

DRAFT

**SONORAN DESERT CONSERVATION PLAN
STEERING COMMITTEE**

EDUCATION SESSION # 1

**May 22, 1999 (9:00 - 11:30 a.m.)
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2021 N. Kinney Road / Tucson, Arizona, 85743**

**CONSERVATION PLANS,
THE ENDANGERED SPECIES ACT,
AND THE CONSTITUTION**

**The Endangered Species Act and the Constitution
Fred Bosselman, Chicago-Kent College of Law**

**THE ENDANGERED SPECIES ACT AND THE CONSTITUTION:
Fred Bosselman, Professor, Chicago-Kent College of Law**

I've had a long interest in and acquaintance with the Endangered Species Act and I am going to resist the temptation to talk about it generally and concentrate on the issues that I've been asked to address which is the Endangered Species Act or as we know and love it or hate it, the ESA and the Constitution.

I will give you a synopsis for those who want to leave early about what I am going to say. After all, lectures on Constitutional Law, I understand if I see a few people nodding off. Even my students have been known to do that.

When we talk about Constitutional issues in relation to the Act, of course, what we are really asking is, is there a likelihood that the Endangered Species Act is unconstitutional in part or as applied to particular situations? There are three basic situations in which the constitutionality of the Endangered Species Act might be at risk to some degree. I am going to just summarize those real quickly and then we will come back and talk a little more in detail about.

Whenever we talk about risk, obviously we're talking about two elements. One is the likelihood that something will happen, and the second is, the severity of what would result if it did happen. Those are really separate concepts.

Okay, the first risk with the Endangered Species Act is that some parts of it will be held to have been beyond the power of Congress to enact because they are not permissible exercises of the Interstate Commerce power. The likelihood of that occurring is quite low. The risk and severity of the impact on the Act of that occurring would be catastrophic. So you have an issue of low likelihood, but catastrophic severity.

The second issue is the application of the Endangered Species Act to certain tracts of private property in a manner that would deprive that property of all beneficial use and constitute a taking of property. The likelihood that that might happen in individual instances is low to moderate. The severity of its happening is also low to moderate, we'll come back to that in more detail.

The third and perhaps least recognized risk associated with the Endangered Species Act is that the mitigation demanded by the government as a condition for being allowed to take Endangered Species will exceed the power of government to demand because of a lack of a nexus in rough proportionality -- two tests that the Supreme Court has come up with in recent years. The likelihood that this may occur in given situations, is in my opinion, moderate to high. The impact of its occurrence is relatively low, the severity of the occurrence is relatively low.

Okay, let's start with some basics. When we talk about the constitutionality of a statute, we're talking about the American system, right? We have a Federal Statute here. We have since Marbury versus Madison back in the early part of the 19th century, accepted the fact that the United States Supreme Court may declare an Act of Congress to be unconstitutional. We also, as a local government here, have to comply with other state and Federal Statutes, the state constitution and so forth, but the only issue I am focusing on is the possible unconstitutionality of the Endangered Species Act, the Federal Statute.

The ESA has been in affect now, as you have already heard, since 1973. We had known of its applicability to private property to the issue of protecting habitat since 1980. There have been numerous challenges to the Endangered Species Act in the courts and there has yet to be an appellate decision of a Federal Court holding unconstitutional in any way, any aspect of the Endangered Species Act; either on its face or as applied to individual property.

This is a surprising fact to a lot of people because a lot of people have focused on the Endangered Species Act and have assumed that it has an extremely severe impact on private property. And it is puzzling to them that given this situation -- why has there never yet been a case in which a court has held that the application of the Endangered Species Act to this property constituted an unlawful taking?

That's not to say that there won't ever be or that there may not be cases coming up through the system right now that may produce such a result, but in the 20 years or so that we've been applying the ESA and the way we are applying it now, it hasn't happened yet.

Remember, when we are dealing with the United States Supreme Court, the fact that it hasn't happened yet, even though you've had 20 years does not mean that it may not happen in the future. The court only decides issues that are presented to it. It does not, like law professors, go out and ramble on about what might happen in the future or what might be constitutional if they did something differently.

Secondly, the Court is changing the law, the Court is always changing the law. You may have noticed in the media this week the Court adopted a very significant change in constitutional law in regard to the right to travel, they held unconstitutional a California Law that provided it different standards for welfare for people that recently moved into the state.

The Court is changing the law all the time. I only digress as far as I can see by the way, the right to travel does not affect the Endangered Species Act. If a state should designate owls as citizens so that they would be subject to the privileges and immunities clause of the Constitution, that might change -- but I'm being facetious. It is interesting though that the Endangered Species Act, as we will come to see, was largely motivated by travel, by the right of species to migrate, and by the prevention of the trade in International and Interstate Commerce in rare species and products from rare species.

The other thing you have to recognize when you are talking about the current Supreme Court is that this is not a Supreme Court of environmentalists. It's a Supreme Court of elderly people, many of them even older than I am, who grew up at a time when they didn't learn about the Amazon Forest in school the way kids do today. They didn't have the conception of the environment that younger people do today and they really don't understand this stuff, they just don't. It's not that they are necessarily hostile to things like the Endangered Species Act, but when you read their opinions you know that they are just mouthing the words, they don't really understand these issues. Whenever the Supreme Court takes a case involving the Endangered Species Act, most of us just cross our fingers and hope for the best.

Okay, let's start then with this question of the commerce clause. Under our Constitution the Federal Government is limited in its powers to those powers that are specifically set forth in the constitution. One of those dating way back to the beginning of the nation is the power to control Interstate and Foreign Commerce. All right, virtually anything it wants, as long as it calls it part of the Interstate Commerce, as long as it says it, has some relationship to Interstate Commerce.

That situation has lasted until just a few years ago, between 1935 and 1995, the Supreme Court never held unconstitutional a Federal Statute for having violated or gone beyond the commerce power. In 1995, you had the famous Lopez decision in which the court began to change that attitude. You may remember that case, it was the case in which the Federal Statute made it a crime to have a gun within so many feet of a school. The Supreme Court threw out that statute and said it was beyond the power of Congress, it dealt with a local issue which was education, and it did not deal with any commercial issue so it was beyond the power of Congress. They have subsequently held another part of the statute unconstitutional on a similar basis.

That had raised then, in people's minds, the question of, is the Endangered Species Act within the power of Congress to regulate Interstate Commerce? It is interesting that today it would raise that question in people's mind because at the time that the Act was adopted there was no doubt that is what Congress had in mind in passing the Endangered Species Act. The thing that Congress was focusing on at that time was, in fact, the trade in Endangered Species -- the importation of parrots and various rare birds by collectors, butterflies that were being traded, ivory and many products from endangered species and of course, the Fish and Wildlife Service still spends a very large amount of its effort under the Endangered Species Act as the policeman for smuggling and trade in Endangered Species.

We have now gotten so accustomed to thinking of the Endangered Species Act as a habitat protection vehicle that it is not unrealistic today to say, "Well is local habitat protection something that is within the power of Congress to regulate under the Endangered Species Act?" The groups that wanted to raise this issue thought they had an excellent vehicle for it. It was in Gail's territory while he was in office in California, and it was the famous flower loving fly which occupied a doomed area which was San Bernadino County in California. It was a very rare species, highly localized and never found outside the county, much less outside the State of California. And unlike butterflies or some more colorful insects, it was not regularly collected by people who trade in things like butterflies.

So the people that were attacking the statute thought they had a good opportunity here to get a test from the Supreme Court of whether the Act could apply to something that was as localized and is non-commercial as the flower loving fly. That case went up to the District of Columbia Court of Appeals. The Court upheld the validity of the statute, but with three different opinions by three different judges that were all, let's say written with a certain amount of difficulty apparently and lacking a lot of cohesion in their analysis. The petition for certiorari was filed to the Supreme Court, but just within this term and within this last year, the Supreme Court refused to hear the case.

For the moment at least, the risk of the Supreme Court addressing that issue is declined and it is unknown whether a similar case will come up in the next few years, but I think that the risk is a serious one, that it will be challenged and there are some arguments that frankly I find make me nervous.

Nevertheless, if the court adopts the analysis that I think they will adopt they are going to say that the basic function of the Endangered Species Act is, was and still is, to regulate the trade in Endangered Species and you cannot regulate the trade in Endangered Species if you cannot keep the species alive.

You cannot keep the species alive unless you can control the habitat of the species so I think there are within prior precedents of the Court, plenty of reasons to assume that the entire Endangered Species Act will be found to be valid within the Interstate Commerce power of Congress, but if it is not, what is going to happen?

What is going to happen is presumably those aspects of the Endangered Species Act that do not involve migratory species or that involve particularly localized species might be in some way, culled out of the Act by the Court leaving an administrative nightmare, as whatever test the court might apply would have to be then evaluated species by species or even population by population in a way that I think might really undercut the effectiveness of the statute.

Okay, the second area is this question of deprivation of all economic use. We know that the Supreme Court in 1992 very clearly held that a regulation, whether it be state, federal or local, that deprives property of all beneficial economic use is unconstitutional as a taking.

Why has the Endangered Species Act never been found to be a taking?

Well, the simple answer is that it is not implemented in a way that deprives property of all economically viable use.

If you study the way that the Fish and Wildlife Service has actually implemented the statute you know that you will find very rare situations in which you could get any sort of a reasonable argument that because of the Endangered Species Act, my property has been deprived of all economically and beneficial use. It is not that there are not people out there who have been looking for these cases. If you think you have a case there are plenty of organizations that would be happy to come out and look at your property and evaluate it in the hopes that they might find a case that they could take to court. But it is just not the way that the Service has been implementing the statute.

Does this mean that the service has been too lax? That the service has not been doing its job?

I don't think so, I think in most cases the fact is that we can live with Endangered Species. The concept that some people have that it is them or us is not really realistic. In most situations that I have encountered and I have been involved as a practicing lawyer and as an academic in this area for a long time, I really never run into a situation that I didn't think could be worked out to allow both humans and Endangered Species to coexist. Probably not in the way that either of them would perceive as ideal, but they coexist.

The statute has survived. It has never yet been struck down. There are some cases arising out of the Spotted Owl controversy in the Northwest that are tough cases where there really is a very substantial loss of value for large areas. It may be that in those cases there will be a taking in a particular situation but again, I say that the severity of the risk here is relatively limited. It will be limited to particular parcels of property and not have an impact on the application of the statute as a whole.

The third situation is this mitigation issue.

The Act is being implemented as you heard from both Gail and Marc through the use of so called Section 7 consultations and these Section 10(A) Habitat Conservation Plans. In both situations, what is basically happening is mitigation. That is, the project is allowed in some form to go forward on the condition that certain other things be done that will have a benefit for the species, whether that is the creation of a preserve, whether it is shooting cowbirds to protect flycatchers, or even captive breeding of species in extreme situations. All of these things are simply one or more forms of mitigation.

The Supreme Court in a series of cases culminating in the Dolan Case in 1992 has held that when you force somebody or when you make it a condition for somebody to enter into mitigation, that mitigation must have a reasonable nexus as they say, a connection (that's all the word nexus means is simply connection to the problem that you are trying to solve), and that that must be roughly proportional.

That is, the amount of mitigation you are asking somebody for must be roughly proportional to the kind of harm that their project is going to do.

It is my experience that the Fish and Wildlife Service and a lot of local governments as well have not really paid a lot of attention to that requirement of rough proportionality either because they do not think it is going to be applied to them or simply because the difficulty in this area of quantifying harm, in quantifying benefit is so great that they may assume that they won't be challenged on that issue.

I think that's an area that they are quite likely to be challenged on and that there is quite a good chance of success in some situations of winning on the ground that the amount of mitigation that you are being asked to pay for is not proportional to the amount of harm that you are going to be doing, so I would only suggest to you that as you go through your own planning process, you keep that issue in mind and try to develop your own methodologies for assuring that you can tell landowners when you ask them to mitigate damages they are going to do, that that mitigation is roughly proportional to the amount of harm that their project would create.

Thank you.