

R E S P O N S E

# Comment on *Rethinking the ESA to Reflect Human Dominion Over Nature*

by Wm. Robert Irvin

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Above my desk at work, I keep a button that reads “Save the Ugly Animals Too.” It is a reminder that more than just the charismatic megafauna, such as wolves and bald eagles and grizzly bears and whales, are worth conserving. From the standpoint of protecting the web of life, including the ecosystems that benefit us all by providing services such as water purification, flood control, nurseries for our fish and shellfish, and opportunities for outdoor recreation, it is often as important to conserve the lesser known species, the cogs and wheels that drive those ecosystems.

The commitment to conserve threatened and endangered species, and the ecosystems upon which they depend, is the grand promise of the Endangered Species Act (ESA).<sup>1</sup> Enacted in 1973, the ESA has done a remarkable job of saving from extinction charismatic and “ugly animals” alike. In doing so, it has engendered enormous controversy at times, such as the debate in the mid-1970’s over the snail darter and the Tellico Dam, the battles in the 1980’s and early 1990’s over the northern spotted owl and logging of old growth forests in the Pacific Northwest, and the current flare-up over the Delta smelt and water for California’s Central Valley farmers. Despite these controversies, the ESA has endured, testifying both to the value Americans place on preventing extinction and the flexibility of the ESA.

However, as Katrina Wyman correctly notes in her thought-provoking Article,<sup>2</sup> while the ESA has endured, it has not always prospered in its overarching goal of recovering species to the point where the ESA’s protections are no longer required.<sup>3</sup> Only a handful of species have recovered to

the point where they have been delisted. And while supporters of the ESA, myself included, argue that the appropriate measure of the ESA’s success is not simply the number of fully recovered species, but the much higher number of species that have been saved from extinction due to the ESA’s protection, that argument is not entirely persuasive.

Wyman points out that the number of species protected by the ESA is only a fraction of the species actually imperiled. Limited resources, in staff and funds, within the U.S. Fish and Wildlife Service (FWS) have prevented listing and critical habitat decisions from being made in a timely fashion or on the basis of greatest conservation need. Rather, litigation, threatened and real, has largely driven which species get FWS’ attention. With the Intergovernmental Panel on Climate Change projecting that as much as 30% of species could go extinct in this century at current rates of global warming,<sup>4</sup> Wyman reasonably predicts that the listing backlog will only worsen.

Wyman also points out that not only is funding for endangered species conservation inadequate, but the funding that is available is not always spent on either the species most in need or the species that would most benefit from it. Instead, species that have political pull or some other type of appeal are more likely to be the beneficiaries of limited recovery funds. Thus, for endangered species, like Hollywood actors or professional athletes, it pays to have a good agent.

Finally, Wyman notes that although endangered species conservation may not cost society as much as the ESA’s detractors would have us believe, this fact is due as much to a lack of enforcement and monitoring as anything else. Although she describes the ESA as more of a paper tiger than a pit bull, Wyman points out that landowner perception of the ESA’s power too often leads to intentional destruction of endangered species habitat in order to avoid the ESA’s restrictions.

1. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18. “The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.” *Id.* §1531(b).

2. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion Over Nature*, 40 ELR (ENVTL. L. & POL’Y ANN. REV.) 10803 (Aug. 2010) (a longer version of this Article was originally published at 17 N.Y.U. ENVTL. L.J. 490 (2008)).

3. “The terms ‘conserve’, ‘conserving’, and ‘conservation’ mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. §1532(3). Thus, conservation means recovery.

4. A. Fischlin et al., *Ecosystems, Their Properties, Goods, and Services*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 211-72 (M.L. Parry et al. eds., 2007).

Underlying all of the problems, Wyman posits, is a fundamental “denial of the extent of human domination of nature” in the ESA. She argues:

My basic critique of the ESA is that it is built on an untenable premise that there is something natural—whether called species, ecosystems, or biodiversity—out there that we can save from humanity’s reach. The Act’s problems ultimately are rooted in a denial of the extent of human domination of nature and a failure to recognize our limited ability to halt and reverse the decline of species, ecosystems, and biodiversity given our pervasive impact on the planet.<sup>5</sup>

In short, Wyman argues that we cannot save it all and pretending we can only undermines the overall effectiveness of our conservation efforts.

While I agree with Wyman that implementation of the ESA has at times left much to be desired, I disagree with her diagnosis of the underlying problem, that the ESA is premised on a denial of human dominion over nature. In the opening words of the ESA, Congress found that “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.”<sup>6</sup> Thus, Congress clearly recognized that human impacts on nature are the fundamental causes of endangerment and, therefore, human dominion over nature.

With the recognition of human dominion over nature comes its corollary, human stewardship of nature. The concept of stewardship is fundamental to the overarching goal of the ESA, to recover species to the point where the protection of the ESA is no longer required. Indeed, while we may have dominion over nature, we do not necessarily know the comparative value of each of its components and the consequences of losing any one of them. No wonder then that Aldo Leopold wisely concluded that “[t]o keep every cog and wheel is the first precaution of intelligent tinkering.”<sup>7</sup> Thus, even if we cannot achieve recovery for every species, the duty to try is an important recognition of our stewardship of nature. As Robert Browning wrote:

Ah, but a man’s reach should exceed his grasp,  
Or what’s a heaven for?<sup>8</sup>

While I believe that our obligation as stewards of nature necessitates the extraordinary reach of the ESA, I recognize, as Wyman does, that in practice the ESA has had a limited grasp. As a result, her thoughtful recommendations for improving the effectiveness of the ESA warrant serious consideration.

Wyman proposes four steps to improve ESA effectiveness. First, she recommends that the decision of what level of protection to provide a species be separated from the decision to list that species. Second, rather than seeking to recover

every species that is listed, conservation goals should be set based on what is achievable as a practical and fiscal matter for each species. Third, conservation funding should be directed to biological hotspots, where limited funds will produce the greatest conservation benefit by conserving indicator or umbrella species, the conservation of which also results in conservation of other species. Fourth, we should use conservation laws and measures besides those provided by the ESA to conserve species.

To some extent, her first recommendation, that the decision to list a species be separated from the decision of what level of protection to provide it, is already occurring in certain circumstances. Protection for threatened species under the ESA can vary, by promulgating a rule pursuant to Section 4(d) specifying what protections shall apply.<sup>9</sup> While the determination whether a species should be listed as endangered or threatened is supposed to be purely a biological one, the added flexibility of a threatened listing has undoubtedly tipped the balance in certain listings.<sup>10</sup> Separating the decision to list from determining the implications of that listing may make such decisions more transparent. It will not, however, eliminate potential controversy over protecting a species; rather, it may only defer such controversy to a later stage in the administrative process. Additionally, for those species that are indisputably endangered, a sliding scale of protection, rather than the full protection currently afforded such species by the ESA, would be unwarranted.

Wyman’s second recommendation, setting conservation goals that are achievable for each species, also may be taking place de facto. There are species that have such limited range and are of such limited numbers that they will never reach a point where the ESA’s protection is no longer needed. For these conservation-reliant species, stabilization, not recovery, is the goal.<sup>11</sup> And even though the ESA sets a general goal of recovering species, it does not preclude a more practical recognition that recovery may not be achievable in all cases. However, setting a lesser goal than recovery should be the exception, not the rule. Otherwise, it will become too convenient to decide that a particular species is not worth recovering, even though we may be unable, or unwilling, to fully calculate the cost of not recovering the species.

Wyman’s third recommendation, directing limited funding to biological hotspots where it will do the most good, is extremely sensible. Clearly, protecting umbrella and keystone species, the conservation of which will also conserve other species within the same ecosystem, is an effective way to spend limited resources. However, unless a system is developed that eliminates congressional earmarks and similar

9. 16 U.S.C. §1533(d).

10. For example, the decision to list the polar bear as a threatened species, rather than endangered, is currently being challenged in litigation in part as a political, rather than biological, determination. See Center for Biological Diversity v. Kempthorne, No. 1:08-cv-2113 (D.D.C. 2009).

11. The Devil’s Hole pupfish (see [http://www.fws.gov/nevada/protected\\_species/fish/species/dhp/dhp.html](http://www.fws.gov/nevada/protected_species/fish/species/dhp/dhp.html)) and the Bruneau Hot springsnail (see <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=G03R>) are good examples of species with such limited range (each inhabits a single small body of water) that they will always be dependent on the ESA’s protection for their continued survival.

5. Wyman, *supra* note 2, at 10803.

6. 16 U.S.C. §1531(a)(1) (emphasis added).

7. Aldo Leopold, *The Round River, in A SAND COUNTY ALMANAC, WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 190 (1970).

8. Robert Browning, *Andrea del Sarto* (1855), available at <http://www.poemhunter.com/poem/andrea-del-sarto/>.

political pressure on budget decisions by federal agencies, it is unlikely that any system of prioritizing funding for biological hotspots can be fully or effectively put in place.

Wyman's fourth recommendation, using conservation laws other than the ESA to conserve species, is the most important step to be taken. When we fail to protect species and their habitats under laws such as the National Forest Management Act<sup>12</sup> or the Clean Water Act,<sup>13</sup> the ESA is the final safety net. Consequently, the ESA generally bears the blame in any ensuing controversy over the social or economic costs of species protection when, in reality, the fault lies in our failure to use other conservation laws that may have prevented the need to list the species in the first place. To fix this problem, however, stronger directives to conserve species and habitat will have to be written into those conservation laws. Doing so may prove as problematic politically as would reauthorizing the ESA.

Experience has demonstrated that the ESA is not a perfect solution to conserving biodiversity. Wyman's analysis of the ESA's failings is provocative, compelling us to confront some of the law's imperfections and consider their underlying causes. Her recommendations are similarly thoughtful, challenging us to consider what must be done to make a more perfect ESA. That we may never achieve perfection is no reason not to strive for it, in life or the law.

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12. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16.

13. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.