

Protected Critical Habitats for Birds Expanded

By George J. Mannina Jr.

In *Arizona Cattle Growers' Association*, 2010 DJDAR 8233 (June 4, 2010), the 9th U.S. Circuit Court of Appeals upheld a Fish and Wildlife Service determination under the Endangered Species Act (ESA) that critical habitat for the threatened Mexican spotted owl is not limited to areas where the owl actually resides but can encompass any area the owl uses, including the birds' migratory pathway. That standard means the thousands of miles of migratory bird flyways used by ESA listed birds could become protected critical habitat. The decision also held, in stark disagreement with the 10th Circuit, that when implementing the ESA's requirement to decide whether the economic costs of designating an area as critical habitat outweigh the benefits, Fish and Wildlife Service can ignore economic costs caused by the critical habitat designation if such costs can also be attributed to listing the species. The 10th Circuit in *New Mexico Cattle Growers' Ass'n v. Fish*

and *Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), had ruled that allowing the Fish and Wildlife Service to ignore the economic costs of critical habitat designations by attributing all such costs to the listing meant that economic issues would never be considered anywhere in the ESA because, unlike critical habitat designations, the ESA precludes weighing economic costs when listing a species. Finally, the 9th Circuit stated the ESA's requirement that the Fish and Wildlife Service use the best scientific data available in making decisions "does not require that the *Fish and Wildlife Service* act only when it can justify its decision with absolute confidence."

The 9th Circuit began by citing the statute that critical habitat includes areas essential for the species' conservation. 16 U.S.C. 1532(5)(A). The court said the limits of critical habitat outside the area where the species resides are measured using two tests, frequency of use and uncertainty. Frequency, said the court, considers whether the area is used intermittently for foraging, juvenile population dispersal, or migration.

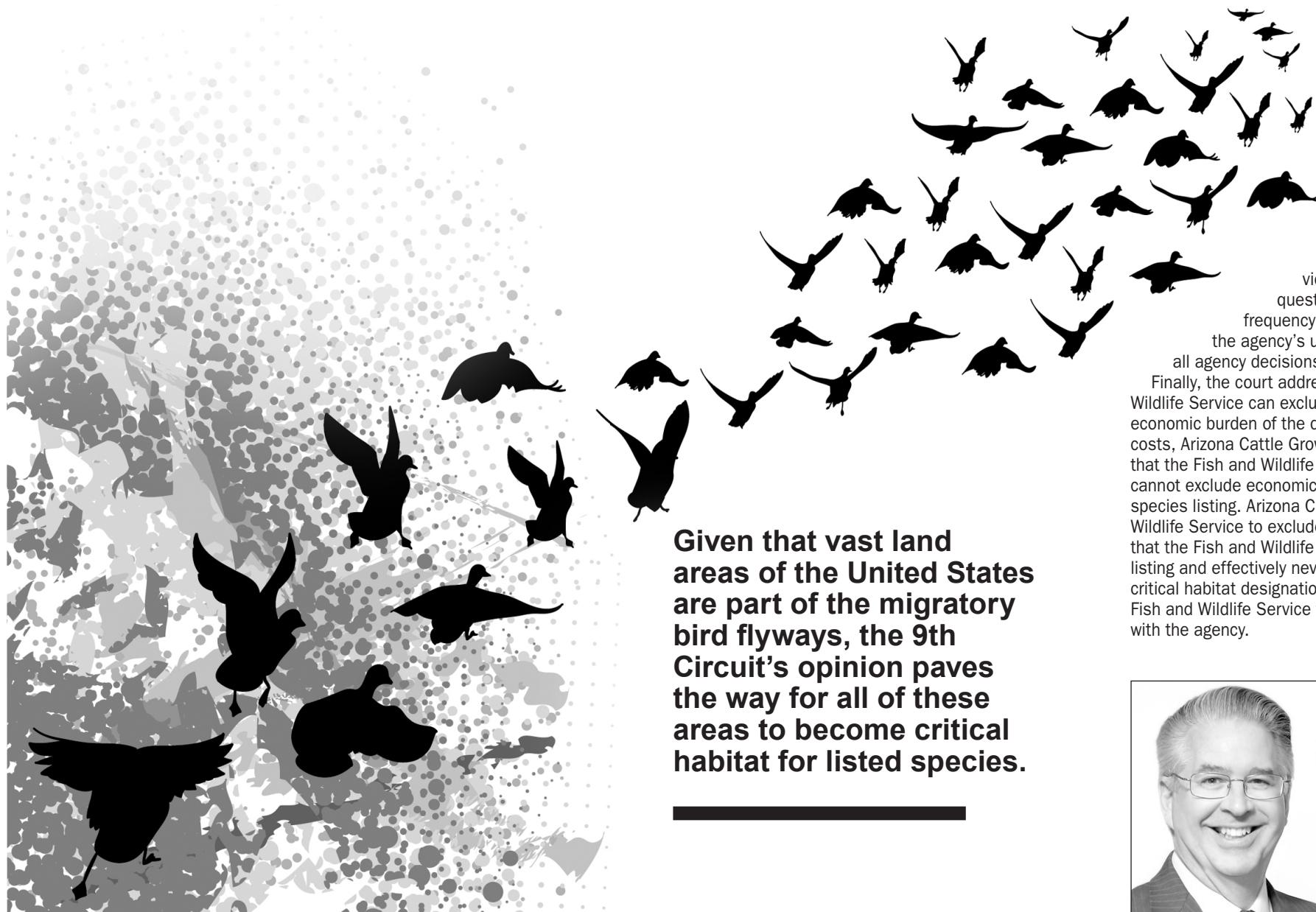
Such areas can be critical habitat because "Congress clearly intended that agencies give the highest of priorities and the benefit of the doubt to preserving endangered species." In short, the 9th Circuit decided that if an area "contains" a listed species for "any reasonable span of time" it can constitute critical habitat. Given that vast land areas of the United States are part of the migratory bird flyways, the 9th Circuit's opinion paves the way for all of these areas to become critical habitat for listed species. Reaching beyond even this broad principle, the court went on to find that because the Fish and Wildlife Service presented evidence that there might be undiscovered owl sites, areas used by these undiscovered animals could also be included in critical habitat.

The 9th Circuit also reaffirmed its ruling in *Gifford Pinchot Task Force v. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004), that critical habitat is not limited to areas necessary for the species' survival but also includes areas necessary for the conservation, i.e., recovery, of the species.

The only limitation the court placed on designating critical habitat is that an area whose only qualification is that it is suitable for future occupancy may not be included in critical habitat. The area must be occupied, as broadly defined by the court.

As to the uncertainty factor in designating critical habitat, i.e., the data needed to support a decision, the court held that the Fish and Wildlife Service is not required to justify its decision "with absolute confidence" because the "ESA accepts agency decisions in the face of uncertainty." Giving the Fish and Wildlife Service vast discretion, the court said that "factual questions" of whether an area is used with sufficient frequency to be critical habitat "are within the purview of the agency's unique expertise." This standard would apply to all agency decisions under the ESA.

Finally, the court addressed the ESA provisions that the Fish and Wildlife Service can exclude areas from critical habitat based on the economic burden of the designation. In evaluating these economic costs, *Arizona Cattle Growers*, citing 10th Circuit precedent, had argued that the Fish and Wildlife Service must include all economic costs and cannot exclude economic burdens because they already exist due to the species listing. *Arizona Cattle Growers* argued that allowing the Fish and Wildlife Service to exclude economic costs associated with listing meant that the Fish and Wildlife Service can attribute all economic costs to the listing and effectively never do an analysis of the economic effect of a critical habitat designation, as required by the ESA. Not surprisingly, the Fish and Wildlife Service took the opposite view. The 9th Circuit sided with the agency.



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Maximizing the People's Right to Choose

By James P. Gray

Based upon his experiences as a veteran trial court judge, his solid Libertarian principles and his observations of the election process based upon his personal involvement, Judge James P. Gray (Ret.) presents fresh and demonstrably workable solutions for some of America's most pressing problems. Judge Gray explains how we would be safer, healthier, better educated and more successful by implementing specific changes to our systems of criminal justice, health care, education and immigration. Regardless of their political affiliation, "A Voter's Handbook" should be required reading for all Americans who wish to get our great country back on track.

BOOK EXCERPT

"Free to Choose" Is the Slogan for Prosperity

For us to maximize everyone's chances of fulfilling our desires for prosperity we must listen better to that great thinker and Nobel Prize-winning economist Dr. Milton Friedman and his equally brilliant wife,

Rose.

Yes, we as citizens and voters actually have to consider economics because this is the "invisible hand" that in so many ways drives our decision-making process and also that of our great nation as well. The basis for our prosperity is simple: the basis is "choice," or as the Friedmans put it in the title of the economic bible they wrote, we must be "Free to Choose."

What does that mean? It means that the foundations of prosperity based upon our free choice are private property rights, a fair and foreseeable system of justice, and entrepreneurship and all of the calculated economic risk-taking that this entails.

This sounds like intellectual egg-head talk, but it really is not. It simply means that we must set up a system that maximizes ways people can choose for themselves how to work and spend their money instead of having the government make those choices for them. This necessarily means that people will benefit from the good choices they make and be responsible for poor ones. That is the way to prosperity. Therefore, every time the government substitutes its "wisdom" for ours, it is taking us further away from prosperity.

For example, if you feel you get good value for your money by having a particular person cut your hair, why should the government require a license before that person can do that work? Remember, if the work is not worth the money charged, the would-be barber will go out of business regardless of what the government license says. Of course, we will still need things like protections against environmental pollution and recourse for defective or even harmful products. Fortunately in most ways the justice system can handle those issues.

So how do property rights fit into this discussion? Let me give you an example. Consider that there was a grove of apple trees growing wild somewhere along the Oregon Trail during the covered wagon days. So when a wagon train would come upon it, the travelers would pick more of the ripe apples than they needed — why not, they're free?

Then the people in the next train would probably pick all of the remaining ripe apples, and most of the green ones as well. Why not, they're free, and the travelers can always feed the unripe apples to their oxen. Of course, soon there would be no more apples at all on the trees, but the people in the next train would cut down the branches and even the trunks of the trees to use as firewood. Why not? They can use the wood, and if they do not cut it down, someone else behind them will.

Therefore, in this situation not only would no one plant, feed or prune the trees and harvest the apples for maximum benefit, the trees would actually be plundered and soon destroyed. But if a private person had full ownership rights to the apple grove, enforced by a fair and foreseeable system of justice, there would very likely be an abundance of good quality and low-priced apples for all.

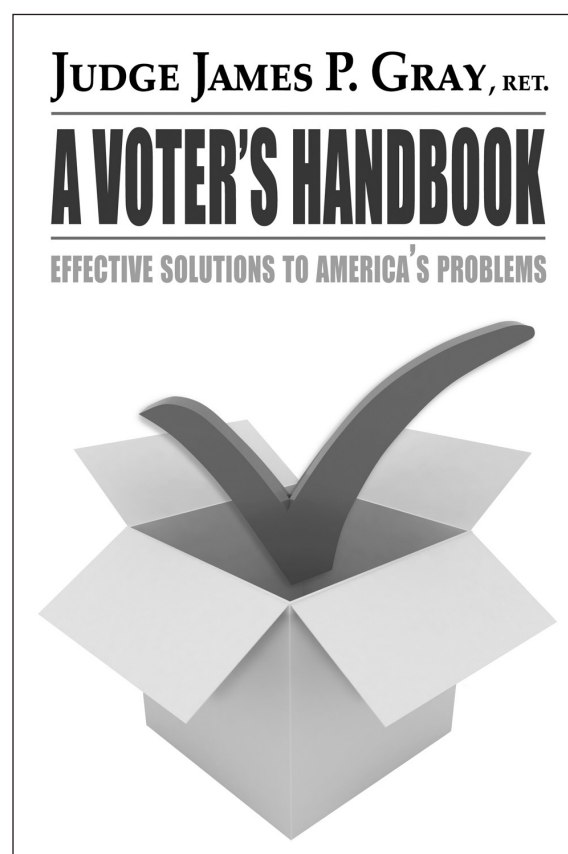
In other words, with enforceable property rights, people have the incentive to work hard and plan for the long-run future because they will profit from their efforts. But without those property rights, the incen-

tives instead are for people to plunder the resources in the short run before someone else does so. That is what we have seen in the over fishing of the world's oceans.

Now to take this discussion one step further, who has more incentive to plant, organize and develop a better apple grove, private people working for their own self-interest, or the government? For the answer to that question, ask the people of Poland, the Czech Republic or Cuba. Or compare the productivity level of South as opposed to North Korea, or previously West Germany as opposed to East Germany. Furthermore, what is a better way to decide how many washing machines to manufacture or how many black cars to produce instead of red cars? To have a government bureaucrat make the decision or a private company that is sensitive to the free market choices of its customers? To have a system of government decisions in the marketplace leads to what the Friedmans call the "tyranny of control." Bureaucrats always have a natural tendency to increase their power and their area of influence. That is a major explanation for our government being so large and controlling today. But to have the decisions made privately brings the most rational decisions in manufacturing and distribution. And that brings prosperity!

In summary, we should arm ourselves with the slogan "Free to Choose," because it demonstrates the fact that we can and do have an influence in our government-at all levels. Our prosperity depends upon it. And these principles can specifically be adapted to the problems we have in America today. As we discuss in this book there are concrete ways we can simplify and change the direction of government, with specific suggestions for the improvement of the criminal justice system for juveniles, adults and the mentally ill; for the overall system of education by instituting competition, reducing dropout rates, utilizing school uniforms and implementing successful programs of meditation; healthcare, by severely limiting the government's involvement and returning to a system of competition; and a way to severely curtail the critical problem of illegal immigration.

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