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# The Endangered Species Act under Threat

MICHAEL J. BEAN

**A** bedrock principle of natural resources law in the United States has long been that wildlife is not the property of those on whose land, or in whose waters, it occurs. Rather, the state and federal governments exercise a special responsibility over wildlife wherever it occurs, on behalf of all citizens. This responsibility—likened to that of a trustee—enables government to limit, or prohibit altogether, actions harmful to wildlife. Amendments to the Endangered Species Act recently approved by the House of Representatives fundamentally alter this principle, effectively putting ownership of wildlife in private hands and limiting the ability of the government to protect endangered wildlife unless it pays private interests when it does so.

That is one of the more startling features of HR 3824, a bill introduced by Rep. Richard Pombo (R–CA) on 19 September, approved by the Resources Committee (which Pombo chairs) on 27 September, and narrowly passed by the full House on 29 September 2005. The rocket-like trajectory that this bill took from introduction to passage would be typical of legislation responding to a dire national emergency. Rather than solve an emergency, however, HR 3824 creates one, especially because of the way it will alter how species are conserved in rapidly developing landscapes.

Current law imposes a qualified prohibition on activities—including development—that harm endangered wildlife. The qualifier is that developers can obtain permits allowing their projects to proceed, provided that adverse impacts are mitigated. Mitigation might take the form of contributing to a fund

to acquire and manage habitat elsewhere, leaving a portion of the developer's land undeveloped, or modifying the timing or scale of development. This approach has been used widely, and is reflected in a great many "habitat conservation plans" under which profitable development activities proceed notwithstanding comparatively modest conservation concessions to mitigate their impact on endangered wildlife. Creative use of such plans has secured private resources to establish networks of conserved land within rapidly developing areas.

The House bill changes all that with two closely linked provisions. First, all property owners—even before securing necessary state and local approvals—can request a determination of whether a proposed use of their property would harm endangered species. If the government fails to answer within 180 days (and the bill gives the government no right of access to ascertain what species are present), the proposed use can proceed—regardless of its impact.

If, however, the government determines that the proposed use would be harmful, the owners can forgo the use and oblige the government to compensate them for its fair market value. Instead of requiring profitable development to underwrite the cost of carefully planned conservation measures to mitigate impacts to a publicly owned resource, the House legislation requires the public to foot the full bill whenever and wherever developers propose to build in endangered species habitat. The principal beneficiaries of these new requirements are not likely to be farmers and ranchers, but developers and speculators who are given an easy new way to

stick a straw into the treasury. They can demand to be paid for abandoning projects that they may never have intended to pursue seriously in any event.

The House bill does still more. In fact, it changes nearly every significant provision in the Endangered Species Act, including those that govern how species are determined to be endangered, how plans for their recovery are developed and implemented, and what protection they receive. It reduces safeguards against harmful pesticides, and eliminates existing provisions intended to protect key habitats from the deleterious impact of federal dams, highways, and other projects. But the impact of these changes, though likely to be considerable, is overshadowed by the drastic undercutting of the government's ability to make reasonable mitigation measures a precondition for development.

Rep. Pombo's principal argument for his bill was that the Endangered Species Act has not been effective enough in recovering endangered species and that his bill would improve it. Few disagree with the first assertion, but rather than improving the law's ability to recover species, these changes will dramatically reduce it and undermine the government's long-standing trust responsibility to safeguard wildlife. The Senate should think long and hard before embracing the House's radical proposals.

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