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ESA & PRIVATE PROPERTY

THE ENDANGERED SPECIES ACT AND "TAKINGS": A CALL FOR INNOVATION WITHIN THE TERMS OF THE ACT

BY
BRUCE BABBITT*

The Endangered Species Act is the most successful environmental law enacted within the past quarter century. However, opponents of environmental regulation have drafted a bill which would cripple the ESA by forcing the government to compensate private property owners for any diminution in property value caused by regulatory action. Secretary Babbitt criticizes the proposed Just Compensation Act, outlines various approaches taken under the ESA to protect endangered species, and concludes that innovation within the terms of the Act is the best approach to strike a balance between species protection and minimizing the regulatory burden on private landowners.

I'd like to talk about the Endangered Species Act (ESA)¹ and the shape of the debate in advance of its reauthorization timetable. I have been up on Capitol Hill in the last several months pushing what I thought was a remarkably uncontroversial, uneventful, plain vanilla scientific institution called the National

* United States Secretary of the Interior. President of The League of Conservation Voters, 1991-1992; Governor of Arizona, 1978-1987; U.S. Attorney General, 1975-1978; LL.B. 1965; Harvard University; M.S. in Geophysics 1963, University of New Castle, England; B.A. 1960, Notre Dame University. This essay was adapted from an address given at the Society of Environmental Journalists 1993 National Conference on October 22, 1993, in Durham, North Carolina.

1. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

Biological Survey. The National Biological Survey would be the biological analog of the United States Geological Survey, and is a scientific innovation of great importance for the future of the country. When was the last time anybody heard of a controversy involving the United States Geological Survey? However, its biological counterpart was the center of political debate on Capitol Hill, and I found myself locked in a cross-fire with Congressman Hayes.² I knew these Congressmen from the South are canny and must see something in this institution that I did not, because they were busy loading it down, including an amendment prohibiting the use of volunteers on the National Biological Survey. I started thinking about it, and it quickly became clear. I called on Mr. Hayes and told him that he was a tricky, no-good devil: he was using my bill as the stage for a dress rehearsal debate on the reauthorization of the ESA. Mr. Hayes sort of smiled and said, "That is exactly what I am doing."

The ESA is undeniably the most innovative, wide-reaching, and successful environmental law which has been enacted in the last quarter century. In 1993, it is precisely twenty years old in its modern form. Case after case of resurgence and rebirth show that it has been remarkably successful: the American alligator has returned;³ the skies are now once again graced by many bald eagles;⁴ the peregrine falcon is now moving from near extinction to the threshold of delisting.⁵ The exceptional stories include, not in the least, the forest plan that has now been worked out in the Cascade forest ecosystem in the Pacific Northwest.⁶

2. Rep. Jimmy Hayes (R-La.). Keynote speaker, *Unintended Consequences of Wetlands Regulation*, Society of Environmental Journalists 1993 National Conference, in Durham, N.C. (October 22, 1993).

3. Endangered and Threatened Wildlife and Plants, 50 C.F.R. §§ 17.11(h), 17.42(a) (1992).

4. 50 C.F.R. §§ 17.11(h), 17.41(a).

5. 50 C.F.R. § 17.11(h).

6. The management plan, commonly known as "Option 9", is contained in DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (DSEIS) FOR THE MANAGEMENT OF THE NORTHERN SPOTTED OWL 1-1 (USDA Forest Service July 1993). The Option 9 plan was a response to two Ninth Circuit cases which enjoined Pacific Northwest timber sales on Forest Service and Bureau of Land Management lands. See *Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993).

The opponents of the ESA understand those successes and those facts, so they attack it from a different direction. A collection of different groups has assembled, advocating a concept called the "takings" doctrine — the notion that the ESA is really about unconstitutional, uncompensated taking of private property. A dry run of what that argument looks like is called H.R. 1388, the Just Compensation Act of 1993.⁷ This simple bill would require any federal agent to compensate owners of private property "for any diminution in value" caused by any regulatory action taken under designated environmental laws. The bill lists such "takings" and at the top of the list is the ESA. In effect, proponents of the bill are saying that when the government takes any regulatory action which causes any diminution in value of any kind of property, the public treasury must pay for that diminution under their proposed mechanism.

I was pondering that the other night, and came up with some examples of what the proponents of this bill are advocating. The first example is the Kesterson National Wildlife Refuge in California. A few years ago, the Kesterson Refuge, which is one of the great migratory bird stocks on the Pacific flyway, had a problem.⁸ The waterfowl were dying; hatchlings were deformed at birth; and all sorts of strange things were happening. Ultimately, scientists found that selenium in irrigation tail water was draining into the wildlife refuge from an agricultural area and poisoning the waterfowl. The ESA and the Migratory Bird Treaty Act⁹ mandated some regulatory action against what was happening at Kesterson. The federal regulatory action taken was simply the charge: "clean up the pollution or we will sue you." The Just Compensation Act would define, purely and simply, the regulatory action taken to stop the pollution as an undeniable diminution in value of a property right. It is going to cost those farmers money to stop the selenium flow into the national wildlife refuge. Under the terms of this bill, the agricultural operations would comply but would also bill the Secretary of the Interior for their cleanup actions. That is

7. H.R. 1388, 103d Cong., 1st Sess. (1993).

8. See generally Harrison C. Dunning, *Confronting the Environmental Legacy of Irrigated Agriculture in the West: The Case of the Central Valley Project*, 23 ENVTL. L. 943, 953 (1993); TOM HARRIS, DEATH IN THE MARSH 190-207 (1991).

9. 16 U.S.C. §§ 703-715 (1988).

exactly what these folks have in mind when they are talking about "takings". The bill's proponents are saying, "We do not like environmental laws, and if they inconvenience us, we will send the government the bill and ask the public to pay." Rather than the old legal maxim "make the polluters pay," it would then pay to pollute because the government would reimburse polluters.

Those who have followed the Florida Everglades controversy can readily see another implication of this bill. Similar to the Kesterson Refuge situation, phosphate contaminated drainage water is causing eutrophication of the Everglades and a corresponding decline in the productivity of the fishery source, including the decline of the Everglade snail kite¹⁰ and a variety of other endangered species. The regulatory action in the Everglades is a message to the sugar companies: "Stop. Clean it up." That message is being sent right now in the form of a legal action in the United States District Court.¹¹ If the Just Compensation Act passed, what would happen? Sugar growers could go into federal court and move to dismiss the lawsuit because they would not be required to pay anything. If sugar companies agreed to clean up the phosphate, the Interior Department would get the bill because the companies would have been inconvenienced by losing a little profit next year which, under the bill, is a diminution in property value.

I could give you a lot of other examples, but I will stop right there. You see my point. If the proponents of the Just Compensation Act get away with this kind of reversal of environmental policy, think about what happens afterwards. What will happen when cancer-causing pesticides are banned and chemical companies incur losses? The chemical companies will send the bill for losses to the government. When the Federal Food and Drug Administration takes a breast implant off the market, the companies will send the bill to the FDA for money lost as the result of the regulatory action. What will happen when the Federal Aviation Administration refuses to certify a defective aircraft engine? Where do you stop?

10. 50 C.F.R. §§ 17.11(h), 17.95(b).

11. *United States v. Southern Florida Water Management District*, No. 88-1886-CIV (S.D.Fla. 1991) reported in II *Envl. L. Rep. Pend. Lit.* 66117 (1991); II *Envl. L. Rep. Pend. Lit.* 66133 (1991).

Our society has a fundamental premise: Regulatory action taken for a valid public purpose can have consequences that legally inconvenience people and, from time to time, do diminish someone's rights. The most interesting examples are planning and zoning laws. Suppose that the Washington, D.C., city council decides to zone a corner lot in my neighborhood for a strip shopping center. That type of decision happens every day in this country. When that lot is zoned, the council has increased its value. At the same time, the council's decision has diminished the value of my residence which is halfway down that block. Never to my knowledge in the history of America, has anyone seriously advocated that a zoning decision which creates a marginal increase in value at the admitted expense of someone else's property right entitles the former to compensation. Think of the chaotic consequences if that were the law in the United States of America. I could round up 200 neighbors and go down to the Treasury to demand compensation. Maybe we should tax the people whose land is increased in value and have a redistributionist scheme which requires all winners to compensate all losers every time a road is built or a neighborhood is rezoned. Do you see what I am getting at? It is a pernicious way of saying we are going to destroy the efficacy of government.

I can hear my good friend, Congressman Hayes, right now saying, "Bruce, you exaggerate. You are another one of those slick big city lawyers pointing out all sorts of hypotheticals." He would say that environmental regulation is different from all those examples because environmental regulation is a special case. Mr. Hayes would like to hold environmental regulation to a higher standard because it is new in American history. Is environmental regulation really different from the kind of action that the D.C. City Council takes every day in my neighborhood? Think about it. Environmental regulations, just like planning and zoning, have the function of protecting the larger interests of the community — air, water, open space — and inevitably there are some winners and losers.

An example comes from my own home town of Flagstaff, Arizona — a really special, ordinary place located high in the ponderosa forests of northern Arizona. About ten years ago the Flagstaff city council, using its zoning powers, passed a law which made it a crime to cut down a pine tree on private lands within the Flagstaff city limits unless that pine tree is removed to make way for an authorized improvement pursuant to zoning and build-

ing codes.¹² Response in Flagstaff to that law — a zoning law which is preeminently an environmental law — was very positive, because the residents of that community said this environmental law works to our manifest advantage. That is why people come to Flagstaff — you can smell the perfume of the pine forest in the air. An extraordinary horizon is everywhere you look. It is perfectly reasonable to create habitat valleys for the benefit of the entire community to protect wildlife and the overall image of the town. Admittedly this detracts from the freedom of a landowner who says, "I have a constitutional right to cut down every pine tree on my lot and to hell with the world." The council is saying that you may use your property in a reasonable fashion and realize an economic use, but in the name of the overall environment of this town, there will be some restrictions on landowners. The good residents of Flagstaff accepted that precept. Palmdale, California, has passed a similar ordinance to protect Joshua trees.¹³ Arizona limits your right to remove cactus on state lands.¹⁴ Massachusetts has under its zoning code a setback requirement on every stream and waterway in the state.¹⁵ Those examples are imposed by local governments under zoning, but they are manifestly environmental regulations.

The ESA is not a land use law. It is a law which says we are going to protect public property — wild and endangered species — but it acknowledges that in many cases the only efficacious way to protect an endangered species is to protect habitat. The ESA, with its focus on habitat, undeniably limits the freedom of some landowners: Freedom to raze a forest, to bulldoze habitat, or to dry up streams which contain an endangered species. The questions then become: How far? What are the restrictions like? When are you entitled to compensation?

Although I thought it unlikely that Manny Lujan,¹⁶ Don Hodel,¹⁷ and Jim Watt¹⁸ were really pushing the ESA and driving people into the courts to protect against their overzealous admin-

12. Flagstaff, Ariz., Ordinance No. 1690 (April 8, 1991).

13. Palmdale, Cal., Ordinance No. 952 (Feb. 14, 1992).

14. ARIZ. REV. STAT. ANN. § 3-901 (1989).

15. MASS. GEN. LAWS ANN. ch. 92, § 107(A) (West 1993).

16. Secretary of the Interior, 1989-1993.

17. Secretary of the Interior, 1985-1989.

18. Secretary of the Interior, 1981-1983.

istration, I did a little research to look for the cases of egregious abuse to which Mr. Hayes and others seem to be pointing to. I marched some of my folks over to the Court of Federal Claims, where hundreds of takings cases of all kinds are filed in waves of protest, to look for cases alleging "takings" due to the ESA. I found that in the twenty years of its modern form, there has not been a single case filed in that court alleging a taking under the ESA.¹⁹ Stuff that one in Mr. Hayes' craw and see what he says.

However, the fact that over the past 20 years, while listing some 800 species and putting up habitat conservation plans, there has not been a takings case related to the ESA in the Court of Federal Claims does not end the inquiry. It is not just about whether or not we have unconstitutionally taken someone's property. No one has yet alleged any case in the court with jurisdiction over such matters. The constitutional standard for a valid taking claim, subject to debate and discussion of the *Lucas*²⁰ case, is that the government must substantially deprive owners of any reasonable use of their property.²¹ You really have to shut them down. I would agree with the critics that the *Lucas* standard is hardly the appropriate standard for the elected representatives of the public — the Clinton Administration — to be bragging about. The standard ought to be higher. A standard of reasonableness is more appropriate. The government should administer the ESA in a way that is sensitive to private property, and demonstrate that the administration of the ESA has stopped short not only of a constitutional taking, but is actually sensible and does not inflict unnecessary inconvenience and hardship on citizens. As this debate begins, I submit that we are doing a pretty good job. Across the last 20 years, we have begun to devise some pretty innovative

19. See generally Frederico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live With a Powerful Species Preservation Law*, U. COLO. L. REV. 109 (1991); Linda Graham Cook, *Lucas and Endangered Species Protection: When "Take" and "Takings" Collide*, 27 U.C. DAVIS L. REV. 185 (1993); Albert Gidari, *The Endangered Species Act: Impact of Section 9 On Private Landowners*, *supra* this volume, 24 ENVTL. L. at 419 (1994); Robert Meltz, *Where The Wild Things Are: The Endangered Species Act and Private Property*, *supra* this volume, 24 ENVTL. L. at 369 (1994).

20. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

21. See generally *Colloquium on Lucas*, 23 ENVTL. L. 869 (1993).

approaches for preserving habitat on public and private lands without shutting down private landowners.

The first step in the process in any kind of endangered species situation is to ask a simple question: Are there public lands available to use as the core of the protection scheme? Public land is owned by all of us so there is no "takings" question. This approach has been fairly successful. Go to California and ask people about the California spotted owl.²² Any of you written stories about the California spotted owl? No, because by good fortune, it turns out that the owl's habitat is mostly public land — about 99 percent — up in the Sierra Nevada in northern California, so nobody squawked. That was gratuitous and nice — whenever we can do that, we do. In all cases where there is public land, we try to construct plans which say that the public land is going to carry the burden of the management. That has been done in the Pacific Northwest spotted owl controversy. The management plan which has come out for the Northwest has stronger provisions for public land, because that enables us to tread a little more lightly on the private land owned by individual timber companies.²³ The habitat conservation rules outside the core areas are a little lighter because our emphasis is on public lands.

Another approach is flat out mitigation. A good example of this is the desert tortoise which is found in the Great Basin of Nevada, California, and Arizona.²⁴ Several years ago, the city fathers of Las Vegas, which is a boom town if there ever was one, discovered that proposed subdivision land had already been occupied by the desert tortoise. The tortoise got there first, so an interesting plan was worked out. The plan provided that as developers bulldozed tortoise habitat for subdivisions, a surcharge was levied on each lot — just like a surcharge for water, sewer, or roads — and put in a bank account to use for mitigation.²⁵ The money was used to buy private lands that were in-holdings in the public domain for tortoise reserves. Mitigation will be just a sur-

22. The northern spotted owl's habitat range extends into northern California. 50 C.F.R. § 17.11(h).

23. See *supra* note 6.

24. 50 C.F.R. § 17.11(h), 17.42(e).

25. Endangered Species Act § 10(a) Incidental Take Permit for Development in Las Vegas Valley, Clark County, Nevada (July 24, 1991) (on file with Dept. of Interior).

charge, like any other kind of infrastructure charge, and we will use it to protect other land. It is a way of telling the private property owner that protection of the landscape can be arranged in a way that makes sense. You will see a lot more of this.

There are some other cases where management changes work. The best example is the red-cockaded woodpecker that hangs out in the neighborhoods around here and all across the South.²⁶ It is a more manageable bird than the Northern spotted owl because it has interesting characteristics. The bird is very picky about where it lives — it has to have an old growth tree. But it is quite eclectic about its dining habits — it eats all kinds of different things and it is not at all picky about its neighbors. It does not have high standards about social company — it will live on golf courses or in backyards. All you have to do is make sure it has good shelter and that the supermarket is not too far away. For those of you who are interested in these things, the red-cockaded woodpecker also has excellent family values. Being monogamous a pair stays together and the young ones stick around to help raise the next generation — really an admirable bird, one worthy of preservation. It turns out that given these characteristics we were able to go to the Georgia Pacific Company and work out a simple plan. In exchange for a favorable response from the overbearing Department of the Interior, Georgia Pacific constructed a plan where biologists move out ahead of logging crews to identify old growth woodpecker trees so that a modest habitat circle can be kept around those trees.²⁷ Georgia Pacific has estimated that this procedure will impact about one percent of their timberland. In light of the background rules and regulations about regulating for the common good, this type of plan seems pretty reasonable to both the Department of the Interior and Georgia Pacific. You will see Georgia Pacific down here running television advertisements bragging about it; I think they should, because they are a living example of how we can solve problems.

For those of you who are from Texas, we have had a quite extraordinary result in a place called the Edwards. It turns out

26. 50 C.F.R. § 17.11(h).

27. Red-Cockaded Woodpecker Management Memorandum of Agreement between Georgia-Pacific Corp. and the United States Fish & Wildlife Service (Apr. 8, 1993) (on file with Dept. of Interior).

that along the Balcones Escarpment down in central Texas, rains give rise to the headwaters of underground rivers running southeast down to the Gulf of Mexico. In these large underground pools, there are a few fairly uncharismatic critters living at great depth, including the Texas blind salamander.²⁸ What was happening was that wells pumping outside San Antonio were lowering the groundwater table and drying up the pools. This one looked like a train wreck in the making. The politicians were going, "Whaaaaaat!?!". The situation really looked like a disaster because people were running for office saying it is going to be people or the Texas blind salamander; it is going to be future for Texas or turn it over to cave dwelling invertebrates and blind salamanders.

What Texas really needed was a groundwater management plan. So we sat down with local government and went to the Texas Legislature with Governor Richards. In a quiet, thoughtful process the Texas Legislature passed the first groundwater management law in its history over the cries of a few Lone Star legislators who said this is Leninism on the run in Texas.²⁹ It had the incidental effect of preserving salamander habitat while assuring that San Antonio's water supply would be a lot more secure than it would have been in the failure to limit over-drafting. This interesting example demonstrates the flexibility of a broad-shouldered ESA accommodating a lot of interesting kinds of provisions.

Another option that you are all familiar with is density transfers. Every planning and zoning commission, in every town and county in this country does density transfers. Density transfers basically give a landowner more density on the south 40 in exchange for a commitment to preserve open space on the north 40. Traditionally, it has been done for aesthetic reasons, but density transfers are also a marvelous tool for preserving habitat. Density transfers will play a big part in the really impressive effort being driven by the state of California, local governments and the Fish and Wildlife Service, to preserve California gnat catcher³⁰ habitat in southern California.³¹

28. 50 C.F.R. § 17.11(h).

29. TEX. WATER CODE ANN. §§ 26.401-26.407 (West 1988).

30. 50 C.F.R. § 17.11(h).

31. See Special Rule Concerning Take of the Threatened Coastal Gnatcatcher, 58 Fed. Reg. 65088 (Dec. 10, 1993). See generally Craig Manson, *Natural Communities Conservation Planning: California's New*

If all of those methods fail, (a land exchange is yet another) option. The Department of the Interior controls 500 million acres of land. I am not claiming that it is all sacrosanct — only 499 million — but there is a land base from which we can, if we get into a corner where these other tools do not work, offer a land exchange. We are doing that right now in southern Utah, Nevada, and elsewhere.³² It was done in Florida to a great benefit in Big Cypress where we picked up 100,000 acres of land in exchange for 100 acres of land in downtown Phoenix — a terrific deal for everyone.³³ If that does not work and there is a manifest looming injustice, we can simply say, "We would like to buy your land."

An example of land exchange is Austin, Texas. As I speak here tonight, Austin, Texas is going to a bond election next week to determine the future of really one of the most exceptional habitat conservation plans ever worked out in this country.³⁴ The basic controversy centers around a bird, the golden-cheeked (wood) warbler.³⁵ These birds are extraordinary critters. They tend to get back into these evolutionary niches where they become dependent on a single tree, a single food source; thus, they are not very movable. The problem in Austin, for those of you who have not been there, is that the highlands to the West — the old "LBJ hill country" — is the most desirable place to live. The birds and the people both want to live in exactly the same place. Go east of Austin and you will find a Siberia or a Sahara where there is nothing but space. The birds and the people both want to go to the hills on the Balcones Escarpment. The question then becomes, can we sort it out? The people of Austin are going to make that decision in about a week.³⁶ What I have said in Austin is if you vote that

Ecosystem Approach to Biodiversity, *infra* this volume, 24 ENVTL. L. at 603 (1994).

32. The Department of the Interior is currently working on possible land exchanges to protect the desert tortoise in Utah and Nevada.

33. Land Exchange Agreement between the United States of America and the Barron Collier Company (May 12, 1988) (on file with Dept. of Interior).

34. Ultimately, the bond measure did not pass. See generally Melinda Taylor, *Promoting Recovery or Hedging a Bet Against Extinction: Austin, Texas's Risky Approach to Ensuring Endangered Species' Survival in the Texas Hill Country*, *infra* this volume, 24 ENVTL. L. at 581 (1994).

35. 50 C.F.R. § 17.11(h).

36. See *supra* note 34.

bond issue, I will throw in another \$5 million to do the federal share of land purchases that are necessary to make this work. Obviously money is in scarce supply, but there are times when it is appropriate.

Lastly, just a few thoughts about why it is that you keep reading all these stories about hardship. The regulatory system is not perfect and the most difficult cases are of small landowners. With the big landowners you can use density transfers, land exchanges, and all these types of things. The toughest case is one where the small landowner owns a strategic piece of property and their complaint usually comes because of the transition. When a species is listed under the terms of the ESA, there is an effective freeze across the habitat occupied by that species. It usually takes two or three years to construct the habitat conservation plan. The kind of Reader's Digest story that you read is always about the small landowner who is caught in the regulatory freeze until we put the habitat conservation plan together, because it is true that between listing and promulgation of that plan the law does sort of say, "Proceed at your own risk." That is the area where improvements need to be made in the coming year. The Fish and Wildlife Service must shorten that freeze to reduce to a bare minimum the inconvenience on the guy who would like to clear an acre to build a house for his mother-in-law, or cut down some trees for a horse arena, or whatever it may be. We can handle that by inventing some new concepts. For example, we might construct a kind of transition habitat plan.

The message that comes out of all this is that the ESA is not the problem. The problem is that the people who have been charged with administering the ESA have not explored imaginative and creative ways to arrange possibilities to give effect to a wonderful, expansive Act. Innovation within the terms of the ESA is a much better approach than incredible ideas such as the Just Compensation Act that legislates some sort of statutory formula to pay landowners. Think of the litigation and speculative land purchases that would result. There will never be enough money if every time there is a government regulation, somebody gets paid. We need to recognize this and the need to do innovative habitat conservation schemes. The burden is on the Department of the Interior to make it easier for people. I think we can and will continue to do that.

Against that background, the ESA is an extraordinary piece of legislation. Controversy about the ESA is not due to deficiencies in the ESA itself; rather, it is the willful failure of public officials to use the Act. I believe deeply that we can conserve biodiversity on this American landscape. All we have to do is think together and adopt an ethic of living a little more lightly on the land while understanding that we cannot separate nature from our daily activities. Empty space has disappeared. The days when you could set up a little park out there, post a sign and forget about it are gone. We have to begin to think of ourselves as inhabitants of ecosystems and begin to live, think, and act accordingly.