take" of endangered species, which is broadly defined to include essentially any act that affects a single member of the species or its habitat. However, Congress chose not to forbid the take of threatened species. According to one senator, this was because Congress sought to "minimiz[e] the use of the most stringent prohibitions. ... Federal prohibitions against taking must be absolutely enforced *only* for those species on the brink of extinction."[1]

Anyone familiar with the U.S. Fish and Wildlife Service's history of implementing the statute knows that it has strayed far from what Congress intended. A Carter-era regulation purports to overrule Congress' judgment, by forbidding the take of all threatened species.[2] As a result, burdensome regulations are not a last resort, reserved for the most at-risk species, but the knee-jerk result for the listing of any species, no matter how remote the threats they face are or how ineffectual regulation will be.

Obviously, this hurts property owners across the country. But it also undermines species recovery, by eliminating a key incentive for conserving species. Under the statute, states and property owners have a strong incentive to conserve threatened species—if they continue to decline and become endangered, the take prohibition will apply.[3] They also have an incentive to recover endangered species, since the take prohibition will be lifted once they are downlisted. The illegal regulation causes the Service to treat both types of species the same, stripping away these incentives. The regulation also threatens voluntary conservation efforts more directly, by exposing landowners

HEADQUARTERS: 930 G Street | Sacramento, CA 95814 | (916) 419-7111 | Fax: (916) 419-7747
ATLANTIC: 8645 N. Military Trail, Suite 511 | Palm Beach Gardens, FL 33410 | (561) 691-5000 | Fax: (561) 691-5006
DC: 3033 Wilson Blvd., Suite 700 | Arlington, VA 22201 | (202) 888-6881 | FAX (202) 888-6855
HAWAII: P.O. Box 235856 | Honolulu, HI 96823-3514 | (808) 733-3373 | Fax: (808) 733-3374
NORTHWEST: 10940 NE 33rd Place, Suite 210 | Bellevue, WA 98004 | (425) 576-0484 | Fax: (425) 576-9565
ALASKA: (907) 278-1731 | **OREGON**: (503) 241-8179

E-MAIL: plf@pacificlegal.org
WEB SITE: http://www.pacificlegal.org

to the prospect of substantial criminal and civil penalties, even for actions intended to benefit species. Finally, the regulation creates a perverse incentive for litigation by environmental special interests, which deplete the Service's, states', and landowners' resources while doing nothing to recover species.

The Regulation Undermines Conservation Efforts

Unfortunately, the regulation harms the species it purports to protect, by severely undermining incentives to conserve and recover them. Under the statute, the take prohibition should be the key incentive for encouraging landowners to protect species. Those that have threatened species on their lands have a strong incentive to be proactive in conserving, lest their condition worsen. If that happens, the species may be listed as endangered, subjecting the property owner to the take prohibition. Similarly, the statute encourages property owners to take steps to recover endangered species, by rewarding them for their successful efforts. When the species recovers to the point that it is merely threatened, the take prohibition's burdens on the property owner go away. Thus, under the statute, the take prohibition acts as a carrot (to entice private efforts to recover endangered species) and a stick (to encourage efforts to conserve threatened species).

Under the regulation, however, both categories of species are treated the same, eliminating these incentives. A landowner whose property contains a threatened species has little incentive to conserve it because, from her perspective, the damage is done. Whether the species remains threatened or continues to decline to the point of being endangered, the property owner is subject to the same burdensome regulation. The same is true of property owners whose lands contain endangered species. They have little reason to recover the species because, even if they succeed, they'll get no relief. The same restrictions on their use of their property will remain in place.

The regulation also discourages private conservation efforts in other ways. Because take is defined so broadly under the regulation, any conservation efforts could expose the property owner to criminal and civil liability. The regulation forbids, for instance, capturing a protected animal to move it to a conservation area. It also forbids getting too near or disturbing a creature, by broadly defining "harassment" as take, even when attempting to benefit the species. The penalties are substantial, including fines and even imprisonment.[4] Finally, the regulation empowers special interest groups to sue property owners if their activities may cause minor takes.[5] These expensive and time-consuming lawsuits disrupt property owners' plans while doing little to contribute to species' recovery. What reasonable property owners would put substantial amounts of their money or time into trying to recover species, when doing so exposes them to all these risks?

These perverse impacts of the regulation may explain why the Endangered Species Act has had such limited success. The statute's goal was to conserve and recover species. But it hasn't done that. In fact, less than two percent of listed species have recovered to the point that they could be

removed from the list.[6] Fixing the incentives for private property owners is the best way to turn this around, especially since the vast majority of protected species rely on private lands for their habitat.[7]

The Regulation Violates the Endangered Species Act

When Congress enacted the Endangered Species Act, it recognized its potential for burdening property owners, especially the statute's broad take prohibition. Numerous congressmen and senators acknowledged that this provision imposes stringent limits on ordinary activities.[8] Thus, Congress chose to make the take prohibition a last resort under the statute. It consciously limited the provision to endangered species—those that are currently "in danger of extinction."[9] Senator Tunney, the bill's Senate floor manager, explained that the take prohibition was limited in this way to ensure "maximum protection for species *on the brink of extinction* ... provid[ing] the necessary national protection to *severely endangered* species while encouraging the States to utilize all of their resources [to protect species]."[10]

The Endangered Species Act also protects threatened species, though not through the burdensome take prohibition. Instead, they're protected from federal projects that jeopardize their survival.[11] This is because threatened species are not currently at risk of extinction but are "likely" to become endangered "within the foreseeable future"—a low bar.[12] Species can be listed as threatened because of remote risks based on projections decades into the future.[13]

Congress gave the Service a limited authority to impose regulations on private landowners to protect threatened species, including prohibitions against take. But regulations can only be adopted if "necessary and advisable" for the protection of the particular species.[14] This was no invitation to reverse Congress' judgment by extending the take prohibition to all threatened species. The Senate Report accompanying the bill made this abundantly clear, explaining that the provision:

> requires [the Service], once [it] has listed a species of fish or wildlife as a threatened species, to issue regulations to protect *that* species. Among other protective measures available, [it] may make any or all of the acts and conduct defined as [take] as to "endangered species" also prohibited acts as to *the particular* threatened species.[15]

Thus, the Service is limited to adopting species-specific regulations and must demonstrate that the regulation is necessary and advisable in every case. The Service cannot sidestep these limits by adopting a general regulation forbidding the take of all threatened species.

Yet that's precisely what the Service did during the Carter administration. It adopted a regulation that forbids the take of all threatened species.[16] At the time, the Service offered no evidence or analysis to justify the regulation as "necessary and advisable" to the conservation of any species. This regulation has automatically applied to every threatened species, including the hundreds of species that were not listed when the regulation was adopted. Consequently, the agency

never considers whether it is necessary and advisable to regulate the take of more recently listed and future listed species. According to a recent Supreme Court decision, the failure to consider the costs of imposing regulation alone is enough to make the regulation unreasonable.[17]

This action was a complete about-face from the agency's representations to Congress during its deliberation over the statute, in which the agency's leaders acknowledged that their power was limited.[18] This too significantly undermines the regulation, as the Supreme Court has held that agency flip-flops (especially unexplained ones) are not entitled to the deference that usually applies to agency decisions.[19]

The regulation turns the necessary and advisable standard on its head. Today, the Service only *reduces* burdens on property owners if it determines that deregulation is necessary and advisable for the conservation of the species.[20] In practice, this means that the Service only pares back restrictions when the regulation is counter-productive; no consideration is given to whether the regulation is overly burdensome or ineffective. This is the direct opposite of what Congress intended and what the statute says.

The Illegal Regulation Imposes Unfair Burdens on Private Property Owners

This regulation has caused much mischief over the last 40 years. Many of the most controversial impacts of the Endangered Species Act have actually been the work of it. For instance, the listing of the Northern spotted owl led to intense conflict between federal bureaucrats, environmentalists, property owners, and the timber industry.[21] The protections that were imposed as a result of that listing crippled the timber industry in the Pacific Northwest.[22] Few realize, however, that the Northern spotted owl is listed as a threatened species. The statute did not require logging restrictions to be imposed to prevent take. Instead, they arose as a result of the regulation's application to the species' listing as threatened.

There are countless more examples of threatened species affecting local economies, property owners, and small businesses. Nationwide, there are approximately 150 species subject to the illegal regulation. The regulation's consequences for those affected are severe. The late Justice Scalia once described the take prohibition as imposing "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."[23] Justice Scalia perfectly describes the experiences of many of Washington Cattlemen's Association's members, who are effectively punished for having maintained their property as suitable habitat for species.

Washington Cattlemen's Association

The Washington Cattlemen's Association is a non-profit trade organization dedicated to promoting and preserving the beef industry through producer and consumer education, legislative participation, regulatory scrutiny, and legal intervention related to environmental regulation, including the Endangered Species Act. The Association represents over 1,300 cattlemen and landowners throughout the State of Washington, many of whom own rural lands burdened by Endangered Species Act regulations. In addition to managing their cattle operations, its members also engage in voluntary conservation efforts to preserve and recover species on their private properties.

PLF's Litigation Team

Pacific Legal Foundation's Environmental Project's mission is to ensure that environmental laws do not violate constitutional rights or ignore the toll they take on people's lives. It also challenges counterproductive "environmental" regulations that both unnecessarily burden property rights and harm the environment.

Recently, PLF has won several significant victories in the U.S. Supreme Court protecting everyday people from abuse by federal bureaucrats. In *Sackett v. Environmental Protection Agency*, PLF won property owners the right to challenge Clean Water Act orders forbidding them from using their property, on pain of $75,000 per day in fines.[24] In *U.S. Army Corps of Engineers v. Hawkes*, it won property owners the right to judicial review of a federal agency's assertion of jurisdiction to control the use of their property under the Clean Water Act.[25]

PLF Attorney Jonathan Wood is lead counsel, working with PLF Principal Attorney Damien Schiff and College of Public Interest Law Fellow Ethan Blevins. This backgrounder was prepared by Jonathan Wood. For more information, or to arrange interviews with PLF attorneys and their clients, please contact:

Harold E. Johnson, Director of Communications
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: hej@pacificlegal.org

Notes:

1. Cong. Research Serv., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 357 (1982) (statement of Sen. Tunney) (hereafter "Legislative History") (emphasis added). Senator Tunney went on to say that "I feel that [the Endangered Species Act] provides the necessary national protection to *severely endangered* species while encouraging the States to utilize all of their resources toward the furtherance of the purposes of this act." *Id.* at 360 (emphasis added).

2. *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975), *codified at* 50 C.F.R. § 17.31.

3. *See* Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23, 47-52 (2015).

4. 16 U.S.C. § 1540.

5. *Id*.

6. Jonathan H. Adler, *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* 9-10 (Adler ed., 2011); M. Lynne Corn & Kristina Alexander, Cong. Research Serv., R42945, *The Endangered Species Act (ESA) in the 113th Congress: New and Recurring Issues* 2, 6 (2014). A similar amount have been delisted because they were improperly listed in the first place or have become extinct, notwithstanding the statute's protections. Corn & Alexander, *supra* at 6.

7. *See* Adler, *supra* note 6, at 6-7.

8. Wood, *supra* note 3, at 35-37.

9. 16 U.S.C. §§ 1532(6), 1538.

10. *See* Legislative History at 359-60.

11. 16 U.S.C. § 1533.

12. 16 U.S.C. § 1532(20).

13. *See, e.g.*, *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation – MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013) (upholding the listing of the polar bear as threatened based on climate change model projections several decades into the future); *Defenders of Wildlife v. Jewell*, No. 14-cv-246, 2016 WL 1363865 (D. Mont. Apr. 4, 2016) (wolverine should be listed as threatened despite healthy and growing population because models predict that the population will begin to decline in 50-100 years).

14. 16 U.S.C. § 1533(d).

15. S. Rep. No. 93-307, at 8 (1973), *reprinted in* Legislative History, *supra* note 1, at 307 (emphasis added).

16. 50 C.F.R. § 17.31.

17. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

18. *See* Letter from Douglas P. Wheeler, Acting Assistant Secretary of the Interior, to Rep. Leonor Sullivan, Chairman, House Committee on Merchant Marine and Fisheries (Mar. 23, 1973), *in* Legislative History, *supra* note 1, at 162.

19. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 145-46, 155-56 (2000).

20. *See, e.g.*, Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158, 46,159 (Aug. 2, 2012).

21. *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114, 26,174 (June 26, 1990).

22. *See, e.g.*, U.S. Fish & Wildlife Serv., *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina*) I-7, I-8 (June 28, 2011); Scott Learn, *Northern spotted owl marks 20 years on endangered species list*, The Oregonian, June 25, 2010, http://www.oregonlive.com/environment/index.ssf/2010/06/northern_spotted_owl_marks_20.html; Washington Forest Protection Association, *Delving into the impact of the spotted owl* (Dec. 17, 2010), http://www.wfpa.org/news-and-resources/blog/delving-into-the-impact-of-the-spotted-owl/.

23. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714 (1995) (Scalia, J. dissenting).

24. 132 S. Ct. 1367 (2012).

25. 136 S. Ct. 1807 (2016).