

by Michael J. Bean

# Lessons from Leopold in Assessing the ESA

Some 63 years ago, Aldo Leopold called the need to conserve threatened forms of wildlife “the crux of conservation policy.”<sup>1</sup> Nearly four decades later, Congress made the first serious national effort to address this challenge. With enactment of the Endangered Species Act of 1973 (ESA), Congress undertook to stem the loss of the nation’s most imperiled plant and animal life.

We now have more than a quarter century’s experience with which to evaluate the law’s impact. In doing so, it is useful to keep in mind that Leopold carried with him a notebook in which he jotted down quotations that he found noteworthy. One came from Robert Louis Stevenson: “to hold the same views at 40 as we held at 20 is to have been stupefied for a score of years.”<sup>2</sup> With the benefit of more than a score of years of experience under the ESA, it is time to reexamine it.

Leopold is an appropriate guide for this task because a good argument can be made that the success or failure of the ESA will be determined by how well it works on private lands. First, very few endangered species have all of their habitat on Federal land. Many have none of their habitat there, and many more have a substantial portion of their habitat on non-Federal (and mostly private) land. Second, outside of the West, federal land comprises less than a tenth of the land area of most states, and even in parts of the West, such as California, many of the concentrations of endangered species are on private rather than federal land. As Leopold noted, “[t]he only progress that counts is that on the actual landscape of the back forty,”<sup>3</sup> and most of the back forty is in private ownership.

One could change all this simply by acquiring all the habitat needed for each species. The magnitude of that challenge, however, is revealed by the recent agreement to spend several hundred million dollars to acquire a very tiny fraction of the existing habitat of the threatened marbled murrelet. In the 1930’s public land acquisition for conservation purposes began in a big way. Leopold hailed the fact that “[f]or the first time in history we are buying land on a scale commensurate with the size of the problem.”<sup>4</sup> At the same time, however, he warned that land acquisition alone was not a sufficient conservation strategy. He worried that “[b]igger buying ... is serving as an escape mechanism—it masks our failure to solve the harder problem. The geographic cards are stacked against its ultimate success. In the long run it is exactly as effective as buying half an umbrella.”<sup>5</sup>

The “harder problem” to which Leopold referred was the problem of ensuring proper management of land not in public ownership. Failure to solve that problem leaves wildlife resources huddled under Leopold’s metaphorical half an umbrella. If private lands are not managed compatibly with the needs of species found on public lands, then those public lands will, at best, become islands of protected habitat, too small in many instances to support viable populations of imperiled species, too far removed from each other to enable dispersal and genetic interchange, too few in number to guard against the vagaries of demographic chance and natural disaster, and too exposed to threats from outside their boundaries

from pollution, exotic species, water depletion, and other factors.

Leopold recognized two approaches to conservation on private land: one attempts to deter undesirable practices through prohibition and regulation; the other encourages desirable practices through incentives. The administrators of the ESA have thus far relied upon the tool of regulation; they are only now beginning to explore the tool of incentives. Strict regulation will continue to be needed, particularly in urbanizing landscapes, where development threatens permanent losses of habitats and the rare species they support.

Habitat conservation plans have been used most often, and probably have their most useful potential, in these urbanizing landscapes. When landowners are developers, intent on converting raw land into suburban subdivisions, the conservation tradeoffs are stark. Land either remains unconverted and retains some or all of its habitat value for endangered species, or it is converted and typically loses all of its habitat value for such species. In this context, habitat conservation plans are a mechanism to win from deep-pocketed development interests the dedication of at least some land to conservation purposes, and the funding to manage those lands appropriately, in exchange for sacrificing other lands to development. It is admittedly a Faustian bargain, but the alternative of just saying no to all future development in endangered species hotspots like southern California, Florida, and much of the Sunbelt, is wishful thinking.

The stark all-or-nothing choices facing conservation in the urbanizing landscape are different from the choices



**Aldo Leopold**

*Aldo Leopold Foundation photo*

in the “working landscape” of farms, ranches, and forest lands. Here, the choices are not between land uses with no habitat value and other uses with ample habitat value. Rather, they are between means of farming, ranching, and forestry that provide relatively more habitat value for imperiled wildlife and those that provide relatively less. The challenge is to make it in the interests of these landowners to make the environmentally preferable choice.

Unfortunately, it is in this working landscape that the ESA's results have been most disappointing. Rather than enlisting working landscape landowners as allies in the effort to conserve imperiled species, the ESA has made them wary of involvement. Landowners who might restore habitats, control exotics, manage to achieve desired successional stages, or allow rare species to be reintroduced to their land have been reluctant to do these things for fear that such good deeds will only be rewarded by the imposition of land use restrictions once rare species respond by occupying their land. Thus, while the ESA's prohibitions aim to prevent the destruction of the habitats that support endangered species today, those same prohibitions have sometimes

deterred landowners from creating the habitats that will be needed to support those species tomorrow.

Leopold recognized that economic self-interest would not often cause landowners to conserve threatened species. Indeed, this fact is exactly what set threatened species apart from game species in Leopold's mind. He observed that “[m]ost species of shootable non-migratory game have at least a fighting chance of being saved ... [because] powerful motives of local self-interest are at work in their behalf.”<sup>6</sup> But the same cannot be said “of those species of wilderness game which do not adapt themselves to economic land-use, or of migratory birds which are owned in common, or of non-game forms classed as predators, or of rare plant associations which must compete with economic plants and livestock, or in general of all wild native forms which fly at large or have only an esthetic and scientific value to man.”<sup>7</sup> Leopold astutely observed that “[t]he private owner who today undertakes to conserve beauty on his land, does so in defiance of all man-made economic forces from taxes down—or up.”<sup>8</sup> He referred to the landowners on whose land rare species occurred as “the ‘suppressed minorities’ of conservation.”<sup>9</sup> Calling such landowners “custodian[s] of a public interest,” he forecast “that conservation will ultimately boil down to rewarding the private landowner who conserves the public interest.”<sup>10</sup>

Leopold's belief that rewarding private landowners who conserve the public interest is the key to successful conservation reflected an evolution in his thinking. A decade earlier, he put more hope in the promise of regulation. Then he wrote that “to protect the public interest, certain resources must remain in public ownership, and ultimately the use of all resources will have to be put under public regulation, regardless of ownership.”<sup>11</sup> By 1934, he was willing to compress the history of conservation in America into two

sentences: “We tried to get conservation by buying land, by subsidizing desirable changes in land use, and by passive restrictive laws. The last method largely failed; the other two have produced some small samples of success.”<sup>12</sup>

A similar compressed history of the ESA might be written at this point. By buying land, we have achieved some small samples of success in protecting endangered species. Through restrictive regulation, we have largely failed to improve the status of rare species, though we have prevented the status of some from deteriorating as much as they otherwise might have done. We have yet to make a serious effort at subsidizing desirable changes in land use for the benefit of endangered species. That is the most urgent task that lies ahead.

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#### Notes:

<sup>1</sup> “Threatened Species: A Proposal to the Wildlife Conference for an Inventory of the Needs of Near-Extinct Birds and Animals,” reprinted in *River of the Mother of God; and Other Essays*, U. of Wisconsin Press, 1999.

<sup>2</sup> Robert Louis Stevenson, quoted in “Sage for All Seasons,” *Smithsonian* (Sept. 1998).

<sup>3</sup> “The Ecological Conscience” reprinted in *River of the Mother of God*.

<sup>4</sup> “Conservation Economics,” reprinted in *River of the Mother of God*.

<sup>5</sup> *Id.*

<sup>6</sup> “Threatened Species,” supra note 1.

<sup>7</sup> *Id.*

<sup>8</sup> “Land Pathology,” in *River of the Mother of God*.

<sup>9</sup> “Conservation Economics,” supra note 3.

<sup>10</sup> *Id.*

<sup>11</sup> “Pioneers and Gullies,” reprinted in *River of the Mother of God*.

<sup>12</sup> “Conservation Economics,” supra note 3.