

## R E S P O N S E

# Above All, Try Something: Two Small Steps Forward for Endangered Species\*

by Richard P. Johnson

Rich Johnson has been an environmental and natural resource attorney with the U.S. Government Accountability Office for over 15 years. He has worked on numerous GAO reports addressing the implementation of the Endangered Species Act and federal land management laws. The views expressed herein are entirely those of the author and do not reflect the views of the GAO.

In a recent essay,<sup>1</sup> Katrina Wyman suggests four substantial reforms aimed at improving implementation of the Endangered Species Act (ESA)<sup>2</sup> and furthering species recovery: (1) decoupling listing decisions from permanent species protection;<sup>3</sup> (2) requiring the Fish & Wildlife Service (FWS)<sup>4</sup> to implement cost-effective species protection measures;<sup>5</sup> (3) prioritizing funding for biological hotspots;<sup>6</sup> and (4) establishing additional protected areas.<sup>7</sup> Although Wyman does not specifically frame it this way, these four proposals amount to a grand legislative bargain: ESA critics would get a regulatory mechanism that specifically requires the FWS to take costs into account, while environmentalists would get more funding for species recovery and more land, both federal and nonfederal, on which development is restricted or prohibited.

These are bold proposals. Wyman correctly perceives that the most likely way forward from the current sterile debates over the ESA will involve some form of painful legislative compromise. However, her proposals reach so far that they stand little chance of immediate enactment. Two more mod-

est types of compromise focused on federal lands may offer greater prospects for near-term progress.

## I. One Giant Leap?

Everyone who checks into an emergency room checks out, either with or without a pulse. The ESA's emergency room is different: most listed species simply do not leave.<sup>8</sup> This outcome is disappointing but not necessarily disastrous.<sup>9</sup> While one of the ESA's goals is species recovery,<sup>10</sup> the ESA is hardly the first law to fall short of its own grandiose aspirations.<sup>11</sup> "The reality is that the ESA has worked out as a pragmatic compromise—few species actually recover but few slide into extinction[.]"<sup>12</sup> Successive Congresses have tolerated this compromise; the ESA has been substantively amended just once in the last 20 years.<sup>13</sup>

This long legislative reticence in the face of pungent controversy suggests the odds are against fundamental changes to the ESA. In addition, the grand bargain Wyman proposes would require each side in the ESA debate to make large,

\* "It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something." Franklin D. Roosevelt. Oglethorpe University Commencement Address (May 22, 1932).

1. 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)).

2. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

3. Wyman, *supra* note 1, at 10804-05.

4. The U.S. Department of the Interior's Fish and Wildlife Service and the U.S. Department of Commerce's National Marine Fisheries Service (NMFS) share responsibility for implementing the ESA. Generally, the Fish and Wildlife Service manages land and freshwater species, while NMFS manages marine and anadromous species. Of the 1900 listed species, NMFS has jurisdiction over just 68. Endangered Species Act (ESA), <http://www.nmfs.noaa.gov/pr/laws/esa/> (last visited Jan. 23, 2010). Although some of these species present headline-grabbing public policy challenges, such as the sockeye salmon (<http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Sockeye/SOSNR.cfm>), for simplicity's sake I confine my remarks (as Wyman did) to the Fish and Wildlife Service.

5. Wyman, *supra* note 1, at 10805-07.

6. *Id.* at 10807-08.

7. *Id.* at 10808.

8. See, e.g., John Kostyack & Dan Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10203, 10208 (2009).

9. Well, it is not disastrous yet. See *infra* note 17.

10. The ESA's principal purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[.]" 16 U.S.C. §1531(b). The act defines "conserve" to mean "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 chapter are no longer necessary." 16 U.S.C. §1532(3).

11. For example, the Clean Water Act declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. §1251(a)(1), ELR STAT. FWPCA §101(a)(1). Today this goal seems comical, yet few have written off the Clean Water Act as a wholesale failure.

12. J.B. Ruhl, *Adapting the Endangered Species Act to a Changing Climate*, 41 TRENDS: ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER 9 (Nov./Dec. 2008). See generally U.S. GOVERNMENT ACCOUNTABILITY OFFICE, ENDANGERED SPECIES: FISH AND WILDLIFE SERVICE GENERALLY FOCUSES RECOVERY FUNDING ON HIGH-PRIORITY SPECIES, BUT NEEDS TO PERIODICALLY ASSESS ITS FUNDING DECISIONS, GAO-05-211 (2005).

13. Pub. L. No. 108-136, Div. A, Title III, §318, 117 Stat. 1433 (2003) (limiting the FWS' authority to designate critical habitat on lands controlled by the U.S. Department of Defense).

visible concessions on long-held principles in exchange for the prospect of potentially large but highly indeterminate benefits. Many legislators would decline this invitation, particularly those who fear a primary challenge from their own party's base more than a general election loss.

## II. Two Small Steps

“Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived.”<sup>14</sup> As Wyman recognizes, saving ecosystems demands a similarly ecumenical approach.<sup>15</sup> Wyman also recognizes (if only tacitly) that progress depends on significant political compromises.<sup>16</sup> While federal lands are not the only hope for species recovery, they will play a critical role in any organized effort to alleviate the condition of species in the ESA emergency room.<sup>17</sup>

Place-based land management legislation and collaborative land management under existing law provide two possible methods for assisting species recovery through ecosystem restoration. Nie<sup>18</sup> and Keiter<sup>19</sup> have recently assessed the problems and prospects associated with place-based legislation—that is, legislation designed to address the specific land management challenges of a given region or locality. Neither article focuses on species recovery, yet legislation that effectively restores and/or protects resilient ecosystems could enhance recovery of listed species.<sup>20</sup> As relevant here, such legislation generally (1) designates additional protected federal lands as Wyman advocates, such as wilderness, though usually at the price of authorizing or even requiring devel-

opment on other federal lands;<sup>21</sup> and/or (2) establishes land management goals (such as ecological restoration) and related methods for achieving those goals.<sup>22</sup> Place-based legislation responds to local ecological and economic conditions and enhances local participation in land management decisions, but carries with it the reciprocal risks of balkanizing federal land management by carving the federal estate into locally dominated fiefs.<sup>23</sup> The record of place-based federal land management legislation is checkered at best.<sup>24</sup> As Keiter suggests, perhaps the most significant point about this record is that there *is* a record—in contrast to its legislative modesty with respect to the ESA, Congress has passed place-based laws with gusto.<sup>25</sup> This provides a considerable, if not yet wildly encouraging, base of experience on which to build. Unlike root and branch ESA reform, place-based experiments face a better chance of surviving the legislative gauntlet.

Ecosystem restoration and species recovery may also proceed using collaborative land management approaches under existing law. As GAO reported recently,<sup>26</sup> numerous regional and local groups have successfully used collaborative resource management to begin addressing longstanding resource conflicts in a variety of geographic, ecological, and economic contexts.<sup>27</sup> Collaborative resource management is much more than the mere absence of conflict; it includes several key characteristics such as: (1) inclusive representation of all key stakeholders; (2) developing common goals; (3) leveraging available resources; and (4) providing conservation

14. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

15. “The ESA is only one of the tools at our disposal to protect biodiversity, and perhaps not even the most important one.” Wyman, *supra* note 1, at ###.

16. *See supra* notes 5-6 and accompanying text.

17. Wyman, *supra* note 1, at 10808; *see also* Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 41-56 (1997). Many species' days in the emergency room are numbered, because climate change will desiccate, inundate, or incinerate their hospital beds. *See generally* J.B. Ruhl, *Climate Change and the Endangered Species Act: Building a Bridge to the No-Analog Future*, 88 B.U. L. REV. 1 (2008).

18. Martin Nie & Michael Fiebig, *Place-Based Legislation as Method of Resolving Multiple-Use Conflicts on National Forests*, *ECOLOGY L.Q.*, 37(1) at 12-19 (forthcoming 2010), available at [http://www.cas.umt.edu/facultydatabase/FILES\\_Faculty/1126/Place%20based%20forest%20law.pdf](http://www.cas.umt.edu/facultydatabase/FILES_Faculty/1126/Place%20based%20forest%20law.pdf).

19. Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1208, 1210 (2005).

20. *See, e.g.*, Reed F. Noss, *Some Principles of Conservation Biology as They Apply to Environmental Law*, 69 CHI. KENT L. REV. 983, 904-07 (1994). Ecosystem “restoration” refers to restoring the ecosystem to its condition prior to intensive human disturbance, *see* Keiter, *supra* note 19, at 1195, or more precisely “the restoration of degraded ecosystems to emulate more closely, although not necessarily duplicate, conditions which prevailed before disruption of natural structures and processes.” COVINGTON ET AL., *ECOSYSTEM RESTORATION AND MANAGEMENT: SCIENTIFIC PRINCIPLES AND CONCEPTS* 601 (1998). “Resilience” refers to the ability of an ecosystem to recover from severe disturbances such as severe wildfires, insect outbreaks, etc. *E.g.*, JOHNSON AND FRANKLIN, *RESTORATION OF FEDERAL FORESTS IN THE PACIFIC NORTHWEST: STRATEGIES AND MANAGEMENT IMPLICATIONS* 6 (2009).

21. This category covers most recent wilderness bills. *See* Nie & Fiebig, *supra* note 18, at 16-17. A pending Senate bill, S. 1470, would address long-running timber harvesting controversies in western Montana, centering in part on the threatened grizzly bear, by setting aside certain lands for wilderness or other conservation purposes while requiring the Forest Service to implement ecosystem restoration projects, which would include harvesting, in areas deemed less important for grizzly habitat.

22. For example, the law implementing the star-crossed Quincy Library Group forest management compromise falls into this category. Nie & Fiebig, *supra* note 18, at 13. A pending Senate bill, S. 2895, would address a portion of the all-too durable spotted owl controversy in the Pacific Northwest by authorizing certain timber harvesting activities as part of a larger strategy to restore the dry forest landscapes of eastern Oregon, while imposing clear limits on certain old-growth harvesting.

23. Keiter, *supra* note 19, at 1208-10.

24. Nie & Fiebig, *supra* note 18, at 12-19, 28-29; *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, VALLES CALDERA: THE TRUST HAS MADE PROGRESS BUT FACES SIGNIFICANT CHALLENGES TO ACHIEVE GOALS OF PRESERVATION ACT, GAO-10-84 (2009); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, NATURAL RESOURCE MANAGEMENT: OPPORTUNITIES EXIST TO ENHANCE FEDERAL PARTICIPATION IN COLLABORATIVE EFFORTS TO REDUCE NATURAL RESOURCE CONFLICTS, GAO-08-262 at 97-103 (2008) (discussing the arduous implementation history of the Steens Mountain Cooperative Management and Protection Act).

25. Keiter, *supra* note 19, at 1209.

26. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, NATURAL RESOURCE MANAGEMENT: OPPORTUNITIES EXIST TO ENHANCE FEDERAL PARTICIPATION IN COLLABORATIVE EFFORTS TO REDUCE NATURAL RESOURCE CONFLICTS, GAO-08-262 (2008) [hereinafter GAO: OPPORTUNITIES EXIST].

27. *Id.* at Appx. II (discussing seven different collaborative resource management efforts around the country).

incentives (such as conservation easements).<sup>28</sup> The collaborative efforts GAO studied had many of these characteristics, and generally reduced conflicts over natural resources while improving natural resource conditions, although data demonstrating the latter was limited.<sup>29</sup> Four of the seven collaborative efforts GAO studied are addressing ecosystems that support listed species.<sup>30</sup>

### III. Conclusion

Whether or not Wyman's grand ESA bargain is appealing, no such deal is likely in the near future. Place-based ecological restoration legislation has a greater chance of passage, and will allow experimentation with different approaches to ecosystem restoration and therefore species recovery on federal lands. Even without such legislation, collaborative resource management groups are making some restoration progress and offer another potential lifeline for listed species. Merging the two approaches, that is, developing place-based laws with the key collaborative resource management characteristics in mind, may help to avoid the pitfalls of earlier place-based legislative efforts.<sup>31</sup> That could be an innovative way of getting listed species out of the emergency room alive and well, and it certainly will not hurt to try until a better deal comes along.

---

28. See *id.* at 21-23 for the full list of characteristics GAO identified. Providing incentives for conserving species and their habitat on nonfederal lands to avoid listing may be particularly promising. *E.g.*, Donald C. Baur et al., *A Recovery Plan for the Endangered Species Act*, 39 ELR 10006, 10008-09 (Jan. 2009). However, such approaches must deliver real ecological progress rather than empty sugarcoated calories. *Cf.* Florida Key Deer v. Paulison, 522 F.3d 1133, 1147, 38 ELR 20083 (11th Cir. 2008) (FEMA program offering incentives to communities to develop conservation plans violated ESA requirement that agencies develop programs to conserve species because program had been totally ineffective).

29. GAO: OPPORTUNITIES EXIST, *supra* note 26, at 26-40.

30. These include the Blackfoot Challenge (bull trout, grizzly bear, gray wolf); the Malpai Borderlands Group (jaguar, among others); the Onslow Bight Forum (red-cockaded woodpecker); and the Uncompahgre Plateau Project (lynx). A fifth project, the Cooperative Sagebrush Initiative, seeks to avert listing of the greater sage grouse and Gunnison sage grouse by taking measures to conserve sagebrush habitat in light of, among other things, significant oil and gas development that has occurred in recent years in the Interior west. *Id.* at Appx. II.

31. See *supra* note 26.