

115TH CONGRESS
1ST SESSION

S. 935

To amend the Endangered Species Act of 1973 to permit Governors of States to regulate intrastate endangered species and intrastate threatened species, to amend the Migratory Bird Treaty Act to permit the taking of certain black vultures and ravens, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 25, 2017

Mr. PAUL (for himself and Mr. HELLER) 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, to amend the Migratory Bird Treaty Act to permit the taking of certain black vultures and ravens, 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”.

1 **SEC. 2. DEFINITION OF ESA.**

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

4 **SEC. 3. FINDINGS.**

5 Congress finds that—

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

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

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

16 (4) there is—

17 (A) no comprehensive independent study of
18 the costs or benefits of the ESA;

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

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

1 (5) the ESA effectively penalizes landowners for
 2 owning endangered species habitat by forcing them
 3 to bear the cost of conservation;

4 (6) the regulatory listing process under the
 5 ESA has become a tool for environmentalists to un-
 6 dermine, slow down, or halt construction of infra-
 7 structure projects, hampering economic growth and
 8 employment; and

9 (7) litigation stemming from the ESA and some
 10 resulting settlements between the litigants and the
 11 Federal Government have made the ESA even more
 12 unworkable, to the detriment of species.

13 **SEC. 4. AMENDMENTS TO THE ENDANGERED SPECIES ACT**
 14 **OF 1973.**

15 (a) DETERMINATIONS OF ENDANGERED SPECIES
 16 AND THREATENED SPECIES.—Section 4 of the Endan-
 17 gered Species Act of 1973 (16 U.S.C. 1533) is amended—

18 (1) in subsection (a)—

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

23 (B) in paragraph (2)(A)(ii), by inserting “,
 24 with the consent of the Governor of each State

1 in which the endangered species or threatened
 2 species is present,” after “, who”;

3 (2) in subsection (b)—

4 (A) by striking paragraph (3);

5 (B) by redesignating paragraphs (4)
 6 through (8) as paragraphs (3) through (7), re-
 7 spectively;

8 (C) in paragraph (3) (as so redesignated),
 9 by striking “paragraphs (5) and (6) of this sub-
 10 section” and inserting “paragraphs (4) and
 11 (5)”;

12 (D) in paragraph (5)(A) (as so redesign-
 13 ated), by striking “paragraph (5)(A)(i)” and
 14 inserting “paragraph (4)(A)(i)”;

15 (E) in paragraph (6) (as so redesignated),
 16 by striking “paragraph (4), (5), or (6) of this
 17 subsection” and inserting “paragraph (3), (4),
 18 or (5)”;

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

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

1 (3) by striking subsection (c) and inserting the
2 following:

3 “(c) LISTS.—

4 “(1) DEFINITION OF JOINT RESOLUTION.—In
5 this subsection, the term ‘joint resolution’ means
6 only a joint resolution the matter after the resolving
7 clause of which is as follows: ‘That Congress ap-
8 proves the lists relating to endangered species and
9 threatened species submitted by the Secretary of the
10 Interior on _____.’ (the blank space being
11 appropriately filled in).

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

14 “(A) a list of all species determined by the
15 Secretary of the Interior or the Secretary of
16 Commerce to be endangered species; and

17 “(B) a list of all species determined by the
18 Secretary of the Interior or the Secretary of
19 Commerce to be threatened species.

20 “(3) CONGRESSIONAL APPROVAL.—The lists de-
21 scribed in paragraph (2) shall not take effect until
22 a joint resolution described in paragraph (1) is en-
23 acted.

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

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

“(B) specify—

“(i) with respect to the species over what portion of the range of the species that the species is endangered or threatened; and

“(ii) any critical habitat within the range.

“(5) PUBLICATION.—The Secretary of the Interior shall publish in the Federal Register each list approved in accordance with paragraph (3).

“(6) AUTOMATIC REMOVAL.—

“(A) IN GENERAL.—On the date that is 5 years after the date on which a joint resolution is enacted in accordance with this subsection, each species listed on a list approved by the joint resolution shall be removed from the list.

“(B) PETITION FOR RELISTING.—

“(i) IN GENERAL.—The Secretary of the Interior, in consultation with the Governor of each State in which the endangered species or threatened species is present, may submit to Congress a list

1 that includes any species that was removed
2 under subparagraph (A).

3 “(ii) CONGRESSIONAL APPROVAL.—

4 The list described in clause (i) shall not
5 take effect until a joint resolution de-
6 scribed in paragraph (1) is enacted.”;

7 (4) in subsection (d)—

8 (A) in the first sentence, by striking
9 “Whenever any species” and inserting “Except
10 as provided in subsection (j), whenever any spe-
11 cies”; and

12 (B) in the second sentence, by striking
13 “The Secretary may” and inserting “Except as
14 provided in subsection (j), the Secretary may”;

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

18 (6) in subsection (g)—

19 (A) in paragraph (1), by striking “The
20 Secretary shall” and inserting “Except as pro-
21 vided in subsection (j), the Secretary shall”;
22 and

23 (B) in paragraph (2), by striking “para-
24 graph 7 of subsection (b) of this section” and
25 inserting “subsection (b)(6)”;

1 (7) in subsection (h)—

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

6 (B) by striking paragraphs (1) and (2);
 7 and

8 (C) by redesignating paragraphs (3) and
 9 (4) as paragraphs (1) and (2), respectively;
 10 (8) in subsection (i)—

11 (A) by striking “subsection (b)(5)(A)(ii) of
 12 this section” and inserting “subsection
 13 (b)(4)(A)(ii)”;

14 (B) 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 (C) 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

land within the State, have the exclusive authority to, in accordance with the purposes and policy of this Act—

“(i) promulgate or enforce any regulation or guidance;

“(ii) designate a critical habitat;

“(iii) issue a permit or license;

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

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

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

“(3) NEWLY LISTED SPECIES.—

“(A) IN GENERAL.—The Governor of a State may, before the Secretary or any other person, regulate any intrastate endangered species or any intrastate threatened species listed under this section that is listed on or after the 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 (b) COST ACCOUNTING.—The Endangered Species
 12 Act of 1973 is amended by inserting after section 12 (16
 13 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 and Public Works of the Senate and the Com-

1 mittee on Natural Resources of the House of Representa-
 2 tives a report estimating the costs described in subsection
 3 (b)(1)—

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

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

10 **“SEC. 12B. PROPERTY RIGHTS.**

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

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

17 “(2) DETERMINATION.—

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

1 “(B) FAILURE TO RESPOND.—If the Sec-
2 retary of the Interior fails to respond before the
3 expiration of the 90-day period described in
4 subparagraph (A), the proposed use shall be
5 considered to not violate any provision of this
6 Act.

7 “(3) EFFECT OF DETERMINATIONS.—

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

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

23 “(b) COMPENSATION FOR AGENCY ACTIONS.—

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

25 “(A) AGENCY ACTION.—

1 “(i) IN GENERAL.—The term ‘agency
2 action’ means any action taken by the Di-
3 rector of the United States Fish and Wild-
4 life Service in accordance with this Act
5 that diminishes the fair market value of
6 any real property by not less than 50 per-
7 cent with respect to the intended use of the
8 real property.

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

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

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

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

1 property determined in accordance with paragraph
2 (3).

3 “(3) DETERMINATION OF FAIR MARKET
4 VALUE.—

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

8 “(i) 1 shall be chosen by the Sec-
9 retary; and

10 “(ii) 1 shall be chosen by the owner or
11 lessee.

12 “(B) FAILURE TO AGREE ON FAIR MARKET
13 VALUE.—

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

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

1 “(C) COSTS.—The Secretary shall be re-
 2 sponsible for all costs relating to the determina-
 3 tion of fair market value made under this para-
 4 graph.”.

5 (c) PENALTIES AND ENFORCEMENT.—Section
 6 11(g)(4) of the Endangered Species Act (16 U.S.C.
 7 1540(g)(4)) is amended by striking “attorney and”.

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

12 **SEC. 5. AMENDMENT TO THE MIGRATORY BIRD TREATY**
 13 **ACT.**

14 Section 2 of the Migratory Bird Treaty Act (16
 15 U.S.C. 703) is amended by adding at the end the fol-
 16 lowing:

17 “(c) EXCEPTION FOR BLACK VULTURES.—Sub-
 18 section (a) shall not apply to any black vulture (*Coragyps*
 19 *atratus*) that an individual reasonably believes to be en-
 20 dangering any real or personal property, including—

21 “(1) livestock;

22 “(2) a vehicle; and

23 “(3) a building.

24 “(d) EXCEPTION FOR RAVENS.—Subsection (a) shall
 25 not apply to any action relating to the population control

1 of the raven (*Corvus corax*) in any area in which predation
2 by a raven poses a risk, as determined by the applicable
3 State wildlife management agency, to an effort to recover
4 a member of a species that is—

5 “(1) listed by the Secretary of the Interior as
6 an endangered species or a threatened species under
7 section 4 of the Endangered Species Act of 1973 (16
8 U.S.C. 1533); or

9 “(2) a candidate for listing as an endangered
10 species or a threatened species under section 4 of
11 the Endangered Species Act of 1973 (16 U.S.C.
12 1533).”.

○