Preface to the First Edition

Over nearly 30 years of practicing and teaching natural resources law, I’ve had close encounters with practically all the primary statutes in the area. The most ambitious, complex, and far-reaching of these, I can say without hesitation, is the Endangered Species Act. No other statute has so immodest a goal as preserving life forms on the planet from extinction; no other statute employs such a complex and sweeping array of tools and techniques designed to carry out that goal.

The web of life is unfathomable: “Nature is not only more complex than we think; it’s more complex than we can think” was an expression often voiced by the participants in the Northwest Forest Plan, which was formulated as a response to spotted owl gridlock in the early 1990s. So it’s not surprising that a law designed to preserve viable remnants of the natural world would be complicated too.

The ESA is of interest to lawyers from just about every standpoint: its interface of science and law; its mediation of the tension between executive discretion and judicial review; the interaction between the executive and legislative branches in its administration; the role of citizen suits in its administration; federalism issues; and its overlapping regulatory tools (principally the consultation process of Section 7, the “ takings” prohibition of Section 9, and the habitat conservation planning process of Section 10).

The act is having a remarkable effect on land and water management in communities across the country. Its cutting edge is regulatory, and it bristles with opportunities for litigation. There is no gainsaying that the courts have played a large role in its implementation, stepping in at critical moments with decisions such as Tennessee Valley Authority v. Hill (snail darter) and Sweet Home (take through habitat modification). Yet most of its real gains on the ground have come not from court orders, but from negotiations and settlements that guide undertakings by landowners, water managers, and governmental agencies.

That fact is part of the genesis of this book. Justice Frankfurter once observed that “it would be a narrow conception of jurisprudence to confine the notion of ‘laws’ to what is found written in statute books, and to disregard the gloss which life has written upon it.” The ESA’s effects can scarcely be understood by pondering its text or the regulations that implement it, or even the judicial opinions that address it. Life has supplied a gloss that anyone serious about dealing with the ESA must understand.

Over the years, a hardy band of law-trained people have become real experts—indeed, gurus—of the ESA cum gloss. Remarkably, nearly all of them have been corralled and persuaded to contribute to this volume. These authors—diverse in their experiences and points of view—eat, drink, and live (okay, they administer, litigate, advocate, and teach) ESA issues, and it shows. They understand the statute’s complexity, its subtlety, and (pardon the expression as applied to law that seeks to
forestall extinction) where its bodies are buried. A goodly number of these experts, I am proud to report, are currently or were lawyers in the federal government (most in the Interior Department’s Solicitor’s Office).

In short, the subject is worthy, the authors eminently qualified guides. The result is a superb collection of commentary on a fascinating and challenging law that is remaking land and water use in America.

John Leshy

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