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Introduction

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Introduction

As Congress considers reauthorization of the Endangered Species Act (ESA), several aspects of the Act and its implementation are under vigorous discussion in the public and private sectors. The ESA has had far-reaching impacts on U.S. policy regarding the preservation of species, and also contains broad authorities on managing public and private lands. The debate arises out of the desire to find an appropriate balance among scientific, economic, and policy considerations related to the conservation of biodiversity. These are difficult, controversial issues involving some very basic values as society attempts to establish the significance of species loss, and to balance private property ownership rights with the desire of society to preserve species. While many people and organizations view the intent and implementation of the ESA as successful, it is acknowledged that opportunities for improvements exist, particularly regarding implementation on private property.

In response to this debate, the University of Wyoming's Institute for Environment and Natural Resources (IENR) Board devoted its May 1996 forum to a discussion focusing on the ESA and private property.¹ Prior to the forum, the Institute commissioned a research study panel of University of Wyoming faculty and external experts who prepared a summary and analysis of the key policy issues. These summary papers provided the basis for the Board's discussions, and are contained herein.

The importance of private property to the goals of the ESA was revealed in a recent General Accounting Office report that indicated over 90% of the 781 species listed as threatened or endangered as of May 1993 had habitat on nonfederal lands.² Of these listed species, 73% relied on nonfederal land for over half of their habitat and 37% were completely dependent on nonfederal lands.³ According to the report, privately owned property accounted for the majority of nonfederal lands, with 609 listed species having all or part of their habitat on private lands.⁴

1. The University of Wyoming established the Institute for Environment and Natural Resources in 1993 to develop balanced research and policy solutions to environmental and natural resource issues. The Institute is led by a policy board of leaders from government, industry, academia, ranching and the environmental community, representing diverse state, regional, national and international interests and expertise. This representation of many different viewpoints on the board is complemented by an interdisciplinary university research faculty.

2. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 1,4 (Dec. 1994).

3. *Id.* at 5.

4. *Id.*

Responsibility for implementing the ESA lies with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). The ESA can directly affect private landowner's in several ways. Section 7 states that federal agencies must consult with the FWS or the NMFS on proposed federal activities. Such consultations can affect private property owners when federal access, permitting, or funding are involved. However, no biologists, federal or otherwise, are authorized to enter private land to survey for endangered species without the landowners' consent. Section 9, and the agency regulations directing its implementation, contain prohibitions against harming endangered species and define prohibited acts to include significant modification of a species' habitat (including habitat on private land) that directly or indirectly kills or injures a member of a protected species. Section 10 provides for exemptions to Section 9 prohibitions through development of Habitat Conservation Plans. These plans may require technical resources that are beyond the financial means of many landowners and so are not always viewed as practical solutions to conflicts.

The ESA seriously concerns many private landowners because of the potential restrictions on use of their property; the extent of the actual impact on private property owners is difficult to evaluate. Some people argue that effects are widespread and mostly detrimental, while others believe that though there have been onerous burdens placed on a few property owners, the severity of the problem is overstated. The IENR Board acknowledges that there are disagreements about implementation of the ESA, but recommends that the Act should be reauthorized, with improvements that address implementation on private lands. Following discussions at the May, 1996 forum, the Institute Board developed eight principles related to the ESA and private property. These principles are presented at the conclusion of this piece.