ENVIRONMENTAL LAW’S LAND USE MANAGEMENT

DISCUSSION QUESTIONS FOR FEBRUARY 21, 2006

1. In order for a species to be listed, it must either be “endangered” or “threatened.” The author points out that there are some ecologists who believe that this may not be the right point at which to list the species. Should we wait until a species is “endangered” (which means “in danger of extinction throughout all or significant portions of its range”) or “threatened” (which means it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”) before listing, or should we list it at some earlier time before it gets to the point of becoming endangered or threatened? If so, what implications would this have on the species listed? Would they receive the same protection as they do now, or would they receive even less protection?

2. The commerce clause reasoning used by the dissenting judges in *GDF Reality* could apply to many of the federal environmental laws (CAA, CWA etc.). In *Gonzalez v. Raich*, the Supreme Court rejected the “myopic focus” on *Lopez* and *Morrison*. In affirming the “comprehensive scheme of regulation” justification under the commerce clause, they put an end to the reasoning used by those fevered Federalist Society Circuit Court Judges seeking to overturn a variety of federal laws. By reaffirming the constitutionality of the ESA (the Court denied cert on *GDF Realty* one week after the *Raich* opinion), the short debate about inability of the commerce clause to reach as far as our federal environmental laws thus concluded.

The failure of the original drafters of the ESA to include a provision to compensate landowners for foregone use of their property was:

a. a thoughtful decision regarding the wise use of taxpayers’ money

b. an oversight

c. the single biggest impediment to effective species protection and recovery

3. Sheldon’s article, Overview of Wildlife Law in Environmental Law tracks popular attitudes towards wildlife “through its expression in law.” The article vilifies the early inhabitants of the country with regard to their destructive activities and ignorance of basic ecology.

a. While we have made significant advances in our understanding and protective legislation, is it likely that future generations will look upon us with similar contempt? Why/Why not?

b. If so, is it possible to predict the ultimate conclusion of progression of attitude and legislation described?

c. Apart from endangered species, are the distinctions and categorizations of animals requiring protection and those which do not grounded in any sort of logic or are
they merely based upon the how the public “feels” about a particular animal. (e.g. dolphin-safe tuna).

4. In Christy v. Hodel, the Secretary suggested that the best way to relieve the population pressures caused by grizzly bears is to combine the limited taking of specific nuisance bears with a closely regulated sport hunt. Considering the substantial evidence that the Plaintiff in this case was able to produce before the ALJ, couldn’t the goals of the ESA be more fairly balanced with the rights of such individuals. Perhaps a procedure should exist by which such individuals who can show that they have attempted to comply with the ESA for a reasonable amount of time and have killed the threatened animal only as a last resort. The regulation of the sport hunt could then take into account and be appropriately modified in light of the number of animals killed by ranch owners.

5. Global warming is threatening the polar bear (not on the endangered list, but being considered). The bear population has dropped from around 1200 to less then 1000 in just the last few years. Is there ever going to be a point where the damage done to necessary habitats of enough endangered species qualifies for ESA’s definition of “take” which includes “significantly impairing essential behavioral patterns including breeding, feeding, or sheltering.” so that the economic benefits do not override the protective statutes?