

**SPECIAL  
REPORT:  
The ESA**

An analysis and  
historical perspective of  
the 1973 Endangered  
Species Act

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~ **SPECIAL SECTION** ~

Methow Valley News  
November 11, 1999

**ESA: born with little debate,  
remarkable powers**

*Protecting most things great and small*

Researched, reported and edited

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**T**he Endangered Species Act of 1973 was passed at a time when the country was entangled in an unpopular Vietnam war. Watergate was just emerging to torture and ultimately topple the Nixon administration. Bell bottoms and mini-skirts, mutton chop sideburns, beards and long hair set the fashion. Disco ruled at clubs and proms.

Double-digit interest rates, long gas lines and flawed wage and price controls made up an unbalanced economic equation.

Russell Means led the American Indian Movement in an FBI standoff at Wounded Knee and the Supreme Court loosened restrictions on abortion.

In all of this, the environmental movement crafted its Magna Carta. Rachel Carson had set the stage a decade before with "Silent Spring," a literary warning of impending biological apocalypse emerging from dangerous pesticides and indiscriminate pollution. A receptive Congress and pre-occupied executive branch cleared the way with an unusual spirit of harmony.

This was legislation that made the country feel good about something when conflict dominated the daily headlines. And the country began the road to identify and save all wild things endangered—great and small, noble and mundane.

More than two and a half decades since its passage, the ESA can point to some notable successes—perhaps most prominent being the continuing recovery of the bald eagle. Since the rare snail darter nearly stopped construction of a major Tennessee dam, the act has also delayed or blocked many other public and private projects. And the listing of species is far out-pacing removal of those already listed.

The law in the past decade has faced, and so far withstood, repeated attempts to soften what critics say are its inflexible and unrealistic provisions. Yet it's this same "absolutist" fidelity to any threatened or endangered species that supporters defend so determinedly.

In the debate over the ESA, there seldom appears to be a middle ground. It's love it or hate it. And live with it, because the polls show the act enjoys great national popularity--especially in less affected urban centers.

Now the impacts of the ESA prove to substantially control, if not permanently change, the lifestyles and economy of the Methow Valley. Already part of the Valley has lost an irrigation season and had the operation of its largest employer threatened. Now stream fishing will be mostly banned indefinitely beginning next year.

This special section of the *Methow Valley News* examines the early history of species protection in America through passage of the ESA. A future issue will explore the criteria and procedures.

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## Effort to save species dates to 1870s concern for buffalo

Today most people think of the Endangered Species Act as the beginning of federal efforts to prevent eradication of wildlife.

But the federal government considered measures to preserve species as early as the 1870s. One early attempt was national legislation in 1874 that would have outlawed buffalo slaughter in the territories, but which died through a pocket veto by President Grant.

In 1894, Congress passed legislation outlawing buffalo hunting in Yellowstone National Park. Through the late 19th century, however, most wildlife legislation was at the state level, intended to protect hunting interests. And the Supreme Court upheld state powers over wildlife in an 1896 decision, *Geer v. Connecticut*.

In 1900, with the Lacey Act, Congress passed the first significant legislation to protect species that had been killed in violation of state laws and transported across state lines. President Roosevelt in 1903 established the nation's first wildlife refuge on Florida's Pelican Island.

When the last known carrier pigeon died in a Cincinnati zoo in 1914, the country responded by signing, with Canada, the Migratory Bird Treaty of 1916, which was ratified two years later as the Migratory Bird Treaty Act. Although challenged by the state of Missouri, the act was upheld by the Supreme Court which rejected the "state ownership doctrine" that Missouri argued gave the states sole authority to regulate wildlife.

In 1934, in the New Deal era, Congress passed the Fish and Wildlife Coordination Act. It established voluntary measures that encouraged federal agencies to consider the connection between habitat and health of wildlife in dam-building and pollution-generating activities.

An important provision of the act resulted in expansion of national forests, wildlife refuges and national parks.

In 1940, Congress acted to protect the nation's symbol with passage of the Bald Eagle Protection Act.

Interest in ecology and wildlife management heightened with publication, in 1949, of Aldo Leopold's *A Sand County Almanac*. But it was Rachel Carson's *Silent Spring*, released in 1962, that is widely considered the driving force of the environmental movement, with its focus on the threat of pesticides to the health of wildlife and humans.

Following Carson's book, the movement to provide legislative protection for species gained momentum. In 1964 Congress created the National Wilderness Preservation System, and the Bureau of Sport Fisheries and Wildlife, now the US Fish and Wildlife Service, formed a committee on rare and endangered species that published a "redbook" including 63 species.

The forerunner of today's ESA was passed in 1966, with the Endangered Species Preservation Act. The language was moderate, requiring several federal agencies to protect threatened species, "insofar as is practicable and consistent" with their mission. The

legislation applied only to vertebrates and merely encouraged voluntary cooperation with other federal departments. It did, however, create the National Wildlife Refuge System. Within the refuges, wildlife could not be "taken" without a permit.

With the 1966 act, however, a legislative trend was emerging, paving the way for the 1969 Endangered Species Conservation Act that recognized the international threat to wildlife. The Wild Free-Roaming Horses and Burros Act was passed in 1971, and the Marine Mammal Protection Act in 1972, followed by an international convention that addressed import-export controls for endangered species.

When President Nixon threw his then crisis-plagued administration behind species protection by calling for stiffer legislation, Congress had many willing supporters. Although a 1972 bill failed, the stage was set for the landmark legislation of 1973. Although the question of state authority to manage wildlife was debated, most other parts of the proposed bill drew little discussion or opposition.

A Senate bill passed by 92-0 the House version by 390-12, with proposals then heading to a conference committee where the only significant topic was the administrative balance between Interior and Commerce. There was, however, a major difference in the Senate and House bills—at the time of little concern but one that today has proven to have dramatic and significant impact: under Section 9, the Senate bill viewed "take" as any action that would harm a species, but the House bill would only prohibit actually injuring or killing a species.

On Dec. 19, 1973, the Senate approved the conference report unanimously and the next day the House agreed 345-4, with 73 not voting. Nixon signed the legislation Dec. 28.

It took a few years, but many of the Congressmen who voted for the legislation would later view their decision as having unintended consequences. Congress, the Nixon administration and the public all seemed to be focused on the ESA's protection of, what one observer called "charismatic megafauna"—such as eagles, wolves and bears and other vertebrates, much like those headlining a Marlin Perkins' "Wild Kingdom" television show of the era. The fact that ESA would protect insects, plants, and obscure wildlife was mostly overlooked.

But in 1975, the Fish and Wildlife Service listed the tiny snail darter. The three-inch perch was little known, and viewed as neither a sport nor food fish. In 1978, with the Supreme Court's decision in *Tennessee Valley Authority v. Hill*, the power of ESA in the judicial arena was confirmed.

In delaying construction of a major hydroelectric dam, the court's decision also strictly defined the requirements of Section 7 "consultations." among federal agencies. The case arose when a conservation group sued to stop the Tellico dam on the little Tennessee River. The TVA, a federal agency, argued that it had consulted with the Department of Interior under Section 7. TVA maintained it could make the decision to proceed with the dam, even though the consultation concluded the snail darter would be "jeopardized" under the act.

The snail darter decision resulted in an amendment, in 1978, forming the so-called "God squad," actually the Endangered Species Committee, that bestowed the power to grant exemptions of federal projects under ESA if economic benefits were deemed greater than the need to protect a species.

The committee could have exempted Tellico by a five to seven vote, but it surprised Congress by deciding the dam didn't make economic sense. It took separate legislation, a rider to another bill, to get the dam built.

Soon after ESA was passed, some Congressmen also began to realize that the broad scope of species protected by the act could affect the use of land and, therefore, its economic value under Section 9 prohibitions applying to "take" of a listed animal, insect or plant on private property. Today a desert sand fly in California has become one of the latest examples of the power of the ESA to protect a virtually unlimited range of living things.

Opposition to the ESA has periodically sprung up in Congress during the 1990s, and some lawmakers have attempted to block re-authorization of the act. But most political analysts say the ESA remains highly popular, especially in urban areas where species listings infrequently raise critical economic issues. The Puget Sound area is one of the few urban regions in the country having to balance economics and species protection.

But far away from the coast in the Methow Valley, issues of both Section 7 and Section 9 of the ESA loom over an already delicate economy. The Forest Service's decision not to allow irrigation diversions on federal land has already had a significant impact on the local economy. And a cloud remains on the horizon for the next growing season, as Section 9 requirements for private irrigators are being developed.

The Methow now has two fish, spring-run Chinook and steelhead trout, listed as endangered and the bull trout as threatened. The west slope Cutthroat could be listed anytime. And an environmental group has petitioned for listing the sage grouse, although initially the US Fish and Wildlife Service says the impact will be more in Douglas County.

The growth of listings exponentially eclipses de-listings that have resulted from species that have recovered.

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## ESA's power rests in a few key sections

As with most legislation, the Endangered Species Act contains much boilerplate and stilted, often redundant language.

But provisions having the most critical impacts are found in few key sections that are open to widely differing interpretations. They outline what must be done by government and the private sector when a species listings is made--and the potentially heavy penalties for violations.

Some of the most debated provisions involve what constitutes "best scientific and commercial data" used for decisions to list a species and chart its continued protection and recovery.

This is an brief overview of ESA provisions that have been most discussed and have the greatest potential impact in the Methow Valley.

The responsibility for making listings decisions falls with the Secretary of Commerce or Interior, whichever cabinet level department has agencies with plant and wildlife missions.

Under Commerce, the key agency is the National Marine Fisheries Service, what might be called a sub-agency of the National Oceanic and Atmospheric Agency (NOAA).

US Fish and Wildlife Service, the other key government agency, is part of the Department of Interior.

Section 3 of the ESA affords protection for all endangered and threatened species, "other than a species of the Class Insecta determined ..... to constitute a pest whose protection

under the provisions of this Act would present an overwhelming and overriding risk to man."

Section 3 also defines "critical habitat" as the, "specific areas within the geographical area occupied by the species, at the time it is listed".. "specific areas outside the geographical area occupied by the species"... "(that are determined) essential for the conservation of the species," and, "(areas) for which no critical habitat has heretofore been established."

Although broad in scope, Section 3 does provide that, "Except in those circumstances determined by the Secretary critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.."

In practice, the interpretation of habitat is left largely at the agency rather than cabinet level, leaving "the Services," as they're known, with substantial power to make decisions.

Those decisions that result in listings must be made, "solely on the basis of the best scientific and commercial data available."

Besides Section 3, the sections most often cited in ESA discussions and media coverage include:

Section 4 stipulates that listing decisions be made, "solely on the basis of the best scientific and commercial data available to (the cabinet level officials) after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species.."

Section 4(b) provides that an agency can designate "critical habitat, and make revisions thereto...on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact..." But the law allows for exclusion of, "any area from critical habitat if (the secretary of the cabinet department) determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned."

In the Methow Valley and elsewhere in the upper Columbia Basin, there are arguments that the, "best scientific and commercial data available," has not been developed to support either listing of the species or designation of critical habitat.

Section 4(d) applies to threatened, rather than endangered species, and requires issues regulations deemed, "necessary and advisable to provide for the conservation of such species."

Section 7 requirements resulted in a lost irrigation season for many Methow Valley irrigators who divert on Forest Service land, and in effect served notice of things to come with ESA enforcement.

Section 7 requires that federal agencies "in consultation with" the listing agency "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species ... after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

Section 9 defines the responsibilities and jurisdictions of ESA for "private persons," making it unlawful for landowners to "take" threatened or endangered species.

Section 10 provides a remedy for allowing the, "take" of a listed species with a permit, know as an "incidental take permit." This is an important issue in the memorandum of agreement for the Methow Valley, in that National Marine Fisheries Service will not issue an "incidental take permit" until certain criteria, such as target stream flows, yet to be set, are achieved.

A permit to take listed species cannot be issued, "unless the applicant therefor submits...a conservation plan that specifies..the impact which will likely result...steps the applicant will take to minimize and mitigate (them)..funding that will be available..(and) what alternatives actions to such taking the applicant considered.."

NMFS has agreed "habitat conservation plan," is the best way to protect landowners and government agencies against ESA litigation. However, the agency has said it will not issue a permit for "incidental take" until the plan is completed after several years.

Section 11 is the penalties and enforcement section of ESA. It describes penalties of as much as \$25,000 for civil infractions to \$50,000 in criminal cases and possible jail terms of a year.

This section that authorizes "citizen suits," in which private parties may file suit, with 60 days notice, to force compliance with ESA. The broad nature of this provision has prompted some observers to call it the "hammer" of the legislation.

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