A BEARISH LOOK AT THE ENDANGERED SPECIES ACT: Christy v. Hodel and its Implications

by Dan Ritzman

History of the Endangered Species Legislation

In 1900 the near extinction of the Passenger Pigeon concerned Congress deeply about the hastened extinction of species due to human activities. In that year Congress passed the Lacey Act—the first piece of legislation addressing the problem of extinctions. As with most of the subsequent laws this Act was very limited in the number of species it protected. Over the next 66 years, the Legislature produced little in the way of meaningful wildlife conservation legislation. But during the last 25 years, Congress has made significant steps toward guaranteeing the continued existence of all species.

Congress passed the Endangered Species Preservation Act (ESPA) in 1966. ESPA authorized the Secretary of the Interior to acquire new habitat for endangered species of vertebrates. Beyond the increased ability to acquire land, ESPA directed the Secretary to evaluate other programs under his control and bring them into conformance with the goals of species preservation.

All in all, ESPA "was a vague policy directive that served primarily as a symbolic statement of congressional support for endangered species protection."[1] In 1969 Congress passed the Endangered Species Conservation Act (ESCA) in an effort to remedy some of the weaknesses in ESPA. ESCA expanded the number of species covered by ESPA and increased the coverage to a global scale. The international aspect of ESCA was far reaching, it prohibited the importation of any endangered species except for scientific or zoological purposes.

Despite the improvements of ESCA, endangered species protection was still flawed. These two Acts contained four major flaws: (1) The laws provided no protection to endangered populations of healthy species. For example, if there were a healthy population of Bald Eagles in Alaska the Bald Eagles in the lower 48 were not protected. (2) There was no mention of a prohibition against the taking of an endangered species. Regulation was left to the states. (3) ESPA and ESCA designated the responsibility of species preservation to just a few agencies. (4) Both acts only covered vertebrates.

In 1973, Congress enacted the Endangered Species Act.

In 1973 Congress enacted the Endangered Species Act (ESA) 16 U.S.C.A. 1531, a truly comprehensive piece of legislation which remedied the major flaws of the previous endangered wildlife legislation. ESA affords protection to all endangered members of the plant and animal kingdoms, and places the responsibility of species preservation on all agencies of the federal government. ESA clearly states that the life of an endangered species will be afforded the highest priority.[2]

The enactment of ESA fueled a number of court cases, a majority of which attempted to determine the intent of Congress and construe the meaning of the Act. The most famous, or infamous, of these was TVA v. Hill. 437 U.S. 187 This case pitted the express language of ESA against a large, expensive federally funded project.

In 1967 the Tennessee Valley Authority began construction of the Tellico Dam on the Little Tennessee River. After the dam was completed, but before the gates of the dam were closed and the water started to rise, a biologist discovered a fish that was believed to exist nowhere else but in that stretch of the Little Tennessee River about to be flooded. In January of 1975 the Secretary of the Interior listed that fish, the Snail Darter, as endangered.

Opponents of the dam took the case to court claiming that the ESA requires TVA to keep the dam open to avoid causing the extinction of the Snail Darter. The Court of Appeals enjoined TVA from closing the gates of the dam and directed that the injunction "remain in effect until Congress, by appropriate legislation, exempts Tellico from compliance with the ESA or the Snail Darter has been deleted from the list of endangered species." 437 U.S. 191 This decision was affirmed by the US Supreme Court. 437 U.S. 187 Congress did pass legislation that exempted the Tellico Dam from compliance with the ESA. TVA closed the gates and filled the reservoir. Subsequently, biologists did find other populations of Snail Darters in other rivers.

Christy v. Hodel

In Christy v. Hodel neither the intent of Congress nor the wording of the ESA are in question, rather Christy seeks to examine the constitutionality of the actions of government agencies mandated by the ESA.

Facts and District Court Decision

Richard Christy grazed his sheep on land adjacent to Glacier National Park in Northern Montana, which he rented from the Blackfeet Indian Tribe. A few days after he released his sheep onto the land he began to lose sheep to grizzly bears. His shepherd attempted unsuccessfully to scare the bears away. Christy then hired a trapper hoping that he could capture the bears and move them to a new location. Shortly thereafter, Christy saw a couple of bears moving toward his flock. He scared one of the bears away and shot and killed the other bear. The Department of the Interior (DOI) fined Christy $3,000 under the Endangered Species Act (ESA) and the Grizzly Bear Regulations (50 CFR 17.40) for killing the bear.

Richard Christy began to lose sheep to grizzly bears.

The Secretary of the Interior had listed the grizzly bear as endangered but the Grizzly Bear Regulations do allow very limited sport hunting of the bears to keep their population viable. These regulations are promulgated under ESA and they currently allow the state of Montana to issue 14 permits to hunt grizzly bears. Biologists have determined that humans need to "remove" that many animals to keep the population of bears steady.[3]

DOI held an Administrative hearing at which Christy admitted to killing the bear, but claimed it was in defense of his property, the sheep. The Administrative Law Judge agreed with DOI that Christy should pay a fine but reduced the amount to $2,500. Christy filed an administrative appeal on the grounds that the imposed fine infringed on his constitutional right to protect his property. DOI denied the appeal because DOI cannot rule on the constitutionality of laws.

In January of 1986, Christy joined with other ranchers (his co-plaintiffs, Guthrie and Perkins,) from Teton County, Montana who had lost sheep to grizzly bears, and filed suit in the U.S. District Court of Montana. Christy sought a permanent injunction to keep DOI from enforcing ESA and the Grizzly Bear regulations. As in the administrative hearing, plaintiffs argued that DOI deprived them of their fundamental right to possess and protect their property. 857 F.2d 1327 Further, the ranchers claimed that the action of the Grizzly Bears constituted a "taking of their property by the Federal Government without just compensation or due process and ESA deprived them of equal protection under the laws." 857 F.2d 1327.

DOI maintained it had followed the letter of the law and filed a counterclaim asking for the $2,500 plus interest. In May 1987, The district court granted DOI's motion for

summary judgement. The court found for the defendants, rejecting all of the plaintiffs' arguments, and held that the evidence in the Administrative Record supported the $2,500 fine.

The Ninth Circuit's Appellate Decision

On June 30, 1987, the plaintiffs appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit considered five issues. "(1) Do the ESA and the Regulations as Applied Deprive Plaintiffs of Property without Due Process? 857 F.2d 1328 (2) Do the ESA and the Regulations, as Applied, Deny Plaintiffs Equal Protection of the Laws? Id. at 1331 (3) Do the ESA and Regulation Effect a "Taking" of Plaintiffs Property without Just Compensation in Violation of the Fifth Amendment? Id. at 1334 (4) Does the ESA Unconstitutionally Delegate Legislative Authority to the Secretary? Id. at 1335 (5) Did the Secretary Exceed the Scope of His Delegated Authority in Promulgating Regulations Permitting Limited Sport Hunting of Grizzly Bears?" Id. at 1336.

To answer the first question the Ninth Circuit Court looked to the U.S. Supreme Court decision in San Antonio Independent School District v. Rodriguez 36 U.S. 16 (1973). In that case, the Supreme Court held that legislation must impinge upon Constitutionally protected rights for it to undergo strict judicial scrutiny regarding its violation of the due process clause. However, the Christy court cited approvingly Belter v. Middendorf 632 F.2d 808 (1981) in holding that when the legislation does not infringe upon a fundamental right, "the law need only rationally relate to any legitimate end of government." Therefore, the ESA would be upheld if the court could hypothesize a basis rationally related to a legitimate reason for Congress to have passed the Act.

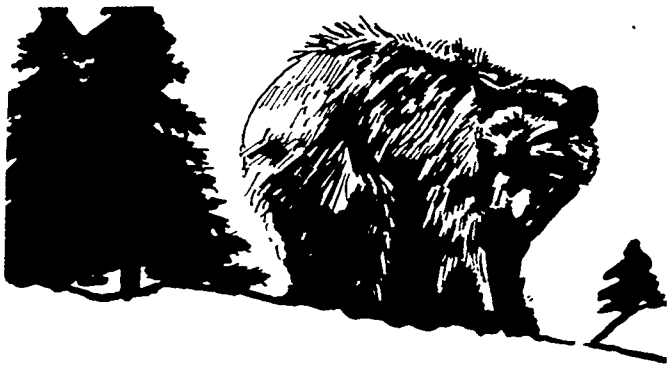
The Ninth Circuit rejected the claim that the 5th Amendment guarantees the right to kill federally protected wildlife in defense of property.

The plaintiffs asked the court to infer that the Constitution protects a person's right to kill threatened species in defense of personal property despite the fact that the Constitution does not explicitly recognize such a right. The court pointed out that the U.S. Supreme Court has recently expressed reluctance to discover new fundamental rights embedded in the due process clause. Because of this reluctance, the Ninth Circuit Court rejected plaintiffs' claim that the Fifth Amendment guarantees the right to kill federally protected wildlife in defense of property.

Since the court determined that the ESA did not impinge upon a constitutionally protected right it did not subject the ESA and regulations to "strict judicial scrutiny." Instead the court set out to determine if the Act furthered any legitimate governmental end. To make this determination the court turned to the language of the Act itself. The court found Congress' intent in passing the Act was "to halt and reverse the trend towards species extinction, whatever the cost." TVA v. Hill 437 U.S. 187. The ESA and grizzly bear regulations passed both of the tests that the court established, therefore the court held they did not deprive the plaintiffs of their property without due process.

Regarding the question of equal protection, the court stated that the plaintiffs must first show that the law classifies people in some way. The plaintiffs argued that in this instance the ESA divides people into two distinct classifications: First, people who graze livestock near grizzly bear habitat and the rest of the people in the United States. Second, people allowed to hunt the bears for sport under certain conditions and livestock owners who are not allowed to hunt the bears. The court held that the first classification could not be found in the ESA, but the second classification could. 857 F.2d. 1334.

The plaintiffs argued that if the bears are endangered then there is no rational basis for sport hunting. But the court pointed out that Congress stated, "when population pressures within a given ecosystem cannot be otherwise relieved, to conserve the population may require regulated taking."[4] Consequently the court ruled that sport hunting of the bears has a rational basis and the classification in the ESA does not deny the plaintiffs equal protection of the laws.



The third question reflects the plaintiffs assertion that by protecting grizzly bears, the DOI has made the bears "governmental agents" and as agents these bears have taken the plaintiffs property without just compensation. The court noted that the plaintiffs employed faulty logic. The promulgation of the regulations is a government action, but the regulations leave the plaintiffs in full possession of their property "bundle." It is the bears that are "taking" the sheep, not the regulations.

Other courts have dealt with the issue of damage to private property by wild protected animals and have found that protected wildlife are not government agents. The plaintiffs, in effect, would have the government insure its citizens against the actions of the protected species. But, "the federal government does not own the wildlife it protects, nor does the government control the conduct of such animals." 857 F.2d 1336

The plaintiffs argued that the authority delegated to DOI is unconstitutional since it "fails to provide the necessary standards either to direct the Secretary in the promulgation of the regulations, or for a reviewing court to employ in examining the content of the regulations against the statutory authorization." Id.

Congressionally authorized sport hunting of grizzly bears does not violate the ESA.

To address this assertion, the Court again turned to the language of the ESA itself. The Act states "[w]henever any species is listed as a threatened species ... the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d) (1982).

The court found that Congress can establish standards and delegate the responsibility for "effectuating" its legislative policy. The court believed that Congress, by limiting the Secretary's legislative authority has established a standard with enough precision that the court could determine when the secretary has overstepped his bounds. Therefore the ESA in not unconstitutional in its delegation of powers to the Secretary.

In presenting their fifth assertion, the plaintiffs argued that the regulations, which allow sport hunting of grizzly bears, run contrary to the purpose of the ESA. The court, however, found that Congress has authorized limited hunting of threatened species under special circumstances when there exists no other way to relieve population pressure within a certain ecosystem. In this case the Secretary, in consultation with the Director of the Fish and Wildlife Service, had determined that the grizzly bear population pressure in northwestern Montana can not be regulated by any means other than sport hunting, and the Secretary had limited the area.

The Court found for the defendants on all five of the major questions that this case raised; therefore the court affirmed the district court's order for summary judgment. On June 12 1989 Christy appealed the case to the U.S. Supreme Court. The case identification became Christy v. Lujan to reflect the recent change in administration at DOI. The Court denied the Petition for writ of certiorari, with Justice White dissenting. 489 U.S. 1016

The significance of Christy v. Hodel

The Endangered Species Act has proven itself to be one of the stronger environmental statutes passed by Congress. Many other "environmental" laws, such as the National

Environmental Policy Act and the National Forest Management Act, have been interpreted by the courts to be laws that do not "mandate" an environmentally sound option. ESA on the other hand, was adopted as an extremely strict law that left little room for interpretation. ESA made it clear that Congress wanted to protect the threatened species above all other goals.

The law underwent tough judicial scrutiny in TVA v. Hill and emerged intact with the majority of the court finding that if Congress had not meant to afford this much protection to wildlife, then Congress would need to change the law. Congress did add some minor amendments and regulations in the late 1970's and early 1980's; but the strongest provisions of the Act are still in place, as evidenced by Christy.

While most of the cases that have dealt with ESA attempt to construe Congress' intent in making the law, Christy v. Hodel does not. Christy v. Hodel accepts Congress' intent and tests the constitutionality of this intent. This case looks at the law in light of the Bill of Rights, and with regard to the power of Congress to delegate authority. The court examined the language of the Constitution and the language of the Endangered Species Act and found that the Act did not stray outside the power of the Federal government as granted to it by the Constitution.

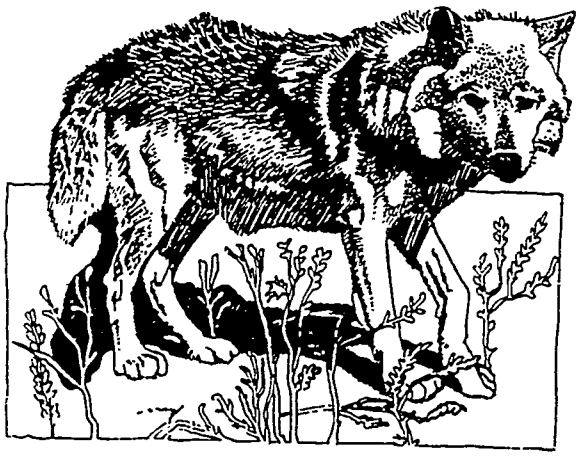
Congress took a stand on the side of threatened species.

Specifically, the law does not infringe on a persons right to due process, nor does it deny equal protection under the laws. Additionally the Act does not deny just compensation for a "taking" of personal property. And finally the court found that Congress did not violate the Constitution by granting limited legislative power to an administrative agency in the Executive Branch.

In writing and passing the Act, Congress took a stand on the side of threatened species, and the ruling in Christy v. Hodel fortifies that commitment. The decision in Christy is a relief to environmentalists for two reasons. First because traditionally, many rulings do not favor the environmentally sound action. And second, because it strengthened an important piece of wildlife conservation legislation.

ESA's continuing Impact in the Northern Rockies

The major beneficiaries of this decision are obviously the animals. This case could set a precedent for other litigation involving endangered animals that have had a harmful impact on the local economy. The livestock owners suffer the most immediate harm as a result of the holding in Christy. The battle between the ranching industry and endangered species is still raging in the northern Rockies.



Wolves are now the focus of most of the ranchers attention. Slowly and methodically gray wolves have been moving down from Canada into Montana, Idaho and Washington. These wolves are reoccupying habitat from which earlier wolf population had been eradicated. The Federal government sponsored this eradication to ensure the the safety of the cows and sheep of the local ranchers.

The gray wolf is listed as an endangered species and thereby accorded protection under ESA. Local ranchers are pressuring the government to lessen the coverage of ESA. Interior Secretary Manuel Lujan and Agricultural Secretary Clayton Yeutter have both recommended amendments to the Act that would give economic considerations more weight.[5]

One group that continues to fight for the protection and preservation of the wolves is the Defenders of Wildlife. In an effort to mitigate the impacts of wolves on the local ranchers the Defenders of Wildlife have established a trust that will compensate the ranchers if they can prove that they lost stock to wolves. While this seems like an equitable arrangement, the ranchers still complain about the difficulty of proving that the loss was caused by a wolf. Many studies do show that a number of the losses that the ranchers claim to be caused by wolves can be attributed to other causes.[6]

The language of ESA calls for the restoration of species in danger of extinction either locally or across an entire range. Currently environmentalists are using this language in a push to reintroduce the wolf to its former range in Yellowstone National Park. A recent report published by the Department of the Interior, "Wolves for Yellowstone?"[7] confirms that the reintroduction of wolves makes ecological sense and that the wolves would not pose a threat to the local economy.

Conclusion

Species diversity is often used as an indicator of the health of our environment. The more different species the healthier the environment. In 1973 Congress passed the Endangered Species Act in an effort to halt the alarming rate of species extinction. ESA has withstood Nineteen years of judicial interpretation and continues to be the most important tool for protecting endangered and threatened species and their habitats.

Early in 1993 ESA is due to come up before Congress for review. There is likely to be pressure from developers and other businessmen to limit the power of ESA. Currently the Act requires the Secretary of the Interior to base the decision to list an animal solely on the biological facts. Developers and Businessmen would like to amend the Act to allow the Secretary to consider the economic effects of listing the species as threatened or endangered. If Congress decides to revise the Act and relax the controls all endangered species will lose their only safety net.

ENDNOTES

[1]Kohm, Kathryn A. Balancing on the Brink of Extinction: The Endangered Species Act and Lessons for the Future. Island Press, Washington D.C. (1991).

[2]For a comprehensive look at early species protection legislation see Daniel J. Rohlf's book The Endangered Species Act: A Guide to its Protections and Implementation.

[3]According to an article in the September 23, 1991 edition of the San Francisco Chronicle, biologists have actually determined that 21 bears need to be removed from the population each year. Montana Fish and Game estimates that 7 bears are killed illegally each year and sets the numberer of permits at 14 accordingly.

[4]16 U.S.C. § 1532(3) (1982).

[5]Lapham, Nicholas. The Wolf Fund newsletter, Winter-Spring 1991 The Center for the Humanities and the Environment, Moose, Wyoming.

[6]Return of the Wolf, Newsweek, August 12, 1991.

[7]Wolves in Yellowstone? report to Congress VI VII May 1990.

***Dan Ritzman** is an undergraduate senior at U.C. Davis majoring in Environmental Policy Analysis and Planning. He plans to continue on to graduate school and work in the resource conservation field.*