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WHOSE LAND IS IT ANYWAY? ENDANGERED SPECIES, PRIVATE PROPERTY, AND THE FIGHT FOR THE ENVIRONMENT

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The Endangered Species Act (ESA) has come in for a lot of inflammatory rhetoric in recent years, primarily at the hands of property rights groups, land-intensive businesses, chemical manufacturers and users, and their associations. The Act is up for reauthorization. (Actually, it expired three years ago, but most statutes, ESA among them, remain in effect unless repealed.) Reauthorization provides an avenue for change, focusing the attention of special-interest groups and making the Act a more attractive target. Prominent among the charges levelled by its detractors are: ESA protects listed species to the exclusion of human needs; ESA ignores economic considerations, imposing burdensome, inequitable costs on landowners, businesses and workers; ESA constitutes an unconstitutional "taking" of private property without compensation. In this paper, I distinguish legitimate concerns about the Act and the endangered species process from self-serving carping, summarize the Administration's and Congress' proposals for reforming the process and the Act; and report on the status of and prospects for reauthorization. I begin by reviewing the basic structure of the Act, and the stages at which economic considerations enter the process.

The Endangered Species Process

For our purposes, the endangered species process is composed of three elements: listing (§4); the subsequent protections, prohibited activities and enforcement (§7 and 9); and relief/exemption from the sanctions of the Act (§7 and 10). Consistent with the central purpose of the Act (the conservation of endangered, threatened species and their ecosystems), listing is done solely on the basis of biological considerations. Along with listing a species, the Act requires the Secretary to designate critical habitat. Although listing is based on biology, in configuring critical habitat, the Secretary must consider economic impacts, and may exclude potential sites if their opportunity costs are too high. The final configuration must satisfy the biological imperative, however.

Regulatory Constraints—Once listed, §9 protects a species against "taking"—broadly, harming in some way, including degrading its habitat. The take prohibition applies to all entities, private and public. Plants, however, are not protected on private land. In addition, §7 prohibits federal

actions that would jeopardize a species or adversely modify its critical habitat. Sometimes, §7 can affect private entities, because some private activities require a federal permit or other federal action. These prohibitions are not tempered by economic considerations, and it is this feature which makes the Act such a tempting target for vilification.

Regulatory Relief—The situation is not quite so rigidly inflexible, however. As indicated above, §7 and 10 provide opportunities to reduce the regulatory burden; §10 allows the Secretary to grant permits to take listed species. Taking must be incidental to engaging in otherwise legal activities, and permits are conditioned on carrying out an approved conservation plan. Protective measures can involve land set-asides, but many do not. Often the restrictions are limited to management changes and prescriptions. Restrictions on the use of agricultural chemicals and insecticides are a principal example. Generally, such adjustments to management practices involve minimal or modest costs.

Not only does §7 allow economics to be considered; it also provides for complete exemption from the strictures of the Act, if a project is sufficiently important. Once a federal agency determines that an action it is considering may affect a listed species, §7 requires it to consult with the Fish and Wildlife Service (FWS) to try to devise a way to conduct the proposed action without jeopardizing the species. In the vast majority of cases, project modifications consistent with conserving the species are effected at minimal cost. If there are no reasonable modifications, however, the agency can appeal to a cabinet-level committee for an exemption. Exemptions are not granted lightly. The administrative hearing process can be both lengthy (six months or more) and costly, and the standards for exemption are exacting; basically, that the project is of paramount economic import. Thus, contrary to the inflated rhetoric, the process does take economics into account and does embody considerable flexibility.

Perverse Incentives and the Nature of the Costs

Having clarified the record, however, it would be disingenuous not to acknowledge the Act's effects, or to contend that it does not entail costs or inequities, or could not benefit from reform. Nothing with the scope of the Endangered Species Act is devoid of costs.

Navigating the administrative process can be time consuming and create uncertainty, both of which are costly. The restrictions on private land use can reduce the income which landowners can earn from their property. All of this creates anti-conservation incentives, with landowners frequently striving to avert the discovery of a species or its habitat on their land. Indeed,

anti-conservation incentives emerge even prior to listing. Depending on the specific circumstances, once a species is proposed for listing, landowners may have an incentive to incur advocacy costs, hiring scientists, planners, lawyers and lobbyists in an effort to prevent land-use restrictions from being applied to their property. Because of the generally inadequate habitat conditions that exist once a species reaches the stage at which it is a candidate for listing, there is likely to be a greater need for strict conservation of the remaining habitat. This may reduce the opportunities for compatible commercial activities. Often landowners, caught in such circumstances, complain that it is unfair for them to bear such costs, given that other landowners were able to degrade or destroy habitat before the species was listed (Goldstein and Heintz).

Thus, there are indeed costs to protecting endangered and threatened species. Be mindful, however, that advocates routinely misrepresent the effects of the ESA in order to exaggerate the potential burdens for development. The resurgent property rights movement in this country is particularly prone to this offense. What one owns when one owns land, what one does and does not have title to, what one's property rights are, are all central to the issue of who should bear the burden of regulatory costs, whether from ESA or any other statute. The charge has been levelled that ESA constitutes an unconstitutional "taking" of private property without compensation. Numerous bills have been introduced in Congress this year to address this issue. A brief sojourn into legal history will prove enlightening at this point.

Property Rights and Their Evolution

One does not have unfettered use of one's property. Property is always purchased subject to prevailing limitations. Property rights (commonly called "the bundle of sticks" in the legal literature) are not inalienable, and never have been. They did not descend from the Mount. They are a creature of the social compact, and they evolve with the changing nature of society. Indeed, most takings challenges are evolutionary exercises. They are attempts to redefine property rights rather than to preserve existing ones.

The property rights bills now before the Congress are excellent examples of the genre. The bills profess to be protectors of constitutionally guaranteed rights, but they stand in sharp contrast to court doctrine, and are far from subtle in redefining property rights. At numerous junctures they dispense with limitations long in effect.

To varying degrees, the bundle of sticks that constitutes property includes the right to: exclude others from one's property; occupy and derive beneficial use; convey and bequeath (McElfish, p. 10240). These attributes

of U.S. property law have their roots in English common law, have evolved over centuries, and have never been absolute. The right to use and manage one's land as one saw fit was fundamental to 18th century England and colonial America. But, rooted in both English common law of the time and property law in colonial America, was the concept of protection from externalities (a cost imposed upon person A as a result of B engaging in an activity beneficial to him). A landowner had the right to the "quiet enjoyment" of his property, by which was meant "the power to prevent any use of his neighbor's land that conflicted with his own private enjoyment" (McElfish, p. 10237). Inevitably, development and industrial society conflicted with the absolute nature of these prior rights to protection from harm. Legal doctrines began to emerge which deferred less to prior rights, and gave more emphasis to the balancing of beneficial uses.

Thus, the laws governing property have been abridged and modified regularly to reflect the changing nature of society. Sometimes the conditions inherent in existing contracts have been preserved, and new doctrines applied only to future transactions; sometimes changes have been applied retroactively. Sometimes constraints have been accompanied by compensation; sometimes not (Goldstein and Watson).

Property Rights and the ESA

The enactment of ESA in 1973 constituted an amendment to existing property rights. One could make a plausible argument that some property owners at that time suffered capital losses; in almost all cases, partial losses. Congress could have compensated affected landowners in 1973. It chose not to. This is standard practice; legislative compensation provisions are extremely rare. Most legislation affects people's income or wealth in one direction or another—some positively, some negatively. We do not generally compensate those who have their activities restricted by new laws or regulations, nor do we tax those who experience windfall gains as a result of government actions. To do so would make it virtually impossible to govern. In the words of my learned colleague, Joe Sax: "We don't pay people not to do bad things to us." We don't pay them not to dump toxic waste in our waterways; we don't pay them to stop manufacturing CFC's which punch holes in the ozone layer; we don't pay them because zoning prohibits them from siting a chemical facility in a residential area, and we don't pay them not to use their property for criminal activities. Destroying endangered species or their habitat is a bad thing, and, as a property owner, you do not have the right to engage in it. In the legal vernacular, it is not one of the sticks in the bundle of rights which you got when you purchased property.

What about purchasers of land since 1973, or landowners whose property is affected when a new species is listed? Should they be compensated? I am

told that, in response to this question, Gordon Tulloch, a well-known conservative economist and favorite of the right, sneered, "a bunch of babies," by which I take it he meant that investors should be mindful of the potential for government regulatory action, understand that they are taking risks when purchasing property, and adjust their offering price accordingly.

Is any of this a violation of the Fifth Amendment to the Constitution — taking private property for public use without just compensation? In a word, no. The courts have taken a very cautious view of takings claims, requiring a near-total loss of value before compensation is due. In so doing, they have rejected the proposition that property owners are entitled to the *maximum* potential return on their investments. Again, to do otherwise would make such basic local community protections as zoning, health and safety, and pollution control unmanageable.

The Art of the Possible

I cannot tell you how few converts one makes among landowners and property rights ideologs with this scholarly little recitation of the evolution and status of property rights law, and its underlying ethic. The classically conservative stance notwithstanding, politics is the art of the possible, and sometimes it is not possible to be philosophically pure when trying to govern.

Administration Proposals

After a period of reflection, the Administration proposed a 10-point program for improving the ESA (White House Office of Environmental Policy). Many of the changes are aimed at reducing the regulatory and economic burden of the Act and providing landowners with certainty about their responsibilities and administrative decisions. Principal among these are:

Early identification of allowable activities. In conjunction with listing, the Services (FWS and NMFS) are to identify specific activities that are exempt from the "take" prohibitions of §9.

Expedite habitat conservation planning (HCP). The Services have published a draft procedure for streamlining the §10 permitting process, including designating categories of HCPs based on an activity's threat to the species (high, medium or low). The proposal calls for simplified and expedited processing for applications involving low or medium impacts.

"No surprises" policy. In the event of unforeseen circumstances, no additional land restrictions or financial contribution will be required from

landowners operating under an HCP. There is some fine print. Under extraordinary circumstances, the FWS could seek additional mitigation, but it would be limited to modifications within the habitat already conserved or to operating prescriptions for the conservation program. The Administration has recommended that Congress enact similar certainty assurances for landowners who cover candidate species in their HCP. The assurances would indemnify the landowner from additional mitigation requirements in the event that the candidate species is listed.

Small landowner exemption. This provision would exempt small landowners who use their property as a residence, want to disturb five acres or less, or want to undertake activities that have a negligible effect on threatened species. The FWS has published a proposed rule. It covers new listings of threatened species, but the FWS is considering a corresponding exemption for species already listed. The Administration has asked Congress for authority to extend the rule to endangered species.

The Administration is also considering ways to use market mechanisms to achieve gains in conservation efficiency and equity (The Keystone Center; Fischer and Hudson). Incentives may be able to help to bring about land use patterns that achieve habitat objectives at lower cost. Incentives may also induce innovations in the production of habitat and in the techniques employed in managing land for commercial uses that allow habitat objectives to be met at lower cost. Land management techniques that make habitat conservation and other uses more compatible hold particular promise for reducing the costs of meeting conservation goals. It is not feasible, however, to rely primarily on markets for the preservation of ecological resources. Many critical conditions necessary for markets to function properly cannot be fulfilled for such resources. To function properly, market mechanisms for conservation have to be used in conjunction with diligently enforced regulatory regimes (Goldstein and Heintz; Goldstein). Finally, conservation incentive systems generally require funding (tax inducements, direct payment schemes), and although they may achieve a given objective more cheaply than command and control, Congress is always wary of funding a new program.

Congressional Bills

There are numerous bills addressing the ESA in the Congress. None are serious efforts to reform the process for protecting vulnerable species and their ecosystems. Their intent is to reduce protections to a minimum, while freeing up private activities. In general, they do this by: limiting the grounds for listing; establishing numerous opportunities for procedural challenges to listing, including judicial review; abandoning the biological imperative

by making economic considerations an element in the determination of any conservation plan for a species; narrowing the definition of "take," and, hence, the regulated offenses; restricting habitat protection primarily to designated federal lands (parks, wilderness areas, and special refuges), and on private lands, requiring compensation for landowners, or relying largely on voluntary conservation efforts. The bills are too numerous for me to summarize each here. I focus on the principal bill in the House, HR 2275, but S. 768 is similar in many respects.

Conservation objectives and requirements. Deletes as a goal of the ESA the conservation of ecosystems on which listed species depend.

Abandons the restoration of species to a recovered status as the central goal of the ESA. Following listing, a task force would assess the conservation needs of the species, and the social and economic effects of such conservation. Based on the task force's report, the Secretary is given broad discretion to craft a conservation objective for the species—ranging from only prohibiting deliberate killing of members of the species to complete recovery.

Requires emphasis on captive breeding as a technique for protecting and restoring species, ignoring the National Academy of Science's conclusion that captive breeding is fraught with problems and not a substitute for habitat protection and other conventional conservation measures.

Diminished protections. Eliminates adverse modification of habitat as a prohibition under §9, thereby reversing the recent Supreme Court decision in Sweet Home. Defines "harm" only as the direct killing or injuring of a member of a listed species.

Restricts critical habitat designations to areas occupied by a species at the time of listing, thereby handicapping conservation efforts to re-establish a species and achieve recovery. Removes protection for distinct populations.

Reduced protections on public lands. Amends the requirement that federal agencies use their authorities in furtherance of the purposes of the ESA for the conservation of listed species, to require such actions only to the extent consistent with their primary missions. Allows federal agencies to self-regulate and determine whether their actions would jeopardize a species (violate §7), and reduces the jeopardy standard from "likely to jeopardize the continued existence of the species" to "significant diminution of the likelihood of survival of the species by significantly reducing the...entire species."

On federal lands, species are to be conserved only in "biological diversity reserves," crafted from existing parks, refuges, wilderness areas and areas offered by non-federal parties.

Compensation. Requires full compensation of an owner of private property for diminutions in the value of any portion of his property by 20 percent or more due to federal actions taken under the ESA. Compensation would come from the action agency's budget, thereby discouraging enforcement.

This last deserves special attention. It is a radical provision which would expand property rights and the entitlement to compensation far beyond current court standards. (This Congress is particularly fond of this type of legislation; similar provisions having been introduced in over 100 bills since January.) Under current court standards, if a regulation with a valid public purpose eliminates all economic use (including reasonable, investment-backed expectations) of an *entire piece of property*, a taking has probably occurred. In contrast, this bill authorizes segmentation. Thus, if an agency action diminishes the fair market value of a *portion* of a property by more than 20 percent, the property owner would be entitled to compensation. In brief, the bill would expand the judicial standard for property rights and the entitlement to compensation by:

- Ignoring whether the action had a valid public purpose;
- Focusing on the regulated portion of the property, i.e., specifically allowing segmentation; and
- Lowering the threshold for eligibility for compensation from essentially 100 percent (the constitutional standard) to 20 percent.

The provision is a prescription for disaster—extensive litigation, frivolous claims for compensation, endless bickering about changes in property values and their causes, inestimable budgetary drains. If enacted, this bill will radically alter the relationship between the citizenry and its government, and set a precedent for legislation to come. The bill does nothing to address the acknowledged inequities and inefficiencies under ESA, opting instead for sweeping compensation provisions, and crippling the protections for endangered species and their ecosystems.

These species aren't here for nothing. Each plays a role in a complex, integrated, interdependent ecosystem. If you think conserving the ecosystem is expensive, try getting along with one that is severely degraded and malfunctioning.

Finally, a look at the prospects for reauthorization. It does not appear that gridlock and confrontation have given way to bipartisan statesmanship. Secretary Babbitt has condemned the congressional proposals as irresponsible and unacceptable, and has recommended a presidential veto in the absence of significant revisions. S. 768 has a private property rights/ compensation provision, but it is much more vague than that in the House

bill. Compensation bills have fared less well this year in the Senate than in the House, so the prospects for this particular feature are questionable. Many of the other provisions under consideration in the House and Senate bills would have to be significantly revised before a bill would be acceptable to the Administration. Given the complexity of this issue and Congress' other priorities, it seems unlikely that bills could pass both houses; that the differences will be resolved in conference, and that a bill will be sent to the President before the end of the year. It is more likely that the bills now before the Congress are the opening salvos, and that the real action will occur next year. Presidents try to avoid controversial decisions during an election year. But unless a more responsible reauthorization bill emerges from the legislative process, a veto is virtually certain, and likely can be sustained.

NOTE

The views expressed in this paper are the author's, and do not necessarily reflect those of the Department of the Interior.

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