SECRETARY OF THE INTERIOR BRUCE BABBITT
SPEECH ON THE ENDANGERED SPECIES ACT
OCTOBER 22-24, 1993 DURHAM, NC
TO THE SOCIETY OF ENVIRONMENTAL JOURNALISTS

INTRODUCTION: It is my privilege and my pleasure to introduce to you the Secretary of the Interior of the United States the Honorable Bruce Babbitt.

MR. BABBITT: Thank you very much. It's a pleasure to be here. And I'm going to make a confession at the outset. My intention today really not to make any news. I think some of you will understand that. I ran for President a few years ago and upon hearing that I am speaking to several hundred journalists with the intention of not making any news, I assume not much doubt about why I got out of the race very early, back in 1988. But what I want to do is see if I can, at the risk of being a little bit pedantic, talk about some of these larger issues; especially the Endangered Species Act, and the shape of the debate that I think is coming at us well in advance of the eventual reauthorization timetable of the Endangered Species Act.

The reason I selected this topic is because I have been up on Capital Hill in the last several months, pushing what I thought was a remarkably uncontroversial, uneventful, plain-vanilla, scientific institution called the National Biological Survey. I think a scientific innovation of great importance to the future of the country, and one, which I have been at pains to characterize as a scientific institution, if you will, the biological analogue of the United States Geological Survey. I went up to Capital Hill ready to say, 'When was the last time anybody heard of a controversy involving the United States Geological Survey?' and here I have its biologic counterpart. All of a sudden I am sitting in a committee locked in crossfire with your luncheon speaker trying to think, 'I know these Congressmen from the south are canny and he must see something in this institution that I don't.' This, as they are busy sort of loading it down with amendments including an amendment prohibiting the use of volunteers by the National Biological Survey. Then I started thinking about it and it became clear very quickly. I called him up and I said, "Mr. Hayes, you're a tricky, no-good devil! What you're doing is using my Bill as the stage for a dress rehearsal debate about the Endangered Species Act!" He sort of smiled and said, "That's exactly what I'm doing!" So that brings me here today to take the bait, if you will, and to talk about the Endangered Species Act and what those issues are and what I think our response is.

The Endangered Species Act, undeniably, is the most innovative, wide reaching, and I believe, successful environmental law that has been passed or enacted in the last quarter century. In 1993, this year, it is precisely twenty years old in it's modern form and I believe it has been remarkably successful. I can site case after case of resurgence of and rebirth of the American Alligator, the fact that the skies are now once again graced by many Bald Eagles, the Peregrine Falcon; now moving from near extinction to the threshold

of de-listing. There are many, many exception stories, including not in the least, the forest plan that has now been worked out in the Cascade Forest ecosystem in the Pacific Northwest.

The opponents of the Endangered Species Act understand those successes and those facts. So they have kind of come at us from a difference direction. There is now a collection of different groups assembled under a tent, who are advocating a new concept. It's called Taking Doctrine. And that's what you are going to be hearing next year. It's this notion that what the Endangered Species Act is really about unconstitutional, uncompensated, taking of private property. If you want to see the dry run of what that argument is going to look like you need to dig up a Bill call HR-1388, which is styled as the Just Compensation Act of 1993. I recommend that you have a look at it, because this is where it's coming from. It's a pretty simple Bill. It says that it would require any federal agency to compensate owners from private property, and I quote; "for any diminution in value", close quote, caused by any regulatory action taken under designated environmental laws. There is a little list of them, and right at the top is Endangered Species. So what they are saying is 'Secretary of the Interior, henceforth, when under the Endangered Species Act takes any regulatory act of any kind, which causes any diminution in value of any kind of property, much dip into the public treasury and begin paying, under the mechanism specified in that Bill for any diminution in the value of any kind of property; real property or any other property. I was pondering that the other night and I thought that I needed some examples of what these folks are advocating. The first example I came to is the Kesterson National Wildlife Refuge in California. Some of you may remember that a few years ago, Kesterson, which is one of the great migratory bird stops on the Pacific flyway, had a problem. The waterfowl were dying. They were deformed at birth. There were all sorts of strange things happening. It turned out that there was selenium poison, which was running into the wildlife refuge from irrigation tail water being put into the refuge as drainage water from an agricultural area. Obviously, under the Endangered Species Act, I am mandated to take some regulatory action against what was happening at Kesterson. My regulatory act is as follows; clean up the pollution or we're going to sue you. It's real simple. What this act would say surely and simply is by saying, "stop the pollution" what am I doing? I am undeniably causing a diminution in value of a property right. It's going to cost those farmers money to stop the selenium flow into that National Wildlife Refuge. And under the literal, exact terms of this Bill they'll comply but they'll send me the bill for their clean up actions. That's exactly what these folks have in mind when they are talking about "takings". They are saying, 'we don't like environmental laws. And if they inconvenience us, we're going to send you the bill and ask the public to pay.' I guess what I would say, rather than the old legal maxim, "make the polluters pay", what they are saying is that 'it pays to pollute because the government will reimburse your costs'.

Those of you who have covered the Everglades in Florida, I think can readily see another implication of this Bill. The issue in the Everglades is phosphate contaminated

drainage water, which is causing nutrification of the Everglades and a corresponding decline in the productivity of the fish resource, the decline of the Snail Kite which is linked to some of those resources and a variety of other endangered species. What is my regulatory action in the Everglades? It is a message to the sugar companies, "Stop, clean it up!" That message is being sent right now in the form of an action in the United States District Court. Okay, if this Bill passes, what happens? Sugar growers go into federal court and say, 'you better dismiss this lawsuit because we're not paying anything! Sure, we'll clean up the phosphate, but they Interior Department gets the bill because we've been inconvenienced. If you make us clean this up, we'll have a little less profit next year and that is a diminishment in value of our property'. I could give you a lot of other examples, but I'll stop right there. You can see my point.

If they get away with this kind of reversal of environmental history, start thinking about what happens after that. Pretty soon they are going to be over at the EPA saying that when chemical companies incur losses when pesticides found to cause cancer are banded, what happens; well, the chemical companies will send their bill to the government. When the federal Food and Drug Administration takes a breast implant off of the market they will send a bill to the FDA saying, 'hey, we lost money as the result of a regulatory action!' When the Federal Aviation Administration refuses to certify a defective aircraft engine; where do you stop?

The fact is that our society has had a fundamental premise; and that is that regulatory action, taken for a valid public purpose can have consequences that inconvenience people. In fact, from time to time, they do diminish someone's rights in the public interest. The most interesting example I can think of, that I would start with, is planning and zoning. Think of this one: suppose that the Washington, D. C. City Council, that notable repository of wisdom and governmental skill, decides to zone a corner lot in my neighborhood for a strip shopping center. I've got to tell you that happens every day in every community in this country. What happens when they zone that lot? They convert some value on a lot owner on that corner, at the same time as they diminish the value of my residence, which is half way down that block. It has never, to my knowledge, in the history of America been advocated that a zoning decision, which creates a marginal increase in value at the admitted expense of someone else's property rights; my residential right, that that act gives me a right to compensation. Think of the consequences, if that is the law in the United States of America! There would be chaos! I'd round up 200 neighbors and be down in front of the Treasury saying, "Compensate me!" Maybe we should have a tax on the people whose land is increased in value and have a redistributionist scheme, which says 'all winners compensate all losers every time a road is built, a neighborhood is rezoned'. Do you see what I am getting at? It's a way, a pernicious way, of simply saying that 'we are going to destroy the efficacy of government'.

I can hear my good friend Mr. Hayes, I can hear him right know saying, 'Bruce, you exaggerate. You're another one of those slick, big city lawyers pointed out all sorts of hypotheticals'. Well, well and good! I guess he'd say that environmental regulation is different from all of those cases I used. Maybe he would say that an environment regulation is a special case. It's new in American history and we've got to hold it to a higher standard. But is environment regulation really that much different? Think about it; is it really different from the kind of action that the D. C. City Council takes every day in my neighborhood? I'd submit that environmental regulations, just like planning and zoning have the function of protecting the larger interests of the community; air, water, open space, whatever you want. Inevitably, on the margin, there are some winners and some losers. I think of an example that comes from my own hometown; Flagstaff, Arizona. It's a really special, extraordinary place, located high in the ponderosa forests of northern Arizona. The Flagstaff City Council, using it's zoning powers about ten years ago, passed a law saying that in the city limits of Flagstaff, Arizona it is a crime to cut down a pine tree on private land, unless that pine tree is removed to make way for an authorized improvement pursuant to the building code and the zoning laws. Now, the response in Flagstaff, Arizona to that law, a zoning law, which I submit is preeminently an environment law, was very positive. The residents of that community said, 'that's an environmental law that works to our manifest advantage. That's why people come to this town!' You walk in and you can smell the perfume of the pine forest in the air. Everywhere you turn there is this extraordinary horizon, and it's perfectly reasonable for the benefit of the entire community to create habitat values to protect the wildlife and to protect the overall image of this town. And admittedly, it will subtract from the freedom of a landowner who says that he has 'every constitutional right to saw down every pine tree on his lot, and to hell with the world'! The city council is saying, "no you don't. You use your property in a reasonable fashion and realize an economic use. But in the name of the overall environment of this town, we are going to post some restrictions of landowners'. The good residents of the town of Flagstaff have accepted that and the courts in Arizona, which is not a notably aggressive State in these kinds of things has said, 'yes, that's fine'. Palmdale, California has done it with Joshua trees. Arizona limits your right to remove cactus from state lands. Massachusetts has, under it's zoning code a set back requirement on every stream and waterway in the state. Those are imposed by local governments, under zoning authority. But they are manifestly environmental regulations.

Of course, I think you now see where I am headed. That's really what the Endangered Species Act is about. It's not a land use law. It's a law that says that we are going to protect public property; wild, endangered species. But it is a law, which acknowledges in many, many cases the only efficacious way to protect an endangered species is to protect the habitat. It is undeniable that the Endangered Species Act, in operation with it's focus on habitat, is going to limit the ability of some landowners in some places to do anything they want; to raze the forest, to bulldoze the habitat, to dry up a stream which contains an endangered species. The question then becomes, 'what are

the restrictions like?' And when are you entitled to compensation. I did a little research about that because I thought listening to my friend Mr. Hayes and others, that I'd be able to find some cases of egregious abuse. I thought, "It seems to me unlikely that Mannie Luhon and Don Odell and Jim Watt were really out there pushing this Act, driving people into the courts to protect against their overzealous administration". I thought I'd have a look. So I marched some of my folks over to the Court of Claims, where there are hundreds of takings cases of all kinds being filed in waves of protest, and I said, "what about the Endangered Species Act?' Do you know what I found? I found that in the twenty years of this Act, in it's modern form; there has not been a single case in a Court of Claims alleging a taking under the Endangered Species Act. I want all of you, when you are talking with Mr. Hayes next time, to sort of stuff that one in his craw, and see what he says!

The fact that in twenty years, we've listed some 800 species, put up habitat preservation plans, spent a thoughtful and reasonable amount; this has never created a takings case in the Court of Claims is to me really not the end of the inquiry. And I'll tell you why. It's not just about whether or not unconstitutionally taken someone's property. No one has yet alleged any case. Constitutional standard for a taking, I think, is subject to debate and discussion, coming out of the Lucas cases. You have to substantially deprive of any reasonable use of their property. You've really got to shut them down. But I would agree with the critics that this is hardly the appropriate standard for the elected representatives of the public, the Clinton administration and its mandarins to be bragging about, saying, "Well, we've never committed a constitutional take." It seems to me that the standard ought to be higher. We ought to be held to a standard of reasonables. We ought to be able to demonstrate that we are administering this law in a way that is sensitive and that isn't imposing hardship on people. And that we have stopped short, not only of a constitutional taking, but we actually are administering this Act in a sensible way which does not inflict unnecessary inconvenience and hardship on the citizens who put us in office. What I would submit and will submit, as this debate begins, is that we're doing a pretty good job of it. And the reasoning is that across the last twenty years we have begun to devise some pretty innovative approaches to this issue of taking steps to preserve habitat on public and private lands without shutting down private landowners. The first step as we go through this process in any kind of situation is to ask a simple question. Are there public lands available that we can use as the core of the protection scheme? Public land, owned by all of us, where there is no taking question. We've been fairly successful at that. You go to California and ask people about the California Spotted Owl. Have any of you have written stories about the California Spotted Owl? No, you know why? It turns out that by good fortune, it turns out that the habitat is mostly public land, about 99% up in the Sierra Nevada in northern California. Nobody is squawking. That is gratuitous and nice. Whenever we can that, we do. In all cases for this public land we try to construct plans that say that the public land is going to carry the burden of the management load. That's been done in the Pacific Northwest with the Spotted Owl controversy there. The management plan that has come

out for the northwest has stronger provisions for public land because that enables us to tread a little more lightly on the private land owned by individuals and the timber companies; the habitat conservation rules outside the core areas; rest a little more light as a result on the public lands. Another approach that we've used that I think you are going to see a lot more of is the flat out mitigation. A good example of this is the Desert Tortoise, which is found in the Great Basin of Nevada, California and Arizona. Several years ago the city fathers of Las Vegas, which is a boom-town if there ever was one, discovered that all subdivision land had already been taken by the Desert Tortoise; he got there first. They came to us and said, "What are we going to do?" We worked out an interesting plan. We said to the developers, "As you bulldoze tortoise habitat for subdivisions, we will levee a surcharge on each lot; just like a surcharge for water, sewer or roads. We'll put it in a back account and we'll use it for mitigation." We would go out a little further out and buy up the private lands that are in holdings in the public domain and set up tortoise reserves. Your mitigation will just be a surcharge like any other type of infrastructure charge, and we'll use it to protect land in the out back. It's concept that's been used in California on the Monterey Peninsula and a lot of other places. It's a way of saying to private property owners that we can rearrange the protection landscape in a way that makes sense; you'll see a lot more of it. There are some other cases where just management changes work. The best example I can give you of that is the Red Cockaded Woodpecker, which hangs out in the neighborhood around here and all across the south. It's a more manageable bird than the Spotted Owl because it has interesting characteristics. It's very picky about where it lives. It has to have an old growth tree. But its quite eclectic about it's dining habits. It eats all kinds of different things. And it's not at all picky about its neighbors. It doesn't have high standards the social company. You'll find them living on golf courses, in back yards; all you have to do is make sure it's got good shelter and the supermarket is not too far away. For those of you who are interested in these things, it also has excellent family values. It's a monogamous critter. They stay together and the young ones stick around to help raise the next generation. It's really an admirable bird. It's one worthy of preservation. It turns out that given these characteristics we were able to go to Georgia Pacific, for example, and work out a simple little plan whereby Georgia Pacific in exchange for a favorable response from an overbearing Department of the Interior, says that they have constructed a plan where our biologists move out ahead of the logging crews, identifying the old growth woodpecker trees and keep a little; very modest habitat circle around that tree. They estimate that this procedure will impact maybe one percent of their timberland. And again, in light of the background rules and regulations; regulating for the common good seems to me to be pretty reasonable. It seems pretty reasonable to Georgia Pacific. You'll see them down here running television ads, bragging about it. I think they should, because they are a living example of how we can solve problems.

For those of you who are from Texas, we've had a quite extraordinary result in a place called the Edwards Aquifer. This is one that looked like a train wreck in the making. The politicians were going wild. It turns out that along the Balconni's Escarpment down

in central Texas, there are a bunch of really marvelous springs that give rise to the headwaters of these rivers that run southeast down to the Gulf of Mexico. As fate would have it, in these large pools there are a few, fairly uncharismatic critters living at Great Gap, including one, which is called the Blind Texas Salamander. And I'll tell you, it really looked like a disaster because people were running for office and it's going to be people, or the Blind Texas Salamander. It's going to be future for Texas, or, turn in over to cave dwelling, invertebrates and blind salamanders! We got into this and took a careful look. What was happening was that the pumping up outside of San Antonio was lowering the groundwater table and drying up those pools. We had a careful look. We used the USGS and others. It turned out that what Texas really needed was a groundwater management program. So we sat down with local governments. We went up to the Texas legislature with Governor Richards. And in a sort of quiet, thoughtful process, the Texas legislature passed the first groundwater management law in its history, over the cries of the few lonestar legislators who said that this was Leninism on the run in Texas! The Legislature passed it. It's had the incidental effect of preserving the water levels and insuring that San Antonio's water supply will be a lot more secure than it would have been in the failure to limit over drafting.

This is just another interesting example of the flexibility of this Act. It is a broad shouldered act that accommodates a lot of interesting kinds of provisions. One that I think you are all familiar with is density transfers. It's the most obvious one of all. Every planning and zoning commission, every town, every county in this country does density transfers. It basically says to a landowner, "We'll give you more density on the south forty in exchange for your commitment to preserve open space on the north forty". It's been done traditionally for aesthetic reasons. But I think you can see the implications. It's a marvelous tool for preserving habitat. For those of you from southern California, we are currently at work in a really impressive effort being driven by California's local governments and the Fish and Wildlife Service to preserve the Gnatcatcher habitat in southern California. Density transfers will be a big part.

If you make your way through all of those and you still don't have something to work with, you can look at land exchanges. The Department of the Interior has 500 million acres of land. I am not claiming that its all sacrosanct; only 499 million. But that's a land bank from which we can, if we get into a corner where these other tools don't work, we offer a land exchange. And we are doing that right now in southern Utah, in Nevada and elsewhere. It's been done in Florida too. It was a great benefit in Great Cypress where we picked up 100 thousand acres of land in exchange for 100 acres of land in downtown Phoenix. It was a terrific deal for everyone. If that doesn't work, and there is a manifest, looming injustice, we can simply say, 'we'd like to buy your land'. An example of that is Austin, Texas. As I speak here tonight, Austin, Texas is going to a bond election next week to determine the future of one of the most exceptional habitat conservation plans that has ever been worked out in this country. The basic problem there is a bird; the Gold Cheeked Warbler. These birds are extraordinary critters. They

tend to get backed in to these evolutionary nitches where they are dependent on a single tree, a single food source. They are not very movable. And the problem in Austin, for those of you who have not been there, is that the highlands, the country to the west, the old LBJ hill country is the birds most desirable place. The birds and the people both want to live in exactly the same place. Go east of Austin to Siberia, the Sahara; there's nothing but space! But the birds and the people want to go to the hills on the Balconni's Escarpment. The question then becomes, 'can we sort it out'? The people of Austin are going to make that decision in about a week. What I have said in Austin to the people is, "If you vote that bond issue, we'll throw in another five million dollars to do our share of land purchases that are necessary to make this work". Obviously, money is in scarce supply, but there are times when it is appropriate.

Lastly, just a few thoughts about why it is you keep reading all of these stories about hardships. The system isn't perfect, and the most difficult case is the small landowner. The big ones who can use density transfers, land exchanges and all of these things are easy. The tough one is when we get a small landowner who is on a strategic piece of property. Their complaint usually comes because of the transition. When a species is listed under the terms of the Endangered Species Act, there is an effective freeze across that habitat occupied by that species. It usually takes us two or three years to construct the habitat conservation plan, which will begin to free the land up. And the kind of Reader's Digest story that you read is always about the small landowner who is caught in the regulatory freeze, until we get the conservation plan together. It is true that between listing, the promulgation of that plan, the law does sort of say, 'proceed at your own risk'. That's the area where we've got to start making some improvements. That's what you'll be hearing from us on in the coming year. And as I've said to the FWS, "shorten that freeze to reduce to a bare minimum the inconvenience on the guy who is saying that he'd like to clear an acre to build a house for his mother-in-law. Or, the guy who wants to cut down some trees for a horse arena, whatever it may be. We can handle those by inventing some new concepts. I think for example, we could have a kind of transition habitat plan where we can use the provisions of Section 7. "I am doing what I do best", which has become pedantic.

I sound like I am in front of a law school class, so I'll wrap it up right there, and say that the message that comes out of all of this is that the Endangered Species Act is not the problem. The problem is that the people who have been charged with administering the Act, haven't explored, with imagination or creativity the range of possibilities. And the way it is, it's a wonderfully expansive Act and it's much better for us to proceed that way, than to get backed in to these incredible ideas that you are going to legislate financial remedies for land owners. If you have some sort of statutory formula, think of the litigations and speculative land purchasers on the landscape. There would never be enough money in the history of the world, if every time the government makes a regulation somebody gets paid. We recognize the 5th Amendment. We recognize the need to do these mitigation habitat preservation schemes. The burden is on us to make things

easier for people. I think we have, and will continue to do that. And against that background, when the time comes, we will be up there saying that the Endangered Species Act is an extraordinary piece of legislation. It's not the deficiencies in the Act. It's the willful failure of public officials to use the Act. And I believe deeply, that we can preserve the incomparable biodiversity of this American landscape. We can accommodate a reasonable expectation of any landowner. All we have to do is think together and adopt an ethic of living a little more lightly on the land; understanding that we can't separate nature from our daily activities. Empty spaces have disappeared. The days when you can say, "We'll put up a little park out there and post a Ranger" are gone. We're all in these ecosystems and we have to begin to think of ourselves as inhabitants of those systems. And we must begin to live and think accordingly. Thank you.