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### **Treaties, International Agreements and the Origins of the ESA**

Congress passed the Endangered Species Preservation Act (ESPA) in 1966. This law allowed listing of only native animal species as endangered and provided limited means for the protection of species so listed. The Departments of Interior, Agriculture, and Defense were to seek to protect listed species, and insofar as consistent with their primary purposes, preserve (protect) the habitats of such species. Land acquisition for protection of endangered species was also authorized.

The Endangered Species Conservation Act of 1969 (ESCA) was passed to provide additional protection to species in danger of “worldwide extinction”. Import of such species was prohibited, as was their subsequent sale within the U.S. This Act called for an international ministerial meeting to adopt a convention on the conservation of endangered species.

A 1973 United Nations conference in Washington D.C. led to the signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which restricted international commerce in plant and animal species believed to be actually or potentially harmed by trade.

Later that year, the Endangered Species Act of 1973 (ESA) was passed, which combined and considerably strengthened the provisions of its predecessors.

The ESA is arguably one of the most recognized acronyms in rural America. First written in 1973 using its current title, it has undergone numerous revisions. This “law of the land” contains more facets than the Hope Diamond and may have its purported curse as well. Mere mention of a landowner having “possible habitat” for a protected, threatened, or endangered species wreaks immediate havoc, both emotionally and economically.

The ESA was amended in 1976-1982, 1984 and 1988, and actually expired in the early 1990s, but has been kept alive through Congressional funding on an annual basis.

The United States’ international commitment of America’s resources under treaties and “other international agreements” has its roots in 16 U.S.C. 1351. An Executive “international agreement” is not ratified by the Senate.

The ESA began with the Migratory Bird Treaty Act of 1918\* between the United States, Great Britain and Canada. This treaty usurped powers reserved to the States. The Migratory Bird Treaty has even been expanded several times.

Some treaties, such as the Western Hemisphere Treaty (Treaty of Tordesillas), have no enforcement clause and are merely good faith treaties that impose no obligation or burden upon anyone.

U.S. v. Pink 315 US 203 (1942), which used treaties to undermine constitutional safeguards, should raise significant, related issues.

If international matters are raised and held to, the matter of which treaty or International Agreement is being applied, comes into play. Legal arguments can and should arise from the implementation and enforcement of the ESA against private property owners.

The Ute Mountain Ute Nation did an excellent job of challenging and defeating the ESA. The Ute Mountain Ute Nation did not sign any of treaties or international agreements — thus, the ESA does not apply to their lands in the southwest quarter of Colorado.

Many definitions contained in the ESA come directly from UN and IUCN (International Union for the Conservation of Nature) glossaries, including but not limited to CITES definitions.

A few definitions from the ESA are necessary in order to understand the complexities of the Act itself:

The ESA definition of an endangered species is “Any species which is in danger of extinction within the foreseeable future throughout all or a significant portion of its range.”

The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

The term “critical habitat” for a threatened or endangered species means -

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features

(I) Essential to the conservation of the species and

(II) Which may require special management considerations or protection; and

(ii) Specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

A “threatened” classification is provided to those animals and plants likely to become endangered within the foreseeable future throughout all or a significant portion of their ranges [Section 3].

A “species” includes any species or subspecies of fish, wildlife, or plant; any variety of plant; and any distinct population segment of any vertebrate species that interbreeds when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man [Section 3].

The term “fish or wildlife” means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof,

or the dead body or parts thereof. [“any mammal” could this be expanded to include humans?]

The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. [This definition is especially meaningful from the context of those human species who have been “harassed, harmed, pursued, wounded, etc.” by the implementation of the ESA.]

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The full 49-page text of the Act may be found at [http://www.house.gov/resources/105cong/reports/105\\_c/esa73\\_pdf](http://www.house.gov/resources/105cong/reports/105_c/esa73_pdf)  
<http://law2.house.gov/uscode-cgifastweb.exe?getdoc+uscview+t13t16+5673+1++%28%29%20%20AND>

## Listing

The listing process was originally planned to protect both species and their habitat. U.S. and foreign species lists were combined, with uniform provisions applied to both (Section 4).

Categories of “endangered” and “threatened” were defined (Section 3).

Broad taking prohibitions were applied to all endangered animal species, which could apply to threatened animals by special regulation [Section 9].

Authority was provided to acquire land for listed animals and for plants listed under CITES [Section 5]; and U.S. implementation of CITES was provided [Section 8].

All Federal agencies were required to undertake programs for the conservation of endangered and threatened species, and were prohibited from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its “critical habitat” [Section 7].

Significant amendments were enacted in 1978, 1982, and 1988 although the overall framework of the 1973 Act remained basically unchanged.

As with most other Federal regulations, a species is proposed for addition to the lists (50 CFR Part 17) in the Federal Register. The public is offered an opportunity to comment, and the rule is finalized (or withdrawn). Species are selected by the United States Fish & Wildlife Service (FWS) for proposed rules from a list of ‘candidates.’

To become a candidate, FWS relies largely upon petitions, FWS and other agencies’ surveys, and other substantiated reports on field studies.

The Act provides very specific procedures on how species are to be placed on the list (e.g., listing criteria, public comment periods, hearings, notifications, time limit for final action) and may be found at 50 CFR Part 424. Selection from the list of candidates for a proposed rule is based upon a priority system (September 23, 1983, Federal Register).

Species may be active candidates from a number of sources. FWS has its own biologists who are monitoring the status of some species. Other agencies [The Nature Conservancy, The Center for

Biological Diversity — formerly known as the Southwest Center for Biological Diversity — and others] have similar staffs that can report when a species seems to be at some risk to its continued existence. Informal letters and various reports are also submitted to FWS from the States and private groups and individuals. There is also a formal petition process available under the Act.

Anyone can petition to have any species — as defined in the ESA — listed.

In the years since its inception, this process has expanded to include “possible habitat?” and has often used the “critical habitat” designation to halt human use of large blocks of land. In a 1998 memo, Donna Darm, the acting regional administrator of the National Marine Fisheries Service (NMFS / NOAA agency) wrote: **“When we make critical habitat designations, we just designate everything as critical without analysis of how much habitat a (population) needs, what areas might be key, etc. We just say we need it all.”**

“This has been our assumption of their attitude all along,” said Chuck Garner, manager of the Kennewick Irrigation District in the mid-Columbia Basin of Washington State. He gave district directors copies of the comments at a board meeting. “They just go in without showing any scientific evidence of what habitat is critical; they just list everything,” Garner said.

Some species have been “emergency listed” in order to stop road improvements. For example, the bull trout near South Canyon Road at Jarbidge, Nevada, was the “sacrificial lamb” used to close the only road for miles in a remote part of northeast Nevada. The bull trout was “emergency listed” for this reason alone: to close a road. Concerned citizens reopened the road on the fourth of July in 2000 in the face of threats of lawsuits and jail time.

Plant species are the special province of the Smithsonian Institution, as directed by the Secretary of Agriculture. The Smithsonian is to review plant species that are or may become threatened or endangered, and recommend methods adequate to conserve the species.

## Methodology

Much of what has given the ESA its “black eye” with those impacted by it is the methodology involved.

Federal environmental policy surrounding this law is often seen to pit one species against others, or speciesism.

Lake Koocanusa is in northwestern Montana and straddles the American-Canadian border. A manmade lake built in the 1970s by the Army Corps of Engineers, Koocanusa was promoted to increase fishing and tourism. A “protected species” of salmon listed in 1992 has put another protected species, the White Sturgeon, at risk.

The United States Fish & Wildlife Service working with the National Marine Fisheries Service, is conducting a “50-year experiment,” using the lake levels to discover if decreased lake levels in the spring will help the salmon in the Columbia River, 800 miles downstream. This effectively puts the spawning grounds of the sturgeon in eminent danger by reducing lake levels at a time when the sturgeon most needs higher levels. This is a prime, but far from isolated, example of the Endangered Species Act violating the Endangered Species Act.

In other highly publicized stories, lynx fur and grizzly bear hair have been used to falsify the boundaries of “critical habitat” for both species, leading to the question: How many other “science-based statistics” have been invented in order to “create” critical habitat?

The Endangered Species Act has been selectively used to protect species other than human and domestic. Many rural producers are descendants of war veterans who settled and improved their lands after government promises of land and water. Indeed, many veterans had deeds — signed by various U.S. presidents — granting them and their “heirs and assigns” land and water rights in perpetuity.

As prospects for rural economic survival dwindle, a federal government or environmental group buyout is touted as the only alternative. Resource providing and resource extraction — farming, ranching, logging, mining, and commercial fishing — are presented to the general public as hurtful “to the environment” and obsolete careers. Tourism and recreation are promoted as being better for all concerned.

Left out of the equation are the facts: people, like any other species, need food and shelter for survival. In order to have both, resource providing and extraction must continue. Sending both to other countries does not bode well for their economies or their environment.

## **Think there’s no such thing as RURAL/CULTURAL terrorism?**

A 2000 ESA hearing, sponsored by the Senate Committee on Environment and Public Works, **actively excluded testimony from landowners** that have seen their property values reduced or completely negated by regulations.

Victim stories are legend. Thousands — perhaps tens of thousands of families and businesses — have been forced to relocate and/or go out of business due to this single statute. Here are but a few:

### **\*Dave Fisher, third generation cattle rancher and owner of the Shield “F” Ranch near Barstow, California**

Dave Fisher has become both the endangered species and the victim. His story is the tip of the iceberg, as there are 1,400 ranch families who fell victim to the ESA along with him.

In late 2001 the Bureau of Land Management (BLM) sent Dave a notice that if his 307 head of cattle were not removed from the 154,848-acre Ord Mountain allotment in the California Desert within 5 days, they would be impounded by the BLM. The BLM declared its lands and those under private ownership in the affected area to be “critical habitat” for the desert tortoise. It did not notify the 1,400 affected families in the area of its intent until after the ink was dry.

Dave and his neighbors tried to cooperate with the BLM. They appealed the original BLM May 15, 2001 decision to the Office of Hearings and Appeals (OHA) and won. That original decision was remanded back to the BLM because it had failed to consult, cooperate and coordinate (CCC) with the permittees as required by Section 8 of the Public Rangelands Improvement Act and as required by the BLM’s own regulations.

Dozens of appeals were filed, protesting the BLM’s September 7, 2001, decision.

**The BLM did not respond to even one of those appeals.**

The desert tortoise “protections” arose from a negotiated California Desert Conservation Area (CDCA) lawsuit settlement between the BLM, The Center for Biological Diversity (CBD), Public Employees for Environmental Responsibility (PEER) and the Sierra Club. This agreement empowered the BLM to partially implement the U.S. Fish & Wildlife Service’s 1994 Desert Tortoise Recovery Plan recommendations for livestock reduction and removal from critical habitat. Proven help for the desert tortoise from cattle droppings (providing moisture and shade) were not factors included in this decision. Dave suggested to the California state BLM director that the director exchange Fisher’s ranch for another ranch. That offered solution was never acted upon.

Ironically, it was rancher stewardship of the land that attracted the desert tortoise in the first place.

Not until the Fisher family drilled water wells on its own land did the desert tortoise become prevalent in the California Desert Conservation Area. The tortoise, in moving into a new habitat provided by ranchers grazing cattle, attracted the attention of the environmental groups. It was used to pressure federal officials to push Fisher and his 1,400 ranching neighbors off the land.

This is an example of ranchers who stayed within the system, cooperated fully with all agencies involved and still — without court order or decision — became its victims. Threats of lawsuits against the Department of Interior (DOI) by three powerful environmental groups seem to have provided the directives for DOI/BLM actions.

#### **\*Anita Cragg, Florida builder**

In 1992, Anita Cragg, president of Space Coast Management Services, bought a housing subdivision in Country Cove, Florida with the goal of building new homes next to existing ones. She had the necessary building permits and interested buyers lined up when FWS ordered her to stop all development because it allegedly posed a hazard to the Florida scrub-jay, a bird which is listed as threatened under the Endangered Species Act.

What Cragg didn’t understand was how her planned development threatened the scrub jay when there were no scrub-jay nests on the property.

Both the FWS and an independent environmental engineer hired by Cragg could not find any nests on her land.

However, when FWS officials were surveying her land in 1993, they saw two scrub jays fly onto her lots. Because Cragg’s property had the potential to be suitable scrub-jay habitat, the agency suspended construction for 18 months.

To get construction resumed, FWS forced Cragg to purchase four acres of land off-site to compensate for the loss of every acre of potential habitat on her property. That cost her \$100,000. Cragg says her deal with the government “didn’t really help the scrub-jay because we weren’t hurting it in the first place.”

#### **\*A Sovereign Nation’s border**

The U.S. Border Patrol’s aggressive efforts to stem illegal immigration and cut crime along the Texas-Mexican border have been a resounding success. In just two years, Operation Rio Grande, the agency’s high-tech interdiction effort, cut the number of illegal aliens attempting to cross the border from 216,000 in 1996 to less than 160,000 in 1999 along a 200-mile stretch of the Rio Grande River.

If it weren't for the operation, Border Patrol officials estimate that there would have been 350,000 illegal aliens attempting to cross the border in 1999. In addition, in just one year, crime in Brownsville dropped 45 percent.

If "environmentalists" have their way, all these gains will be negated.

The Sierra Club, Defenders of Wildlife and the Audubon Society plan to file a lawsuit to put a halt to the Border Patrol's use of critical interdiction technology, which the groups claim pose a "threat" to "endangered species." These groups argue that the agency's use of high-powered lights, which prevent border crossings under the cover of night, also disrupts the habits of the ocelot and jaguarondi, two nocturnal-oriented wildcats on the endangered species list.

"We feel the Immigration and Naturalization Service can accomplish its job without the floodlight and fences and with far less intrusive technologies that have no impact on wildlife," says Jim Chapman of the Sierra Club.

Not so, Border Patrol. Border Patrol assistant chief Rey Garza says. "Taking away the lights will negate everything."

The Rio Grande River is pitch-black, making it an obvious haven for illegal aliens and drug criminals. Garza says that Border Patrol officers have been stabbed and shot trying to do their job on its murky banks.

By installing permanent and mobile light fixtures along targeted sections of the river, the Border Patrol's ability to catch criminals and illegal aliens has increased dramatically. Says officer Garza, "The lights have proven to be a powerful deterrent."

The environmentalists' planned lawsuit especially frustrates Border Patrol officials. They had already agreed to not place their high-tech equipment in U.S. Fish and Wildlife sanctuaries in an attempt to address environmental concerns — even though those sanctuaries have become refuges for illegal aliens.

### **\*Jay Monfort, New York businessman with 300-year family history**

Jay Monfort of Fishkill, New York, began the permitting process in 1990 of trying to expand a gravel mine on his own land. Jay owns a company that manufactures concrete block. He also owns property that could largely supply the gravel needed for his business. Fishkill, New York judged Jay to be in compliance with its zoning regulations and approved the expansion of his Sour Mountain gravel company.

After filing his permit application with the state Department of Environmental Conservation (DEC) Jay became ensnared in a process that continues today. His Draft Environmental Impact Statement (EIS) was rejected as "incomplete" in April 1993, almost six months after the state was required by law to issue its opinion. After resubmitting his EIS, the DEC finally approved it in 1995.

Then the DEC, in collusion with local environmental groups, devised new and costly reasons to further delay the project. At what should have been the end of the process, Jay was told that he would have to start over again because a den of rattlesnakes had been "discovered" on an adjoining property owned by — surprise! — a conservation group. The protected species of snakes were not even on Mr. Monfort's property, and his previous EISs had already addressed potential impacts on the snakes

by his mine.

The DEC informed Jay that he would have to spend several additional years studying the snakes before a decision could be rendered on his proposed mine expansion.

Monfort declares, “The motivation for such abusive tactics appears to be a desire of the state” and the local conservation group, Scenic Hudson, to acquire his property for a land trust.

Jay has not given up. In January 1998 he filed a lawsuit demanding that the state issue a final decision based on his original permit application. The permit process alone has cost him more than \$3 million.

## **A better way to protect wildlife**

Federal “management” of both endangered species and other wildlife has led to a delicate balancing act. A major reason for this, according to Howard Hutchinson, executive director for the Coalition of Arizona/New Mexico Counties, is that critical-habitat designations for endangered species are often determined by “citizen” lawsuits rather than being formulated by people who understand the needs of the species. As a result, he says that decisions are made by Justice Department lawyers based on agreements reflecting political purposes.

Hutchinson cites an example. As the result of a much-publicized “citizen” ESA lawsuit filed by some of the same environmental groups involved in the Klamath Basin crisis, protection of the Mexican spotted owl virtually eliminated the timber industry in Arizona and New Mexico several years ago.

Hutchinson, who serves on the spotted-owl recovery team, says the “resulting growth of underbrush in the forests has not only led to this summer’s devastating wildfires, but has also had a negative effect on several other species that have been declared endangered.” And, says Hutchinson, research has shown that because of the increase in timber density the forests are retaining more water, thus decreasing the amount of water in Southwestern streams by 30 percent. As a result, he says, the Gila trout, Apache trout, spiked ace and loach minnow — all of which live in the streams and also were subjects of “citizen” ESA lawsuits — are suffering.

Even more bizarre than this pitting of one species against another, say critics, is the pitting of a species against itself. This is happening in the case of the Coho salmon, one of the allegedly threatened fish that was the subject of several of the lawsuits that forced the government to turn off the irrigation water in the Klamath Basin.

According to the National Marine Fisheries Service (NMFS / NOAA agency) the government agency that administers the ESA for marine and anadromous (fish that migrate from the ocean to freshwater to spawn) species, the salmon being protected in the Klamath River do not constitute a species as properly defined. The NMFS says they are just one of 52 “distinct population segments” — DPSs — or “evolutionarily significant units” (ESU) of salmon that are found in Oregon, Washington state, Idaho and California. But one-half of the 52 ESUs are protected under the ESA. The Klamath River fish belong to an ESU called the Southern Oregon/ Northern California Coasts Coho salmon. It was listed as threatened under the ESA in 1997.

So what distinguishes one ESU of salmon from another? A genetic difference? No. A difference in the taste of the fillet on the dining-room table? Not even that. According to a regulation promulgated in 1996 by Bruce Babbitt, Clinton’s secretary of the interior, a group of vertebrates qualifies as an



ESU if it “is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological or behavioral factors.”

According to NMFS spokesman Brian Gorman, geography is the primary distinguishing factor.

Gorman says the hatchery fish were not counted because, although they have been released into rivers for at least 100 years, NMFS biologists recently have concluded that the hatchery fish have different “behaviors” and actually are a threat to the “wild” fish. He claims the hatchery fish “diminish the vigor” of the wild fish and make them easier for fishermen to catch. He also says hatchery salmon reproduce less successfully in the wild than “wild” salmon.

In 1998, Oregon Department of Fish and Wildlife personnel were videotaped using baseball bats to kill thousands of Oregon coastal Coho salmon at a hatchery in the Alsea River basin. “There is a rationale for killing the salmon,” says Gorman. “Each hatchery can only handle so many fish, so when the hatchery’s capacity is reached, the excess fish must be killed.”

A similar parallel could be drawn between bovine excreta and that of wild elk or antelope. The head of the Tucson, Arizona-based Center for Biological Diversity, Kieran Suckling, rages about domestic cattle defecating in streams — yet patently refuses to acknowledge that all wild animals produce and drop scat on land and in streams.

Wildlife has been existing, mostly in harmony, with private citizens for many years. The partnership has benefited both: deer and many other avian and animal species forage on the edges of land planted in grain. Species that are of different successions — early, mid and late — are needed by wildlife in order to flourish. Driving a species such as the American Bison almost to extinction was a profound learning experience. The passenger pigeon’s demise was another. The twentieth century found stewardship and land/water use progressing wisely in private hands.

It is certainly possible for most species to have “possible habitat” in many areas where they are not found. That theory holds true for both endangered and healthy populations of humans, flora and fauna. The ability to adapt — stronger in some species than in others — has perhaps encouraged diversity more than hindered it, since it dictates progression or extinction.

The continuing educational process that humans are undergoing to better care for and harvest renewable resources — including timber, sustainable harvest of game birds and animals as well as domestic — points the way toward a far different scenario than environmental extremists have painted. Freedom of choice made possible by private ownership is a viable alternative to today’s ESA restrictions. Truly free enterprise offers healthy, threatened and endangered species ways to partner, which over-regulation and the locking up of millions of acres can never accomplish.

## **“Envisioning” the future of the ESA**

Non-governmental organizations and unelected bureaucrats are using the ESA as a leverage tool to end resource providing in America. This arbitrary and capricious agenda is a self-fulfilling prophecy. If all grazing permits are purchased by such as the Nature Conservancy — thus ending grazing on all Federally owned lands — families will feel the loss in their pocketbooks and on their dinner tables. A much larger percentage of disposable income will go for food as prices go up and availability goes down.

With the remainder of arable land and its water resources being placed off-limits to resource

production and extraction — and human habitation — food and water will soon achieve a place in the American psyche that they have not held for two hundred years. The standard of living that we take for granted will evaporate.

Protection of some species at the expense of others is an artificial scenario, neither practicable nor scientific. Past precedent shows beyond reasonable doubt that the future of the ESA as currently structured and enforced is bleak.

## Conclusion

This Act is a property rights destroying monster. It has wreaked havoc throughout America and beyond, and cannot honestly claim even one “success story.” What the Endangered Species Act can claim is the demise of thousands of rural communities and billions of taxpayer dollars. It can claim many shattered lives, whether through the stoppage of logging, farming, mining, ranching, or commercial fishing in many areas, or the many recreational pursuits (including hunting and fishing) that have been placed off-limits. It has been the secondary reason for many destroyed families — through stress, divorce, suicide, ruined health or nerves, and even early death. Rural and urban people alike must put this law where it belongs: in the wastebasket. Not only has the ESA failed species miserably; it has also failed the American people.

As an economic and cultural change agent, it has no parallel.

Landowners who once provided abundant species habitat have been and are being forced off their land in record numbers. One need look no further than the Klamath Basin of Oregon and California for proof. Property values are gutted, families are wrecked, and once-thriving communities are turned into rural ghettos. Species have not recovered anywhere. The ESA has failed to “protect” any species, and has, in fact, been a substantial contributing factor to actually making some species become endangered that once enjoyed healthy populations.

There is currently a move afoot to “reform” and “strengthen” the ESA — even to the point of codifying “invasive species” by inclusion of language.

Current ESA draft “reform” legislation even dovetails a version of *Kelo v. New London, Connecticut*, by use of a “50 percent clause” — more than half of one’s property must be removed from use before any compensation is considered or applicable.

How many people are content with losing half their property rights before any property compensation even comes into play?

Far from needing reform or strengthening — either of which further decimates property rights — this expired ‘piece of work’ that has Draconian and unconstitutional roots must be uprooted and finished off, to never again make victims of honest folk.

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Julie Kay Smithson lives in rural Ohio with her Blue Heeler dog. She has become a property rights researcher, author and speaker by default, due to the assault on prime farmland in her part of Ohio by

an agency of the Department of Interior, United States Fish & Wildlife Service. Please visit [www.PropertyRightsResearch.org](http://www.PropertyRightsResearch.org) to learn more about property rights, resource providers, consumers, and recapturing freedom.

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