

BRIEF ANALYSIS

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The Endangered Species Act Debate

On June 29, 1995, the United States Supreme Court handed down its 6-3 decision in the case of *Babbitt v. Sweet Home*. The Court ruled that the U.S. Constitution permits federal regulation of private lands for the purposes of protecting rare species and their habitats. Thus, reforming the Endangered Species Act (ESA) is now solely up to Congress.

Yet the political situation has changed since the ESA was first passed. As was true more than 20 years ago, the debate is being driven by a nationwide grassroots movement. However, this time the coalition is composed of small property owners and property rights advocates rather than animal rights groups or public land advocates. The individuals in the new movement have long complained that the ESA is used to confiscate private property without any compensation to the property owners. With the new Republican majority in Congress, they have found a receptive audience.

The Endangered Species Act. The modern version of the ESA was passed by Congress in 1973 and amended many times since by law and Supreme Court interpretation. As written, the act seeks to protect plants and animals that are threatened with extinction, especially on public lands. As administered, the act is perhaps the most powerful private land regulating tool the federal bureaucracy possesses.

The legal authorization for the ESA expired in Octo-

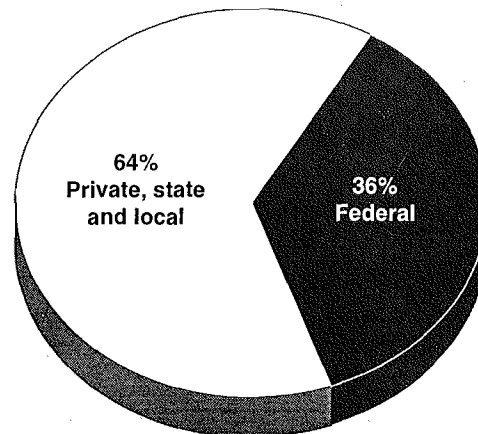
ber 1992. Ever since, Congress has struggled with the controversy surrounding the act and has been unable to pass new amendments, relying on "budgetary authority" to keep the bureaucracy operating. Horror stories are told regarding efforts to protect the Stephens kangaroo rat, the northern spotted owl and the golden-cheeked warbler. Meanwhile, public dissatisfaction has soared in response to perceived federal abuses of the act. And small property owners are demanding that the law be changed.

Riverside, California and the K-Rat. Southern California often experiences fires during the dry season. Thus, ranchers and homeowners have always taken precautions to protect their lands and homes. However, in 1988 the Stephens kangaroo rat was added to the list of endangered species. To protect the "K-Rat," federal and state officials in Riverside County, Calif., began prohibiting farmers

and ranchers from plowing firebreaks on their land. As a result, flammable brush built up and several homes were lost to intense brush fires in 1993.

The Northern Spotted Owl. The northern spotted owl of the Pacific Northwest is genetically almost identical to other West Coast spotted owl populations. However, since this subpopulation was listed under ESA in 1990, millions of acres of valuable timberland have been partially or completely off limits to cutting. As a result, Oregon and Washington have lost tens of thousands of timber-related jobs and billions of dollars in revenues.

FIGURE I
Land Occupied by Endangered Species



Source: Nature Conservancy.

The Golden-Cheeked Warbler. The golden-cheeked warbler is native to central Texas. When this small insect-eating bird was added to the ESA list in 1990, many Texas property owners found themselves denied the right to develop their land, even when it was located in the suburbs of Austin. At one time, as much as 800,000 acres was proposed as a set-aside for the warbler.

Property Rights are the Key. The premise behind the Endangered Species Act is that biological diversity is crucial to the healthy functioning of the environment. But as it is applied today, the ESA puts thousands of private landowners "at risk." In 1993, the Nature Conservancy estimated that almost two-thirds of endangered species inhabited nonfederal lands. In some states, more than 80 percent of the habitat for listed and nominated species is privately owned. [See Figure I.]

Under the Fifth Amendment to the U.S. Constitution, private property may not be taken for any public purpose without the payment of "just compensation." Unfortunately, most environmentalists and private property owners disagree on whether the ESA is being used to take privately owned property or simply to protect a preexisting public interest in the natural flora and fauna.

Even if there is an overarching public interest in species protection, small parcels of land rarely if ever encompass the critical habitat of a rare or endangered species. Bruce Babbitt, the Secretary of the Interior and an advocate of *stronger* federal species protections, admits that small land owners should be exempted from ESA.

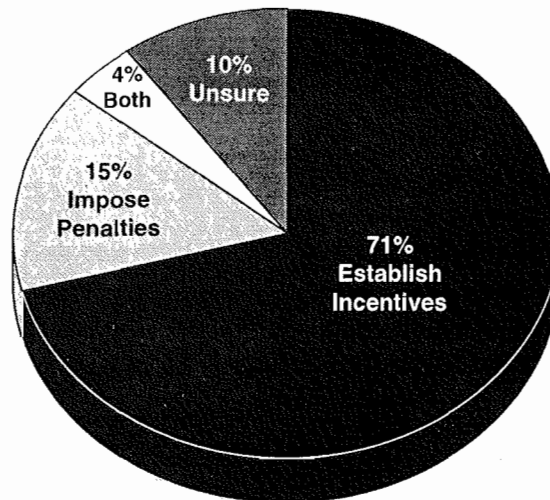
Owners of larger tracts, including timber and mining interests, are much more likely to significantly impact portions of a given ecosystem or habitat. Yet if logging, mining or major development activities impact the property rights of others, the state or federal government already has a regulatory role. For example, when logging threatens to disturb a watershed, negatively affecting both people downstream and the ecological balance of the region, the government can intervene. It can be argued that no right to degrade environmental quality beyond one's own property boundary ever existed. If the argument holds, compensation might not be owed.

Consensus Unlikely. The passion on each side of the debate is unlikely to subside even if Congress takes a firm stand on the issue. Congress may have to tinker with the existing act while mitigating its impact on private property owners.

In fact, the best compromise may be to make endangered species actions voluntary and to support them with incentives. The public is likely to approve of such a compromise; a recent survey found that 71 percent of those polled felt that positive incentives and rewards would more effectively protect species than the current punitive approach. [See Figure II.]

Generally speaking, because of the way nature works, species cannot be saved directly, but only indirectly by saving habitat. But if endangered species are deemed valuable enough to society that the state should preserve their habitat, the Fifth Amendment must be equally valued. Privately owned habitat must not be taken by the government without proper compensation.

FIGURE II
Public Opinion: How to Protect Endangered Species



Source: Tarrance Group poll, March 1995.

Note: Nothing written here should be construed as necessarily reflecting the views of the National Center for Policy Analysis or as an attempt to aid or hinder the passage of any legislation.