

# **THE COLLABORATIVE FUTURE OF THE ENDANGERED SPECIES ACT: AN ADDRESS TO THE DUKE UNIVERSITY SCHOOL OF LAW**

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## I. MY BACKGROUND

When I was in law school, I never thought I would be the Assistant Secretary of the Interior. I practiced law in the air force initially; I did a number of things while in the air force. I was a military prosecutor for a while. I was a public defender for a while. I was a professor at the Air Force Academy for a while. I spent some time on a team that was working on military environmental compliance in Europe. That was more than twenty years ago. I learned a great deal about international environmental issues through those experiences and was in private practice after that.

At some point, the governor of California appointed me the General Counsel at the California Department of Fish and Game. I did that for five years, and it was a great job. Every day was like a Ph.D. course in political science. At the end of that time, I was appointed to the bench. I was a judge for four years. One person I became acquainted with in that position in legal circles was Ann Veneman, and one day I was in my chambers in the courthouse and the phone rang. It was Ann Veneman, and she said, “Would you want to come to Washington?” I said, “Yes,” not thinking it would really happen. So, my name was sent to the White House, where they determined that my background was better fit for Interior than Agriculture.

Along the way, it was an interesting exercise in constitutional government regarding the role of the Senate in the confirmation process. I did not appear to have anything in my background that caused anyone concern. But, there was an issue about duck hunting in

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Mississippi that held up my confirmation for a time because the senators from Mississippi were not getting their fair share of ducks. So, they put a hold on my nomination until the Interior Department published a rule lengthening the hunting season in Mississippi. The senators from Mississippi, after the publication of the rule, immediately removed their hold on my nomination. However, this upset the senators from Minnesota, who believed that the additional duck hunting in Mississippi would come at the expense of hunters in Minnesota, and they put a hold on my nomination. This remained until the Interior Department published a rule withdrawing the previous rule and agreed to study the length of the duck season in both Minnesota and Mississippi. That is how I finally made it through. It was an interesting exercise.

## II. MISGUIDED RELIANCE ON HABITAT DESIGNATION

I want to talk today about the Endangered Species Act (“ESA”). We just passed the thirtieth anniversary of the ESA. President Nixon signed it into law in December of 1973, and this is a convenient opportunity to look back at 30 years of the Endangered Species Act and see where it has succeeded, where it has not, and where it might do better. One thing that is important to understand is that I do not foresee any significant legislative changes to the ESA anytime in the near future. When the current administration was elected, many people said, “Oh boy, they are going to repeal the Endangered Species Act!” Other people said, “Oh God! They are going to repeal the Endangered Species Act!” My message is that we have not repealed the WSA, and so everyone can calm down about that issue. We are intent on improving the administration of the ESA.

How has the Endangered Species Act done? What is the measure of success under the ESA? To me, the measure of success under the ESA is about recovery of species. It seems to me that that is the purpose of the act. Some have said, “You have not listed many species, and therefore your administration of the Endangered Species Act is a failure.” To me, that is the same as saying that the measure of success of our healthcare system is the number of people you put in the hospital. The measure of success in the healthcare system is how many people you make well, or conversely, how many people you prevent from getting sick in the first place.

My view is that the measure of success under our scheme of endangered species conservation, and that includes a number of things, is how many species we keep from reaching the brink of

extinction, or once there, how many species we make well: How many do we recover once they are listed? That is where I want to place a lot of time, energy, and effort in prevention and recovery. In that measure, the Act, which is only one part of endangered species conservation, has done well for some species and has a mixed record as to other species. We need to concentrate on those species where the act has a mixed record. The act has probably not done as well in terms of some broader public policy issues, and that is not necessarily the fault of the ESA itself. So where do we go and what would we like to do? Where do we go is this: A focus on recovery and the conservation of habitat. Recovery is important because that is the measure of how many species you may well. Conservation of habitat is important because that is how you prevent a species from getting sick in the first place. The issue is how you achieve both of those goals.

Regarding habitat, briefly, some of you may have read that I have been very critical of a portion of the ESA that relates to the designation of critical habitat, and I have been. Some have mistaken that for an objection or a misunderstanding on my part and on the part of this administration on the role that habitat plays in the preservation of species. But that is not true; we certainly recognize Conservation Biology 101—that you need habitat to conserve species and to recover species. My objection to the critical habitat provisions of the Act goes like this (first of all, this is a longstanding objection that the U.S. Fish and Wildlife Service (“FWS”) has had for over twenty years): The critical habitat provisions of the act provide minimal conservation benefit beyond that which is afforded by the fact of the listing of the species. Already, the species that is listed is subject to the take provisions of section 9 of the ESA. That is, it cannot be taken, killed, captured, wounded, or harassed. It is also subject, with respect to projects that have a federal nexus, to section 7 of the ESA, which means that any projects must be accomplished in a way to avoid jeopardizing the continued existence of the species and that there must be no adverse modification of the habitat of the species. Thus, when you add critical habitat designation on top, there is not much more you get out of that. That is what you already have by listing the species. So, that is what I have been critical of. I have been critical of it not only because you do not get much benefit, but also because it consumes a mass amount of the agency’s resources to go out and designate critical habitat and to draw these lines on the map, and that is a problem for the FWS.

The second problem is that as you go about designating critical habitat, you create social and economic “dislocation,” if you will. There are a number of competing ideas about the economic cost of critical habitat designations, but the central point is that even the perception of these costs creates a great deal of social controversy that could otherwise be avoided and should be avoided if the additional conservation benefit of critical habitat designation is so small. That is another reason I have been critical of the critical habitat provisions of the act. I like to think of it as eating a chicken wing: There is not much meat to critical habitat designations. On the other hand, you can compare that to other things that provide real conservation benefits to species; for example, conservation plans, where there are requirements in section 10 of the ESA that set out real conservation benefits when a conservation plan is created. That is a far superior way to conserve habitat and contribute to recovery of the species than by designation of critical habitat by a line-drawing exercise, which adds little additional benefit.

### III. THE PROBLEM OF TIMING

The other reason I have been critical of the critical habitat provisions of the Act is that the statute requires that FWS designate habitat at the time of listing. FWS biologists have said that the time of listing is a time when they do not know a lot about the species or even enough about the species to tell you what habitat is critical in the case of many species. The designations thus not only provide little benefit, but they can also be overbroad or underinclusive because we do not know enough about the species in order to do make an accurate designation. The distinction has to be made between the legal and administrative designation of critical habitat and the conservation of real habitat through habitat conservation plans and other programs that provide real conservation benefits to species. That is one of the best focuses for conserving and recovering species.

One of the things that may make some sense, and something that I have been supportive of, is moving these critical habitat provisions of the Act to the recovery phase of the Act. There was a proposal to that effect in Congress a few years ago, but it got nowhere. It makes more sense to make designations at that point in time where it contributes to the effort and understanding of what is necessary for recovery and is tied directly to recovery plans and recovery efforts. At that point, it would be far more helpful than it is at the present. Keep in mind the distinction between the legal habitat designations versus

the real conservation benefit provided by such things as the conservation habitat plan.

#### IV. WORKING WITH, NOT AGAINST, LANDOWNERS

What about keeping species off the list in the first place? There are a number of ways that can be accomplished. One thing that was pioneered in Southern California was the concept of large regional conservation plans that included unlisted species in the agreements and plans. That is a useful tool for keeping those species off the list and keeping them unlisted in the first place. The other way is the active creation, maintenance, improvement, and enhancement of habitat. How do we do that? We can have the government do that for us. That is expensive, and it's costly, but the government does do it. The problem is that we now know that public lands are not the only place necessary for the recovery of species or to prevent them from going extinct. The majority of species that are facing threats that will bring them to the brink of extinction exist on private land. Therein lies one of the great issues of the ESA: How do you get private landowners to participate in the efforts to conserve, restore, and enhance habitat so that species do not go endangered in the first place?

First of all, it is in the interest of the landowners because otherwise, if they allow species to go extinct or reach the point of being considered endangered, there are the sanctions of the ESA through the listing process and the resulting regulatory scheme that accompanies. Thus, it is in the best interest of landowners to participate in habitat-enhancing and restoring efforts. The other problem has been that great fear of those regulatory efforts—and there have been empirical studies on this recently—led to the practice known as “shoot, shovel, and shut-up,” where landowners did not want anyone to know they had species on their land, and the best thing was to get rid of the species and the habitat and no one would be the wiser and there would be no question of the imposition of a regulatory scheme. That is obviously counterproductive to conservation, and that practice has to be discouraged. The question remains: How do you do that? You do that by giving landowners a reason to participate in conservation efforts. Over the past three years, we have spent hundreds of millions of dollars on various programs that give landowners the wherewithal and the reasons to participate in habitat conservation, restoration, and enhancement.

Among those Interior Department programs, we have the landowner incentive, which provides for direct grants to landowners to create, restore, enhance, and protect habitat on private lands. We have a private stewardship grant program that does the same thing. We have the Cooperative Conservation Initiative (“CCI”), which is another set of grant programs that provides incentives for habitat activities. In addition, the Farm Bill—which is much larger than the FWS budget—contains a huge conservation title with literally hundreds of millions of dollars in a number of different programs designed for conservation purposes, and this money is available for landowners to do good things on their land.

Building an ethos of cooperative conservation between agencies and landowners is another goal. The Director of FWS, Steve Williams, implemented a program called “Walk a Mile in My Shoes” where biologists and ranchers, for example, swap jobs for a day. While this may seem like a “cutesy” type of thing, you would be surprised by the difference it makes when someone sees something from someone else’s point of view. Not that either is going to abandon their core beliefs or change their job permanently, but they come away with a better understanding of the constraints that each has to work with and work within. I will tell you that ranchers loved it; they loved being a biologist for a day. The biologists loved it; they loved being a rancher for a day. The important thing is that it builds a respect for each other as human beings. Beyond that, we need to continue to build on the notion that we are all in this together.

We have all read of the Jumping Frog of Calaveras County in Mark Twain’s story. Biologists tell me that this is probably the same species that is called the California red-legged frog, which is an endangered species under both state and federal law. Imagine that two children in Calaveras County, on a ranch owned by their parents, found a couple of red-legged frogs. Now, think about this dynamic under a couple different scenarios. One scenario—the strict regulator approach—state and federal wildlife biologists hear about the discovery, show up at the ranch, and say “Ah, you have a red-legged frog here, so you can do A, B, and C. You had better not do X, Y, or Z. End of story. \$50,000 fine if you do it.” Other scenario: Kids tell parents about the red-legged frog, and the parents say, “Shhhh! Don’t breathe a word of this to anybody. In fact, tonight we are going to take care of these frogs. You don’t say anything about this.” We would never know that there were red-legged frogs on that ranch. But what is happening today is that state and federal biologists have sat

down with that family and worked out a set of conservation plans for the red-legged frog that are designed to preserve the frog and preserve the ranch so that the kids can inherit that ranch and grow up to be ardent conservationists with an appreciation for the need to be conservationists. They are going to do so because of the cooperative and collaborative approach that is been taken by the FWS and the California Department of Fish and Game with respect to the species found on their property. From the agency point of view, we need them, and they need us. And that is what cooperative conservation is all about.

Now, some have said that cooperative conservation looks like you are giving away the store. It sounds like you are not going to enforce the law and make people do what they are supposed to do. Well, no. The law will always be there, and the law will always be enforced. The issue is: How do you approach the goal that the law represents? How do you engage the people whose support of the law is essential to accomplish the goals that the law is there to support? That is really the issue when it comes to cooperative conservation. The agencies are starting to do this among themselves. For example, under section 7 of the ESA, the federal agency that is going to take an action that is going to affect a listed species is supposed to consult with the FWS. Well, some agencies have come to see the FWS as having acted more like a regulator toward them than a consultant. The idea is that the FWS is supposed to develop reasonable and prudent alternatives if they find jeopardy to a species, and those reasonable and prudent alternatives are supposed to enable the action agency to carry out its activities while avoiding jeopardy to the species. On the other side, the FWS has seen the action agencies as recalcitrant, unreconstructed, bent on destructive practices, Neanderthal, etc.

Now, what the agencies are creating is called “counterpart regulations.” These are regulations that allow the action agency to play a more active role in the consultation process under section 7, and in some circumstances—under the guidelines developed by the FWS—to make initial findings required in the consultation process so that collaboration continues. This is particularly important with land management agencies and others that are resource-based agencies. This again enhances the notion that the FWS is ready to engage in cooperative conservation efforts, not just with individuals, but with its fellow federal agencies as well.

## V. CONCLUSION

This is where the ESA is going in the next thirty years. This is not just my vision or this administration's vision. This is a vision that is recognized by environmental advocates of many stripes, by conservationists, by other government agencies, and by academics; this is the way to achieve the best conservation approach through collaboration. And, much academic research is going into future ways of collaborating and innovative approaches to collaborative conservation methods. This is what I see in the next thirty years of the ESA. Like technology, public policy evolves as well, and it gets better and better and improves itself constantly. That is what is happening with the ESA today, and I believe that at some point in the future, we will look back and say we cannot believe we did it any other way, and we will be very pleased with the result.