Document Summary

America's Working Lands: Updating the Endangered Species Act to Ensure Successful Species Recovery and A Productive Future.

Arizona Natural Resource Conservation Districts
State Association

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The United States Congress passed the Endangered Species Act (ESA) in 1973 upon finding that,

> *"(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;*
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> *(2) Other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threated with extinction;*
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> *(3) These species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."*[1]

President Nixon signed the ESA into law with the expectation that the citizens of our country, and landowners in particular, would embrace the law as *the* tool to halt the demise of plants and animals at risk in the United States and around the world.

Since then, the ESA has had the potential to control in some manner and at some point in time each and every acre of the 2.3 billion acres making up the land surface of the United States. Sixty-one percent of this land mass is held in private ownership. According to figures made available through the 2007 Census for Agriculture, 66 percent of private land is in agricultural production.[2] Private landowners are responsible for the stewardship of the natural resources within their control and choose to either be proactive in conserving these resources or are reactive to existing laws and regulations imposed upon them.

Landowners have many reasons to embrace the goals of the ESA. Among them are ecological, economical, societal, and human health benefits. We have much to gain from ensuring the survival of the species of plants and animals that exist in our world today. Simultaneously, we must also consider the benefits we receive from our ability to create and produce the goods that we as humans need to survive: food, clothing, shelter, clean air and water, and the energy and technologies to produce those goods. The ways in which we do this have changed significantly in the past several decades because of this heightened sense of awareness and concern that we as a society have for our environment and the value that we place on clean air, clean water, healthy soils, and abundant wildlife.

Many consider the ESA to be the most powerful environmental law ever passed in this country, yet despite its precautionary nature and nearly four decades of aggressive implementation, the results it has produced in terms of species recovery are dismal and warrant change. To date, the U.S. Fish and Wildlife Service has listed 2,003 species of plants and animals as threatened or endangered. The Service has categorized an additional 251

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[1] Endangered Species Act, 16 U.S.C. §§ 1531 (a) (1-3)

[2] 2007 Census of Agriculture. United States Summary and State Data Vol. 1, Geographic Area Series •Part 51AC-07-A-51; Issued Feb. 2009, Updated Dec. 2009; US Dept. of Agriculture; Tom Vilsak, Secretary; National Agricultural Statistics Service; Cynthia Z.F. Clark, Administrator

species as "candidates" that warrant protection, but has deferred listing those species to allow financial and personnel resources to flow to higher listing priorities.

As of 2011, only 51 species have been removed from endangered or threatened status. Of those 51 delisted species, 10 were delisted because they are extinct, 20 were delisted because of data errors, 3 were delisted due to a change in foreign policy, and 4 were delisted due to the ban on DDT. Four avian species native to the island of Palau and were delisted after a more thorough count of individual species revealed that their population numbers were adequate at the time of listing.[3] The Aleutian Canada goose and Columbian white-tailed deer was delisted because it was adequately protected under other state and federal wildlife laws. [4] The gray wolf was de-listed in certain portions of its range for the same reason by Congressional action.

In summary, at least 41 of the 51 species were delisted not because of implementation of the ESA, but for other reasons. That equals a less than one-percent success rate over a 39-year period. Although some will insist this paltry success rate is a failure of our nation's stewardship of natural resources, the available evidence is much more suggestive that the failure of the ESA is a result of how it is written and implemented.

Voluntary participation of private lands in efforts for species recovery is discouraged by an ESA that punishes first and rewards conditionally:

To ensure the survival of endangered and threatened species, all efforts must be much more incentive and rewards based. Although the ESA purportedly focuses on federal lands, nearly 40 percent of listed species do not occur on federal lands. For the species that are found on federally owned lands, more than 60 percent of habitat is located on state and private lands[5]. The ESA prevents property owners from making legitimate and beneficial

[3] NCPA Policy Report No. 303 September 2007. ISBN # 1-56808-177-4. Website: http://www.ncpa.org/pub/st/st303. Bad for Species, Bad for People: What's Wrong with the Endangered Species Act and How to Fix It. Brian Seasholes

[4] Reforming the Endangered Species Act. Backgrounder #1234. November 13, 1998. Alexander Annett. The Heritage Foundation. http://www.heritage.org/research/reports/1998/11/reforming-the-endangered-species-act

[5] Groves, C. R., L. S. Kutner, D. M. Stoms, M. P. Murray, J. M. Scott, M. Schafale, A. S. Weakley, and R. L. Pressey. 2000. Owning up to our responsibilities: who owns lands important for biodiversity? Pages 275–300 in B. A. Stein, L. S. Kutner, and J. S. Adams, editors. Precious heritage: the status of biodiversity in the united states. Oxford University Press, New York, New York, USA

uses of their own land, does not compensate them for regulatory confiscation of any portion of their property value, and thereby ultimately encourages pre-listing habitat destruction or total closure of private lands to species research. Writer and property consultant Jeff Goodson went as far as to refer to endangered species habitat as a contaminant that devalues private property.[6]

It is difficult to measure the value of incentive based programs such as "safe harbor" and "candidate conservation agreements with assurances" when signing on the dotted line is predicated on fear and uncertainty. The fears of private land owners are legitimate and based on being subjected to punitive measures or third party lawsuits, which are so prevalent in today's society. Furthermore, the uncertainty that rules and regulations continue to change make it difficult for landowners to adequately plan for conservation of endangered species.

We as landowners are expected to trust a faulty system and engage in efforts to "save" species we know, from our intimate knowledge with the land and water, are species listed under false premises from the beginning. The basis for such decisions are all too often grounded upon speculation, anti-growth bias, lawsuit avoidance on the part of government agencies, and insufficient measurable data.

Rob Gordon, Director for the National Wilderness Institute, testified before Congress saying that,

> *"The problem with best available data, or BAD data, is that best is a comparative word. Thus the data need not be verified, reliable, conclusive, adequate, verifiable, accurate, or even good." It is not unusual for the language in listing decisions to say "sufficient data to estimate population size or trends is lacking."*

Even fabricated "data" in listing petitions not only goes unquestioned by the Service but is venerated by it.

The unrealistic timelines and ambiguous language of the ESA encourages frivolous lawsuits while the petitioning process violates equal protection under the law for all citizens:

According to the USFWS Listing Program Work Plan, "Limited resources and an ever-increasing workload have led to litigation over nearly every aspect of the listing program. Litigation obligations have made it difficult for the Service to manage its workload based on biological priorities."[7]

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[6] Goodson, Jeff, RANGE Magazine, Fall 2002, p.29 "The Land Snatchers"
http://www.rangemagazine.com/pdf/fall02_endangered4.pdf

[7] U.S. Fish and Wildlife Service, "Listing Program Work Plan Questions and Answers"
http://www.fws.gov/endangered/improving_ESA/FWS Listing Program Work Plan FAQs FINAL.PDF

The flawed structure of the ESA makes it susceptible to litigation. Just since 2007, special interest groups have petitioned the Service "to list more than 1,250 species, nearly as many species as the agency listed during the previous 30 years of administering the ESA. The Service was petitioned to list 695 species in 2007, 56 species in 2008, 63 species in 2009, and 451 species in 2010. Three petitions, termed "mega-petitions," simultaneously petitioned hundreds of species for review."[8] Given that the ESA contains a broad provision enabling groups and individuals to sue as a way to enforce short deadlines or disagree with negative findings, these "mega-petitions" have severely impacted the functionality of the Service in being able to recover already listed species.

To further confound the situation, a recent court settlement requires that a final listing determination be made on all 251 species on the candidate list within the next six years. This is a highly unrealistic expectation of the Service given the close examination with which they should process the information they have available to them to make these decisions.

In addition, the 90 day review period is too short for adequate consideration of a new petition's merits. In 2008 the Government Accountability Office found that none of the 90-day petition findings issued from 2005 through 2007 was issued within the desired 90-day time frame. During these years, the median processing time was 900 days, or about 2.5 years, with a range of 100 days to 5,545 days (over 15 years)[9].

Ironically the only aspect of the listing process that does not permit judicial review is a positive finding during the petitioning process. This sets up a double standard under the law and violates the Constitutional equal protection rights of United States citizens. This is particularly troubling when even if the petition purports to give new information about a species, whether or not it actually does, the agency can forward it into the twelve month finding period. It appears that if the Service lacks the resources to adequately review a petition within 90 days, their default position is to automatically go to the one year review. This allows them more time since judicial review only applies to negative findings.[10]

We believe that if positive petition findings were as equally subject to judicial review as negative findings, the Service would base far fewer decisions on speculative information and far fewer livelihoods would be destroyed or curtailed as a result of petitions the Service ought to be rejecting. Furthermore, if we remove the incentive to allow baseless petitions to move forward, the Service could direct its resources to species that truly need its attention. This fact alone should warrant a full review and legislative makeover the ESA.

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[8] U.S. Fish and Wildlife Service, "U.S. Fish and Wildlife Service Listing Program Work Plan Questions and Answers" http://www.fws.gov/endangered/improving_ESA/FWS Listing Program Work Plan FAQs FINAL.PDF

[9] Highlights of GAO-08-688T, a U.S. FISH AND WILDLIFE SERVICE Endangered Species Act Decision Making, May 2008

[10] Endangered Species Act, U.S.C.§1533(b)(3)(C)(ii)

By simply removing the word, "negative" from Section 4 (b)(3)(C)(ii) of the Act, a dramatic improvement in results could be achieved.

There are many broad terms used in the ESA that when left to interpretation also result in court intervention. If terms were more clearly defined within the ESA, many inefficiencies and court actions would be avoided.

The ESA has a narrow focus that ignores economic realities and multi-species management:

A major flaw of the ESA is its intentional exclusion from consideration the economic impacts of listing a species as threatened or endangered as described in Section 4 and within the prohibitions detailed in Section 9 of the Act. Ignoring the economics of species management is not only antithetic to species recovery; it casts aside the magic of the entrepreneurial spirit and problem solving talents of the American people.

Congress, in passing the ESA, never acknowledged the *benefits* to species that often arise as a direct result of economic growth and development. Today we not only have the ESA to address resource concerns, but numerous other laws and regulations to control our consumption of natural resources in order to protect the natural world. However, many would agree, we have regulated natural resource consumption to a point where fundamental production methods that require raw materials and that are environmentally sustainable or even environmentally beneficial, have either been outlawed or regulated beyond economic sustainability.

This overregulation is reflected in the dramatic shift of manufacturing leadership from the United States to foreign countries where environmental regulations either do not exist or are minimal, vastly reducing production costs. Americans now import most consumer goods and use them without any knowledge of the environmental impacts involved in producing them, little reason to care, and with minimal if any control over product safety. Our Country once dominated in key industries such as manufacturing, timber, and textile production. Sustainable production of agriculture products is threatened more and more with every new regulation imposed on America's farmers and ranchers. The regulatory burden on these industries has killed well-paying jobs, crippled rural economies, and will likely have significant indirect effects to natural resources abroad. This has given rise to a public that is increasingly apathetic toward endangered species because they are more concerned with their own survival.

The ESA as written and implemented is inflexible and prohibits the Service to recognize the many activities important for the management of habitats for multiple species that may or may not be listed as threatened or endangered. Most conservation practices on agriculture and/or private land promote biodiversity by providing mosaic habitats and supplemental food and water. Such benefits include, but are not limited to: wildlife using water supplies that ranchers establish and maintain for their cattle, grazing and logging activities that keep forest fuel loads in check, mining activities that improve and expand the lambing habitat for bighorn sheep, the creation of riparian habitat by constructing a stock pond, and

the stream structure supporting warm water fish habitat maintained by cattle grazing in riparian areas. For example, in Cienega Creek and Red Rock Canyon, Arizona, when cattle were removed from the riparian areas, thus changing the channel morphology, the endangered Gila top minnow that had previously thrived in the presence of cattle declined precipitously or disappeared entirely. [11]

A significant problem with the single species management concept fostered by the ESA as currently implemented is the desire of federal biologists to kill certain animals in an effort to increase the survival of other animals. Take for example the Barred owl, which USFWS is currently proposing to kill in favor of the endangered Spotted owl. With fewer old growth forest stands in the northwestern United States due to fires, timber harvest, and development, forests are now composed of earlier seral stages of timber. These timber stands favor the Barred owl over the Spotted owl.

When some Barred owls hybridized with Spotted owls, the USFWS decided to kill up to 8,960 barred owls.[12] Some people call this action "playing God." It is risky behavior with unknown consequences. The ESA should not be implemented in a manner that pits one species against another. The long term consequences could be dire. The process stops evolution. It also defies Darwin's concept of survival of the fittest. Both the Spotted and Barred owls are native. The ESA should not be used to pick winners and losers.

In Summary:

The following points are the major and minor updates we recommend in order for the ESA to accomplish its intended purpose. Each of these is described in more detail in the full body of this document with references to specific sections of the ESA. The key changes we suggest are listed as follow:

- All agency actions in the listing process must be judicially reviewable.
- There must be more realistic timelines for listing and critical habitat determinations.
- The *best* scientific data available must also be reliable, replicable and verifiable.
- The ESA must not focus on single species management when that approach is counter to natural processes, making recovery of certain species dependent on killing other species (example: Spotted and Barred owls).

[11] Livestock management and the conservation of imperiled aquatic species on the Las Cienegas Conservation Area, Arizona (Jeffrey R. Simms and Karen M. Simms, BLM, 2010)

[12] Draft Environmental Impact Statement: "Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls"
Draft Environmental Impact Statement, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service Portland, Oregon, March, 2012

- Listing petitions must have scientific integrity to pass the initial review by the agencies.
- More transparency of listing decision subject matter is necessary.
- It is a societal responsibility to recover a species and the ESA should better reflect this through compensatory programs for landowners to ease the burden on private property. We must replace coercive incentive programs with truly incentive based compensatory programs.

- Species which are listed and afforded the protections of the ESA should be limited to those species with a majority range within the borders of the United States. We have no control over management in other countries, and at this time in history our budget expenditures are reliant on borrowed dollars. Any foreign efforts only dilute our ability to recover listed species here in the U.S.
- Presently ambiguous and subjective language must be further defined within the ESA.
- What flexibility that exists in the ESA is not always reflected in implementation, and reflects federal agency bias. Permitting outside scientific audit and review of listings, recovery plans, and consultations at the request of applicants would provide more accountability to federal agency personnel.

- In addition to cooperation with state governments, more emphasis needs to be placed on cooperation with local governments. Local governments have jurisdiction over broad based planning and zoning for private lands, where the majority of T&E habitat exists. The burden of species management is disproportionately carried by local economies.

- The term *conservation* is used throughout the ESA and is overly inclusive. It refers to all actions, programs, and efforts towards the wise use of natural resources and should not be used in the context of the ESA.
- Decision makers must be allowed to adapt the management of an ecosystem based upon new information. After almost 40 years, is the current methodology working when less than one-percent of listed species have been "recovered?"
- Effectiveness of the ESA is dependent upon more oversight and cost/benefit analysis of species listing and recovery.

- Our efforts must be more focused on those species that are most in danger of extinction due to the direct measurable effects of human activity, and only when the modification of those activities will have a significant measurable effect on species survival.

Preventing the extinction of species proven to be directly impacted by human activities is a serious business for this and future generations. We as landowners are the stewards of the majority land base needed for species recovery. This document should be viewed with the following in mind: to make the Endangered Species Act as good as it can be to help, not discourage, land managers to lead the way to successful species recovery.