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From: "Norman MacLeod" <gaelwolf@waypt.com>
To: "Citizens' Alliance for Property Rights" <capr-discussion@lists.celestial.com>
Sent: Monday, August 01, 2005 9:22 PM
Subject: [Capr-discussion] FW: Livestock Weekly: ESA Has Always Been AboutLand Use Control, Not Species Aid

From: KFALLS@aol.com [mailto:KFALLS@aol.com]
Sent: Monday, August 01, 2005 8:20 PM
To: KFALLS@aol.com
Subject: Livestock Weekly: ESA Has Always Been About Land Use Control, Not Species Aid

Thanks to Ronnie Merritt for sending this to me! The Texas Livestock Weekly Online version is by subscription only. This article is fantastic and even mentions the Klamath Basin suckers and the Ivory-billed woodpecker. ~ Barb

ESA Has Always Been About Land Use Control, Not Species Aid

By Colleen Schreiber

AUSTIN — The federal Endangered Species Act, the law of the land for more than 30 years, has accomplished little in terms of actual species recovery — but then, that was never its purpose.

The law actually was born out of a movement to impose national land use control, and to do so in such a way that the “greens” and government wouldn’t have to pay for the land.

That was the gist of opening remarks made by RJ Smith at the Southwest Landowner Conference here in late spring. Smith, who has been actively involved in the ESA debate since the law was first enacted in 1973, is president of the Center for Private Conservation, a Washington DC-based group whose purpose is to demonstrate that free enterprise and private property rights can be harnessed to create private solutions to environmental problems.

Smith provided an overview of the ESA, how it came about, who was behind it and why, and he updated listeners on where the law stands today.

Smith said the philosophy of government land use control is the basis for the problems facing private property rights advocates today.

“The goal wasn’t to take your land outright, necessarily. The goal was to take it indirectly, and to accomplish that they came up with a law that says, in essence, that you can’t use your land if you have endangered species or critical habitat for an

endangered species."

The movement toward national land use control began at the state level in the late 1960s. Vermont and Oregon were the first two states to implement statewide land use controls.

"You needed permission to do just about anything on private lands in those states," Smith told listeners.

San Diego became the first city to introduce this new way of thinking, and the idea was proposed by both Republicans and Democrats.

The national land use movement, he noted, was sparked in part by a huge swell in environmental activism.

"One piece of legislation after another was passed without anyone thinking about the long-term implications of these laws," Smith commented. "They were just going to save the environment."

President Richard Nixon was also a big supporter of national land use control, so much so that he came up with his own bill. That bill came close to passing.

"We were seven votes away from giving the government the outright power to control all of our land," Smith said, "but we put together a coalition and got it defeated."

In 1969 Congress passed the National Environmental Protection Act, which created the EPA and the President's Council on Environmental Quality. The latter was within the executive office of the President for the purpose of advising the executive branch on environmental issues.

The following year William "Bill" Reilly came on board as the senior staff member of the CEQ. Reilly worked with the Nixon administration to form a "citizen's advisory commission" on environmental quality. The commission was made up of such "citizens," Smith said, as the Rockefeller family.

Reilly also began publishing a series of books. The first was "Quiet Revolution in Land Use Control," and the second, published in 1973 but now out of print, was "The Taking Issue, an analysis of Constitutional Limits of Land Use Control."

Reilly openly revealed his agenda, Smith said, in a passage that referred to private property rights as a "quaint anachronism, something that a modern nation can ill afford."

Reilly and his counterparts had a long list of concerns, and aired them in his various publications and books.

"They believed that we must move away from the concept of individual private property rights to a concept of property where everyone in the community has an equal say about how any piece of property is being used," Smith told listeners.

"They also realized that there was no way that the 'greens' and the government could buy all the land in America, so they looked for ways to get around the Fifth Amendment of the Constitution. One way to do that, they decided, was to control development by withholding permits.

"They said that they needed a vast expansion of regulatory takings," he continued. "The idea was to make takings commonplace so that the courts would think of it as a legitimate part of the government's police powers.

"They said U.S. courts should presume that any change in existing natural ecosystems,

i.e., anything you do on your land, is likely to have adverse consequences and landowners should have to demonstrate the nature and extent of any changes.

"They also said that it was time the Supreme Court re-examined its precedents requiring a balancing of public benefit against land value lost. They said a mere loss of land value can never be justification for invalidation of the regulation of land use.

"They said we need to start regulating land now in order to dampen prices and slow down development, and then force more and more people into becoming willing sellers."

The group also believed that the right to develop land must be separated from the right to own that land, Smith continued. Their justification was that other countries had done this, those other countries being Communist or Socialist nations such as Russia and China.

"This is supposed to be a free country where you owned the land, where you had inalienable rights, where the land was your castle and you should do what you want with it," Smith remarked.

Finally, Reilly and his group believed that if any development was allowed, landowners should be required to make mandatory donations of part of their land.

"How do you have 'mandatory donation?'" Smith asked.

It was from within this framework that the Endangered Species Act came to be passed in 1973. Passage of the Act was one of the last accomplishments of the Nixon administration.

"There were two predecessor acts," the speaker noted, "one in 1966 and another in 1969. These laws identified a list of species that people couldn't kill. The Greens didn't like those acts, though, because it didn't give them the land use control. The laws also said that every government agency must do whatever is practicable to protect listed species, but what they found out was that none of the government agencies ever found it practical."

Another book which helps in understanding some of the thinking of those behind the ESA, Smith told listeners, is a book written by Charles Mann and Mark Plummer titled "Noah's Choice: The Future of Endangered Species."

The authors of that book extensively interviewed the four people who drafted the ESA bill. The four referred to themselves, Smith said, as the "co-conspirators."

The four expanded the law to protect not only separate species, but sub-species and isolated populations of otherwise common species as well. More important, Smith said, is that they struck the word "practical" from existing law every time it was mentioned and replaced it with language that said "no agency may take any action which harms a listed species."

In the new law, "taking" a protected species was broadly defined, Smith said.

"If you harass an endangered bird in any way, it could be considered a taking. The Department of Interior went even further by defining 'harm' to mean a deliberate or negligent act that modifies or degrades habitat needed by a listed species for breeding, feeding, or sheltering. Harm could also include any activity that affects a species' behavioral pattern.

"None of these things take your land outright," he reminded. "It just says you can't do anything on your land that harms a species or affects the habitat. So if an endangered bird lives in a tree and you chop down the tree, even though you didn't harm the bird, you're in violation of the Act and you could be fined up to $100,000 and spend a year in jail.

"These four guys bragged about how they knew that no one in Congress had any idea

what they'd passed, but *they* knew what had been passed, because they wrote the bill."

The first real test of the Endangered Species Act, Smith told listeners, came when environmental activists pushed to have a tiny fish known as the snail darter listed as endangered. The snail darter happened to live in waters in eastern Tennessee where a major dam construction project was already well underway.

"They (environmentalists) realized if they could get the snail darter listed, they could stop development of the Tellico Dam," Smith said. "Some of the greens in Washington didn't want the first test case of the ESA to be a tiny fish against the mighty dam, but they listed it anyway."

Almost immediately a lawsuit was filed, *Hill v. Tennessee Valley Authority*. The case went all the way to the Supreme Court, and two years later the Court ruled 6-3 in favor of the snail darter, which halted construction of the dam despite the fact that millions of dollars had already been spent on its construction.

"The judges said it was clear that the intent of the ESA was to protect every listed species no matter the cost," Smith said.

The court's ruling, Smith said, outraged Senator Howard Baker and Representative John Duncan from Tennessee. They were so upset with the ruling that they passed the first amendment to the ESA. The intent of the amendment was to form a committee which would bring together the various secretaries of the state agencies and state governors. That committee would decide whether a project could be completed or not.

"They got nicknamed the God Squad because they got to decide whether a project would survive or not."

Baker and Duncan submitted the snail darter to the God Squad but in 1979 the group they'd formed to help them unanimously ruled for the fish.

"It's been mostly status quo ever since," Smith told listeners.

Currently some 1500 species are listed under the ESA. Only 40 species have been delisted, and seven of the 40 were delisted because they went extinct while they were on the list.

Five others, he noted, were delisted not because of what had been done by the ESA itself, but for other reasons. For example, the peregrine falcon and the brown pelican were delisted because their eggs were no longer being thinned by the use of DDT. The gray whale was delisted because hunters were no longer killing whales. The whales hadn't been hunted, to speak of, for more than a century, Smith pointed out.

Twenty-six species were delisted because of what's known as an "original data error." One example is an endangered globe-mallow, a squash species found in the Arizona desert. The plant was listed in 1986, Smith said, because the "greens" wanted to stop the Central Arizona water project. It was delisted in 1993 because they discovered that the plant grew abundantly and was not at all on the brink of extinction.

"Someone looked over the other side of the hill and found that they were everywhere."

Other examples of listing errors include the short-nosed sucker fish and the Lost River sucker fish. In April of 2001, the government shut off water to Klamath Basin farmers and ranchers to save these two little fish species.

"Originally they said they found less than 20 of these fish, and they found none of the Lost River sucker fish, so they were both listed. Well, once a species is listed, the government

frees up millions of dollars to do surveys," Smith noted.

"The first survey they did, they found 252,000 of these short-nosed sucker fish, and the one they thought was essentially extinct, they found 94,000 of them."

Just one of the many victims of the Klamath Basin fiasco is a veteran of World War II.

"He has a deed hanging on his wall granting him and his heirs water rights in perpetuity, signed by Franklin Delano Roosevelt," Smith told listeners. "Yet his water was turned off. This has happened over and over," Smith told listeners.

There have been two true recoveries. One was the Columbia white-tailed deer, found along the Oregon and Washington border. The other was the Lucian Canadian goose.

"All they had to do was kill the foxes on the Lucian Island, and as soon as they did that the bird became common again."

The ESA was up for reauthorization in 1992. It has yet to be reauthorized. Meanwhile, Congress continues to fund it. There has been a "full-court press" ever since it came up for reauthorization to try to fix its shortcomings, Smith said, but nothing has been solved as of yet.

"When Bush came in and we gained more Republicans in both houses, everyone thought there was a chance to do something about the ESA," the speaker commented, "but none of these people have the courage to do anything about property rights. They're trying to fix the ESA without fixing property rights."

Smith noted that two bills currently in the House will eventually come out of the House Resource Committee. One bill is sponsored by Congressman Dennis Cardoza, D-Calif., and another by Greg Walden, R-Ore.

The Cardoza bill, Smith quipped, suggests a "radical" proposal in that designated "critical habitat" should actually have genuine habitat inside it. Cardoza has proposed this legislation because people whom he represents, specifically the entire city of Fresno, are being impacted by a protected ferry shrimp that *could* potentially live in low-lying areas outside of Fresno.

"This huge circle around Fresno has been designated as 'critical habitat' for these ferry shrimp. Never mind the fact that the ferry shrimp aren't even found in this designated 'critical habitat' area."

Walden's bill would require "good science" behind ESA rulings.

"Everyone would like to have good science, but unfortunately, none of you will get to determine what good science is," he commented. "The feds will always make that decision. And when you list these little obscure things that no one knows anything about … it takes millions of dollars and years of studying to really find out how many there are. So I don't think good science necessarily gets us anywhere."

There is talk that Senator Michael Crapo, R-Idaho, along with Lincoln Chafee, R-RI, will reintroduce the Kempthorn bill, a bill which Smith said helps big industry but does little about private property rights.

"Senator Crapo, once a strong advocate of private property rights, gets greener every day," Smith remarked.

Finally, Smith had a warning about the newly discovered ivory-billed woodpecker, previously thought to be extinct. There apparently have been individual sightings of this bird for the last 60 years, but those sighting have always been disregarded because no one managed to

get video of the sightings.

The ivory-billed woodpecker, said to be the size of a raven, was found in the Big Woods in east central Arkansas. The area where the bird was sighted was originally a national wildlife refuge. Today it's an international wetland. Smith said the bird was discovered 16 months before it was actually reported, and he claimed the sighting was kept quiet because environmental activists wanted to acquire additional habitat for the bird and feared that the price of land, much of it agricultural, would shoot up once the announcement was made.

"It's going to require tens of millions of acres to recreate habitat for this bird, and it still might not work because there are so few left and they need such vast areas," Smith said. "The environmentalists, however, are already saying if their plan doesn't work that we need to save this land for black bears and songbirds."

The Conservation Fund, a competitor to The Nature Conservancy, has a goal of buying up all private forest land in East Texas, Smith told listeners.

"We think the money coming from feds will allow them to buy up much of this land between the Trinity River and the Neches River and in the Big Thicket and maybe extend it all the way to the Sabine River.

"Discovery of the bird," he concluded, "is the greatest thing ever to happen to national land use control, and unfortunately, probably the worst thing that could ever happen to private landowners in America."
