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Endangered and Other Protected Species: Federal Law and Regulation

E. Donald Shapiro
New York Law School

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BOOK REVIEW

ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION. By Richard Littell. Washington, D.C., BNA Books, 1992. Pp. 185. \$72.00

*Reviewed by E. Donald Shapiro**

Richard Littell's book, *Endangered and Other Protected Species: Federal Law and Regulation*,¹ provides an informative survey of the regulations that have been promulgated to protect endangered or threatened species of flora or fauna. As such, it should have wide appeal among lawyers working in environmental law as well as among individuals dealing with protected species of plants or animals. Extensively annotated, this book includes many valuable references to administrative decisions not often found in the usual sources, making it extremely useful for lawyers specializing in this area. Written in a style well-suited for a layperson, the book also will interest those curious to understand how the legal system affects conservation.

The book discusses many important pieces of federal legislation, in particular the Endangered Species Act of 1973,² as well as the effect of various international agreements to which the United States is a party, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).³ The author's research also includes an array of noteworthy administrative law decided by the Departments of Interior and Commerce in connection with the enforcement of the Endangered Species Act and other statutes.⁴

Initially, the book analyzes the landmark U.S. Supreme Court decision of *Tennessee Valley Authority v. Hill*,⁵ a case that arose from the battle

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* The Joseph Solomon Distinguished Professor of Law at New York Law School and Supernumerary Fellow of St. Cross College at Oxford University. The author wishes to express his appreciation to his research assistant, Anthony Van Zwaren.

1. RICHARD LITTELL, *ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION* (1992).

2. 16 U.S.C. §§ 1531-1543 (1988).

3. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 244.

4. See LITTELL, *supra* note 1, at 77-93.

5. 437 U.S. 153, 154 (1978) (holding that the construction of the Tellico Dam and Reservoir Project must be terminated under the Endangered Species Act because the dam would eradicate an endangered species if constructed).

to preserve the "notorious" snail darter.⁶ Along with the equally significant *Portland Audubon Society v. Hodel*,⁷ which addressed the threatened existence of the spotted owl, this case demonstrates how the government has attempted to achieve the often divergent goals of conserving the nation's natural heritage on the one hand, and of promoting economic growth on the other.⁸

Although Littell possesses an obvious attachment to preserving the natural order, he also recognizes the important need to promote economic growth, a distinction that eludes many in the field.⁹ He approves of cases, for example, where the government has acted against unfortunate people trying to protect livestock from the depredations of various endangered species. Yet, at the same time, he is sympathetic to the use of controlled trade to finance continued conservation, albeit through the sale of limited numbers of protected species.¹⁰

Conservation clashed with economic interests again in the important case of *Christy v. Hodel*,¹¹ involving a sheep farmer who shot and killed one of the grizzly bears that had been decimating his herd. He pled a defense of protecting property after being fined \$2,500 as a civil penalty.¹² Had the grizzly been listed as an endangered species rather than merely a threatened species, the farmer could have faced criminal penalties as well.¹³ The Court of Appeals for the Ninth Circuit refused to hear the property argument because it considered only self-defense or defense of others as legitimate reasons for shooting protected wildlife.¹⁴

6. See LITTELL, *supra* note 1, at 3-6. See also *Hill v. Tennessee Valley Auth.*, 549 F.2d 1064, 1066-67 (6th Cir. 1977) (reversing the district court's denial of an injunction against continued construction of the Tellico Dam, which threatened the endangered snail darter), *aff'd*, 437 U.S. 153 (1978).

7. 866 F.2d 302, 305 (9th Cir. 1989) (holding that the Northwest Forest Resources Council's economic interest in ensuring continued supplies of timber did not make it an intervenor of right in an environmental group's action against the Bureau of Land Management to prevent the sale of tracts of timber that threatened the existence of the northern spotted owl), *cert. denied sub nom. Northwest Forest Resource Council v. Portland Audubon Soc'y*, 492 U.S. 911 (1989).

8. See LITTELL, *supra* note 1, at 4-5, 47.

9. *Id.* at 4-5.

10. *Id.* at 103.

11. 857 F.2d 1324, 1327 (9th Cir. 1988) (holding that the Endangered Species Act and the grizzly bear regulations did not deprive livestock owners of their property without due process of law), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 1114 (1989).

12. *Id.* at 1329.

13. See 16 U.S.C. § 1540(b).

14. 857 F.2d at 1330.

This decision ignored the fact that the farmer had used other, non-lethal methods in attempting to drive off the bears before he resorted to gunfire.¹⁵

The ivory trade in Africa exemplifies how the economic needs of developing nations can become subservient to efforts to preserve species.¹⁶ Although elephants neared extinction in the northern parts of Africa, the species was so prevalent in the southern parts of the continent that in Zimbabwe the government carried out a policy of culling 1,000 elephants a year to prevent overpopulation.¹⁷ The Southern African nations urged the CITES committee to impose a partial ban, rather than a complete one, because the funds gained from the sale of ivory were needed by the tribespeople as well as to promote conservation of the species.¹⁸ The international community, however, decided that a partial ban would be too difficult to enforce and banned the culling process completely.¹⁹ Littell points out that sometimes, in their zeal to protect wildlife resources, conservationists overlook legitimate economic concerns of indigenous peoples.²⁰

Whether *mens rea* or strict liability should be applied to violations of the Endangered Species Act presents another interesting legal question discussed in the book.²¹ In *United States v. Nguyen*,²² the court of appeals for the Fifth Circuit affirmed the conviction of a fishing boat captain who killed an endangered species of sea turtle after the turtle had become ensnared in his nets.²³ In reaching its conclusion, the Court of Appeals was convinced that "Congress [had] deliberately dispensed with a *mens rea* requirement for violations of that statute."²⁴ Other jurisdictions, however, have refused to interpret the Act as imposing strict liability and have required a showing of *mens rea*.²⁵

15. LITTELL, *supra* note 1, at 77.

16. *Id.* at 103.

17. *Id.*

18. *Id.* at 104.

19. *Id.* at 103.

20. *Id.* at 104.

21. *See* 16 U.S.C. § 1540.

22. 916 F.2d 1016, 1020 (5th Cir. 1990) (holding that the government was not required to prove that the defendant knew the sea turtle he caught was a threatened species in order to convict the defendant).

23. *Id.* at 1017, 1020.

24. *Id.* at 1019-20.

25. *See, e.g.*, *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *United States v. Billie*, 667 F. Supp. 1485, 1487 (S.D. Fla. 1987) (holding that "knowingly" is an element of an offense of killing or taking an animal in violation of the

The book extensively covers the Endangered Species Act and its succeeding amendments. For instance, the Endangered Species Act Amendments of 1982²⁶ were designed to thwart attempts by the Reagan administration to hamstring environmental protection by having the Secretary of the Interior weigh economic considerations in making conservation decisions.²⁷ The Amendment guards against efforts to set economic criteria for protecting species or their habitats.²⁸

Littell also offers a broad examination of the Endangered Species Act's "listing process"²⁹ and prosecutorial provision.³⁰ The Act not only requires the Secretary of the Interior to compile a list of plants and animals to be protected, but also to assess the habitat that is necessary for their survival.³¹ The courts often have intervened to force the Secretary to list species where denial of protection has been considered capricious because of pressure from special interest groups.³² This issue arose during the controversy surrounding *Portland Audubon Society v. Hodel*,³³ where the U.S. Fish and Wildlife Service and the Secretary delayed listing the northern spotted owl as imperiled because of the effect such a listing would have on the lumber industry. The Ninth Circuit held that the delay was arbitrary and capricious. In *State of Louisiana ex rel. Guste v. Verity*,³⁴ the Fifth Circuit cautioned that a court "is not to weigh the evidence in the record pro and con. . . . [I]f the agency considers the factors and articulates a rational relationship between the facts found and the choice made, its decision is not arbitrary or capricious."³⁵

Endangered Species Act of 1973 but that only general intent is required, as opposed to specific intent, to take a particular protected species).

26. Pub. L. No. 97-304, 96 Stat. 1411 (1982) (codified at 16 U.S.C. §§ 1531-1544).

27. See LITTELL, *supra* note 1, at 12.

28. *Id.*

29. See LITTELL, *supra* note 1, at 15-30; see also 16 U.S.C. § 1533(c).

30. See LITTELL, *supra* note 1, at 77-90; see also 16 U.S.C. § 1540(a)-(h).

31. See 16 U.S.C. § 1533(b)(2).

32. See, e.g., *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied sub nom. Northwest Forest Resource Council v. Portland Audubon Soc'y*, 492 U.S. 911 (1989).

33. See *supra* note 7 and accompanying text.

34. 853 F.2d 322, 325 (5th Cir. 1988) (holding that regulations imposed on the shrimping industry in order to reduce sea turtle mortality did not violate equal-protection guarantees and were not arbitrary and capricious).

35. *Id.* at 327.

The Lacey Act,³⁶ another important federal law cited in this volume, in effect extends federal protection to any species protected by state regulations as well as by foreign governments. The state or foreign laws and regulations, however, must be aimed at protecting the species involved, not designed to collect revenue or to fulfill other non-protective objectives.³⁷

The book delves into other important federal regulations, including: the Marine Mammal Protection Act,³⁸ the Bald Eagle and Golden Eagle Protection Acts,³⁹ and the Migratory Bird Acts.⁴⁰ Littell gives fair and full treatment to enforcement, litigation, and interpretation questions.

The reader will find that this book answers many questions relating to how courts and federal administrative agencies have treated various statutes. Littell has done an admirable job in presenting all of this information without turning his book into a dry legal tome. He has presented the material in an objective manner, but has not hesitated to point out where, for example, the Reagan and Bush administrations bowed to special-interest groups in order to subvert the intent of Congress in passing many of these laws, especially the Endangered Species Act and the Marine Mammal Protection Act.⁴¹ Similarly, Littell has not allowed his interest in protecting these disappearing species of plants and animals to cloud his vision of the need to promote economic expansion and account for population growth.⁴²

By no means an environmental radical, Littell does not believe that all economic development should be halted for the sake of an owl or a snail darter. In fact, he claims that it is sometimes necessary to engage in certain types of cultivation to preserve a species, as in Zimbabwe, with the elephant herds, or in the Cayman Islands, where farmers raise sea turtles, harvesting some and setting the rest free. This balanced approach gives Littell a more authoritative and persuasive voice than the extremist experts in the field. This book makes an invaluable reference source for anybody interested in environmental law.

36. 16 U.S.C. § 667(e).

37. *See* *United States v. Molt*, 599 F.2d 1217, 1218 (3d Cir. 1979) (affirming the district court's dismissal of counts based on alleged violations of Fiji revenue law that was not covered by the Lacey Act, and reversing the district court's dismissal of counts based on alleged violations of Papua New Guinea wildlife-protection law that was covered by the Lacey Act).

38. 16 U.S.C. §§ 1361-1407.

39. 16 U.S.C. § 668.

40. 16 U.S.C. §§ 703-712, 715-718.

41. *See* LITTELL, *supra* note 1, at 12-13, 134-39.

42. *Id.* at xvii-xviii.

