Blood Alley, and other stories

Endangered *Species*

Human beings: the only living things left unprotected — both by and from — the Endangered Species Act.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

— James Madison

A stretch of Highway 70 in northern California has killed and injured so many people in automobile accidents over the years it's come to be called "Blood Alley." Plans to straighten the highway's dangerous curves have been on the drawing board since 1991 — but have not been carried out. What has held things up? The answer: bureaucrats at the U.S. Fish & Wildlife Service who've barred the necessary life-saving changes in order, they argue, to protect a tiny wildflower known as Butte County meadow foam. Liberal pressure groups that urge massively intrusive regulation any time anyone can

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show that "even one life might be saved" have been strangely silent. Or, perhaps, not so strangely, given that saving lives in this instance would mean less government, not more, and big government, not human life, is the liberal hypocrites' real *raison d'être*.

Finally last July, after nearly 14 years, FWS approved a plan to save peoples' lives. Through the long-suffering efforts of *conservative* Congressman Wally Herger, working with the California Department of Transportation, $20 million has been secured, but not merely to straighten the dangerous stretch on Hwy. 70. FWS is requiring that the entire intersection of Hwy. 70 and Hwy. 149 be moved so as to avoid disturbing the meadow foam.

Few people realize the extent to which, for the last 32 years, Americans across the country, and especially in California, have been subjected to an ideological drive to use environmental concerns — for the protection of plants, insects, or natural processes — as an excuse to justify official government *un*concern, even contempt, for human life, liberty, and property. As I write, the nation is riveted by images of our fellow citizens in the Gulf region who have lost everything they own to the ravages of Hurricane Katrina, while hundreds, perhaps thousands, more have lost even their lives. But are the victims of bureaucratic intransigence about Highway 70 any less dead than those killed by natural disasters? Is their families' grief any less? The cause of death on Highway 70 is not a hurricane, but obtuse enforcement of the 1973 federal Endangered Species Act (ESA) — does that make it right? Left-wing opponents of amending ESA may think so; their actions suggest that they do. But few Americans would agree.

Similarly, broad public outrage continues over the Supreme Court's *Kelo v. City of New London* decision allowing local governments to seize private property, transferring it from some citizens to others whose use of the property would increase local tax revenues. To accomplish this, the activist Court majority effectively converted constitutional author James Madison's carefully chosen "public use" stricture in the Fifth Amendment — "nor shall private property be taken for public use, without just compensation" — into the malleable, open-ended concept of "public benefit." Madison, like all the Bill of Rights' framers, knew that without specific restrictions limiting the taking of private property to "public use" — schools, parks, public buildings, roads, and the like — government would engage in exactly the sort of mischief the city of New London, Connecticut, is visiting upon Suzette Kelo and her neighbors. Because greater tax revenues in the city's coffers would benefit "the public," the Court said, the Fifth Amendment did not prevent the city from taking Kelo's and her neighbors' homes.

This regrettable Supreme Court decision did not, however, touch states' power to protect their citizens from its heavy-handed result. Arizona and Washington already prohibited state and local government eminent domain takings of private property for private use. The Alabama Legislature, with the governor's approval, just enacted a similar statute, and two dozen other states, including California, are moving in that direction. Yes, even in this "liberal" state, a good chance exists the government will act to protect its citizens, judging by the hue and cry over *Kelo* coming not just from Republican legislators who traditionally defend property rights but also from Democrats — those representing homeowners in older, modest, often minority neighborhoods, the people whose property is most in danger of being seized by greedy city officials seeking increased revenue from private venturers looking for low-cost land. This is not really surprising. Polls show huge national majorities — as high as 90 percent — oppose New London's actions against its older, long-time residents.

But there is a less publicized, less known, and therefore more insidious threat to private property — to peoples' homes — than that presented by either *Kelo* or Katrina. *Kelo*, like a natural disaster, threatens the property of people who already own homes. But many Californians are prevented from owning homes in the first place by lawsuit-driven enforcement of the Endangered Species Act. Driven by large, well-financed "environmentalist" organizations, ESA litigation has become a weapon in an ideological war waged against the American people. The

presence of one or more of California's nearly 300 protected species of plants, birds, insects, fish, and other wildlife is used, under ESA, to harass property owners and deprive them of their rights; to hold up or halt improvement and construction of schools, hospitals, and highways; to threaten or, in some cases, destroy the lives and health of California families and the education of our children.

How does it work? Activist litigators like the "Center for Biological Diversity" (CBD) have grown adept at using ESA to prohibit private land use. When, in the mid-1990s for example, the U.S. Fish & Wildlife Service (FWS) found insufficient scientific or legal basis for designating certain lands as critical habitat for the Alameda whipsnake, CBD sued to force the habitat designation. To no one's surprise, FWS quickly settled, agreeing to designate critical habitat for the whipsnake "on an expedited basis." Rushing to accomplish what would usually be a lengthy, labor-intensive process, FWS, within months of the settlement, designated as critical whipsnake habitat seven geographical areas encompassing 406,708 acres of mostly privately-owned land within Alameda, Contra Costa, San Joaquin, and Santa Clara counties. Yet, FWS openly acknowledged that its field biologists had no idea which of those acres were actually occupied by the whipsnake, and that all lands within the range of the snake that biologists believed *might* contain habitat needed by the snake were included in the designation.

Numerous frustrated property owners challenged this bureaucratic overreach. "For several months," one said, "day-and-night observations and thorough field surveys were conducted ... on our ranch, looking for ... the Alameda whipsnake, but absolutely *none* of these creatures ... were found on our ranch." Despite the enormous financial burdens the designation imposed on the property owners — little or no use of their property, instant evaporation of its value, no buyers wanting to purchase land designated as critical habitat — for more than six years FWS declined to modify the designation.

Pacific Legal Foundation then challenged the designation in federal court. In short order, the judge set this onerous, ill-founded designation aside, finding that FWS had failed to perform an adequate biological survey of the whipsnake's range as well as several other important ESA-required analyses, including an assessment of the snake habitat designation's economic and social impact not only on property owners directly hit, but on surrounding communities as well — its effects, for instance, on the availability of affordable homes in the area.*

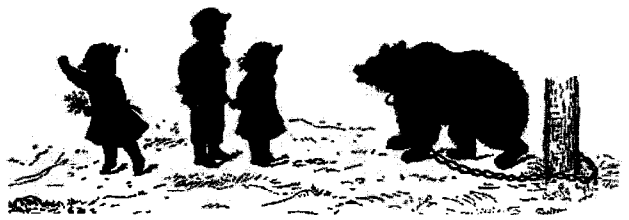
This sort of heavy-handed government encroachment on private property has been going on for more than three decades. It is long past due being officially recognized as a "taking" under the Fifth Amendment. Congress declared in its ESA "findings" that endangered or threatened "species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." That means that species preservation is a "public use." As such, the public ought to pay for it, rather than imposing the full burden of species preservation on individual property owners.

Official unconcern for human life and safety under ESA has not been limited to the case of California's Highway 70 that I described at the beginning of this article. In 1990, for another example, the Army Corp. of Engineers publicly identified a stretch of levee south of Marysville as needing immediate repair, without which, the Corp. said, "loss of life is expected." But ESA protection of the Valley Longhorn Elderberry Beetle was used as an excuse to delay approving the necessary repair. In January 1997, a high flow in the Feather River broke the levee, flooding the area. Three people drowned.

In an economically-depressed neighborhood in San Bernardino County, the discovery of eight protected Delhi sands flower-loving flies delayed construction of a badly-needed county medical care facility for more than a year. U.S. Fish & Wildlife bureaucrats gave the green light for the hospital's construction only after an additional $3.5 million of taxpayer funds were spent to acquire a new site for the facility, thus keeping the originally-purchased site vacant as habitat for the family of flies. The meaning of all these parables is plain: human life, under ESA, is cheap.

ESA is also used against public education. In San Diego County, for example, federal bureaucrats (from FWS of course) recently declared the intended site of Jonas Salk Elementary School "the largest unprotected vernal pool complex remaining in Mira Mesa." They said fairy

*The Ninth Circuit Court of Appeal in 2004 upheld this landmark decision: *Home Builders Association of Northern California v U.S. Fish and Wildlife Service and Center for Biological Diversity.*



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shrimp eggs that lie dormant in the hard-pack soil of these vernal pools during the dry months will hatch once the rainy season begins. Owning the site since 1979, the school district contends that the seasonally rain-filled ruts, trenches, and other depressions on the 13-acre site are the result of years of usage by motorcycle and dirt bike riders. FWS says it makes no difference that these vernal pools were man-made. FWS also rejected the school district's offer to reduce the actual building site from 13 acres to nine. So, Jonas Salk Elementary School will not open in September 2006 as planned. The earliest it might open will be September 2007, or it might be delayed still more, or may never open at all. To salvage the site, the school district is considering a "mitigation" trade-off with FWS, whereby it would purchase vernal pool acreage in another area of the county in return for FWS's sign-off. The price tag? At least $4 million — funds needed to educate our children.

These cases show that ESA has become, intentionally or not, a weapon deployed against human rights, damaging human welfare. With *Kelo* catapulting private property protection to the top of Americans' list of critical issues, the political environment is the best it's been in decades for ESA reform. Legitimate concerns *for* property rights and *against* anti-people "environmentalism" must be addressed. Members of Congress and staff are well-informed about ESA's glaring deficiencies and ways to cure them effectively. It is time to get that job done.

And this fall Congressman Richard Pombo, (R-CA), House Resources Committee chairman, will introduce a much-anticipated bill to amend ESA significantly. It has been in the research and development phase for a couple of years. However, when Pombo finally released its provisions not long ago, the measure received mixed reviews: some people calling it "an updating," "an improvement," and "a strengthening" of ESA, others describing it as "a Pandora's box," "a wolf in sheep's clothing," and "all smoke and mirrors." Curiously, these characterizations do not come from ESA's defenders; all of them come from supporters of property rights. The bill is regarded as an improvement by most large industrial landowners who favor reform of ESA's anti-business provisions (which threaten many businesses' survival and, in fact, have been used to destroy much of the timber industry). But grassroots advocacy groups interested in ESA reform — those more directly concerned with the Act's devastation of small owners' rights to use their property — fear the bill contains provisions potentially worse than current law.

An historic reaffirmation of every American's right to own and control his property could be achieved, both because of *Kelo* and the growing abuses of ESA. Failure to achieve it would be tragic. Anything shy of a clear mandate that the *human* species should receive primary consideration would be no cure at all. CPR

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SPIRIT OF THE RECALL

CPR's BI-MONTHLY REPORT ON CALIFORNIA'S 'BLOW UP THE BOXES' REVOLUTION

Nowhere to go but up

by Christopher Shelton

Watching the governor and the GOP take the pummeling they have in the last few months brings to mind what it must have been like in London during the worst of the World War II Nazi blitz. The union-financed air-wave assault has been every bit as relentless as the waves of Luftwaffe bombers that pounded London night after night for more than a year. The damage wrought by the multi-million dollar union media campaign is real, as real as the burned out London buildings left in the bombers' wake.

And yet it bears remembering that beneath London's rubble stirred a man who would rally his fellow citizens, and indeed the free world, holding out hope for the ultimate triumph when almost no one in the world saw victory as possible. Is such a leader stirring in the Capitol, ready to inspire his troops and fellow citizens?

There had better be, and there well might be. For if victory is to be the GOP's come November 8, Governor Arnold Schwarzenegger is going to have to do a Winston Churchill impression worthy of the ages. Many senior politicos of both parties believe him still capable of doing just that.

Attitudes found in the competing camps are most counter-intuitive. The GOP apparatus in the Capitol talks bouyantly of a September-October game plan led by the governor and bringing victory in November. The Democrats, meanwhile, continue to fret, moan and whine like folks who are 20 points behind in the polls.

Part of any GOP victory must include quick rehabilitation of the governor's public approval numbers, and part of the plan for that includes having him give a Churchillian address to the state, laying out exactly how bad things are and pointing out that "blood, tears, toil, and sweat" are required to fix California's myriad problems. He needs to admit starkly to the people that he was taken in by Democrat promises of compromise, and was betrayed. This is a speech he should have given shortly after taking office, as a matter of fact, rather than allow himself to be deluded by Democrat talk of bipartisan cooperation. Better late than never, however.

"The Speech" would be followed up by eight weeks of nonstop, in-your-face campaigning by Schwarzenegger, painting the choice facing the voters on November 8 in powerful, crystal-clear, dare we say Churchillian, terms. Had Churchill lost the Battle of Britain, he certainly would have been publicly shot or hung, probably after a show trial. The governor realizes that the political equivalent of this fate awaits him if he is an across-the-board loser in November.

Both Republican hopes and Democrat nervousness trace partially to a shared belief that things cannot get worse for the governor. Due to an enormous mis-calculation by his political consultants, he did not respond effectively — or, frankly, at all — to the months of union-financed electronic-media character assassination. The Democrats and public employee unions have had the

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