

113TH CONGRESS
1ST SESSION

S. 1731

To amend the Endangered Species Act of 1973 to permit Governors of States to regulate intrastate endangered species and intrastate threatened species, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 19, 2013

Mr. PAUL (for himself, Mr. HELLER, and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Endangered Species Act of 1973 to permit Governors of States to regulate intrastate endangered species and intrastate threatened species, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Endangered Species
5 Management Self-Determination Act”.

6 **SEC. 2. DEFINITION OF ESA.**

7 In this Act, the term “ESA” means the Endangered
8 Species Act of 1973 (16 U.S.C. 1531 et seq.).

1 **SEC. 3. FINDINGS.**

2 Congress finds that—

3 (1) the ESA was passed in 1973 as a means of
4 protecting and recovering species and has not been
5 substantially revised in over 25 years;

6 (2) the ESA has not achieved its stated goal of
7 recovering threatened species or endangered species;

8 (3) of the species listed in accordance with the
9 ESA, less than 1 percent of the total number of spe-
10 cies in the United States have been recovered and
11 removed from the list, largely due to data errors or
12 other factors;

13 (4) there is—

14 (A) no comprehensive independent study of
15 the costs or benefits of the ESA;

16 (B) no full accounting of how much the
17 Federal Government and State and local gov-
18 ernments spend to implement, enforce, and
19 comply with the ESA; and

20 (C) no meaningful effort to account for the
21 costs the ESA imposes on the private sector;

22 (5) the ESA effectively penalizes landowners for
23 owning endangered species habitat by forcing them
24 to bear the cost of conservation;

25 (6) the regulatory listing process under the
26 ESA has become a tool for environmentalists to un-

1 dermine, slow down, or halt construction of infra-
2 structure projects, hampering economic growth and
3 employment; and

4 (7) litigation stemming from the ESA and some
5 resulting settlements between the litigants and the
6 Federal Government have made the ESA even more
7 unworkable, to the detriment of species.

8 **SEC. 4. DETERMINATIONS OF ENDANGERED SPECIES AND**
9 **THREATENED SPECIES.**

10 Section 4 of the Endangered Species Act of 1973 (16
11 U.S.C. 1533) is amended—

12 (1) in subsection (a)—

13 (A) in paragraph (1), by inserting “, with
14 the consent of the Governor of each State in
15 which the endangered species or threatened spe-
16 cies is present,” after “The Secretary”; and

17 (B) in paragraph (2)(A)(ii), by inserting “,
18 with the consent of the Governor of each State
19 in which the endangered species or threatened
20 species is present,” after “, who”;

21 (2) in subsection (b)—

22 (A) by striking paragraph (3);

23 (B) by redesignating paragraphs (4)
24 through (8) as paragraphs (3) through (7), re-
25 spectively;

1 (C) in paragraph (6) (as so redesignated),
2 strike “paragraph (4), (5), or (6)” and insert
3 “paragraph (3), (4), or (5)”; and

4 (D) by adding at the end the following:

5 “(7) DEFINITION OF BEST SCIENTIFIC AND
6 COMMERCIAL DATA.—In this subsection, the term
7 ‘best scientific and commercial data’ includes any
8 scientific evidence made available to the Secretary by
9 any State agency.”;

10 (3) by striking subsection (c) and inserting the
11 following:

12 “(c) LISTS.—

13 “(1) DEFINITION OF JOINT RESOLUTION.—In
14 this subsection, the term ‘joint resolution’ means
15 only a joint resolution the matter after the resolving
16 clause of which is as follows: ‘That Congress ap-
17 proves the lists relating to endangered species and
18 threatened species submitted by the Secretary of the
19 Interior on _____.’ (the blank space being
20 appropriately filled in).

21 “(2) LISTS SUBMITTED TO CONGRESS.—The
22 Secretary of the Interior shall submit to Congress—

23 “(A) a list of all species determined by the
24 Secretary of the Interior or the Secretary of
25 Commerce to be endangered species; and

1 “(B) a list of all species determined by the
2 Secretary of the Interior or the Secretary of
3 Commerce to be threatened species.

4 “(3) CONGRESSIONAL APPROVAL.—The lists de-
5 scribed in paragraph (2) shall not take effect until
6 a joint resolution described in paragraph (1) is en-
7 acted.

8 “(4) CONTENTS OF LISTS.—Each list described
9 in paragraph (2) shall—

10 “(A) refer to the species included on the
11 list by any scientific and common name; and

12 “(B) specify—

13 “(i) with respect to the species over
14 what portion of the range of the species
15 that the species is endangered or threat-
16 ened; and

17 “(ii) any critical habitat within the
18 range.

19 “(5) PUBLICATION.—The Secretary of the Inte-
20 rior shall publish in the Federal Register each list
21 approved in accordance with paragraph (3).

22 “(6) AUTOMATIC REMOVAL.—

23 “(A) IN GENERAL.—On the date that is 5
24 years after the date on which a joint resolution
25 is enacted in accordance with this subsection,

1 each species listed on a list approved by the
2 joint resolution shall be removed from the list.

3 “(B) PETITION FOR RELISTING.—

4 “(i) IN GENERAL.—The Secretary of
5 the Interior, in consultation with the Gov-
6 ernor of each State in which the endan-
7 gered species or threatened species is
8 present, may submit to Congress a list
9 that includes any species that was removed
10 under subparagraph (A).

11 “(ii) CONGRESSIONAL APPROVAL.—
12 The list described in clause (i) shall not
13 take effect until a joint resolution de-
14 scribed in paragraph (1) is enacted.”;

15 (4) in subsection (d)—

16 (A) in the first sentence, by striking
17 “Whenever any species” and inserting “Except
18 as provided in subsection (j), whenever any spe-
19 cies”; and

20 (B) in the second sentence, by striking
21 “The Secretary may” and inserting “Except as
22 provided in subsection (j), the Secretary may”;

23 (5) in subsection (f)(1), by striking “The Sec-
24 retary shall” and inserting “Except as provided in
25 subsection (j), the Secretary shall”;

1 (6) in subsection (g)(1), by striking “The Sec-
 2 retary shall” and inserting “Except as provided in
 3 subsection (j), the Secretary shall”;

4 (7) in subsection (h)—

5 (A) in the matter preceding paragraph (1),
 6 by striking “The Secretary shall” and inserting
 7 “Except as provided in subsection (j), the Sec-
 8 retary shall”;

9 (B) by striking paragraphs (1) and (2);

10 and

11 (C) by redesignating paragraphs (3) and
 12 (4) as paragraphs (1) and (2), respectively;

13 (8) in subsection (i)—

14 (A) by striking “or if the Secretary fails to
 15 adopt a regulation pursuant to an action peti-
 16 tioned by a State agency under subsection
 17 (b)(3),”; and

18 (B) by striking “or petition”; and

19 (9) by adding at the end the following:

20 “(j) INTRASTATE ENDANGERED SPECIES OR
 21 THREATENED SPECIES.—

22 “(1) DEFINITIONS.—In this subsection:

23 “(A) GOVERNOR OF A STATE.—The term
 24 ‘Governor of a State’ means the Governor of a

1 State in which an intrastate endangered species
2 or intrastate threatened species is present.

3 “(B) INTRASTATE ENDANGERED SPE-
4 CIES.—The term ‘intrastate endangered species’
5 means an endangered species that the Governor
6 of a State determines is present only within the
7 State.

8 “(C) INTRASTATE THREATENED SPE-
9 CIES.—The term ‘intrastate threatened species’
10 means a threatened species that the Governor
11 of a State determines is present only within the
12 State.

13 “(2) CURRENTLY LISTED SPECIES.—

14 “(A) IN GENERAL.—The Governor of a
15 State may regulate any intrastate endangered
16 species or any intrastate threatened species list-
17 ed under this section that is listed before the
18 date of enactment of this subsection.

19 “(B) AUTHORITY OF GOVERNOR.—If the
20 Governor of a State elects to regulate an intra-
21 state endangered species or an intrastate
22 threatened species under subparagraph (A), the
23 Governor of the State shall, with respect to the
24 management of the intrastate endangered spe-
25 cies or intrastate threatened species on any

1 land within the State, have the exclusive au-
2 thority to, in accordance with the purposes and
3 policy of this Act—

4 “(i) promulgate or enforce any regula-
5 tion or guidance;

6 “(ii) designate a critical habitat;

7 “(iii) issue a permit or license;

8 “(iv) develop or implement a recovery
9 plan; and

10 “(v) establish any goal with respect to
11 the recovery plan.

12 “(C) APPLICABLE LAW.—The management
13 described in subparagraph (B) shall be subject
14 to the law of the State in which the land, in-
15 cluding public lands (as defined in section 103
16 of the Federal Land Policy and Management
17 Act of 1976 (43 U.S.C. 1702)), is located.

18 “(3) NEWLY LISTED SPECIES.—

19 “(A) IN GENERAL.—The Governor of a
20 State may, before the Secretary or any other
21 person, regulate any intrastate endangered spe-
22 cies or any intrastate threatened species listed
23 under this section that is listed on or after the
24 date of enactment of this subsection.

1 “(B) APPLICABILITY.—If the Governor of
2 a State elects to regulate an intrastate endan-
3 gered species or an intrastate threatened spe-
4 cies under subparagraph (A), subparagraphs
5 (B) and (C) of paragraph (2) shall apply.

6 “(C) JUDICIAL REVIEW.—Any action by
7 the Governor of a State under this subsection
8 shall not be subject to judicial review in any
9 court of the United States or in any State
10 court.”.

11 **SEC. 5. COST ACCOUNTING.**

12 The Endangered Species Act of 1973 is amended by
13 inserting after section 12 (16 U.S.C. 1541) the following:

14 **“SEC. 12A. COST ACCOUNTING REPORT.**

15 “(a) DEFINITIONS.—In this section:

16 “(1) DIRECT COSTS.—The term ‘direct costs’
17 includes—

18 “(A) Federal agency obligations related to
19 the cost of any study;

20 “(B) capital, operation, maintenance, and
21 replacement costs; and

22 “(C) staffing costs.

23 “(2) INDIRECT COSTS.—The term ‘indirect
24 costs’ includes foregone power generation costs and

1 replacement power costs, including the net costs of
2 any transmission of power.

3 “(b) COST OF COMPLIANCE.—

4 “(1) IN GENERAL.—Except with respect to
5 intrastate endangered species or intrastate threat-
6 ened species regulated by a Governor of a State
7 under section 4(j), the Administrator of the Bonne-
8 ville Power Administration, the Administrator of the
9 Southeastern Power Administration, the Adminis-
10 trator of the Southwestern Power Administration,
11 and the Administrator of the Western Area Power
12 Administration shall each include in a monthly bill-
13 ing statement submitted to each customer of the re-
14 spective Administration the share of the direct and
15 indirect costs to the customer incurred by the Ad-
16 ministration related to complying with this Act.

17 “(2) ASSISTANCE IN IDENTIFYING COSTS.—The
18 Director of the Bureau of Reclamation shall assist
19 the administrators described in paragraph (1) with
20 identifying the costs described in that paragraph.

21 “(c) REPORT.—Not later than January 30 of each
22 year, each of the administrators described in subsection
23 (b)(1), in coordination with the Director of the Bureau
24 of Reclamation, shall submit to the Committee on Envi-
25 ronment of the Senate and the Committee on Natural Re-

1 sources of the House of Representatives a report esti-
2 mating the costs described in subsection (b)(1)—

3 “(1) with respect to the Western Area Power
4 Administration, on a project-by-project basis; and

5 “(2) with respect to the each of the Administra-
6 tions described in subsection (b)(1) (except the
7 Western Power Administration), on a systemwide
8 basis.

9 **“SEC. 12B. PROPERTY RIGHTS.**

10 “(a) DETERMINATION OF PROPOSED USE OF REAL
11 PROPERTY.—

12 “(1) IN GENERAL.—Any owner or lessee of any
13 real property may submit to the Secretary of the In-
14 terior an application that includes any proposed use
15 of the real property.

16 “(2) DETERMINATION.—

17 “(A) IN GENERAL.—Not later than 90
18 days after the date on which the application de-
19 scribed in paragraph (1) is submitted, the Sec-
20 retary of the Interior shall submit to the owner
21 or lessee in writing a determination as to
22 whether the proposed use will violate any provi-
23 sion of this Act.

24 “(B) FAILURE TO RESPOND.—If the Sec-
25 retary of the Interior fails to respond before the

1 expiration of the 90-day period described in
2 subparagraph (A), the proposed use shall be
3 considered to not violate any provision of this
4 Act.

5 “(3) EFFECT OF DETERMINATIONS.—

6 “(A) AFFIRMATIVE DEFENSE.—It is an af-
7 firmative defense to any civil penalty assessed
8 under section 11 or to any civil action, civil
9 suit, or prosecution brought under that section
10 that the owner or lessee of real property reason-
11 ably relied on a determination, including a de-
12 termination that resulted under paragraph
13 (2)(B), that a proposed use will not violate any
14 provision of this Act.

15 “(B) COMPENSATION FOR UNFAVORABLE
16 DETERMINATIONS.—If the Secretary of the In-
17 terior determines that a proposed use will vio-
18 late a provision of this Act, the owner or lessee
19 of the real property may seek compensation in
20 accordance with subsection (b).

21 “(b) COMPENSATION FOR AGENCY ACTIONS.—

22 “(1) DEFINITIONS.—In this subsection:

23 “(A) AGENCY ACTION.—

24 “(i) IN GENERAL.—The term ‘agency
25 action’ means any action taken by the Di-

1 rector of the United States Fish and Wild-
2 life Service in accordance with this Act
3 that diminishes the fair market value of
4 any real property by not less than 50 per-
5 cent with respect to the intended use of the
6 real property.

7 “(ii) EXCLUSION.—The term ‘agency
8 action’ does not include any action taken
9 with respect to intrastate endangered spe-
10 cies or intrastate threatened species regu-
11 lated by a Governor of a State under sec-
12 tion 4(j).

13 “(B) LESSEE.—The term ‘lessee’ means a
14 lessee of any real property affected by an agen-
15 cy action.

16 “(C) OWNER.—The term ‘owner’ means an
17 owner of any real property affected by an agen-
18 cy action.

19 “(2) COMPENSATION.—Except as provided in
20 paragraph (3)(B), not later than 180 days after the
21 date on which an agency action takes place, the Sec-
22 retary shall pay an owner or lessee an amount equal
23 to 150 percent of the fair market value of the real
24 property determined in accordance with paragraph
25 (3).

1 “(3) DETERMINATION OF FAIR MARKET
2 VALUE.—

3 “(A) IN GENERAL.—The fair market value
4 described in paragraph (2) shall be determined
5 by 2 licensed independent appraisers of whom—

6 “(i) 1 shall be chosen by the Sec-
7 retary; and

8 “(ii) 1 shall be chosen by the owner or
9 lessee.

10 “(B) FAILURE TO AGREE ON FAIR MARKET
11 VALUE.—

12 “(i) IN GENERAL.—If the appraisers
13 chosen under subparagraph (A) fail to
14 agree on the same fair market value, the
15 Secretary and the owner shall jointly select
16 an additional licensed independent ap-
17 praiser to determine the fair market value.

18 “(ii) EXTENSION OF TIME TO MAKE
19 DETERMINATION.—The licensed inde-
20 pendent appraiser described in clause (i)
21 shall determine the fair market value not
22 later than 270 days after the date on
23 which the agency action takes place.

24 “(C) COSTS.—The Secretary shall be re-
25 sponsible for all costs relating to the determina-

1 tion of fair market value made under this para-
2 graph.”.

3 **SEC. 6. PENALTIES AND ENFORCEMENT.**

4 Section 11(g)(4) of the Endangered Species Act (16
5 U.S.C. 1540(g)(4)) is amended by striking “attorney
6 and”.

7 **SEC. 7. CONFORMING AMENDMENT.**

8 Section 6(d)(1) of the Endangered Species Act (16
9 U.S.C. 1535(d)(1)) is amended by striking “the status of
10 candidate species pursuant to subparagraph (C) of section
11 4(b)(3) and”.

○