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Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation*

Ira Michael Heyman**

I. INTRODUCTION

It might seem odd that I have chosen the Endangered Species Act¹ as the topic for this prestigious lecture concerning the law of real property. But it is appropriate because the Hefner Fund celebrates Archie Hefner's "competence and devotion to the advancements of legal practice in land use management, property rights, and environmental planning . . ." The statute of which I speak, of course, protects rare and endangered animals and plants. But it does this largely by seeking to protect their habitats—land and water locations—habitats useful for other inconsistent purposes. Clearly we are concerned with land management and planning. Three contemporary western situations that exemplify this are the spotted owl in its old growth forest habitat in the Northwest valuable for timber products; the Delta smelt which needs water that otherwise would be used for irrigations and urban consumption in California; and the California gnatcatcher which requires coastal sage shrub locations otherwise developable for housing in Southern California.

Thus we are involved with land planning and management to resolve collisions between desired uses. Some of the collisions occur on public lands—as in the case of the spotted owl. Some occur where title (or rights) are arguably unclear—for instance the Delta Smelt involving water rights in the flow of the Sacramento. And some occur on clearly private land—as in the case of the gnatcatcher.

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1. 16 U.S.C. § 1531-1544 (1976).

I will be speaking mainly about habitat located on private land. It is there, of course, that the property rights' issues are most pronounced. Chief among them is the regulation-taking line. As my title indicates, the property "taking" argument is coming back. It is prominent in many western land controversies—rights to graze cattle on the public lands, rights to carry on hard rock mining, and rights to devote one's land to desired uses regardless of the consequences to endangered species. The most radical proposal regarding takings to date was the one offered as an amendment to the House bill creating the National Biological Survey.² It would require Federal Agencies to compensate owners for "any diminution in value" caused by any action taken under designated environmental laws, most prominently the Endangered Species Act.³

II. THE ENDANGERED SPECIES ACT IN GENERAL

The ESA focuses on the listing of individual species. I think that it would be wiser to focus instead on habitat supporting many species. This latter approach would facilitate advanced land use planning rather than crisis management and would help determine which species upon which to concentrate attention. It would also create an opportunity to balance conservation and development in a more sensible way than presently occurs. The present legal environment can make it exceedingly difficult to take those actions that avoid serious equity impacts on private land owners and people who rely on the resources of the public lands for their jobs and lifestyles.

A glance at the core process of the ESA illustrates that it calls for crisis management. Most listings proceed from petitions filed with the Fish and Wildlife Service of the Department of the Interior by individuals and organizations. The Service carries on a biological investigation if a prima facie case seems evident on the basis of information proffered by the applicant and it concludes whether the species is on its last legs (endangered) or on its way there (threatened). If it concludes that either is true, it is a federal crime to "take" any of the species unless an exemption is granted. "Take" is much broader than kill—it includes nearly everything detrimental to the species which covers, where relevant, destruction of habitat critical to its survival.

2. H.R. 1845, 103rd Cong. (1993).

3. H.R. 1388, 103rd Cong. (1993).

Ideally, as the Act is constructed, there would be prompt investigation on every qualifying petition. Realistically, however, investigations can be costly and time consuming and Fish and Wildlife's budget is inadequate. At any time, therefore, there are hundreds or perhaps thousands of candidate species awaiting processing depending on how energized are the petitioners. Undoubtedly, some species fail during the wait. The Act, interestingly, provides no criteria for scheduling investigations and the Service's attempts to construct priority criteria have been less than satisfying and have differed in various regions of the country.

Putting aside scheduling problems, in general the Act only comes into play when a species is on the way out. The characteristic processes of the Act do not anticipate potential troubles in the future. The stated purposes of the Act underscore this: "The purposes of the Act," it states, "are to provide a means whereby the ecosystems, upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . ."⁴ The Act does not seek to preserve ecosystems important to the sustenance of any species in order to prevent them from becoming endangered or threatened. The bite of the Act comes later. Thus, a crisis is at hand when the process begins. Secretary Babbitt speaks of avoiding train wrecks. The ESA is designed to produce them.

Examples abound of such train wrecks. A story highlighted in an article in the January 1992 issue of *The Atlantic Monthly* tells the tale of a young man whose dream was to build a world-class golf course and related hotel and residential development proximate, but a bit inland, of the Oregon coast. He envisaged another Pebble Beach. The land was not in pristine condition—cow pasture and an off-road vehicle site. He organized the landowners to be backers, borrowed money and engaged a famous gold-course designer. His development was frustrated by the presence of the habitat (one of the few remaining) for the rare Oregon silverspot butterfly which had been registered as threatened under the ESA.

This example suggests that an advanced planning approach might have balanced protection and development (allowing golf while protecting butterflies), moderated compensation claims, and avoided the collision. My second example again involves the Pacific Northwest, but this time the forests—especially the old growth forests. A good number of these are in public ownership largely managed by the Forest Service (in the

4. 16 U.S.C. § 1531(b) (1976).

Department of Agriculture) and to some extent by the Bureau of Land Management (in the Department of Interior). You have all read about the Administration's efforts to come to an outcome which decently balances the plight of the spotted owl against timber cutting that sustains the forest economy and the lifestyle of loggers and their families. The decade of the eighties saw a great acceleration in timber cutting to meet market demands—including a heavy Japanese demand for raw timber for process and use. Much of the increase resulted from technological advances that raised productivity. But the increase, and its haphazard means, caused broad deleterious impacts. The imperilling of the spotted owl was only one. Hand in hand came stump farms, degraded streams, and a precipitous decline in fish populations, especially salmon. Focus on the spotted owl was, in a way, a surrogate for general despoliation. It was a convenient handle for lawsuits by environmental organizations. These lawsuits were successful because those in control in the Eighties failed to seek a balance between production and protection.

The forest example again illustrates vividly how collisions between species protection and production could be moderated by intelligent planning well anterior to the dispute. If we had carried on in the seventies or early eighties the analyses done in the past 10 months, we would have moderated the timber cut, protected spotted owls, streams, salmon, and a host of other species in especially rich habitats of the old growth forests, and moderated the impacts on jobs and lifestyles that have been caused by the roller coaster of high cut and no cut.

III. EXISTING PROVISIONS THAT AMELIORATE COLLISIONS

There are two provisions in the ESA which seek to ameliorate collisions. The first involves public lands [section 7] where Federal land agencies (and private applicants for permits on the public lands) can avoid criminal and civil penalties for "take" by consulting with the Fish and Wildlife Service where actions might jeopardize the continued existence of endangered or threatened species or destroy habitat critical to their survival.⁵ If a project is contemplated, the proponent agency (or applicant) does a biological assessment (a part of an environmental impact analysis). If in the Service's opinion the action or project can go forward as planned,

5. 16 U.S.C. § 1536 (1976).

or under added terms and conditions, without jeopardizing the species' survival, the action goes forward. This is the usual result.

This public agency process helps moderate by formalizing a reviewing process before the Agency makes irreversible or irretrievable commitments of resources. If adequately followed, it would have avoided the terrible collision between the planned Tellico Dam in Tennessee and the snail darter, the first major ESA case that reached the United States Supreme Court.⁶ That case confirmed the basic philosophy of the Act as I have described it. In that instance, opponents of the project petitioned well after huge planning, and construction costs had been incurred, but, nevertheless, the project was halted to protect the snail darter.

The reviewing process, however, even if well followed, is largely an exercise of due diligence. It prevents inadvertent destruction of species. But it does not provide direction well in advance of the intended action and hence does not articulate a planning basis for land management. Moreover, even a good investigation does not provide complete assurance for species not picked up in the assessment that might still frustrate aspects of the desired project. This is less a problem in a legal sense on public land than private, except where a permit holder's investment is jeopardized.

The second process for ameliorating collisions is designed for the private landowner. It is the conservation plan (usually dealing with habitat) that specifies how the landowner plans to assure that contemplated development will not unduly impinge on listed species. This might be by so designing the project that critical habitat is preserved. This was the outcome in the first use of the process on San Bruno Mountain in San Mateo County, which provided for the maintenance of patches of habitat necessary for the survival of the Blue Mission butterfly. If the Fish and Wildlife Service is satisfied, after public hearings, that any destruction of species pursuant to the plan will not appreciably reduce the likelihood of the survival and recovery of the species, the plan is approved and the applicant is exempted from liability for incidental takings of the species.

This process could help solve the problem of the Oregon development highlighted in *The Atlantic Monthly*, if the conservation criteria can be met and the Service is willing to be decisive and so attest. Decisiveness is a problem, however, given all the uncertainties that attend a prediction of biological behavior. Often, and understandably, Service personnel want to

6. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

delay decision until more studies are accomplished despite the injection that decisions should be made on the basis of the best available scientific information. Delay, of course, can be the end of a development project because parties must be held together, options are expensive, and interest and taxes normally must be paid.

The process is designed for large land developers—ones who likely have enough land to devote to habitat protection, as well as development, and have the funds necessary to carry on the required biological and planning studies and to pay holding costs. Each conservation plan is specially sculpted. It is not a process that is well adapted for the use of owners of small parcels.

IV. THE PRESENT ESA PROCESSES AND PROPERTY RIGHTS

Before I explore what to me is a more ideal system for species protection—one built on early planning—I would like to take note of the property rights taking arguments that have been raised in the context of the Act. (In evaluating them it is useful to note that not one successful taking claim under the Act has been prosecuted in any Federal Court).

The most extreme argument suggests, as the House bill I noted would have provided, that any diminution in land value must be compensated. I cannot imagine that Representative Tauzin of Louisiana, the bill's author, believed this premised on a constitutional imperative. But it reflects a viewpoint of a number of radical reactionaries gathered under the banner of "Wise Use" and other like organizations. I say radical reactionaries because they echo arguments made during the post Civil War 19th Century and early Twentieth Century where any impediment to market outcomes was viewed by some as constitutionally prohibited by the Due Process and Contract Clauses. Interestingly, while these views frustrated such matters as child labor laws, they found no expression in cases involving laws that affected land values by prohibiting particular uses. Prior to 1922, no Supreme Court case found a taking of property rights in land by the exercise of regulatory power. Physical invasion or acquisition of title were necessary. Typical of the period was the First Justice Harlan's rejection of claims in *Mugler v. Kansas*⁷ where state-enacted prohibition rendered valueless building and machinery used to produce spirits. His grounds were broad:

7. 123 U.S. 623 (1887).

A prohibition simply upon the use of property for purposes that are declared . . . to be injurious to the health, morals, and safety of the community, cannot . . . be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes . . . but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.⁸

These outcomes in both English and American Courts reflected a long history of common law nuisance principles—both private and public—which recognized the interconnectedness of land use and the propriety of judicial or legislative intervention of protecting private parties and the public interest.

Two Supreme Court cases in the 1920's lay today's background for evaluating the Wise Use argument. First was the Supreme Court decision in *Euclid v. Ambler Realty Co.*,⁹ in 1926, (nearly 70 years ago) upholding a comprehensive zoning ordinance against the attack that it improperly deprived landowners of substantial value by prohibiting particular uses in particular zones. Since *Euclid*, it is well accepted that Americans who live in urban areas are permissibly subject to a broad range of land use restrictions designed to protect and enhance the common good.

There is no discernible reason why rural Americans are not similarly vulnerable to regulations which reasonably restrain landowner discretion in order to protect species of fish and wildlife. These arguably are simply rural manifestations of the generally urban phenomena of zoning. I suspect that part of the problem is that folk who live outside the exurban ring have considerably less familiarity with the phenomena of zoning, and in any event are contemptuous of restraints on individualism long ago accepted where populations are more dense and thus conflicting.

The second case of importance was *Pennsylvania Coal Company v. Mahon*¹⁰ which held, contrary to the prior case, that regulation which deprived a landowner of too much value would be viewed as a taking of property rights and thus impermissible. This limitation, as spelled out in the recent case of *Lucas v. South Carolina Coastal Council*,¹¹ provides the most meaningful context for evaluating the property taking issue.

8. *Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887).

9. 272 U.S. 365 (1926).

10. 260 U.S. 393 (1922).

11. 112 S.Ct. 2886 (1992).

Mahon, however, has been read by some to suggest other analytical obstacles.

Prominently it has been argued that regulations characterized as exacting benefits are different than those preventing harm. Thus, for instance, regulation for the protection of species, it is argued, is different than regulation fashioned to prevent inconsistent uses such as a shopping center in a residential neighborhood; that the latter prevents harmful use while the former—species protection—exacts a benefit. This has been one of the argued formulas to distinguish permissible regulation from unconstitutional taking based in part on *Mahon*. The distinction, however, has rarely proved decisive. The problem is, as stated by Justice Scalia in the *Lucas* case, that harm and benefit are simply opposite sides of the same coin and defy rational analytic differentiation. Thus, regulation requiring the use of land within a zone only for industrial purposes can be viewed either as preventing harms to industrial users created by proximate location of residences peopled by those who might object to noise and congestion, or a required dedication to a particular use because the city wants to attract revenues and jobs. The same analysis, and confusion, attends exclusive agricultural zoning. Most pertinently, wetlands regulation could be viewed as exacting a contribution of desirable habitat for public purposes or as a means of prohibiting a landowner from harming a vital ecosystem resource.

One of the most definitive rejections of harm-benefit distinctions arose in *Penn Central Transportation Co. v. City of New York*,¹² where the Court upheld landmark regulation which prohibited owners of buildings classified as landmarks from changing exteriors so long as the buildings produced a reasonable return in their limited configuration. The argument was that such owners were being required to forego economic opportunities afforded others in their area (e.g., greater height and densities) simply to benefit the citizens of New York and that the latter might pay for this benefit. The argument was rejected.

Property taking doctrine relevant to us is best expressed in the *Lucas* case. As many of you know, *Lucas* involved the validity of South Carolina legislation hypothesized for purposes of the decision to prohibit all uses of the complainant's parcel located on a barrier island. Justice Scalia for the Court said that such a regulation amounted to a taking if it prohibited all reasonably productive uses, unless all such prospective uses could be

12. 438 U.S. 104 (1978).

viewed as common law nuisances. The gravamen of the decision, however, was not forced dedication of the parcel to public benefit, but rather a pronouncement that regulation which sterilized land values by prohibiting all “reasonable” economic uses was invalid, even if, to the chagrin of a number of us, the reasonable economic uses were ecologically harmful. (Scalia refused to view ecological harm as a common law nuisance.) The bottom line is that ecological protection is a legitimate objective, but the regulation better leave the landowner with some reasonable economic use. Reasonable is nowhere defined, but prior cases suggest that devaluation can be substantial, but not close to total.

Many of my colleagues find the Scalia approach unsatisfactory as providing a definitive line for differentiating between valid regulation and invalid taking. The Court, however, seems to be saying that a rule that is certain in meaning, even if unsatisfactory in some applications, is better than a rule of such uncertain application that predicting an outcome is torturous; the *Lucas* rule seems no less unsatisfactory than the bright line attempts. The problem, of course, is that we are seeking a formula to determine when considerations of equity demand that a burden be shared more broadly than by a relatively small number of landowners. The circumstances where burdens are differentially imposed are so legion and so difficult to classify that it is doubtful that we can define another single theory. Moreover, we tend to suspect that burden and benefits work themselves out over time roughly equitably among landowners and that we should only intervene where results are particularly egregious. Finally, no one has come up with a workable administrative means systematically to balance costs and benefits. In fact, perhaps the most telling criticism of Representative Tauzin’s attempt to require universal compensation is its utter unworkability.

There is one problem suggested in cases prior to *Lucas* that still leaves prediction uncertain. This is how to identify the property the value of which is impacted. If I own one hundred acres and am asked to forego development of five acres important as butterfly habitat, does a court focus on the five or the one hundred in determining total deprivation? The distinction is crucial. In one analysis, I lose 5 percent of the value of 100 acres; in the latter 100 percent of the five acres. Most cases suggest that the base for the calculation will be 100 acres. Otherwise, for instance, conventional setback requirements would be constitutionally suspect.

The foregoing suggests the format for dealing with property taking claims under the present cases-by-case approach of the Endangered Species Act.

Larger developers should normally pose few problems. In most instances, such developers can internalize the costs of creating and implementing conservation plans and still have considerable value left. Either habitat can be set aside or developers can mitigate by providing habitat elsewhere. So long as the Service avoids undue delay, successful attack is doubtful.

That taking claims can be avoided, of course, does not assure developer cooperation. Perhaps the most vexing problem involves certainty. Expensive dedication or mitigation in return for a permit does not protect against the discovery of another species that will start the process all over again unless there has been total buildout. In modern days of staged development, for many in this State under developments agreements, the risk can be significant.

Successful taking claims involving smaller landowners are more probable. It is more likely, for instance, that all or a very large proportion of a small landowner's property will consist of critical habitat. Under the ESA, the Service can take into account the economic impact of critical habitat designation on a landowner if exclusion from critical habitat designation will not lead to the extinction of the species in question. There is thus the possibility of an exemption (much like a zoning variance) in many cases.

Other ameliorating schemes are not feasible, however, under a case-by-case approach. Considerable thought is being given these days to devices that spread out burden and benefit of regulation to assure more equitable distribution of costs, even if not required by the Fifth Amendment. One device, used successfully in the New Jersey Pinelands, is transferable development rights. Unfortunately, however, the case-by-case approach of the ESA, makes it impossible to use such an approach.

In the absence of a spread-out technique, and where "variances" are impossible, it will probably be necessary to acquire the parcels of smaller owners. Finding a source of funds is difficult and it is improbable that local levies will be devoted to effectuate a purely federal program. It is possible, of course, to liberalize land exchange opportunities. Under present limitations, however, exchanges will rarely be available. This will result in liberal use of exemptions and, where possible, heavy reliance on public lands to carry the critical habitat burden and such a result might be unwise as a matter of both biology and economics.

V. PLANNING AND REGULATING IN ADVANCE

Advance multi-species planning, as a compliment to the species-by-species approach, solves a multitude of policy, planning, and legal problems inherent in the ESA. An easy way to envisage how this would work is to imagine a county or city general plan with a conservation element (perhaps combined with the open space element) that identifies critical habitat for numbers of species. Imagine further that the important habitat is defined on a regional ecosystem basis by a regional or State agency (in California, the State Fish and Game Commission) under relevant statutory and regulatory guidelines. Further imagine an implementation strategy for protecting the lands so identified in a systemic way. Development would be permitted under rules that protect needed habitat or prohibited completely in some areas. Finally, imagine review by the Federal Fish and Wildlife Service which would be empowered to exempt the whole of the cooperating political jurisdictions from species "taking" limitations for at least ten years, if it was satisfied that the multispecies plan adequately protected presently listed species and nonlisted candidate species waiting in the wings. Presume that the exemption could be ended for substantial departures from the plan, thus leaving the Service as a monitor, but not a direct regulator.

Note how many problems of the Act are addressed by this approach. First, the approach ameliorates the problem of total species coverage by choosing out habitat protection as the organizing principle for the application of regulation. Thus, priority is determined on the basis of "rich" habitat, the sustenance of which will seek to assure survival of species before they need to be listed, as well as listed ones. Of course, some species will be lost by reliance on this process; but they are being lost now because energy and money are limited and they are never reached under the case-by-case approach.

Secondly, the approach also moderates the balancing problem by integrating habit conservation into a process where other needs are also portrayed. The likelihood of making better accommodations between conservation and development where all is being planned together is much greater than where species preservation is a last-minute add on.

Finally, the approach also addresses notable legal and planning problems. It creates geographic and temporal zones of relative certainty. If the conservation element permits development in particular places, developers, local officials, and environmentalists know where these are. If the element prohibits development, or conditions it under performance

standards, another kind of certainty is created and the market can adjust itself to the reality. Moreover, the very act of designation focuses argument on the important values at stake and minimizes the probability of future destructive change in the regulations. Advance planning helps avoid the collisions of crisis management.

Advance designation also aids in the assessment of the costs of critical habitat conservation and suggests means to minimize the need to acquire property into public ownership. Also, by identifying properties which probably must be acquired, it arms local conservancies with important information to guide their acquisition programs. Additionally, "zoning" of this sort permits the designation of transfer zones for purposes of establishing a market for development rights which will tend to minimize acquisition requirements. Finally, advance designation gives time to organize those institutions necessary to manage habitat and to determine the means for raising funds to operate them.

There is a serious limitation, as well as a heady opportunity, offered by the multi-species planning approach. The limitation is that the federal government, alone, cannot conceivably create and administer a land planning and regulation system on private lands within the States. Even if constitutionally permissible, pervasive federal land planning and zoning is a political impossibility. The opportunity, however, is that fashioning such a system would stimulate a creative federalism with states and local governments playing a major role in both planning and management and with the federal role—with respect to private land—limited to setting standards and monitoring performance. This is a much more salubrious role for federal officials than to be the equivalent of zoning administrators.

VI. A TEST OF THE APPROACH—IN CALIFORNIA

A major experiment towards these ends is occurring in Southern California in a joint operation between state and federal officials. The state mechanism is the Natural Communities Conservation Planning Act which provides for regional planning at an ecosystem level guided by the California Department of Fish and Game. NCCP works in concert with the California Endangered Species Act—an Act quite similar to the federal version.

Under the NCCP, the State Department of Fish and Game entered into agreements with local governments and private landowners for the preparation of plans for management and conservation of multiple species, including ones in jeopardy of extinction. The plans must be consistent with

State guidelines and must be approved by Fish and Game to be effective. Essentially they identify habitat important to the sustenance of multiple species and establish rules designed to assure continued sustenance. These might include limitations on development and actions necessary to improve habitat. The plans cover public and private lands within cooperating local jurisdictions, if the owners agree to such coverage. The inducement for agreements is the state's willingness to waive prohibitions against takings of protected species on land covered by enforceable plans. The beauties of the approach are twofold. First, the studies and planning ideally occur before particular development is proposed. The approach is thus proactive, not reactive—much like advance urban planning and zoning. Second, the approach is habitat oriented, protects a multiplicity of species (including endangered ones), and reduces the numbers of species that will become vulnerable to extinction, thus minimizing conflicts.

The California approach is being tested for the first time in Orange, Riverside, and San Diego Counties. The federal government is an active participant in two regards. It has joined the California effort by agreeing to permit incidental taking of a threatened species under the federal law—the gnatcatcher—on lands for which NCCP plans have been approved. It has also provided appropriations to help fund the scientific efforts that underlie the preparation of the plans.

The California approach addresses the three important needs I previously identified: (1) It protects species before they are on their last legs; (2) ideally, it acts in advance of conflict and producte relative certainty as to which lands are and are not sensitive for species protection, thus letting the market absorb the information and act consistently; and (3) it provides a rich opportunity for state/federal interaction with local folks doing land planning and regulation and federal officials exercising oversight to assure that these will protect endangered species. Moreover, it provides a good model for national adoption which could be stimulated by modest amendments to the Federal ESA.

This combined federal/state approach is exactly what my boss—Bruce Babbitt—applauds. In his words:

“The only effective way to protect endangered species is to plan ahead to conserve the ecosystems upon which they depend. I applaud the cooperative effect here to protect the gnatcatcher. This may become an example of what must be done across the country if we are to avoid the environmental and economic train wrecks we've seen in the last decade.”

VII. CONCLUSION

Advance designation on a habitat basis affecting private lands will require not only changes in the ESA, but the willingness of states to undertake obligations similar to those being developed in California in San Diego, Orange and Riverside Counties covering coastal sage shrub habitat. Incentives will be necessary, but that is another topic for another time.

Until this millennium arrives, the U.S. Fish and Wildlife Service can experiment with the approach on ecosystems on the public lands. Beginnings have occurred in the Pacific Northwest and in South Florida. We should take advantage of these opportunities to hone our methodologies and prepare for a future that better marries species conservation and development and deals effectively with problems encountered under the present Endangered Species Act.