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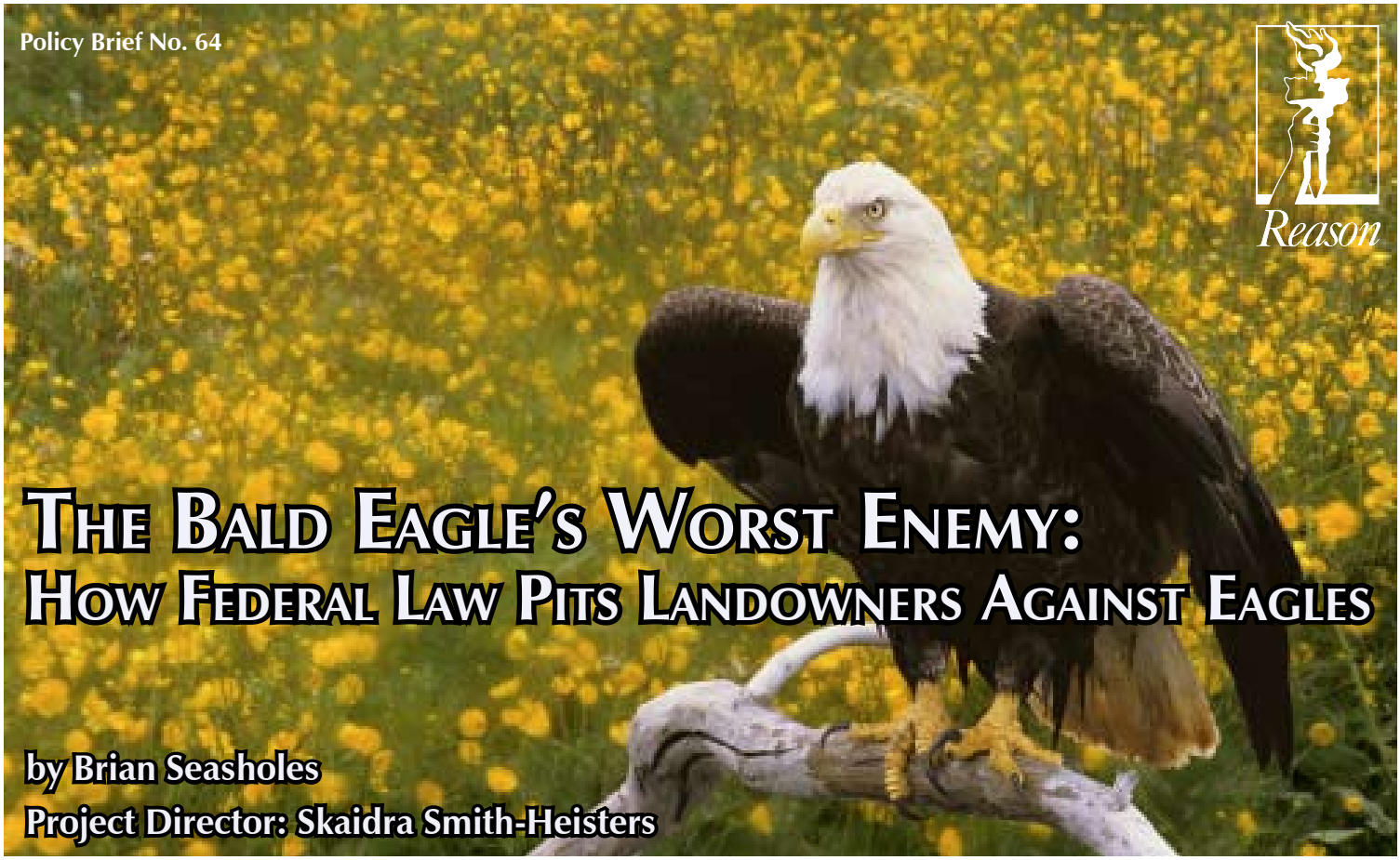

The Bald Eagle's Worst Enemy: How Federal Law Pits Landowners Against Eagles

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INTRODUCTION

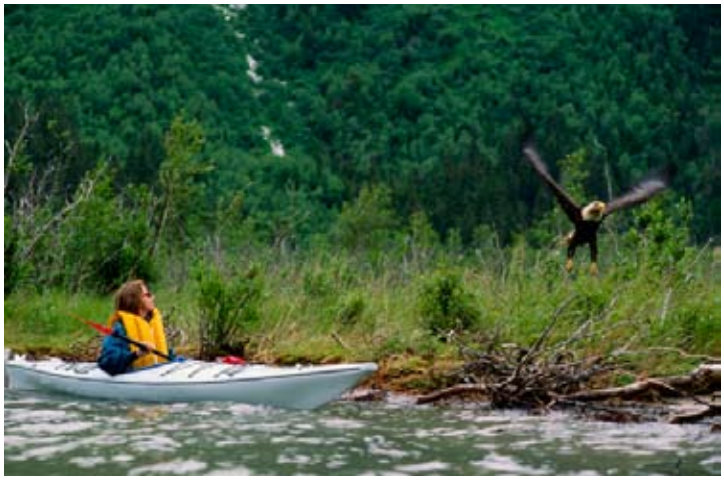
It is great news that bald eagle populations in the contiguous 48 states have done so well in recent decades that on June 29, 2007 these eagles will officially be removed from the endangered species list. Unfortunately, the bald eagle will be delisted in name only because despite the species' much hailed recovery the U.S. Fish and Wildlife Service (FWS) has cut-and-pasted the Endangered Species Act (ESA) land-use regulations—the "teeth" that make the law so broadly powerful—to the Bald and Golden Eagle Protection Act (Eagle Act). This so radically expands the Eagle Act, a predecessor of the ESA, that it is tantamount to rewriting it, something that federal agencies are not supposed to do.

In the early-to-mid 1990s the bald eagle population surpassed FWS's recovery target of around 3,000 pairs in the contiguous states (the continental U.S. excluding Alaska). Since then, the population has continued to grow at the very healthy rate of about 8 percent annually.[1] In the spring of 2007, the population reached at least 11,137 pairs.[2] With the population exceeding the recovery goal by 371 percent, In the spring of 2007, the population reached at least 11,137 pairs. With the population exceeding the recovery goal by 371 percent, it is clear the bald eagle's population is long overdue to be removed from the endangered list.[2]

The ESA has never applied to bald eagles in Alaska, where they have been too numerous to merit listing under the ESA—approximately 50,000-75,000 eagles, or 15,000 pairs.[3] About the same number of eagles are in Canada, the vast majority in British Columbia.[4] Combined, the Alaskan and Canadian bald eagles represent almost 75 percent of the species' population. So the species was never in danger of extinction, even if it had not been listed under the Endangered Species Act.

In 1999, with recovery goals for bald eagles in the contiguous U.S. met, FWS first proposed to remove it from the endangered list.[5] FWS is required by law to act within a year on a proposed delisting, but when 2000 rolled around FWS took no action. Instead the eagle continued to be a "poster animal" for the ESA, used to justify ongoing control of land use on both public and private property.

So despite the eagle's recovery, it was business as usual for FWS until something unexpected happened in October 2005. A Minnesota landowner named Ed Contoski sued



FWS because the agency failed to decide whether to remove eagle from the endangered list in the one year period mandated by the ESA. Ed and relatives own 18 acres on Sullivan Lake in central Minnesota, about 100 miles north of his home in the Twin Cities. To provide for his retirement, and because heart problems prevented him from using and enjoying the property, Contoski decided in 2004, at the age of 67, to sell his half interest to family members. In order to raise the $425,000 they needed to purchase Contoski's half-share, the family determined the only financially feasible plan was for the northern 7.33 acres of the property to be platted for five residential lots. The remainder of the property would not yield the necessary cash for several reasons, the most important of which was that development of about half of the 18 acres was prohibited under the federal Clean Water Act. In addition, access restrictions to the lake, as well as for a new road that would have to be cut, reduced the value of the property's southern portion.[6]

But in the fall of 2004 authorities informed Contoski they would not approve his plan due to the presence of a bald eagle nest, which precluded development of all of the 7.33 acres. He was informed that all development within a 330 foot radius of the eagles' nest tree, which was on one of the lots, should be avoided and that human activity within a 330–660 foot radius should be very limited.[7] Faced with the prospect of a $100,000 fine and/or one year in jail for violating the ESA should harm come to one eagle or even one egg—penalties that would double, triple, and so on for any combination of adult eagles, eggs and chicks thereof—Contoski had no choice but to abandon his plans.

In an effort to recover use of his land, he enlisted the help of Damien Schiff of the Pacific Legal Foundation, who filed suit on Ed's behalf against the Interior Department in October 2005 for failure to act on the delisting within the one year timeframe mandated by the ESA.[8] Contoski won the case in August 2006, and as a result the judge presiding over the case ordered FWS to remove the bald eagle from the endangered list.[9]

Likely anticipating the court's decision, FWS issued a second proposal for delisting the bald eagle in February 2006, some six-and-a-half years after the initial proposal.[10]

REWRITING THE BALD & GOLDEN EAGLE PROTECTION ACT

Why did progress toward removing the bald eagle from the endangered list stall for nearly a decade? In 1997, the bald eagle's status was so secure, and the case for delisting so strong, that a number of the foremost raptor scientists in the U.S. took the unusual step of publicly calling for the eagle's delisting. Tom Cade and Lloyd Kiff of the Peregrine Fund, James Enderson of Colorado College, and Clayton White of Brigham Young University wrote, "Some people ask why the *anatum* peregrine should be de-listed when the bald eagle (*Haliaeetus leucocephalus*), which exists in much larger numbers south of Canada than the peregrine does, was only down-listed to threatened....Our answer is that the bald eagle should have been removed from the endangered list as originally proposed, but the Fish and Wildlife Service made a political decision to down-list when faced by opposition from litigious environmental groups."[11] While the bald eagle was proposed to be downlisted, not delisted, the comments of Cade et al. are still relevant.

Then, in 2004, Environmental Defense addressed anyone with remaining reservations about the future of the bald eagle, stating:

> *We expect eagle numbers to continue to increase, even after they are delisted. The principal threat that depressed eagle numbers historically was the pesticide DDT, with persecution by humans a distant second. DDT is no longer in use in the United States, and persecution is unlikely to resume because of the stiff penalties for doing it and because societal attitudes toward eagles and other birds of prey have changed dramatically from what they were decades ago.*[12]

Even one of the ESA's foremost supporters realizes the need to delist species once they've recovered. "If you have

things on the list that don't really belong there, you call into question the legitimacy of other species that really do need to be on it," observed Michael Bean of Environmental Defense.[13]

Evidently, FWS wanted to remove the bald eagle from the endangered species list, but maintain the land-use regulations that the ESA listing had provided for eagle habitat. The same day the agency issued the second proposal for delisting, FWS also issued proposed regulatory changes to the Bald and Golden Eagle Protection Act (Eagle Act).[14] These changes, which were finalized administratively in June 2007, so radically expand the reach of the Eagle Act that it essentially amends the law. Like so much surrounding legislation, the relationship between the ESA and Eagle Act revolves around a few small words that have enormous meaning.

Congress initially passed the Bald Eagle Protection Act in 1940 out of concern that eagle was "threatened with extinction" due in large part to shooting.[15] To address this, the Act made it illegal, except in Alaska, to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, alive or dead, or any part, nest, or egg thereof." The term "take" was defined as "pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb." In 1972 the term "poison" was added to the definition of "take."[16] Congress also amended the Act in 1962 to cover golden eagles, because immature bald eagles can be mistaken for golden eagles—at which point the law became what we know today as the Eagle Act.[17]

As the definition of "take" makes clear, the Eagle Act's prohibitions deal with actions that are direct and proximate to eagles. With the eagle soon to be off the endangered species list, FWS seems determined to turn the Eagle Act into a mini-ESA, the key component of which is the Eagle Act's definition of "disturb" under the "take" prohibition:

> *Disturb means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.*[18]

Prior to this, "disturb" had never been defined because it was always assumed to be in concordance with the other words that define "take," all of which prohibit actions that are direct and proximate to eagles and their nests.

In order to put the issue of this new definition of disturb under the Eagle Act in perspective, it is necessary to understand the similarities between it and how the ESA protects habitat. The aspect of the ESA that makes it such a powerful law is its ability to control use of land and water. And the teeth that give the ESA this power is the law's prohibition on people taking listed species. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[19] The key, however, is the term "harm," which FWS defined in 1988 as:

> *[A]n act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."*[20]

Harm by habitat modification, as it came to be known, has provided FWS with the ability to regulate not only habitat near a listed species but also habitat far away that might possibly be used for other activities such as resting or foraging. The upshot is that the ESA has had the ability to regulate vast amounts of land and water, especially in the case of a species like the bald eagle that uses enormous swaths of terrestrial and aquatic habitat.

When the ESA's definition of "harm" is compared with the Eagle Act's definition of "disturb," the similarities are striking. Both use very similar terminology, in some

instances identical. FWS has essentially done a cut-and-paste job, transferring the ESA's definition of "harm" to the Eagle Act's definition of "disturb."

Given how the ESA has been used to restrict land-use—just look at the case of Ed Constoski—it is not hard to imagine how the definition of "disturb" under the Eagle Act can be used to encumber huge amounts of habitat, especially because the bald eagle's population continues to grow. Applying FWS nest protection guidelines under the Eagle Act means that the 11,137 pairs in the 48 contiguous states occupy 5.6 million acres (roughly the size of New Hampshire or New Jersey)-524,834 acres of which will be the most stringently regulated because it is closest to nest sites.[21] This habitat, however, is only a small fraction of what is known as the "home range," which is the territory a pair of eagles use to hunt, rest, court, and feed. Home ranges vary in size, but eagle pairs use a rough average of 3,600 acres each, while non-breeding eagles range very widely over millions of acres each.[22] Wintering bald eagles must also be considered because of the influx of eagles from Canada, which brings the winter population in the 48 states to approximately 40,000 eagles (as discussed below the Eagle Act will also cover golden eagles and Alaskan bald eagle populations, both of which are not accounted for in these acreage numbers).

Roughly two-thirds of the bald eagle's population consists of pairs, the rest are unpaired juveniles and adults.[23] It is important to keep in mind that unpaired and wintering eagles are less sensitive to disturbance than nesting eagles, and that there is considerable overlap of territories for unpaired and wintering eagles, as well as some overlap in the outer ranges of nesting eagle pairs. In addition, wintering eagles are not spread evenly across the landscape because they tend to congregate in areas with good food sources, and these areas are a focus of FWS regulatory interest. Habitat most likely to be regulated is that around nests, followed in likelihood by nesting home ranges and areas of winter concentrations. Least likely to be regulated is habitat for unpaired eagles and wide-ranging wintering eagles. Even so, these numbers, especially those for nesting eagles, provide an idea of the enormous amount of habitat used by eagles, habitat that will be covered to varying degrees by the new Eagle Act. As the eagle's population continues to grow, these numbers will increase.

Furthermore, Congress never intended for the Eagle Act to contain land-use control provisions. Indeed, Michael

Bean of Environmental Defense, widely regarded as one of the foremost authorities on U.S. wildlife law, made no mention of any such provisions in the first two editions, published in 1977 and 1983, of his treatise, *The Evolution of National Wildlife Law*.[24] Surely if such authority existed, and especially because such authority is of such overwhelming importance, then Bean would have made some mention of it.

The final definition of disturb represents such an enormous expansion of the regulatory and geographic reach of the Eagle Act that it is tantamount to rewriting the law, something that should necessitate congressional intervention because federal agencies are only supposed to interpret laws, not rewrite them.

With attention focused on the bald eagle in the contiguous U.S., little notice has been paid to three other ways in which the scope of the Eagle Act has been expanded. First, ESA-like land-use controls will extend to bald eagles in Alaska. This is ironic because bald eagles in Alaska were never listed under the ESA due to their large and healthy population. Second, the same applies to the entire national population of golden eagles, which have never been listed under the federal ESA. States with large populations of golden eagles may be impacted by the new Eagle Act for golden eagles in ways never contemplated, especially because in some states golden eagle populations appear to

be declining, which may well subject them to increasing scrutiny by FWS.[27] Third, the large numbers of bald and golden eagles that nest in Canada but migrate south to the U.S. to spend the winter are also covered by the new Eagle Act.

POTENTIAL IMPACTS OF THE EAGLE ACT

The expansion of the Eagle Act will likely come as a surprise to residents and legislators in the contiguous 48 states and Alaska, especially those states with large and/or rapidly growing bald eagle populations as well as states with large golden eagle populations. As with the new definition of "disturb," the ESA provides examples of what the new Eagle Act might look like when implemented.

A. ESA and Eagle Act Guidelines

Under the ESA, FWS has established buffer zones around bald eagle nests because eagles tend to be sensitive to disturbance: a primary zone within 330 feet, in which virtually no activity is permitted; the secondary zone 330–660 feet from the nest in which some more activity is allowed; and the tertiary zone, extending out one-half mile radius from the nest tree, that is a bit less restrictive.[27]

The National Bald Eagle Management Guidelines for complying with the Eagle Act, released by FWS in June 2007, are practically identical to those under the ESA because the Guidelines establish the same buffer zones.[29] For evidence of how the Eagle Act's guidelines will likely affect landowners, one need only look at the case of Ed Contoski. Due to a 330-foot buffer around a nest, he has been prevented from using his land, and is out close to half-a-million dollars as a result.

B. FWS Proposed Permit Program

FWS's proposed permit program for the Eagle Act is very similar to incidental take permits for private landowners under the ESA, otherwise known as Habitat Conservation Plans (HCPs). HCPs were added to the ESA in 1982 as a way for private landowners to have a way out of the Act's absolute prohibition on taking listed species by offsetting such take, or potential take, with mitigation, usually in the form of land set aside for the species in question.

On June 5, 2007, FWS published its proposed permit program for the Eagle Act. The proposed Eagle Act permit program is essentially an HCP program, as FWS admits:

> *Many actions that are considered likely to incidentally take (harm or harass) eagles under the ESA will also disturb or otherwise take eagles under the Eagle Act. The regulatory definitions of "harm," "harass," and "disturb," differ from each other; but overlap in many ways…Currently, there is no regulatory mechanism in place under the Eagle Act that permits take of bald or golden eagles comparable to under the ESA. We propose to add a new section at 50 CFR 22.26 to authorize issuance of permits to take of [sic] bald and golden eagles on a limited basis.*[30]

> *We intend to develop implementation guidance to address procedural details of the permitting process, similar in role and format to the Service's Section 7 and HCP Handbooks.*[31]

A further indication of the similarities between the Eagle Act proposed permit program and HCPs is that, under the proposed permit program, FWS wants to transfer incidental take authorization for bald and golden eagles already covered under existing HCPs (golden eagles are covered under HCPs as a species that may be listed in the future) to the Eagle Act. By proposing to do this, FWS is acknowledging that HCPs and the proposed permitting program under the Eagle Act are functionally equivalent.

On the surface, FWS's proposed permit program seems like a reasonable idea that provides landowners with flexibility. But if the history of ESA implementation is any lesson, the reality may be far different. Take the case of Murray Pacific Lumber, a family-owned company in the state of Washington. In the mid-1990s Murray Pacific was looking at potential closure because protections for endangered species put some 40 percent of the company's saleable timber on 55,000 acres off limits. Faced with this, the company negotiated an HCP whereby they would set aside 5,500 acres for endangered species in order to release the rest of their land from the ESA. "Even though they call these habitat conservation plans voluntary, I didn't feel it was that voluntary," the company's president, Toby Murray remarked. In part, he felt this because his family had to

sacrifice millions of dollars of timber for the provision of the public good of conserving rare species. The company also had to spend more than $1,000,000 to hire biologists and lawyers to write and implement the HCP.[32] As the case of Murray Pacific clearly demonstrates, HCPs are voluntary in name only, forcing individuals to make major sacrifices for the public good without requiring the public to shoulder the costs. It is entirely likely that FWS permit program for the Eagle Act will end up looking like a mini-version of the ESA's HCP program.

ESA HISTORY AS A GUIDE

No doubt, some will be skeptical of the claim that the Eagle Act is now a mini-ESA. Yet, initially almost nobody was aware of the scope of the ESA as well. Congress passed the ESA overwhelmingly in 1973 (92-0 in the Senate, and 390-12 in the House) but it is clear that many members were unaware of the legislation's massive power. According to Lynn Greenwalt, FWS director at the time of the Act's passage:

> *During the rounds of congressional hearings, [following the ESA's passage] many witnesses from Congress came forward to say they did not know this new Act would protect everything. They thought they were voting for legislation to protect eagles, bears, and whooping cranes. They professed not to understand at the time of passage that this law might raise questions about irrigation projects, timber harvests, the dredging of ports, or the generation of electricity. In short, the gap between the ideological commitment to endangered species protection and a more substantial commitment to behavior change surfaced and began to widen.*[33]

Members of Congress who voted for the ESA echo this view. "Our concept of the Act and what it was supposed to do, was, fundamentally, deal with a site specific problem—a road, a bridge or a dam," asserted then Oregon Senator, Mark Hatfield, who voted for the ESA. "We never conceived of it being applied to millions of acres of public and private land that involves literally tens of thousands of people. That was never the original understanding."[34]

This gulf between idealism and reality burst to the surface in *TVA v. Hill*, the 1978 Supreme Court case in which the snail darter, a two-inch species of fish, halted the construction of a dam on the Tennessee River.[35] The case was a wake-up call to Congress, the regulated community and environmental groups about the ESA's massive power. Since then the federal government and environmental groups have used the ESA as a very powerful tool to stop or stymie uses of land and water. In many ways, the ESA has become more useful to its proponents as a means to control use of land and water than as a means to conserve imperiled species. Given this history, it is entirely likely that FWS and environmental groups will use the Eagle Act as they have the ESA. If they did not intend to do so, then they would not have pushed to turn the Eagle Act into a mini-ESA.

STATE AND PRIVATE PROTECTION

There are many reasons to believe bald eagles will continue to thrive even if the ESA's land-use controls were not carried over to the Eagle Act, despite gloom-and-doom predictions of the opposite. The first reason is that the eagle's population has rebounded from the effects of DDT, and this single greatest threat to its survival is no longer an issue. Additionally, the bald eagle's iconic status as the nation's symbol means that state and private entities will continue to afford it protection long after it is removed from the endangered list, and this will allow for many different approaches to protecting the eagles rather than one centralized approach.

Fully 60 percent of bald eagles in the contiguous U.S. reside in just ten states well-known for their commitments to environmental regulations, where state-level protections will continue to conserve bald eagles even without legislation at the federal level (CA, FL, MD, ME, MI, MN, OR, VA, WA, WI). That such a large majority of the eagle's population will be conserved casts doubt on the need for transferring the ESA's land-use controls to the Eagle Act. For example:

- In 1984 the Maryland legislature enacted the Chesapeake Bay Critical Area Law, the purpose of which was to control development within 1000 feet of the state's bay shoreline. Some 70-80 percent of Maryland's bald eagle nests fall within the 1000 foot mark. "Much of the forested areas within the Critical Area will be conserved (Therres, 4/19/04)," according to FWS.[34] The person referred to by FWS is Glen Therres, Associate Director of the Maryland Department of Natural Resource's Wildlife and Heritage Service, in which he is in charge of the state's endangered species program, and since 1986 Maryland's lead bald eagle biologist. Given his position and responsibilities, Therres's assurance that bald eagle habitat in Maryland will be conserved after eagles are taken off the endangered list is very credible. In addition, the Critical Area Law seeks to preserve and establish forested buffers, which are important eagle habitat, 100 feet adjacent to tidal streams and landward of the mean high tide line.[35]
- Washington passed two laws to protect bald eagles and their habitat in 1984. The laws required landowners to do a couple of things: consult with the Washington Department of Fish and Wildlife if a proposed activity would impact eagles or habitat, and if this proved to be the case a management plan had to be developed. By 2000, a total of 1,154 management plans had been developed.[36] According to the Washington Department of Fish and Wildlife, the rules created in the mid-1980s to protect bald eagles in response to the two laws, and which led to the implementation of the management plans, "are the most important mechanism for the protection of habitat on private and state lands in Washington."[37] With 68 percent of eagle nests on private lands, the significance of these conservation efforts is apparent.[38]

  In addition to state efforts, private entities have also been, and likely will continue to be, involved in bald eagle conservation. Corporations are often eager to burnish their environmental images, especially when the bald eagle, the nation's most recognizable and charismatic species, is involved. Corporations have been involved in many efforts to conserve eagles and their habitats, and will continue to do so after they are no longer listed as endangered. For example, Dynegy Corporation and Central Hudson Gas & Electric collaborated to help wintering bald eagles at Dynegy's Danskammer power plant along the Hudson River. Volunteers from Central Hudson put up a large t-shaped perch of rot-resistant cedar logs, and Dynegy installed a video camera accessible over the internet.[39] Local high school students have used the web-cam to conduct research, and Dynegy employees take pride in "their" eagles. "It's pretty cool to have your job and be able to look out and see a bird like that just flying around in front of your office and catching fish," said Susan Tokie.[40] Other private landowners have also been involved in eagle conservation, although the efforts of these private non-industrial landowners, as they are known, tend to be harder to identify. "The contribution of many private landowners that have willingly retained nest, perch, and screening trees should not be underestimated," states the Washington Department of Fish and Wildlife. "Many people appreciate having eagles on their property and have made sacrifices to accommodate them."[41]

CONCLUSIONS

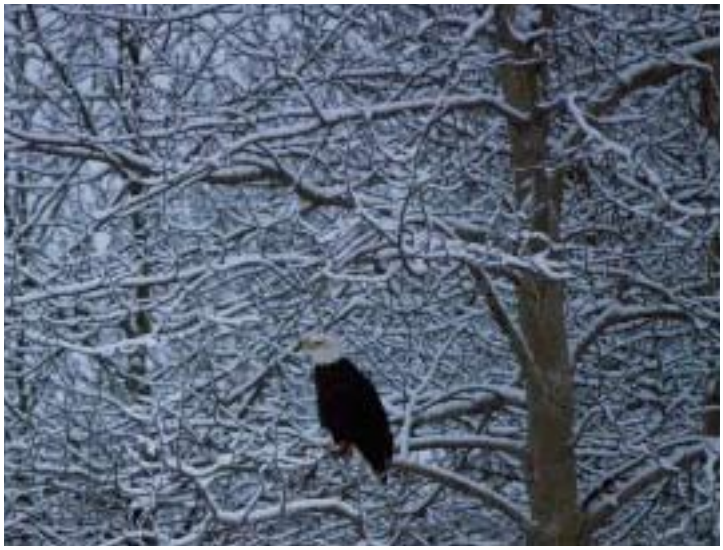
Political controversy surrounding the removal of prominent species from the endangered list is not unique to the bald eagle. James Enderson, in his book *Peregrine Falcon,* reflected that in 1999, when the peregrine falcon was delisted, "[F]or many, success was a bitter pill. Perhaps some people had too much at stake in terms of livelihood to let go of the blue falcon."[42] Commenting on the peregrine's impending recovery, in 1997 Bill Burnham of the Peregrine Fund said, "Others may not wish the peregrine de-listed because their careers and personal income depend on it remaining listed."[43] The observations of Enderson and Burnham are equally applicable to the bald eagle. "If [the bald eagle is] taken off the list, that money will dry up," complained Bob Witzeman, Conservation Chair of the Maricopa (County, Arizona) Audubon Society.[44] When eagles

lose their coveted Endangered Species Act protection, they will also lose what little government funding they once had," grumbled Al Cecere, President of the American Eagle Foundation. "Eagle groups and agencies should not have to resort to panhandling to watch over and help sustain our national bird.[45]

Even though Ed Contoski won his lawsuit in August 2006, which forced FWS to take bald eagles off the endangered list, there is the very real possibility that the federal government will continue to stymie him and other landowners, this time under the Eagle Act. According to the Fifth Amendment, "nor shall private property be taken for public use, without just compensation." But for people like Ed Contoski, whose land has been turned into defacto federal wildlife refuges without compensation, these words have rung hollow and may continue to do so after the eagle is delisted. If FWS's modification of the Eagle Act is to be overturned, intervention is needed from Congress or the courts. With the Pacific Legal Foundation poised to sue on Ed Contoski's behalf over the new Eagle Act, it looks like the latter is more likely. In either case, if nothing happens essentially all of the ESA's land-use controls will have been transferred to the Eagle Act. And if this occurs it will be bad news for bald eagles and for landowners like Ed Constoski.

Had the bald eagle been taken off the endangered list without modifications to the Eagle Act, the population almost certainly would have continued to increase. The combination of the bald eagle's charisma and state and private conservation efforts will ensure the eagle prospers into the future. The time is long overdue for the bald eagle to fly free of the Endangered Species Act's land-use controls.

FWS and its boosters have lost sight of the ultimate purpose of the ESA, which is to recover species to the point they no longer need the Act's protection, not to keep healthy species wards of the federal government. There are numerous truly imperiled species that could benefit from the time and money spent on the bald eagle. Unfortunately, some people are more interested in land-use control, playing politics and trying to exploit the bald eagle for publicity, than allocating scarce dollars judiciously for truly imperiled species. Bald eagles need the willing cooperation of America's landowners, because most eagles in the contiguous 48 states nest on private land, not further regulation that will continue to drive a needless wedge between landowners and the nation's symbol.



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