The Endangered Species Act: Making Innocent Species the Enemy

By Richard L. Stroup

PERC’s 1994 Congressional Staffers’ Conference, held in Annapolis, Maryland, in November, focused on the Endangered Species Act. The meeting, directed by PERC Senior Associate Richard L. Stroup, brought together staff members likely to be involved in the debate over reauthorizing the Act. This article discusses the problems with the Act and suggests improvements. The illustration on page 5 is by Arthur Singer from Birds of North America © 1983, 1966 Western Publishing Company, Inc. Used by permission.

The Endangered Species Act (ESA) runs squarely up against the basic economic problem, the problem of scarcity. Our resources for saving species, just like any other endeavor, are limited and have other uses. But supporters of the current Endangered Species Act would like to avoid the idea of scarcity. They would like to believe that their mission transcends all others.

The conflict between the fact of scarcity and the apparent ability of the Fish and Wildlife Service to disregard limits is the underlying problem with the Act. Until that conflict is resolved, the ESA will not work effectively to save species.

The ESA, as now interpreted, requires Fish and Wildlife Service (FWS) biologists to control uses of lands that they consider important for endangered or threatened species. To preserve a species’ habitat, the Fish and Wildlife Service decides whether farming or logging or building or other activities will be allowed. (Such power is not written into the law itself but reflects the current interpretation of the Act.) On such land, private or public, biologists become, in effect, land managers on behalf of the listed species.

When a northern spotted owl, red-cockaded woodpecker, or other endangered or threatened animal is found on private property, nothing is paid to the owners of the land. Yet the owners are required to meet the demands of the biologists in the Fish and Wildlife Service. The biologists have no economic incentive to limit their demands. They have no budget to restrain them because they have no requirement to compensate the owners they control.

The results can be devastating for the landowner who has listed species on his or her land (or who has habitat that might attract listed species). And they can be devastating for the species as well.

The case of Ben Cone illustrates the effects. In 1982, Benjamin Cone, Jr., inherited 7200 acres of land in Pender County, North Carolina. He has managed the land primarily for wildlife. The wild turkey has made a comeback in North Carolina partly due to his efforts. He has planted chuffa and rye for the turkey. He burns the property frequently to provide habitat for quail and deer.

In the 1970s Ben Cone and his caretaker noted a couple of red-cockaded woodpeckers on the property, but the birds posed little problem because Cone did not wish to log their habitat at that time. In 1991, when Cone tried to sell some timber from his land, the presence of the birds was formally recorded. Cone hired a wildlife biologist to determine the numbers of birds, which are now believed to consist of 29 birds and 12 colonies. According to the Fish and Wildlife Service’s guidelines, a circle with a half-mile radius must be drawn around...
each colony, within which no timber can be harvested. If timber is harvested, Cone is subject to a severe fine and/or imprisonment under the Endangered Species Act. Biologists estimate that 1,560.8 acres have been affected by the bird’s presence. This land is worthless for its timber (but he is still required to pay taxes on its previous value).

Cone has made several changes in the way he manages the wildlife and timber. In the past, he clearcut a 50-acre block every five to ten years. Since the woodpeckers were found, he has clearcut 300-500 acres every year on the rest of his land. Cone told an investigator, “I cannot afford to let those woodpeckers take over the rest of the property. I’m going to start massive clear-cutting. I’m going to a 40-year rotation instead of a 75- to 80-year rotation.”

Some environmentalists argue that examples like Cone’s are merely “anecdotal,” or isolated instances that exaggerate the negative impact of the ESA. Or they paint these individuals as placing their wealth above their social responsibilities.

But Michael Bean, the Environmental Defense Fund attorney often credited with writing the Endangered Species Act, told a group of FWS officials that there is “increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems.” He said that these actions are “not the result of malice toward the environment” but “fairly rational decisions motivated by a desire to avoid potentially significant economic constraints.” He called them a “predictable response to the familiar perverse incentives that sometimes accompany regulatory programs, not just the endangered species program but others.”

Many of Bean’s colleagues in the environmental-activist community simply refuse to recognize the actual consequences of the ESA. They have acted as though their mission—protection of endangered species—trumps all others. But the Act is failing because government officials can avoid weighing one allocation against the other. They can simply order agencies and private landowners to do what they think should be done, and this makes endangered species into the enemy of the landowner.

It is ironic that the Constitution explicitly forbids the government from requiring a citizen to quarter a soldier (that is, provide food and shelter). Yet the government is allowed to require the same citizen to quarter a grizzly bear, a spotted owl, or any other member of a threatened or endangered species. If the Defense Department had the same power to demand the billeting of soldiers as the FWS does now for endangered species, we could expect to see soldiers feared and despised, perhaps even ambushed.

So far, no actions taken by the Fish and Wildlife Service under the ESA have been judged by a court to be a “taking” and thus subject to compensation under the Fifth amendment. In fact, few, if any, ESA cases have been brought before a court. (Ben Cone has considered a suit as one option). However, this may change, and recent Supreme Court decisions suggest that it may recognize control of land to protect endangered species as a taking. If so, compensation will be required, and the cost to taxpayers could be substantial. Such a decision would spur revision of the law.

But whether the courts rule that this control is a taking or not, the law should be changed. When the Fish and Wildlife Service takes control of private land, it should pay compensation, possibly in the form of a rental payment. Compensation would reduce the current fear and hatred for endangered species on the part of landowners and thus would lead to greater protection. In addition, the need to consider the true costs of its actions (since they would no longer be costless to the FWS) would cause the FWS to search for economical, cost-effective habitat and management plans. By entering the budget process, the Fish and Wildlife Service would come to recognize that resources have limits.1

1. It is possible that change will come by a different avenue. The Supreme Court has agreed to reconsider the Fish and Wildlife Service’s claim that the law requires it to tell landowners how to use their land. Rejection of the current interpretation would severely reduce the power of the Fish and Wildlife Service.