The Endangered Species Act
Fundamental Flaws

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The Endangered Species Act was intended to identify animal and plant life that is determined to be in peril of extinction and to recover those species. This original purpose was and remains a laudable goal. However, the Act has two fundamental flaws.

The first is that no economic considerations are permitted to be included as part of the determination in listing the species. The second provides that prevailing plaintiffs are entitled to recover their attorney fees and costs but they are not required to pay the costs if the government prevails. These provisions have allowed the intent, implementation and outcomes of the Act to be hijacked to serve the greed and exploitation of preservationist factions both inside and outside of government agencies.

A total of 1065 American species, 590 foreign species and 250 candidate species have been listed since the law was enacted in 1979. To date, only 51 species have been removed from that list. Twenty three of those species were recovered, 10 were determined to be extinct, and 18 were originally listed erroneously. In spite of the expenditure of billions of tax dollars, the species recovery rate is less than 1.5 percent.

Extreme preservationist groups are routinely using the provisions of the Act to enrich their own coffers while forcing the exclusion of human activity and destroying private property rights. All of these groups employ the same basic methods. They repeatedly petition the Fish and Wildlife Services and the National Oceanic and Atmospheric Administration to list multiple little known species as threatened or endangered. The organizations then sue the agency when it fails to meet the strict timeline for determination of threatened or endangered status. The group that files the suit almost always prevails because the agency has in fact failed to meet the timeline requiring it to take action.

Under the Act, the prevailing plaintiff is legally entitled to recover its attorney fees and costs. The plaintiff routinely claims inflated fees and costs. The agencies generally do not contest those claimed costs in the court ordered stipulated agreement. This method is regularly used to siphon huge amounts of taxpayer dollars from the agencies to be used to fund the operations and to promote the philosophies of the plaintiff factions.

For example, the Western Watersheds Project filed with the Fish and Wildlife Service to list the Slickspot Peppergrass which grows, or has the potential to grow, on certain Idaho rangeland. The grass has no known agricultural, economic or other human uses. Further, there is no known consumption of the grass by either domestic or wild ungulates, according to the Natural Resources Conservation Service.

Fish and Wildlife Services decided against listing the species; however, the agency missed the deadline for that determination. Western Watersheds Project sued repeatedly. In spite of the fact that in 2009 Slickspot Peppergrass had the highest population ever recorded in the area, the court finally forced Fish and Wildlife Services to list the species and to prepare a draft critical habitat designation for the plant. To date, the agency has paid Western Watershed Project nearly $240 thousand in attorney fees and costs. The costs of the legal fees for the agency, and for intervener ranching interests, are in addition to that amount.

To date, the litigation has accomplished little more than to force the Agency to spend vast sums of taxpayer dollars on legal fees and paperwork. However, it has created an apparent cash bonanza for the Western Watershed Project. Ultimately, the losers will be the taxpayers, the ranchers' and most likely the Slickspot Peppergrass.

The Act's provisions prohibiting damaging or "taking" of the species or its habitat also apply to private property after a species has been listed. Any take of the species must be mitigated according to rules developed by the agency. As a practical matter, mitigation means either privately funding programs supporting the listed species or excluding the land from use where the listed species is found.

The peppergrass species is very vulnerable to fire. Once cattle are excluded from the range, there will be no reason, or financial means, for the ranchers to control the frequent range fires in the area. This series of actions may actually result in the species becoming endangered.

Perhaps emboldened by these and similar specious lawsuits, the WildEarth Guardians and the Center for Biological Diversity filed multiple petitions to list species 113 additional species in 13 federal court cases. The Justice Department and the Fish and Wildlife Service have agreed a sort of class action Endangered Species Act multi-district litigation. This agreement will require the agency to make 1,201 decisions regarding proposed determinations for 1,053 newly identified threatened or endangered species during the next four years. The agreement does not explain how the number of candidate species grew from 113 to 1,053!

This new figure is nearly equal to the total number of American species listed during the entire 33 year history of the Endangered Species Act. The agreement will require the American taxpayers to pay more than $200 million just to process the paperwork to decide whether or not to list the 1,053 species.

Moreover, the WildEarth Guardians and the Center for Biological Diversity have already been designated as "prevailing parties" by the Justice Department. It is virtually certain that the two plaintiff factions will be reimbursed for whatever they claim their attorney fees and costs to be. The amount of fees and costs that they will receive is yet to be agreed upon. The expectation is the cost to taxpayers will be substantial.

Unfortunately, nothing in the multi-district litigation agreement prevents any other factions from filing additional petitions or lawsuits claiming even more endangered species. National Wildlife Federation, Western Watersheds Project, Sierra Club, Humane Society of the U.S. or any number of other groups may want in on the cash bonanza. They have to be aware that there is no way that the Fish and Wildlife Services can complete their existing work load. The groups can be virtually certain that the federal government will violate the timeline for determination on any future petitions they may file. Their cash rewards will be virtually automatic.

The U.S. Fish and Wildlife Services are already facing a backlog of more than 180 Endangered Species Act related lawsuits. These legal actions are routinely filed to block or delay important infrastructure projects, stifle economic activity and prevent private sector job creation. The agency has spent more than $15 million this year taking substantive actions required by various litigation and court orders. That is more than three fourths of their entire 2011 resource management budget for listings and critical habitat designation.

The good news is that Congress is finally attempting to take action. As Chair of the powerful Committee on Natural Resources, Washington Congressman "Doc" Hastings has scheduled a series of hearings on these Endangered Species Act issues. In fact, much of the material in this article is derived from testimony from the first Congressional hearing held December 6th.

We should all applaud and support the Congressman's efforts. Working toward the revision of the Endangered Species Act is a major priority for the Klamath County Republican Central committee. We believe that it is past time to amend the ESA. Please join us in asking Congress to eliminate the provisions that special interest groups are routinely using to enrich themselves, at the expense of the taxpayer and the public interest.

Please remember, if we do not stand up for rural Oregon no one will.

Best Regards,
Doug