The Endangered Species Act: Does "Endangered" Refer to Species, Private Property Rights, the Act Itself, or All of the Above?

*Diana Kirchheim*

Imagine that your family has owned a 3200-acre ranch in western Riverside County, California, for five generations. You grow wheat, oats, and barley. Using standard agricultural practice, you leave a portion of land unplanted, or fallow, for a year so that the soil has a chance to rejuvenate, thereby keeping the land in good condition and increasing future yields.

One day you discover biologists surveying the fallow land on your ranch. These biologists forward the data collected on your land to the Fish and Wildlife Service (FWS). The data indicates that a population of Stephens Kangaroo Rats was found on your farm. The FWS decides to prohibit your family from plowing the 800 fallow acres so that the rodents can be studied. It takes the rats three years to traverse your property. Once the FWS lifts the ban on planting on the fallow land, your family is out $400,000 in lost income and expenses for attorneys and biologists. Your family now plants every acre every year, reducing the land's yield and eliminating all natural habitat for wildlife, out of fear that the rat will return and the use of your land will once again be taken from you.

In another scenario, you are a resident once again of Riverside County in southern California, a region notorious for wildfires. Unfortunately, the FWS has prevented you from discing1, a procedure

---

1. "Discing" is a mechanical process whereby an implement, usually pulled and powered by a tractor, cuts into and overturns the soil. Fire experts believe it to be the most effective means of fire prevention. Michael Vivoli, Note, "Harm"ing Individual Liberty: Assessing the U.S. Supreme Court's Decision in Babbit v. Sweet Home, 32 CAL. W. L. REV. 275, 315 n.267 (1996).

---

* J.D. Candidate 1999, Seattle University School of Law; Clerk, Supreme Court of Washington, the Hon. Gerry Alexander, 2000-2001. The author wishes to thank Professor Richard Settle for his excellent criticisms and suggestions and Bill Pickell for the topic suggestion and analysis of the current debate. In addition, thank you to the law review editorial committee for its thoroughness and detailed editing, especially to Brad Buckhalter, Sharon Cates, and Heather Carr. Last, but definitely not least, thanks Mom and Dad for all your wisdom, love, and support.
used to dig firebreaks to keep your home safe from wildfires. The FWS has taken this position because discing would disturb the burrows of Stephens Kangaroo Rats. You have been applying for permission to disc your property for over a year. Then a wildfire strikes. The fire department urges people to disc their property. The FWS still refuses your requests to disc. When you smell the smoke nearing your home, do you violate federal law by discing the land around your home to protect it, or do you allow the fire to destroy it? Whatever decision you make, the rats will be destroyed.

Unfortunately, these hypotheticals are real-life scenarios. They happened to property owners under the current Endangered Species Act (ESA or “the Act”). In fact, the Kangaroo Rat regulations in Riverside County, California have made the rat the largest “landowner” in that county.

It is not only the Stephens Kangaroo Rat that is affecting property owners. There are many compelling stories from people who had to live with the real-life impact of the ESA. As a result of these adverse effects on property owners, the ESA has been criticized not only for being ineffective in preserving species and their ecosystems, but also for being more expensive than Congress originally envisioned. In fact, Senator Mark Hatfield, one of the authors of the Act, was quoted as saying:

---

2. Richard Pombo & Joseph Farah, This Land Is Our Land: How to End the War on Private Property 46-47 (1996). The first scenario represents the true story of the Domenigo family and their farm. It is interesting to note that FWS threatened the Domenigo family with a $50,000 fine and/or a year in prison for each rat disturbed. In addition, the taxes on the property were never abated. Vivoli, supra note 1, at 315 n.262. The second scenario is based on the wildfires that struck Southern California in 1993. Pombo & Farah, supra this note, at 46-47. Twenty-nine families in Riverside County lost their homes to the wildfires. Id. The FWS had in fact prevented the families from digging firebreaks or discing in order to protect the burrows of Stephens Kangaroo Rats. Id. at 47. Michael Rowe decided to disc his property against the FWS’s wishes and violate the ESA. Id. Yshmael Garcia obeyed the FWS and did not disc his property. Id. His house burned down and the rats’ burrows were destroyed. Id. Mr. Garcia summed it up best: “My home was destroyed by a bunch of bureaucrats in suits and so-called environmentalists who say animals are more important than people.” Pombo & Farah, supra this note, at 47.


5. For example, families in Owyhee County, Idaho, cannot get bank loans for their homes because the listing of a tiny snail, the Bruneau Hot Springs snail, has caused the value of their property to plummet. In Laramie, Wyoming, the community’s mosquito control program has been suspended because of the ESA, causing severe health risks for Laramie citizens, including a boy who contracted encephalitis from a mosquito. 143 CONG. REC. S9411-03, S9412 (1996) (statement of Senator Kempthorne).
I have supported—and I continue to support—the ESA. . . . But unlike many of my colleagues from urban areas, I also have to deal with the human side of this act, and thus[,] have special reason to know that it has come to be an environmental law that favors preservation over conservation. There is no question that the act is being applied in a manner far beyond what any of us envisioned when we wrote it 20 years ago. . . . The fact is that Congress always considered the human element as central to the success of the ESA. The situation has gotten out of control.6

The ESA, as written and applied today, is not reaching the goals that its drafters envisioned. While the ESA in theory saves species from extinction and restores them to viable populations, in actuality it often devastates property owners and arguably results in the recovery of few species. By shifting the burden of species conservation to private property owners, the ESA has caused people to fear species conservation instead of encouraging property owners to become part of the solution by conserving species on their own property. In an era of environmental awareness, we all want the same goal: to preserve the species in our environment. Only by encouraging the states and citizens of our country to become actively involved in endangered species conservation and by giving them incentives to implement this program, will we see a turnaround in the recovery of threatened species. Therefore, the ESA must be rewritten to restore it to its original purpose of species conservation without imposing stifling bureaucratic regulations.

There is no doubt that the ESA was adopted with the utmost good will. Upon signing the ESA on December 28, 1973, President Nixon stated, "[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed."7 This statement defines the ESA's ultimate purpose, which is to conserve the Nation's natural heritage for the enjoyment and benefit of current and future generations.8 "Conserve" is defined in the ESA to mean the use of all methods necessary to bring a protected species to a point where the ESA's protections are no longer needed.9 The Supreme Court found that "[t]he plain intent of

8. Id.
Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. 10

The ESA is the most comprehensive environmental legislation Congress has ever passed. 11 Since its adoption, a conflict has arisen between those who think the ESA is effective in saving endangered species and those who think it infringes on property rights and often results in major economic loss in return for minor environmental gain. 12 This conflict intensified when the ESA came up for renewal beginning in 1992. 13

The future of the ESA is uncertain. Recent attempts by Congress to reauthorize the ESA have failed. 14 Some have noted that the ESA has come close to being repealed or becoming extinct itself. 15 Private property advocates have promoted several proposals to weaken the ESA's power upon reauthorization and, in some cases, have advised repealing the Act itself. 16 Donald Berry, vice president for lands at the World Wildlife Fund, notes that "if there is one event that causes the diverse environmental community to hyperventilate in unison, it is an assault on the ESA." 17 Environmentalists have apparently felt no urgency to reauthorize the ESA because it remains operational as long as money is appropriated for it. 18 A recent ruling by the United States Supreme Court on the ESA has added more fuel to the debate between private property interests and environmentalists and will be discussed in a later section of this Comment.

This Comment will focus on the current problems of the ESA and suggest how the ESA can be rewritten to accommodate both environmental and private property interests. Section I will discuss procedure under the ESA. In Section II, the Comment examines the controversial "harm" definition frequently arising in ESA litigation. In Section III, the Comment will dispel the myth that the ESA is currently operating as originally intended and will discuss the reasons why

11. Id. at 180.
15. Protecting the ESA Senate's Endangered Species Act Reauthorization Compromise Won't Please Everyone, But It's Better Than Actions to Gut the Law, PORTLAND OREGONIAN, Sept. 30, 1997, at B06 [hereinafter Protecting the ESA].
17. RAY & GUZZO, supra note 6, at 91.
private property owners criticize the current ESA. Section IV will examine a proposal for reauthorizing the ESA written by Senator Dirk Kempthorne (R-Idaho) that Congress failed to adopt in 1997. Further, in Section V, the Comment will focus on suggestions for improving the Kempthorne Reauthorization Bill as the basis for future legislation geared toward ESA reform and reauthorization. Finally, in Section VI, this Comment will conclude that the ESA should not be reauthorized without first being rewritten to ensure a balance between strong, effective species protection and a genuine respect for property rights and economic interests.

I. PROCEDURE UNDER THE ESA

The ESA is administered by the Secretaries of the Interior and Commerce. Specifically, the FWS is responsible for terrestrial species, while the National Marine Fisheries Service (NMFS) is responsible for marine species.

The ESA requires that endangered and threatened species be identified and that these species, along with their habitats, receive statutory protection. Federal protection for species begins once the species has been listed in the Federal Register as either threatened or endangered. The decision to list a species as threatened or endangered is thus a key decision.

At the initiative of the FWS, NMFS, or any interested person, a species or critical habitat may be proposed for listing or delisting. Once a petition is filed, the agency has ninety days to determine whether the request presents enough data to support further investigation. If there is enough evidence to support further investigation,

---

23. “Endangered species” are those in danger of extinction throughout all or a significant portion of their range, while “threatened species” face a somewhat less imminent prospect of extinction but are likely to become endangered in the foreseeable future. 16 U.S.C. §§ 1532(6), 1532(20).
24. All decisions to list a species are subject to notice and comment of informal rulemaking under the Administrative Procedure Act. PATRICK W. RYAN AND GALE SCHULER, THE ENDANGERED SPECIES ACT - A PRIMER (Perkins Coie, LLP 1998). However, judicial review of those decisions is limited. To successfully challenge a listing, a challenger must demonstrate that the agency acted in an arbitrary or capricious manner. Id. Successful petitions for delisting a species that has been listed are also rare, despite the fact that the ESA allows delisting. Id.
26. Id.
then the agency begins review of the species's status. 27 Review must be completed within a year and the following action must be taken: (1) rejection of the petition, (2) proposal of a rule to list the species, or (3) extension of time for consideration of the petition for another year. 28

Once a decision is made to propose a rule listing a species, the agency has another year to make the listing decision after proposal of the rule. 29 A decision to list a species as endangered or threatened must be made "solely on the basis of the best scientific and commercial data available. . . ." 30 However, the conservation efforts that are already in place by state and local programs and regulations may also be considered. 31

The ESA contains three major mechanisms to ensure the protection and recovery of "endangered" or "threatened" species. First, the ESA prohibits all international and interstate trade in listed species. 32 Second, the ESA prohibits federal agencies from taking any action that is likely to "jeopardize the continued existence" of any listed species or likely to result in the "destruction or adverse modification" of any habitat designated as "critical." 33 The determination of whether federal action may jeopardize a species or adversely modify critical habitat is made through a process called "consultation," in accordance with Section 7 of the ESA. 34 Third, the ESA prohibits

27. Id.
29. § 1533(D)(ii).
30. § 1533(b)(1)(A).
32. § 1538(a).
33. § 1536(a)(2)(1988).
34. Whenever an agency action involves a major construction activity, the agency must request information from the FWS about the presence of listed or proposed species. JACKSON B. BATTLE ET AL., ENVIRONMENTAL DECISIONMAKING: NEPA AND THE ENDANGERED SPECIES ACT 169 (Andersons 2d ed., 1986). If no such species is present, the action is allowed to proceed. Id. However, if a species is present, then the agency must prepare a biological assessment to determine whether the species or its critical habitat is likely to be adversely affected by the proposed action. Id. If a biological assessment concludes that adverse affects are likely, then the agency must enter into formal consultation with the FWS. For proposed actions that do not require a biological assessment, agencies must initiate formal consultation if the action may affect a listed species or critical habitat. Id. After formal consultation concludes, the FWS prepares a biological opinion, which addresses the extent to which the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat. Id. If no jeopardy will result, the action may proceed. Id. If no jeopardy will result, but individual members of a listed species might be taken within the meaning of Section 9 of the ESA, then the FWS may issue an incidental take statement which protects the agency against Section 9 liability for a stated number of "takes," so long as the agency employs specified precautionary measures. Id. If the FWS determines that jeopardy will result, then it must suggest reasonable and prudent alternatives that will not jeopardize the species. Id.
any person from "taking" any listed animal species, unless the Secretary has issued a special permit authorizing the "take." The Act broadly defines the term "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." This broad, controversial definition provides wide-ranging protection for listed animals and will be further discussed in Section II.

In addition to these mechanisms, the ESA requires the Secretary of the Interior to develop and implement "recovery plans" for all listed species, unless the development of such a plan "will not promote the conservation of the species." Recovery plans must, to the "maximum extent practicable," include: (1) site-specific management actions to promote conservation; (2) objective, measurable criteria that, when met, will deter the species may be removed from the list; and (3) estimates of the time and money necessary to achieve the plan's specific goals. Also, recovery plans must be based solely on biological considerations, not on economic or social factors.

In addition to protecting individual species of plants and animals, the ESA emphasizes the need to protect the ecosystems of endangered and threatened species. A listed species' habitat, the "critical habitat," is obviously essential to saving the species from extinction. Critical habitat is defined as "the specific areas within the geographical area occupied by the species, at the time it is listed" and even "specific areas outside the geographical area" if this land is essential for the species to survive. Under the 1978 amendments to the ESA, when

---

Generally, actions that may jeopardize a listed species, or that will result in the destruction or adverse modification of their critical habitat, may not go forward unless an exemption is received. Id. Congress established a seldom-used process in 1978 to allow agencies to apply for exemptions from the ESA and to pursue the action. Id.

35. 16 U.S.C. § 1539(a). Under Section 10 of the ESA, any person who proposes an activity that may "incidentally" result in the "taking" of a listed species may prepare and seek approval of a habitat conservation plan (HCP). BATTLE ET AL., supra note 34, at 170-71. The HCP must describe the impact that will likely result from the taking, the steps that will be taken to minimize and mitigate that impact, the funding that will be available to carry out the mitigation, and the alternatives to the proposed plan that were considered. Id. The Secretary is required to approve a permit that authorizes the incidental taking of a listed species if he or she finds that the applicant will minimize and mitigate the impacts to the maximum extent practical, that adequate funding is available to carry out the mitigation, and that the taking will not appreciably reduce the likelihood of survival of the species. Id.

37. § 1533(f)(1).
40. § 1531(b).
41. § 1532(3)(A)(i)-(ii).
a new species is listed, the Secretary of the Interior must designate the critical habitat to the extent that such designation is prudently possible. A balancing test is then used, under which the benefits of excluding land from the critical habitat are weighed against the benefits of including the land in the critical habitat. If the benefits of excluding the land outweigh the benefits of including it, then a certain portion of the land will be excluded from the designated critical habitat. However, the Secretary is not to exclude an area if its exclusion will result in the extinction of a species. After the 1978 amendments to the ESA, the Secretary was required to consider economic impact when designating critical habitat for a listed species. Congress nullified this provision in the 1982 amendments to the ESA.

Three courses of action are available to prosecute persons who violate the ESA. First, the government can impose civil penalties on a violator. Second, the government can seek to impose criminal penalties. Third, citizens are granted the right to bring a civil action in district court. Any person may sue to enjoin an ESA violation or to compel the Secretary of Interior to enforce the take prohibition. A citizen may also specifically sue the Secretary for failure to perform a nondiscretionary act. The ESA further encourages individuals to assist the Secretary in enforcing the Act by rewarding those persons who provide information leading to an arrest, a conviction, a penalty, or the forfeiture of property.

43. § 1533(a)(3)(A).
44. Id.
47. Godfrey, supra note 16, at 986.
49. § 1540(a)(1). The ESA can be enforced with civil penalties up to $25,000 for each violation, subject to defenses. Id.
50. § 1540(b)(1). A person who "knowingly violates" an ESA provision may face criminal prosecution, resulting in fines up to $50,000 and imprisonment for up to a year. Id.
51. § 1540(g)(1).
52. § 1540(g)(1)(A)-(B).
54. § 1540(d).
II. HARM DEFINITION AND RECENT LITIGATION

The most contentious aspect of the ESA for property owners is its power to take private property through extensive restrictions on land where endangered species may exist.

As discussed previously, Section 9 of the ESA provides that it "is unlawful for any person subject to the jurisdiction of the United States to ... take any [listed] species within the United States or the territorial sea of the United States."\(^{55}\) As mentioned above, "take" means to "harm," among other things. The meaning and scope of the "harm" definition is significant under the ESA because, if a property owner is found to have harmed a protected species, then the landowner has taken a species under Section 9 and is subject to fines and possible imprisonment.\(^{56}\) As a result, the interpretation of the term "harm" is critical to finding that a landowner has violated Section 9 of the ESA.

To further clarify the application of the term "take," the Secretary of the Interior promulgated a regulation defining the term "harm" as that used within the take definition of the ESA.\(^{57}\) Currently, "harm" within the take definition means an act which actually kills or injures wildlife, including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."\(^{58}\)

The agency's promulgation of the "harm" regulation has been very controversial and the subject of much litigation.\(^{59}\) Several courts have interpreted the ESA's terms "take" and "harm" differently. The Supreme Court ruled on the "take" definition in Tennessee Valley Auth. v. Hill.\(^{60}\) In that case, the Court shut down a billion dollar dam project in order to protect an endangered breed of perch known as the snail darter.\(^{61}\) The Court found that, upon examination of the ESA's language, history, and structure, Congress intended endangered species to be afforded the highest of priorities.\(^{62}\) While this case interpreted Section 7 of the ESA, destruction or adverse modification of the

55. § 1538(a)(1)(B).
56. § 1540(a)(1).
57. 50 C.F.R. § 17.3 (1995).
58. Id.
61. Id. at 174.
62. Id. at 175.
endangered snail darter’s critical habitat was clearly prohibited. Because Section 9 of the Act does not explicitly prohibit alteration or loss of critical habitat, the issue arose of whether a “taking” as prohibited by Section 9 includes harm, degradation, or loss of habitat.

The Ninth Circuit decided the issue in *Palila v. Hawaii Dep’t of Land & Natural Resources* by relying on the strong support that the Supreme Court gave the ESA in its *Hill* decision. At the district court level, the court found that the Palila bird’s critical habitat was Hawaii’s mamane forests. Plaintiffs alleged that mouflon sheep, grazing on public lands and feeding on shoots, seedlings, and bark of the mamane forest, endangered the Palila bird and constituted an impermissible taking under the ESA. The district court ruled that the habitat destruction was an impermissible taking because the Hawaii Department of Land & Natural Resources would foreseeably harm the Palilas by allowing the sheep to continue to graze and thereby significantly impair the Palila’s ability to feed. Despite no actual death or injury to the Palila, the court still found a violation of the take clause and ordered the sheep removed from the public lands so that the Palila’s food sources could grow and regenerate.

The Ninth Circuit affirmed the lower court’s ruling, holding that the regulation was consistent with the congressional intent to afford endangered species the highest priority. This case established the important and controversial precedent of protecting endangered species even where the habitat modifications that harm the wildlife are foreseeable, but cause neither actual nor proximate injury or death.

Another recent case established its own application of the harm regulation. In *Sweet Home, Chapter of Communities for a Great Oregon v. Lujan*, a group of small landowners in the logging industry sought a declaratory judgment against the Secretary of the Interior and the Director of the FWS. The loggers argued that the application of the harm regulation to the Northern Spotted Owl and other threatened wildlife species prevented them from developing all viable uses of their

---

63. 852 F.2d 1106 (9th Cir. 1988).
64. Palila v. Hawaii Dep’t of Land & Natural Resources, 649 F. Supp, 1070, 1078 (D. Haw. 1986), aff’d, 852 F.2d 1106 (9th Cir. 1988).
65. Id. at 1080.
66. Id. at 1082.
67. Palila, 852 F.2d at 1109 n.6.
68. See Keenan, supra note 59, at 1489.
property because these endangered species occupied their land. The loggers contended that the Secretary acted beyond his authority when he included habitat modification within the harm regulation. The Secretary argued that a "harm" occurs only where there is an intentionally-caused, actual, physical injury to a specific member of a listed species. The United States District Court for the District of Columbia rejected the loggers’ challenges and found the regulation valid.

The loggers appealed the district court’s ruling by arguing that Congress had not intended habitat modification to be equivalent to a prohibited take. The District of Columbia Circuit Court of Appeals initially affirmed the lower court, but on rehearing en banc, the panel reversed its decision and found the Secretary’s regulation to be impermissible.

The D.C. Court of Appeals’ holding in Sweet Home conflicted with the Ninth Circuit’s holdings in the Palila case and thus caused a split in the circuits regarding whether the Secretary’s interpretation of the harm definition was reasonable. In Palila, the Ninth Circuit ruled that a taking exists where there is a foreseeable harm, but did not require proximate cause between the habitat modification and the harm. On the other hand, the court in Sweet Home ruled that including habitat modifications that significantly affect feeding, breeding, and sheltering patterns of endangered species within the harm regulation was an invalid agency interpretation of the congressional intent regarding the scope of activities included within the take prohibition. Faced with conflicting opinions, the United States Supreme Court granted certiorari in Sweet Home to resolve the split.

The main issue on appeal was whether the Secretary of the Interior’s interpretation defining “harm” was reasonable. The Supreme Court held that the congressional intent regarding the ESA was ambiguous and that the Secretary of Interior reasonably construed the

70. *Id.* at 283.
71. *Id.* at 286.
72. *Id.* at 284.
73. *Id.* at 287.
76. *Palila*, 852 F.2d at 1110.
intent of Congress when he defined harm to include "significant habitat modification or degradation that actually kills or injures wildlife." The Court's opinion was based on the ESA's text, structure, and legislative history.

The Court found that the ESA's text offers three justifications for finding the agency's interpretation reasonable and valid. First, the plain meaning of harm encompasses habitat modification that results in actual injury or death to specific endangered species. Second, the ESA's comprehensive purpose supports the Secretary's decision to extend protection against activities that cause the precise harms that the statute was enacted to avoid. Third, it can be inferred from the creation of an incidental permit system that the take clause prohibits indirect as well as direct takes.

The Supreme Court also found that the ESA's legislative history reflected the reasonableness of the agency's harm regulation. First, the Senate Report stressed that "'take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." Second, the definition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." The Court concluded that the congressional intent was to include direct as well as indirect acts within the take provision, and therefore, it was reasonable for the Secretary to include habitat modification within the harm regulation.

The legal ramifications of the Sweet Home IV holding are difficult to predict because the case failed to draw a bright line between what constitutes a harm and what does not. The degree of causation that must be shown between the habitat modification and the harm resulting from that modification is still unanswered. While validating the regulation that prohibits acts that proximately and foreseeably

79. Id. at 708.
80. See id. at 697-701.
81. Id. at 697-98.
82. Id. at 698-700.
83. Id. at 700-01.
84. Sweet Home IV, 515 U.S. at 704-08.
85. Id. at 704 (citing S. REP. NO. 93-307 7 (1973)).
86. Id. at 705 (citing H.R. Rep. No. 93-412, p. 15 (1973)).
87. Id. at 708.
88. See Keenan, supra note 59, at 1499.
89. See Duana J. Desiderio, Sweet Home on the Range: A Model for As-Applied Challenges to the "Harm" Regulation, 3 ENVTL. LAW 725, 739 (1997).
cause significant disruption to essential behavioral patterns, such as breeding, feeding, and sheltering, is a victory for environmentalists, it remains unclear which modifications to the critical habitat by landowners foreseeably and proximately cause death or injury to endangered species. A significant question is whether a more direct and proximate nexus must be found to link actual injury to the challenged habitat alteration.90 One thing is for certain, the ambiguous *Sweet Home IV* standard has been applied on a case-by-case basis and provides little guidance to landowners on how they can comply with the "harm" regulation.91

III. MYTHS ABOUT THE ESA'S SUCCESS

While the courts struggle to interpret the ESA's terms, the Act's supporters and critics argue over its real-world effects. The ESA's supporters argue that the Act has successfully protected many species. They point to major success stories in protecting endangered species.92 They also suggest that the ESA is the only defense available against the loss of a species or the destruction of a rare habitat.93 The ESA's supporters acknowledge the ESA's shortcomings, but claim that the shortcomings are based on a combination of inadequate funding and weak enforcement, not on the ESA itself.94

As mentioned above, the ESA defenders also argue that the Act has rescued many species from certain extinction. For example, environmental groups tell stories about the ESA rescuing the bald eagle, the American alligator, and the brown pelican from extinction.95 However, the ESA critics claim that some species should never have been listed. For example, the 1973 population of 734,000 alligators did not indicate that it was in danger of extinction.96 Even the National Wildlife Federation admitted that "[i]t now appears that the animal should never have been placed on the Endangered Species List."97

According to the most recent report provided by the U.S. Fish and Wildlife Service, approximately nine percent of our endangered species are improving in status, twenty-seven percent are stable, thirty-

---

90. *See id.*
92. *See Pombo & Farah supra* note 2, at 51.
96. *Id.*
97. *Id.* (citing National Wilderness Resource at 1, Fall 1994).
three percent are still declining, and thirty-one percent are of indeterminate status. In addition to the fact that the approximately thirty-eight species added to the list each year stand only a ten percent chance of improving, contested delistings indicate that the Act has not been very successful. Secretary of the Interior, Bruce Babbitt, once called the Act "the most innovative, wide-reaching and successful environmental law that has been passed in the past quarter century." Babbitt now believes that the ESA should be reformed and that it is "ripe for reauthorization."

The ESA's critics, on the other hand, argue that there are several reasons why the ESA has been ineffective in protecting species. There are five main problems with the ESA: (1) the method of listing species; (2) the protection of species only once they are on their "deathbeds"; (3) the failure to take into account economic considerations; (4) the fact that decisions under the ESA are not always based on "good science"; and (5) the ESA's effect on private property owners.

The following discussion examines each of these criticisms in detail.

A. Listing of Species

The listing process is time-consuming, expensive, and ineffective. As mentioned earlier, review of species' status may be initiated either by the federal government or by a petition from interested parties. This means, in essence, that anyone with a postcard and a stamp can petition the FWS to list any population of plant, animal, or microorganism under the ESA. Upon receiving a petition, the Secretary has to decide within twelve months whether to propose the species for listing. Whether a species has declined sufficiently to justify listing is a biological, not an economic, question. Once a species has been proposed for listing, the Secretary must publish a notice in the Federal Register, notify appropriate parties, and schedule a hearing, if requested by any person. The Secretary must usually make a
This lengthy process for listing individual species may have seemed quite reasonable when the Department of Interior compiled its original list of seventy-eight endangered species in 1967, but with the several thousand species currently designated as candidates for listing, this system no longer makes sense.\(^{108}\)

In addition to being cumbersome, the listing process also is ineffective. When the ESA was passed in 1973, most members of Congress assumed that they were voting to protect charismatic species such as grizzlies, whales, manatees, whooping cranes, and bald eagles.\(^{109}\) The ESA does protect these types of species, but they are only a tiny portion of all protected species. Most of the ten to one hundred million species protected under the current ESA are fungi, insects, bacteria, and plants, and the ESA is supposed to protect them all.\(^{110}\) Under the ESA, in addition to the listing of any geographically distinct populations of vertebrate species, any species or subspecies of fish, wildlife, or plants may also be listed.\(^{111}\) This is an important distinction. The ESA can be invoked to protect one subspecies, even though others may be plentiful, or even overpopulated.\(^{112}\)

From a biological perspective, the ESA's focus on protecting species instead of ecosystems makes little sense. Some scientists now believe that rather than treating all species equally, the ESA should give priority to the protection of certain keystone species that play a vital role in maintaining the health of ecosystems.\(^{113}\) It "makes little sense to rescue a handful of near-extinct species. A more effective strategy would focus on protecting ecosystems that support maximum biological diversity."\(^{114}\)

The single-species protection has failed to provide adequately for the conservation of a species and its habitat. During the first twenty years of its operation, almost all of the activity under the ESA has been listing species rather than helping them recover.\(^{115}\) The ESA autho-

---

108. See POMBO & FARAH, supra note 2, at 35.
109. See GRIDLOCK, supra note 4, at 83.
110. Id. at 84.
111. POMBO & FARAH, supra note 2, at 35.
112. Id.
113. See GRIDLOCK, supra note 4, at 90-92.
114. Id. at 90.
115. Id. at 86.
rizes the Fish and Wildlife Service to create "critical habitat designations" and requires development of recovery plans for species on both the threatened and the endangered lists.\textsuperscript{116} By 1992, however, the General Accounting Office found that a critical habitat was designated for just sixteen percent of the species listed and that just sixty-one percent had a recovery plan in effect.\textsuperscript{117}

\section*{B. ESA Is Being Applied Too Late to Save Species}

Almost every author who writes on endangered species reform calls for earlier conservation efforts than those currently implemented under in the ESA.\textsuperscript{118} The biological and ecological problems of trying to recover a species that is nearly gone are immense. The management problems of dealing with a species approaching extinction also are intensified. Thus, early intervention is key to conserving species in order to protect entire ecosystems and their interdependent species.

No authority is given under the ESA to protect species other than those designated as endangered or threatened.\textsuperscript{119} The ESA, therefore, extends protection to a species only after its numbers are severely diminished and its very survival is in doubt. This last-minute strategy is dangerous, especially in terms of habitat conservation. Thus, by waiting until a species has barely enough habitat to survive, the ESA may preclude any real hope of recovery. To adequately protect these species, there must be a trend towards comprehensive protection of habitats before species are listed. Simply starting conservation before a species is severely endangered would alleviate much of the pressure, keep more options open, and reduce conservation costs. In addition, time limits for drafting recovery plans for endangered species must be adopted.

\section*{C. Ignoring Economic Considerations}

As previously mentioned, major decisions under the ESA are required to be based on science alone, without regard to economic considerations.\textsuperscript{120} Indeed, as also mentioned, the goal of the law is

\begin{thebibliography}{99}
\bibitem{116} POMBO & FARAH, supra note 2, at 35-36.
\bibitem{117} GRIDLOCK, supra note 4, at 86.
\bibitem{118} Id. at 91.
\bibitem{120} 16 U.S.C. § 1533(b)(1)(A).
\end{thebibliography}
to "halt and reverse the trend toward species extinction, whatever the cost."\textsuperscript{121}

In recent years, however, critics have argued forcefully that in order to produce sound public policy, the ESA must take economic and social costs into consideration. While proponents of the current ESA would suggest improving the Act by fully funding and enforcing it, the cost of fully implementing the Act is staggering.\textsuperscript{122} It has already cost the United States billions of dollars.\textsuperscript{123} In fact, conservative estimates of the ESA's costs are in the tens of billions of dollars.\textsuperscript{124} In the absence of huge increases in federal spending on endangered species protection, the combination of enormous costs and very limited resources creates a clear need to prioritize among species and to weigh the costs and benefits of protecting one species over another. By not considering costs, recovery plans cannot ensure that funds are being spent in a cost-effective manner and that the public is receiving the maximum amount of species protection for its investment.

Almost everyone would agree that the ESA is a noble law. However, critics of the ESA argue that the essence of its policy and implementation requires a balance between strong and effective ecosystem protection and a respect for economic considerations.\textsuperscript{125} Congressman William Dannemeyer (R-California) summed it up best when he said, "[i]f we do not amend this Act to put some balance into the decision . . . to list one of these critters, this act [sic] has the potential of shutting down the economy of this country."\textsuperscript{126}

D. \textit{Effect on Private Property Owners}

Critics also argue that the ESA should take into account the effects of species protection on private landowners. Ike Sugg, the Competitive Enterprise Institute's fellow in land and wildlife policy, says that "[t]he current Endangered Species Act is a disaster for both people and wildlife."\textsuperscript{127} The ESA currently regulates land use without compensating landowners for their losses.\textsuperscript{128} Instead, it places the costs and the burden of species conservation not on society

\textsuperscript{121} \textit{Hill}, 437 U.S. at 184.
\textsuperscript{122} See \textit{GRIDLOCK}, supra note 4, at 82.
\textsuperscript{123} \textit{POMBO & FARAH}, supra note 2, at 35.
\textsuperscript{124} \textit{GRIDLOCK}, supra note 4, at 84 (citing Ike Sugg, an analyst at the Competitive Enterprise Institute in Washington D.C.).
\textsuperscript{125} See \textit{Ruhl}, supra note 14, at 30-71.
\textsuperscript{127} \textit{POMBO & FARAH}, supra note 2, at 185.
\textsuperscript{128} \textit{Id.}
as a whole, but on individual property owners. By refusing to provide property owners just compensation when their property is taken, the ESA gives property owners no incentive to protect endangered species on their land.

The ESA takes precedence over private property rights and ownership and the multiple-use mandates on federal lands. Although the government does not literally take private property under the ESA, the restrictions that the Act places on private property reduce the property's economic value and, in some cases, make the property worthless to the private owner. As previously mentioned, it is unlawful under the ESA for a landowner to modify habitat once a species is listed. Interfering with that habitat invites fines and jail sentences.

The Act's punitive provisions are criticized by the current ESA's opponents because the Act provides no rewards or incentives to encourage good behavior by landowners. Specifically, it does not encourage landowners to restore or enhance the habitats of endangered species on their property. In fact, the ESA's critics say that the Act causes landowners to fear having endangered species discovered on their property because of the severe regulations restricting the use of their property.

Having landowners participate in the process of conserving species is important for several reasons. First, habitat destruction and degradation are the leading threats to biodiversity; it is estimated that they help endanger eighty-eight percent of the plants and animals on the endangered species list. Second, most of the endangered species' habitats are found on private land. In 1993, the Nature Conservancy estimated that almost two-thirds of endangered species inhabited private property. In some states, more than eighty percent of the habitat for listed and recommended listed species is privately owned. No responsible person is opposed to protecting the truly endangered species. Protection provides a significant public benefit. The rights of property owners, however, do not need to be sacrificed

129. Id. at 186.
131. See Wilcove, supra note 94, at 277.
132. See id.
133. See POMBO & FARAH, supra note 2, at 187.
134. Wilcove, supra note 94, at 277.
135. Id.
Endangered Species Act

E. Lack of Good Science

As mentioned earlier, decisions to list species under the ESA must be based solely on the best scientific and commercial information available. The current ESA's opponents argue that the decisions in these areas are based on poor science or no science at all. Some even complain that the listing decisions under the ESA are based as much on politics as on science.

It is possible for the FWS to use the best available data, but only if someone sends it to them. The FWS officials are criticized as accepting a lot of claims at face value. One example is the Mexican duck, which the FWS granted federal protection. As a result of this protection, the Vaca family ranch in Arizona lost 200 acres from its grazing permit. Later, it was discovered that there is no such thing as a Mexican duck. The birds on the Vaca family ranch were mallards, perfectly common ducks.

Critics of the ESA suggest that the ESA must clearly define what is meant by the term "best available scientific and commercial data." Not all data is relevant or even rises to the lowest threshold of being evidence. Data claimed to be scientific must be derived from the use of accepted scientific methods and protocols. Blind peer review should be instituted to review all data and analyses. Qualified experts should also be retained to review the information and should have no financial ties to the FWS. In addition, the blind peer review should be published so that it is available to the public.

This section was intended to educate the reader on the main arguments proposed by both sides on the ESA's effectiveness. The

---

140. See POMBO & FARAH, supra note 2, at 52.
141. Id.
142. Id.
143. Id.
144. Id.
145. See POMBO & FARAH, supra note 2, at 187.
146. See id.
147. See id.
next section will specifically examine these arguments and counterarguments in detail, taking into account the ESA reform.

IV. PROPOSALS FOR REAUTHORIZING THE ESA

This Comment has examined the criticisms of the current ESA and now turns to suggestions to make the ESA more effective at protecting species. Several ESA sections need to be amended or rewritten to effectuate the ESA's purpose and objectives. Any solution should take into consideration the Endangered Species Recovery Act of 1997, a recent, unsuccessful legislative proposal by Senator Dirk Kempthorne (R-Idaho). The Bill was written after nearly two years of heated negotiations between Kempthorne, who chairs the Drinking Water, Fisheries, and Wildlife Subcommittee, and three Senate environmental leaders from the same committee: committee chairman, John H. Chafee (R-Rhode Island); committee ranking Democrat, Max Baucus of Montana; and subcommittee ranking Democrat, Harry M. Reid of Nevada. "The result of efforts in the Senate is legislation that has been carefully crafted to maintain the essential strengths of the current law while taking steps to make it work better for species conservation, the States, and affected landowners."

Senator Kempthorne's Bill had three fundamental goals: first, to maintain and improve conservation of endangered and threatened species; second, to improve and expedite recovery of those species; and third, to reduce the regulatory burden on, and uncertainty for, property owners. Despite the Bill's bipartisan approval and backing from both the Secretary of the Interior, Bruce Babbitt, and President Clinton, Congress failed to enact the Bill into law. The Bill initially passed out of the Senate Environment and Public Works Committee by a vote of 15 to 3. Reports indicated that while the Bill was not ideal, it was a reasonable compromise and merited wider support. Because Congress did not pass the Bill during the 1997

---

149. See Margaret Kriz, It Was a Kodak Moment Last Month at the Often-Quarrelsome Senate . . ., NATIONAL JOURNAL, Oct. 4, 1997.
151. See 143 Cong. Rec. S9411.
154. See A Bird in the Hand, supra note 12.
or 1998 legislative sessions, the debate over the ESA will continue. There are those who feel that the Kempthorne Bill represented the only opportunity for rewriting the ESA until 2001. As a result, the ESA will continue to be a target for property rights advocates and will continue to ineffectively protect species.

This section of the Comment will focus on the Kempthorne Bill's strengths, taking into consideration both private property owners' concerns and environmental concerns, as well as the Bill's weaknesses that should be corrected in future ESA reform legislation. While Senator Kempthorne's proposal has seven parts, this Comment will focus on the following four parts: (1) listing and delisting species; (2) recovery plans; (3) habitat conservation plans; and (4) authorization for appropriations. Finally, this author will conclude that Senator Kempthorne's Bill was a sound piece of legislation containing few impositions on private property owners. In essence, the Bill represented a good compromise between two battling sides, and it is disappointing that this moderate proposal was not enacted into law.

A. Listing and Delisting Species

1. Collection and Use of Scientific Data

Senator Kempthorne's proposal attempted to eliminate some of the current problems of listing species mentioned above. First, in regards to the collection and use of scientific data, the proposal required the Secretary of the Interior to use the best scientific and commercial data available and to give greater weight to scientific or commercial data that is empirical, field-tested, or peer reviewed. Second, it required the Secretary to publish a summary of the best scientific and commercial data available in the listing proposal. Third, the Bill required the Secretary to (1) identify and publish in the Federal Register a description of additional scientific and commercial data that would assist in the recovery plan preparation, and (2) invite any person to submit information to the Secretary.

The Bill's provisions recognized that, in order to improve the listing process, decisions must be based on current, factual information. To enhance public confidence in the listing process, the Bill placed greater emphasis on the use of good science and public participation.

155. See Kriz, supra note 149.
156. S. 1180, § 2(a)(2).
157. § 2(c)(8)(A).
158. § 2(c)(9)(A).
Establishing independent, scientific review of listing decisions and setting specific targets for recovery, which would indicate when a listing should end, could lead to greater accountability and credibility in listing decisions, thereby restoring public confidence. Currently there is so much scientific disagreement surrounding actions and decisions taken by state and federal agencies that the public is beginning to distrust results. Critics of the current ESA feel that listing decisions are often made based on questionable science and politics.

This section of the Bill was not without criticism. One controversial portion of it was a provision that allowed the Secretary, and any other federal agency head, to withhold or limit the availability of data requested under the Freedom of Information Act (FOIA) if the data described an endangered or threatened species’ location, or that of a species proposed for listing, and the data’s release would be likely to result in an increased “take” of the species. Private property owners were concerned that they would be denied access to information gathered from their own land. On the other hand, environmentalists worried that if a species had not yet been, but could be, listed, the property owner would take action that could be detrimental to an endangered species before the listing, thereby avoiding prosecution under the ESA.

2. Peer Review

The Endangered Species Recovery Act of 1997 would have made peer review for all listing and delisting decisions mandatory. The Bill established a peer review panel to aid in listing and delisting decisions. The panel would have included three independent “referees,” chosen from a list provided by the National Academy of Sciences, who have demonstrated scientific expertise in the relevant subject area, who do not have a personal conflict, and who are not participants in other, ongoing listing processes.

The Bill’s incorporation of peer review recognized the importance of sound science. Currently, there is no requirement under the ESA for independent peer review. Critics, however, suggested that requiring the National Academy of Sciences to produce a list from

159. See Protecting the ESA, supra note 15.
161. S. 1180 § 2(d)(2).
162. § 2(c)(10)(A).
163. Id.
164. § 2(c)(10)(B)(i)-(iii).
which qualified experts are chosen is unnecessary and potentially costly and burdensome. Finally, the Bill required the Secretary to provide the person who requested the independent review with a justification for the Secretary’s decision regarding listing or delisting and for any failure to follow a peer review panel majority’s recommendation.

A reformed ESA should include some means for interested persons to intervene in the peer review process. For example, future legislation would be improved if the Bill required peer reviewers to respond to comments submitted by the public on the data’s sufficiency. Another possibility for ESA reform is to require that the peer review panel’s findings be made available to the public.

3. Petition Documentation and Process

The Bill established minimum scientific requirements for petitions to list, delist, or change the status of a species. A petition to list a species under the Bill presented substantial scientific or commercial information if it included: (1) documentation that the fish, wildlife, or plant is a species as defined by the Act; (2) a description of the available data on the historical and current range and distribution of the species; (3) an appraisal of the available data on the historical and current range and distribution of the species; (4) an appraisal of the available data on the status and trends of all existent populations; (5) an appraisal of the available data on threats to the species; and (5) identification of the data that has been peer-reviewed. The Bill required substantially more information to list a species than the current ESA.

Recognizing that endangered and threatened species are often treated the same under the current ESA despite their different legal statuses, the Kempthorne Bill enhanced the distinction between the two by requiring a “special rule” under Section 4(d) of the ESA for species listed as “threatened in the future” by no later than thirty months after the listing decision is made. This would have allowed the Secretary to provide greater management flexibility for threatened species.

The Bill also would have required the Secretary to initiate the procedures for determining whether to delist a species once the recovery goal for the species had been met. Currently, delisting

---

165. See US FWS: Testimony of Jamie Rappaport Clark, supra note 150.
166. S. 1180 § 2(c)(10)(c)(ii).
167. § 2(c)(4)(ii)(I)-(V).
168. § 2(c)(3).
169. Id.
decisions are often delayed, and the ESA’s enforcement continues despite the fact that the species no longer needs protection.

The Bill also recognized that states should have a greater role in the listing and recovery of species. Under the current ESA, states are not included in the listing process even though the species are located within that state. Under the Bill, the Secretary would send listing petitions within ninety days to any affected state and solicit its opinion as to whether the action is warranted. The Secretary would also notify any affected state when considering whether to list a species without a petition. While the Secretary must consider the State’s judgment, the proposed language would not have obligated the Secretary to follow it. Currently, the Secretary can ignore a state’s recommendation without explanation. Future legislation should require at least that the Secretary address why he or she is acting against the particular state’s recommendation.

One way to improve this area of the Bill would be to provide greater notice to affected landowners. Because most people affected by the ESA do not read the Federal Register, future attempts to reform the ESA should include a provision that establishes an early warning system to allow interested persons to get involved in the listing process. Notice could be expanded to include the governor of the affected state or states, county officials, and any interested party that has requested such notice.

B. Recovery Plans

The primary goal of the ESA is the recovery of endangered and threatened species. However, as previously mentioned, many of the endangered species protected under the current ESA do not have written recovery plans. Those plans that do exist often are not implemented, thereby sparking criticism that the current ESA is only concerned with listing species, not saving them. The Kempthorne Bill would have strengthened the recovery planning and implementation process significantly by more clearly focusing the ESA on saving species and removing them from the endangered species list. The Bill proposed to reach that goal in part by imposing deadlines for the development of draft and final recovery plans. Under the proposed legislation, the Secretary would have been required to publish a draft

170. § 2(c)(4)(iii)(I).
171. § 2(c)(4)(iii)(II).
172. § 2(c)(4)(iii)(III).
Endangered Species Act

recovery plan within eighteen months of a listing and a final plan within thirty months. This would have been accomplished by appointing a recovery team, in cooperation with the affected state or states, within sixty days of a species’s final listing. Recovery team members would be selected for their knowledge of the species or for their expertise in recovery plan design.

The Kempthorne Bill would have further promoted state involvement by requiring each recovery team to include: at least one state agency representative; representatives from federal, local, and tribal governments; representatives from academic institutions and commercial enterprises; as well as private individuals and organizations. Under the Bill, the Secretary would have the authority to authorize a state agency to develop recovery plans. Under this provision, a qualified state agency would appoint the recovery team and submit the draft recovery plan to the Secretary for approval.

The Bill also established minimum requirements for the contents of recovery plans. First, the recovery team would have been required to establish a biological recovery goal, based on the best scientific and commercial data available, that would result in delisting. Draft plans also would contain alternative strategies and objectives, measurable benchmarks to achieve the recovery goals, a description of the data used to develop the plan, and any additional data necessary along with a strategy to obtain that data. Currently, recovery plans are not required to contain alternative measures for recovery or their costs.

The recovery measures would have been required to achieve an appropriate balance between (1) effectiveness, (2) efficiency, and (3) social and economic impacts. If the recovery measures identified would impose “significant costs” on a municipality, region, county, or industry, then the recovery team would be required to prepare a description of the overall economic effect on the private and public sectors, including a description of the impact on employment, public revenues, and property values.

174. S. 1180 § 3(c)(1), (2).
175. § 3(d)(1).
176. Id.
177. Id.
178. § 3(h)(5)(A).
179. § 3(e)(1)(A).
180. S. 1180 § 3(e)(2)(B)(ii).
181. § 3(e)(B)(i)(I)-(III).
182. § 3(e)(B)(ii)(I)-(III).
183. § 3(t)(1).
Under the Bill, the Secretary of the Interior would have been required to publish a notice of availability, a summary of each recovery plan, and a request for public comment in the Federal Register and in a local newspaper.\(^\text{184}\) The Federal Register notice would be required to include a description of the economic effects and the recommendations of the independent referees on the recovery goal.\(^\text{185}\) Also, at the request of any person, the Secretary would have been required to hold at least one public hearing in each affected state and up to five public hearings on draft plans in affected states.\(^\text{186}\) After notice and an opportunity for public comment, the Secretary would have retained the authority to approve the final recovery plan.\(^\text{187}\) Another provision of the Bill held that if the Secretary selected a recovery plan contrary to those recommended by the recovery team, then the Secretary would explain why the recommendation was not followed.\(^\text{188}\)

With regard to critical habitats, the Secretary is currently required to designate a critical habitat at the time that a species is listed.\(^\text{189}\) The Secretary, however, often does not have sufficient information to designate a critical habitat. Under current practice, critical habitat is rarely designated at the time of listing, if it is designated at all. The Kempthorne Bill would have revised the current requirement to allow the Secretary to publish a final critical habitat designation thirty months after listing along with the final recovery plan.\(^\text{190}\) This would have allowed the Secretary to take advantage of the recovery team’s expertise and recommendations.

### C. Habitat Conservation Plans

The Kempthorne Bill would have benefited landowners because it required conservation plans to include a “no surprises” provision.\(^\text{191}\) Additionally, it would have made significant changes to conservation plans. First, it would have authorized private landowners to develop habitat conservation plans for multiple, rather than single, species that depend on the same habitat.\(^\text{192}\) This would have considered the needs of several species at once and provided certainty to

---

\(^{184}\) \S\ 3(f)(1).

\(^{185}\) S. 1180 \S\ 3(f)(2).

\(^{186}\) \S\ 3(h)(1).

\(^{187}\) \S\ 3(h)(3).

\(^{188}\) 16 U.S.C. \S\ 1533(a)(3)(A).

\(^{189}\) S. 1180 \S\ 3(n)(2)(A)(ii).

\(^{190}\) \S\ 5(c)(5).

\(^{191}\) \S\ 5(d)(2)(K).

\(^{192}\) \S\ 5(d)(2)(K)(4).
landowners. The Bill also guaranteed landowners, who develop habitat conservation plans and who receive incidental take permits, that they will not be required to spend more money or to carry out additional mitigation measures to meet future requirements under the ESA for species covered by their plans. This is accomplished by "safe harbor" agreements, which encourage landowners to enter into voluntary agreements with the Secretary that benefit conservation. Incidentally, a "no surprises" provision has already been administratively implemented by Secretary of the Interior, Bruce Babbitt.

The Kempthorne proposal also would have provided more certainty through "no take agreements," authorizing the Secretary to enter into agreements with property owners at the property owner’s request to identify activities that would not result in a prohibited take of an endangered or threatened species. Currently, there is no such provision in the ESA. Second, to minimize the cost to small landowners, the legislation required the Secretary, in cooperation with state agencies, to develop a model permit application that could serve as the conservation plan.

Kempthorne’s Bill also established the Habitat Conservation Planning Fund, from which the Secretary may make interest-free advances to states and other political subdivisions to assist in the development of conservation plans. It required advances to be repaid within ten years if no conservation plan were developed or no permit for incidental taking were issued.

D. Appropriations

The ESA must be adequately funded to assure its effectiveness. The Kempthorne Bill extended the authorization of appropriations to carry out the ESA through fiscal year 2003. The costs would have been around $150 million a year, compared to current annual spending of $75 million. There were concerns, however, over where this money would come from. Securing adequate funding to support this legislation was key. Jamie R. Clark, Director of the U.S. Fish and Wildlife Service, was quoted as saying, "Without adequate appropria-
tions, we will face significant litigation backlogs, and some species’s recovery may be stalled."

V. SUGGESTIONS TO IMPROVE THE KEMPTHORNE REAUTHORIZATION BILL

A. Harm Definition

Property advocates have criticized the “harm” definition under the Kempthorne Bill as being too broadly worded because it does not require proof of death or injury to the species. In addition, the uncertainty over what constitutes harm results in insufficient guidance for landowners in complying with the ESA. Some of these individuals would probably support eliminating “harm” from the definition of take, thereby requiring a direct and intentional action. Senator Kempthorne’s Bill, however, failed to eliminate the term “harm” from the take definition. Nevertheless, it did require either the Secretary or the Attorney General to establish, using scientifically valid principles, that (1) acts of such person caused or will cause the take, and (2) the person charged with the alleged violation knowingly engaged in the activity that resulted in the violation or take of a listed species. The Bill also allowed private individuals to request the Secretary to determine within ninety days whether an activity will result in a prohibited take of the species. This provision would have created consistency and, hopefully, would have side-stepped litigation, as this is the section of the ESA most likely to spawn litigation.

Alternatively, in future ESA reform legislation, Congress should require the death of a certain percentage of an endangered species in a specific geographical area before the actions of private landowners are considered an impermissible taking. This requirement would prioritize the interests of the property owner in developing all viable uses of the land and the economic benefits attached to those uses.

Additionally, the definition of “critical habitat” should be amended to include the entire area that can be occupied by the endangered species and the area occupied by species that are dependent upon the endangered species for survival. This shift would protect entire ecosystems, rather than single listed species. However, private property rights advocates would probably concede to this only if

200. US FWS: Testimony of Jamie Rappaport Clark, supra note 150.
202. S. 1180 § 6(a).
203. § 6(b).
landowners would be compensated by tax credits, government subsidies, or direct compensation when a critical habitat designation halts development.

B. Compensation for Private Property Owners

Many critics of Senator Kempthorne’s Bill point to the fact that it does not provide just compensation for takings under the ESA. Many others feel that if compensation were incorporated into the Bill, it would be too controversial to pass. Some would concede, however, that compromise is necessary.

Although legislation designed to protect the environment has existed for many years, the ESA has created the most visible and serious conflicts with property rights. Generally, the ESA has little impact upon private property rights until a species is listed for protection purposes.

The ESA contains two principal prohibitions that have the potential to severely restrict the exercise of property rights. First, it prohibits any person from “taking” any endangered species of fish, wildlife, or plants. Second, it prohibits a federal agency from engaging in any activity (including issuing permits or licenses, or funding of private projects) that jeopardizes the endangered or threatened species’ continued existence or critical habitat.

The ESA should protect property rights. It should recognize that the goal of species preservation is to benefit society and, therefore, society rather than private landowners should bear the cost. Burdening private property owners who have endangered species on their property by making them bear the cost of conservation fosters fear of the ESA’s provisions, not cooperation with its principles. Unfortunately, it is not easy to draft compensation language for the ESA.

The problem with drafting compensation language lies in determining where the line should be drawn and what diminution of value in land should be compensated. Congressman Pombo (R-California) previously introduced a bill that provided compensation for private property owners when the ESA-imposed restrictions diminished the value of their land by twenty percent or more. He felt that, by

---

205. See id.
207. § 1536(a)(2).
208. POMBO & FARRAH, supra note 2, at 188.
doing this, landowners would no longer fear having endangered species on their property.\(^{209}\)

Realistically, compensation language will probably never be included in ESA reform because of its controversial nature. If this is the case, then Congress should enact legislation that would make it easier for private property owners to vindicate their rights by bringing Fifth Amendment regulatory takings cases.

The Fifth Amendment guarantees that there will be just compensation when the government takes private property.\(^{210}\) A governmental taking of private property occurs when government action either directly interferes with or substantially disturbs an owner’s use and enjoyment of his property.\(^{211}\)

One type of taking involves what is characterized as a “physical invasion” of property.\(^{212}\) This can occur when either government employees or private individuals acting on behalf of the government occupy private property. When a physical invasion occurs, it is a taking regardless of the invasion’s economic impact on the owner.\(^{213}\)

The government can also take private property by restricting use of the property if that restriction results in a substantial diminution of the property’s value.\(^{214}\) Under the ESA, the government can severely restrict the use of private property if an endangered species exists on the property. Nevertheless, the question remains as to whether such land use restrictions rise to the level of a governmental taking.

Senator Kempthorne introduced separate legislation providing tax incentives for landowners to protect species on their property. Included in this separate bill was a provision prohibiting federal actions that reduce the value of a landowner’s property by thirty percent or more, unless compensation is offered.\(^{215}\)

While state and federal constitutional provisions may make compensation language unnecessary, private property advocates wish to have compensation language added to the ESA because of the difficulty in getting a regulatory takings case to court. Receiving compensation under the Fifth Amendment is easier in theory than in

\(^{209}\) See id.

\(^{210}\) U.S. Const. amend V (stating “. . . nor shall private property be taken for public use without just compensation”).


\(^{212}\) Id.

\(^{213}\) Id. at 435.

\(^{214}\) See id.

\(^{215}\) ESA Reform Bill Includes Property Compensation Clause, CONGRESS DAILY, Sept. 17, 1997. Evidently, Kempthorne tried unsuccessfully to get this language incorporated into the final bill, but felt optimistic this language could later be added as an amendment. Id.
practice.\textsuperscript{216} The situation is simple: compromise must be made on both sides. Without the compensation language, however, the Bill was still sound because the Fifth Amendment should protect private property rights.

VI. CONCLUSION

The ESA’s goals are undeniably noble. However, the ESA must be comprehensively rewritten to restore its original purpose. The current ESA places the immense burden of pursuing this goal on isolated private landowners whose property happens to harbor listed species. This is not necessary in an era of environmental awareness. We need to focus on an ESA that results in a partnership with landowners to aid in protecting species. The current ESA has been driven not by conservation efforts, but by the courts and special interest groups.

Reforming the ESA now is essential because it is applying more than ever to urbanites. For example, the reach of the ESA is about to be extended to affect urbanites because chinook and chum salmon in the Puget Sound region may soon be listed as threatened species. The proposed listing is the first in the nation for an urbanized surrounding. It includes fourteen highly populated counties in the Puget Sound Area.\textsuperscript{217}

To remedy current and future problems with the current ESA, real reform must be pursued and adopted now. Senator Kempthorne’s proposal represented a good compromise between environmentalists and landowners. In his presentation of the Bill to Congress, Senator Kempthorne said it “will bring real and fundamental reform to the ESA, and it will minimize the social and economic impact of the ESA on the lives of ordinary citizens, and it will benefit species.”\textsuperscript{218} The Bill seemed to bring property owners and environmentalists together to achieve a common goal: successful species conservation and alleviation of some of the stifling bureaucratic controls over property

\textsuperscript{216} See Kriz, supra note 149.

\textsuperscript{217} The impact of this listing, unlike the listing of the spotted owl, has the potential to affect all residents. The result of protecting the salmon could send power, water, and sewer bills soaring and severely restrict construction and development. Thus, salmon listing could slow the growth of the state’s economy and drive taxes higher. Agency Proposes Protection for Chinook Populations, PORTLAND OREGONIAN, Feb. 26, 1998, at C4. Local and state governments, as well as local business leaders, are working together to draft a salmon recovery plan so that they are not forced to have federal agencies and judges decide the appropriate plan for saving salmon in an area with which they are unfamiliar.

\textsuperscript{218} 143 Cong. Rec. S9411-03 (statement of Representative Kempthorne).
owners. Although the Kempthorne Bill did not have enough support to be enacted, future legislation to reform the ESA would be wise to build upon the Bill’s strengths and weaknesses. Unfortunately, until ESA reform is implemented, the debate over the effectiveness of the ESA will continue and the endangered species and landowners will continue to lose.