

115TH CONGRESS  
1ST SESSION

# H. R. 2134

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.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 25, 2017

Mr. LUETKEMEYER (for himself and Mr. SESSIONS) introduced the following bill; which was referred to the Committee on Natural Resources

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## 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-

dermine, slow down, or halt construction of infrastructure projects, hampering economic growth and employment; and

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

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

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

(1) in subsection (a)—

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

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

(2) in subsection (b)—

(A) by striking paragraph (3);

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

4 (C) in paragraph (3) (as so redesignated),  
5 by striking “paragraphs (5) and (6) of this sub-  
6 section” and inserting “paragraphs (4) and  
7 (5)”;

8 (D) in paragraph (5)(A) (as so redesign-  
9 ated), by striking “paragraph (5)(A)(i)” and  
10 inserting “paragraph (4)(A)(i)”;

11 (E) in paragraph (6) (as so redesignated),  
12 by striking “paragraph (4), (5), or (6) of this  
13 subsection” and inserting “paragraph (3), (4),  
14 or (5)”;

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

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

21 (3) by striking subsection (c) and inserting the  
22 following:

23 “(c) LISTS.—

24 “(1) DEFINITION OF JOINT RESOLUTION.—In  
25 this subsection, the term ‘joint resolution’ means

1       only a joint resolution the matter after the resolving  
2       clause of which is as follows: ‘That Congress ap-  
3       proves the lists relating to endangered species and  
4       threatened species submitted by the Secretary of the  
5       Interior on \_\_\_\_\_.’ (the blank space being  
6       appropriately filled in).

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

9               “(A) a list of all species determined by the  
10       Secretary of the Interior or the Secretary of  
11       Commerce to be endangered species; and

12              “(B) a list of all species determined by the  
13       Secretary of the Interior or the Secretary of  
14       Commerce to be threatened species.

15              “(3) CONGRESSIONAL APPROVAL.—The lists de-  
16       scribed in paragraph (2) shall not take effect until  
17       a joint resolution described in paragraph (1) is en-  
18       acted.

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

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

23              “(B) specify—

24                      “(i) with respect to the species over  
25       what portion of the range of the species

1           that the species is endangered or threat-  
2           ened; and

3           “(ii) any critical habitat within the  
4           range.

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

8           “(6) AUTOMATIC REMOVAL.—

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

14          “(B) PETITION FOR RELISTING.—

15          “(i) IN GENERAL.—The Secretary of  
16          the Interior, in consultation with the Gov-  
17          ernor of each State in which the endan-  
18          gered species or threatened species is  
19          present, may submit to Congress a list  
20          that includes any species that was removed  
21          under subparagraph (A).

22          “(ii) CONGRESSIONAL APPROVAL.—  
23          The list described in clause (i) shall not  
24          take effect until a joint resolution de-  
25          scribed in paragraph (1) is enacted.”;

1 (4) in subsection (d)—

2 (A) in the first sentence, by striking  
3 “Whenever any species” and inserting “Except  
4 as provided in subsection (j), whenever any spe-  
5 cies”; and

6 (B) in the second sentence, by striking  
7 “The Secretary may” and inserting “Except as  
8 provided in subsection (j), the Secretary may”;

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

12 (6) in subsection (g)—

13 (A) in paragraph (1), by striking “The  
14 Secretary shall” and inserting “Except as pro-  
15 vided in subsection (j), the Secretary shall”;  
16 and

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

20 (7) in subsection (h)—

21 (A) in the matter preceding paragraph (1),  
22 by striking “The Secretary shall” and inserting  
23 “Except as provided in subsection (j), the Sec-  
24 retary shall”;

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

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

6 (A) by striking “subsection (b)(5)(A)(ii) of  
 7 this section” and inserting “subsection  
 8 (b)(4)(A)(ii)”;

9 (B) by striking “or if the Secretary fails to  
 10 adopt a regulation pursuant to an action peti-  
 11 tioned by a State agency under subsection  
 12 (b)(3),”; and

13 (C) by striking “or petition”; and  
 14 (9) by adding at the end the following:

15 “(j) INTRASTATE ENDANGERED SPECIES OR  
 16 THREATENED SPECIES.—

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

18 “(A) GOVERNOR OF A STATE.—The term  
 19 ‘Governor of a State’ means the Governor of a  
 20 State in which an intrastate endangered species  
 21 or intrastate threatened species is present.

22 “(B) INTRASTATE ENDANGERED SPE-  
 23 CIES.—The term ‘intrastate endangered species’  
 24 means an endangered species that the Governor



1 of a State determines is present only within the  
2 State.

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

8 “(2) CURRENTLY LISTED SPECIES.—

9 “(A) IN GENERAL.—The Governor of a  
10 State may regulate any intrastate endangered  
11 species or any intrastate threatened species list-  
12 ed under this section that is listed before the  
13 date of enactment of this subsection.

14 “(B) AUTHORITY OF GOVERNOR.—If the  
15 Governor of a State elects to regulate an intra-  
16 state endangered species or an intrastate  
17 threatened species under subparagraph (A), the  
18 Governor of the State shall, with respect to the  
19 management of the intrastate endangered spe-  
20 cies or intrastate threatened species on any  
21 land within the State, have the exclusive au-  
22 thority to, in accordance with the purposes and  
23 policy of this Act—

24 “(i) promulgate or enforce any regula-  
25 tion or guidance;

1 “(ii) designate a critical habitat;

2 “(iii) issue a permit or license;

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

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

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

13 “(3) NEWLY LISTED SPECIES.—

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

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

1           “(C) JUDICIAL REVIEW.—Any action by  
2           the Governor of a State under this subsection  
3           shall not be subject to judicial review in any  
4           court of the United States or in any State  
5           court.”.

6           (b) COST ACCOUNTING.—The Endangered Species  
7           Act of 1973 is amended by inserting after section 12 (16  
8           U.S.C. 1541) the following:

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

10          “(a) DEFINITIONS.—In this section:

11               “(1) DIRECT COSTS.—The term ‘direct costs’  
12               includes—

13                       “(A) Federal agency obligations related to  
14                       the cost of any study;

15                       “(B) capital, operation, maintenance, and  
16                       replacement costs; and

17                       “(C) staffing costs.

18               “(2) INDIRECT COSTS.—The term ‘indirect  
19               costs’ includes foregone power generation costs and  
20               replacement power costs, including the net costs of  
21               any transmission of power.

22          “(b) COST OF COMPLIANCE.—

23               “(1) IN GENERAL.—Except with respect to  
24               intrastate endangered species or intrastate threat-  
25               ened species regulated by a Governor of a State

1 under section 4(j), the Administrator of the Bonne-  
2 ville Power Administration, the Administrator of the  
3 Southeastern Power Administration, the Adminis-  
4 trator of the Southwestern Power Administration,  
5 and the Administrator of the Western Area Power  
6 Administration shall each include in a monthly bill-  
7 ing statement submitted to each customer of the re-  
8 spective Administration the share of the direct and  
9 indirect costs to the customer incurred by the Ad-  
10 ministration related to complying with this Act.

11 “(2) ASSISTANCE IN IDENTIFYING COSTS.—The  
12 Director of the Bureau of Reclamation shall assist  
13 the administrators described in paragraph (1) with  
14 identifying the costs described in that paragraph.

15 “(c) REPORT.—Not later than January 30 of each  
16 year, each of the administrators described in subsection  
17 (b)(1), in coordination with the Director of the Bureau  
18 of Reclamation, shall submit to the Committee on Envi-  
19 ronment and Public Works of the Senate and the Com-  
20 mittee on Natural Resources of the House of Representa-  
21 tives a report estimating the costs described in subsection  
22 (b)(1)—

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

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

5   **“SEC. 12B. PROPERTY RIGHTS.**

6           “(a) DETERMINATION OF PROPOSED USE OF REAL  
7   PROPERTY.—

8           “(1) IN GENERAL.—Any owner or lessee of any  
9           real property may submit to the Secretary of the In-  
10          terior an application that includes any proposed use  
11          of the real property.

12          “(2) DETERMINATION.—

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

20                 “(B) FAILURE TO RESPOND.—If the Sec-  
21                 retary of the Interior fails to respond before the  
22                 expiration of the 90-day period described in  
23                 subparagraph (A), the proposed use shall be  
24                 considered to not violate any provision of this  
25                 Act.

1 “(3) EFFECT OF DETERMINATIONS.—

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

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

17 “(b) COMPENSATION FOR AGENCY ACTIONS.—

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

19 “(A) AGENCY ACTION.—

20 “(i) IN GENERAL.—The term ‘agency  
21 action’ means any action taken by the Di-  
22 rector of the United States Fish and Wild-  
23 life Service in accordance with this Act  
24 that diminishes the fair market value of  
25 any real property by not less than 50 per-

cent with respect to the intended use of the  
real property.

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

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

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

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

“(3) DETERMINATION OF FAIR MARKET  
VALUE.—

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

4                   “(i) one shall be chosen by the Sec-  
5 retary; and

6                   “(ii) one shall be chosen by the owner  
7 or lessee.

8           “(B) FAILURE TO AGREE ON FAIR MARKET  
9 VALUE.—

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

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

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



1       (c) PENALTIES AND ENFORCEMENT.—Section  
2 11(g)(4) of the Endangered Species Act of 1973 (16  
3 U.S.C. 1540(g)(4)) is amended by striking “attorney  
4 and”.

5       (d) CONFORMING AMENDMENT.—Section 6(d)(1) of  
6 the Endangered Species Act of 1973 (16 U.S.C.  
7 1535(d)(1)) is amended by striking “the status of can-  
8 didate species pursuant to subparagraph (C) of section  
9 4(b)(3) and”.

○