

Finding an Ethical Basis for Section 7 of the Endangered Species Act

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*"Animals...are there merely as a means to an end.
That end is man."*

—Immanuel Kant

The Environmental Protection Agency declared large tracts of land in New Mexico off limits for wood gathering this year. The agency was worried that continued wood gathering in the area might result in the extinction of the Mexican Spotted Owl. Local residents, many of whom depend on the wooded area for firewood during the long winter, were displeased. Said one resident, Salomon Martinez, "They have left us out in the cold just to protect a bird that is not even good to eat."¹ This situation brings into focus one of the toughest issues facing the Endangered Species Act (ESA): what should be done when the health and prosperity of human beings are placed in conflict with saving an endangered species of little practical value? The issue seems especially important this year as the ESA comes up for review in Congress. Paul Rauber of the Sierra Club warns, "With their party [the Republicans] firmly in control of both houses of Congress, many leading Republicans are now taking aim at the grizzlies and salmon as well as the desert pupfish and kangaroo rats."² Given the ESA's strong prohibition against harming endangered species or their habitats, it is often hard to justify the Act merely on the grounds of aesthetic or scientific values, especially in situations such as the one faced by Mr. Martinez. This is not, however, to say that there can be no strong philosophical basis for the Act.

Essentially, the ESA does three things. First, it closes down the United States market to the importation of endangered species or their products from other countries. Second, it prohibits killing or "taking" any endangered species in the U.S. To do so carries heavy criminal penalties. This section is further strengthened by a definition of "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct."³ And third, the Act contains a strict prohibition of any government action that would harm the habitats of endangered species, or the species themselves. This part of the Act, labeled Section 7, is its primary strength and the focus of this article.

Placed under the deceptive title of "Interagency Cooperation," Section 7 draws its strength from its lack of exceptions. Note the strong language throughout the passage:

"All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities...by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the

*destruction or modification of habitat of such species...."*⁴

In essence, Section 7 prevents *any* government agency from acting in *any* way which may threaten an endangered species or its habitat. What makes the section especially unique is that it does not make allowance for any sort of cost-benefit analysis. It is simply absolute. The section represents the first and only environmental law that protects the environment for reasons other than the betterment of humankind. It affirms a value in species that transcends aesthetic, economic, and resource values.

But despite this unique significance, section 7 has received little formal moral justification. It is increasingly being attacked as a loophole that "eco-liberals" slipped in, presumably to "destroy American business." As the ESA faces an uphill battle in Congress this year, explaining the moral "rights" and intrinsic value of each species may finally become appropriate. Although it would be naive to think that this would have any impact on Congress this year, establishing a formal justification could lay the groundwork for wider future acceptance of the Act and its provisions.

Currently in the field of environmental ethics there are four primary systems of evaluation: utilitarianism, ecological, aesthetic, and moral.⁵ Using each system to evaluate the ESA yields very different results. Utilitarianism bases its conclusions on the consequences of any action. As currently conceived, it is primarily anthropocentric. As Donald Brown correctly points out, "Because most of the dominant Western philosophical systems make human interest the measure of value...such concerns as the rights of animals are not appropriately included in traditional ethical debate."⁶ Thus, an action is "right" when it tends to benefit the human population. It is, however, possible to conceive a broader utilitarianism. To use a utilitarian system, one must be reasonably sure of the consequences of any action. That means that nearly comprehensive scientific and economic data must be available. As one may well imagine, that is rarely the case. Consequently, utilitarianism is often used today in a distinctly reckless fashion. Decisions are made with only a very short-term examination of the potential results. This bodes ill for environmental and biodiversity concerns, since quantifiable anthropocentric impacts are difficult to assess and usually pose little short-term damage to human life. Lately, many politicians have done their best to portray real dangers to the human population that could arise as a result of lack of biodiversity in an effort to give more weight to environmental causes. Given the political and ethical atmosphere of the U.S., such attempts may offer the best hope of saving the ESA. But it is often hard to demonstrate the utility of seemingly insignificant species such as the Mexican Spotted Owl, especially when faced with the immediate concerns of humans living nearby. Utilitarianism is especially bad at justifying absolute prohibitions, such as Section 7, since to the utilitarian a case-by-case evaluation of the potential impacts of placing a species on the list would seem to better suited to promoting the overall "good."

One potential expanded version of utilitarianism would recognize an intrinsic value⁷ in animals and possibly even species. To the early utilitarians, such as Bentham and Mill, utilitarianism's search for the greatest happiness would have to take into account potentially more than just the feelings of humans. In Bentham's utilitarianism, all humans including women counted as one, which put him considerably ahead of his time. But he also believed that since animals could experience what he considered to be the greatest evil, pain, then they too should receive some calculation in the utilitarian system. Many people consider his argument, "The question is not Can they reason? nor Can they talk? but Can they suffer?" to be one of the most inspirational lines in the animal rights movement. But even if a wider utilitarianism took into account the happiness of animals, many of the same problems would be faced. For instance, how much more would humans count than animals? Or would all living beings count alike? How many animal lives equal the life of one human being in importance? How would one measure the happiness of beings largely unable to communicate their happiness or lack of it? All these questions presuppose that accurate judgments about the consequences of an action could be made.

A further problem with such a version of utilitarianism would be that, since all animals would probably be regarded as of similar value, an endangered species would receive no more special protection than a nonendangered species. Essentially, utility assigns no value to the idea of species as distinct from individual beings; utilitarianism denies any intrinsic value to a group, or species. As a value system, this sort of utilitarianism holds little hope for offering adequate protection of endangered species.

The next system to be considered is aesthetic values. The principles of aesthetic value are now often used to defend many parts of the ESA. When the ESA was first passed in 1979, images of fuzzy bears helped convince politicians and their constituents that protection of endangered species was a valid cause. Today, aesthetic values continue to play a large part in the environmental movement. Many groups such as the Sierra Club and Greenpeace focus many of their environmental activities towards the protection of species that humans can identify with. But as a fair and practical value system, aesthetic values are sadly lacking. First, the thought that species would be assigned a value merely on the basis of their aesthetic appeal seems rather unfair. Such a system is analogous to giving a supermodel more rights and privileges than a Nobel laureate. Although it may be equally unfair to rate people on the basis of intelligence, such an example simply illustrates the dangerous nature of the system. Secondly, aesthetic values suffer from many of the same problems as utilitarianism. Because there is no definite formula for determining the aesthetic value of a species, many decisions would become largely arbitrary. And like utilitarianism, aesthetic values simply cannot account for all endangered species. Many endangered species are simply difficult for humans to identify with. Consider the Snail Darter, a two-inch minnow that sparked considerable controversy during the 1970s. The Tennessee Valley Authority (TVA) intended to build a dam at the mouth of the Little Tennessee River, a place that was home to the nearly extinct Snail Darter. In court cases that followed, the Supreme Court eventually ruled that the building of the dam would violate Section 7 of the ESA.⁴ The case drew great attention to the ESA because the Snail Darter lacked any definite utilitarian value and certainly was difficult to find aesthetically pleasing.

Aesthetic values seem unlikely to provide solid, consistent backing for Section 7.

The third value system is ecological values. Ecological values represent a sort of enlightened self-interest. They would place justification for protection of endangered species on the grounds that species have something important to human beings—perhaps a particular genetic pattern, or their role as a key link to an entire ecosystem. Ecological values would be particularly suited towards Section 7 since they make no distinction between species with aesthetically pleasing characteristics and utilitarian value and ones that lack these qualities. Instead, an ecological value system maintains that the chance that a species might have something valuable to humans justifies its continued existence. Like aesthetic values and utilitarianism, ecological values still fail to recognize any particular intrinsic significance in species or members of a particular species. Consequently, some dangers would still exist. It would be possible, for example, for a scientist or the government to decide that a particular species is a detriment to the ecosystem around it, or perhaps even to humans themselves, and that this risk is far greater than the chance that the species holds some undiscovered benefit to the world. In the end, ecological values are still susceptible to the utilitarian cost-benefit analysis. In reality, all ecological values do are to assign a far greater *utilitarian* value to species than does current cost-benefit analysis. In the end, ecological values cannot account for the intrinsic value of species, and thus remain a largely anthropocentric system.

The final value system that deserves consideration is moral. This system would assign a particular *moral* value to a species. It is this system that I believe offers the best basis for Section 7 and, overall, the best way to conceptualize endangered species. It is necessary to explain an important distinction. There is a difference between assigning a value to a species and assigning one to an individual animal. The animal rights movement has for a long time believed that individual animals have intrinsic value, and should not be exploited by human beings. Although arguments often differ, their central thesis is that since animals experience (or are perceived to experience) pain, then it is wrong to make them suffer. But a species, as distinct from its individual members, cannot feel pain. This is the central difficulty that will be dealt with here. To assign a moral worth to a sentient being is one thing, but it is altogether questionable to assign such worth to a group that does not in itself possess any of the qualities traditionally associated with morality.

University of Colorado Professor of Philosophy Holmes Rolston III has done a great deal of writing about issues in Environmental Ethics. He represents one of the few to actually assign a moral weight to a species. In assigning moral weight to species rather than merely to individuals, Rolston argues that two assertions must be verified: first, that a species exists, and second, that it ought to exist. He writes:

A species exists; a species ought to exist. Environmental Ethics must make both claims and move from biology to ethics with care. Do species exist? Species exist only instantiated in individuals, yet species are as real as individual plants and animals. The claim that there are specific forms of life historically maintained in their environments over time seems as certain as anything else we believe about the empirical world. One species will slide into another over evolutionary time.... But it does

*not follow from the fact that speciation is sometimes in progress that species are merely made up, not found as evolutionary lines with identity in time as well as space.*⁸

Rolston believes that regardless of the fact that a species itself lacks the ability to act or experience feelings, because it has an "identity in time as well as space," it deserves a consideration greater than merely as a means to an end. At first, this argument seems a bit dangerous. For instance, a rock may have a unique composition and thus a unique place in the history of the world, but does that mean that we are wrong to break rocks? But the difference seems to be that a species is composed of a number of individuals, individuals which in and of themselves have some sort of moral worth.

Does this mean that in order to affirm a moral worth in a species that the members of that species must themselves have at least a limited right to exist? I would argue that this is not completely necessary. Rolston asserts that a species has worth because it is a unique creation of nature, not because the individual members of that group have worth. The real question becomes: How does the value associated with moral worth arise in the first place? Most people would agree that life represents the source of value. The connection between life and the intrinsic value of humans has already been drawn. From the fact that we live, we believe one ought not to deprive another of that life. But are there not other connections? Those who believe in the rights of animals have extended the line from life towards these animals. Of course, many believe that the different faculties with which life has endowed each of these creatures justifies a difference in moral worth. The question then is: Where would the species fit in? To search for the value of species from first finding a value in animals seems like the wrong approach. Moving from the origin of value, life, the next logical step should be species. The idea is that a species represents the genetic code that produces the worth in an animal. A species is more than merely a name for a group; it is the common characteristics of a group. A species precedes an individual, holding the aspects of life that create the individual.

Rolston does not specifically account for whether he finds the value in species arising from their members or from the species itself. But he concludes:

*A shut-down of the life stream is the most destructive event possible. Never before has this level of question—super-killing by a super-killer—as deliberately been faced. What is ethically callous is the maelstrom of killing and insensitivity of forms of life and the sources producing them. What is required is principled responsibility to the biospheric Earth. Several billion years' worth of creative toil, several million species of teeming life, have been handed over to the care of this late-coming species in which mind has flowered and morals have emerged. Life on Earth is a many splendoured thing; extinction dims its lustre.*⁸

Rolston is right to admit that it is primarily the arrogance that comes from that with which nature has endowed us that allows so many of us to conceptualize ourselves as apart from nature. That is the primary flaw with previous attempts to account for nature in ethical debate. As humans separated themselves from nature, they began to conceptualize it as nothing but a set of resources. That ideology

spread quickly; soon animals, tress, whole chunks of untouched land lost all their uniqueness as they became sites for the continuation of human progress. Now, after that ideology is firmly in place, only by widening our ethic can we truly account for nature in ways that offer hope for our survival and that of thousands of unique and wonderful species.

This moral basis for the ESA best handles the multifaceted demands of Section 7. Assigning each species a moral worth gives it priority over other concerns. Recalling the case illustrated at the beginning of this article, although such a priority for an animal like the Mexican Spotted Owl may sound out of place, it is hardly so. To eliminate that entire species, the creation of millions of years of evolution, would be a catastrophe. That destruction would be only another example of human arrogance and separation from nature. And in the end, the ESA forces the U.S. to look for better ways. Knowing that it cannot relentlessly destroy the environment, perhaps the government will find alternatives that are safer. The assertion that endangered species and human progress cannot coexist is ridiculous. Far from that, the true testament to human progress would be to coexist with all of nature. The ESA is a step in that direction.

References

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- (2) Rauber, P. 1996. "An End to Evolution." *Sierra*. 81:1.
- (3) Definition of "take" reprinted in Plater, Abrams, and Goldfarb, *Environmental Law & Policy* (West Publishing Co.), 657. Originally from 16 U.S.C.A. 1532(19); 1538(a)-(b)(1982); 50 CFR 17.3 (1985).
- (4) Reprinted in Plater, Abrams, and Goldfarb, 657-8. Originally in Endangered Species Act of 1973, 16 U.S.C.A. 1536 (1973).
- (5) Botkin, D., and Keller, E. 1995. *Environmental Science: Earth As a Living Planet* (New York: John Wiley & Sons).
- (6) Brown, D. 1987. "Ethics, Science, and Environmental Regulation." *Environmental Ethics*. 9: 334.
- (7) The phrase "intrinsic value," in terms of environmental ethics, suggests a value which arises not from anything that the individual (or group, or species) does, but from within. It is sometimes used synonymously with inherent value, although some authors make a distinction.
- (8) Rolston, H. 1992. "Challenges in Environmental Ethics." In: *The Environment in Question: Ethics and Global Issue* (New York: Routledge).

