H-Net Reviews
in the Humanities & Social Sciences

Shannon C. Petersen. *Acting for Endangered Species: The Statutory Ark.* Lawrence: University Press of Kansas, 2002. xiii + 168 pp. $29.95 (cloth), ISBN 978-0-7006-1172-0.

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Published on H-Law (January, 2003)

From the Bald Eagle to the Spotted Owl: How the Endangered Species Act Took Flight

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Before the enactment of the National Environmental Policy Act (NEPA) in 1969 and the blizzard of legislation that followed during the early 1970s, there was no field of environmental law in the United States. Unlike some newer constitutions, the United States Constitution contains no right to environmental quality.[1] Environmental problems were seen as local issues, and the federal government would, at most, supply assistance to the states in dealing with such problems.[2] The common-law doctrines of nuisance and trespass were the only routes available for citizens or groups seeking legal recourse against the despoliation of the environment, and these were used only rarely for this purpose.[3]

In a radical shift of approach toward resource management and environmental regulation, NEPA required agencies to consider environmental values before taking actions having environmental effects. The Act is solely procedural; it does not tell agencies *what* they should decide, but rather, *how* they should go about the decision-making process.[4] In later years, Congress passed substantive legislation, including the 1973 Endangered Species Act, directing agencies as to what they could and could not decide by declaring certain environmental impacts presumptively unacceptable.[5] The impact of this substantive legislation increases and decreases according to the degree of resources allocated to enforcement, the interpretations given to the legislation, and the general tenor of the administration in power regarding the balance between development and environmentalism. This is evidenced by the current administration's pro-development orientation, which has all but eviscerated NEPA and its progeny.[6]

In *Acting For Endangered Species*, Shannon Petersen shows how such struggles over interpretation have marked the entire history of the Endangered Species Act (ESA); in particular, Petersen explains how meanings given to certain provisions of the Act by the courts changed the law from its original incarnation and provided it with more power than its drafters envisioned. Ever since the ESA was adopted unanimously in 1973 with very little debate, it has become a magnet for controversy. Petersen, who has a doctorate in history and practices law with Latham & Watkins in Washington, D.C., sketches the historical context of the Act's passage, provides a detailed description of its trajectory, and discusses its two most famous controversies, regarding the tiny snail darter fish in the late 1970s, and the spotted owl during the early 1990s.

Acting for Endangered Species is written for a legal audience, emphasizing the role courts play in the interpretation of the ESA, and presuming a base level of familiarity with the law. Petersen's account is enormously detailed and scrupulously well-organized, sometimes to a fault. The book is divided into three parts. The first surveys the prehistory of the ESA, sketching Congress's attempts to protect species in peril from the late nineteenth century until 1973. Here, Petersen discusses the effort to protect the American bison and the bald eagle, and looks at the growth of the federal government during the twentieth century. He also provides a cursory introduction to the environmental movement of the 1960s, and explains Congress's attention to "charismatic megafauna," those species traditionally seen as representative of the national character. Part 2 gives a detailed look at the snail darter controversy, and Part 3 considers the spotted owl dispute, focusing on the role of the courts in both debates.

In 1978, the United States Supreme Court interpreted Section 7 of the ESA to be a potent limit on federal development projects, a reading that, Petersen argues, the Act's Congressional drafters never intended. Petersen's extremely detailed account of this snail darter controversy is valuable in that it demonstrates how such a seemingly trivial dispute could have taken on such mo-

mentous dimensions and sparked such passion. In the process, *Acting for Endangered Species* undermines the conventional understanding of the ESA as a product of the idealistic and misguided 1960s. Instead, Petersen maintains, the Court's decision reflected a changed scientific understanding regarding the importance of habitat in the preservation of endangered species, and that the strong interpretation of Section 7 was necessary to enact Congress's purpose.

In addition to his focused contributions to the legal history of environmentalism, Petersen has given us an important case study in the interactions between branches of government, showing how courts shape policy and change both the perception and the effect of laws. The struggle between Congress and the courts over the ESA's significance recurs time and time again in different arenas. *Acting for Endangered Species* describes the steps Congress took to dilute the Court's interpretation of Section 7, the lull surrounding the Act during the early 1980s, and the subsequent flare-up of controversy over the spotted owl. Petersen ably depicts the course taken by this seemingly innocuous bill as it took on a life powered by citizen suits and judicial decisions.

In discussing the consequences of the snail darter controversy, Petersen notes that this episode may have "contributed to the antiregulatory sentiment that helped elect Ronald Reagan to the presidency in 1980," and then describes how citizen groups turned to the courts to counteract the administration's hostility to environmentalism. Currently, a similar phenomenon is occurring, as environmental groups litigate to oppose the administration's development plans. And, as in the 1980s, the courts seem to be providing some support for environmentalism in an otherwise markedly pro-development climate.

The book's strength lies in its details and its usefulness in its capture of the nuance of power struggles over legislation. In most cases, readers will close the book with more knowledge about the ESA than they had when they began. Unfortunately, the book's descriptive power is a weakness as well as a strength. Petersen shies away from making judgments regarding the Act, the controversies, or the actions of the players involved. He concludes the book with an unnecessary recap of the relatively simple story told in the previous 120 pages, and an analysis of the effect of the Endangered Species Act that basically says nothing. Attempting to look at the success of the Act, Petersen cites some statistics that say "yes, it succeeded," some that say "no, it did not," and makes some comments about the elusiveness of scientific truth. After discussing Congress's somewhat misguided attention to "charismatic megafauna," he concludes that perhaps the Act has succeeded in its purpose by saving these national symbols.

More interesting, and more fitting, would have been a synthesis of the Act's evolution over time, an assessment of its current utility in reference to its original purpose, a prediction regarding the future of the ESA and other environmental legislation, and a comment on the state of environmentalism in the early twenty-first century. One would expect an analysis such as Petersen gives in a history of the ESA, but in truth that is not what *Acting for Endangered Species* is. Rather than being about endangered species, or even about the success or failure of the ESA, this monograph treats the power struggles surrounding this particular piece of legislation–and, for that reason, should address this in its conclusion.

In sum, Petersen's book is well-researched and extremely informative, but does not draw the connections between past and present for which the material calls. *Acting for Endangered Species* tells an important story, one with a lesson for the future. Petersen should not shy from the moral at the end of his tale.

Notes

[1.] Constitutions such as those of Brazil and South Africa contain affirmative environmental rights, such as ecologically sustainable development mandates. Frederick R. Anderson *et al.*, eds., *Environmental Protection: Law and Policy*, 3d ed. (New York: Aspen Law and Business, 1999), 3. In the early 1970s, some legal commentators began to explore whether the Ninth Amendment could be a source for environmental rights, but concluded that it couldd not. William H. Rodgers, Jr., *Environmental Law*, 2d ed. (St. Paul, Minnesota: West Publishing Co., 1994), 64.

[2.] *See* Anderson *et al.*, *Environmental Protection*, xxvii; Robert V. Percival *et al.*, *Environmental Regulation* (New York: Little, Brown & Co., 1996), 103.

[3.] Percival *et al.*, *Environmental Regulation*, 73. An action was brought for nuisance when something interfered with the use or enjoyment of one's land, and for trespass when there was an invasion of one's possessive interest in land.

[4.] Anderson *et al.*, *Environmental Protection*, 192. NEPA lists its purposes as: "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and

to establish a Council on Environmental Quality." Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C.A. sec 4331 et seq., quoted in Rodgers, *Environmental Law*, 801.

[5.] Percival *et al.*, *Environmental Regulation*, 108.

[6.] *See, e.g.*, Editorial, "Can the Courts Save Wilderness?" *The New York Times*, 4 January 2003.

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Citation: Diana R. Hyman. Review of Petersen, Shannon C., *Acting for Endangered Species: The Statutory Ark*. H-Law, H-Net Reviews. January, 2003.
URL: http://www.h-net.org/reviews/showrev.php?id=7085

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