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LANDSCAPE SCALE HABITAT CONSERVATION PLANS:
THE CALIFORNIA EXPERIENCE

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BIODIVERSITY PROTECTION:
IMPLEMENTATION AND REFORM OF THE
ENDANGERED SPECIES ACT

Natural Resources Law Center
University of Colorado
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I have been asked to describe the history of landscape-scale habitat conservation planning in California under the federal and state endangered species acts ("ESAs") and the difficulties encountered.

I. INTRODUCTION

Habitat conservation plans ("HCPs") were born and grew up in California. They remedy the institutional failings so well characterized by Garrett Hardin's "tragedy of the commons" -- the destruction of the commons by the cumulative uncoordinated impacts of individual uncoordinated actions.

HCPs and the process used to craft them reflect a major change, a paradigm shift, in the manner of addressing the cumulative impacts of development on our wildlife resources. The old paradigm is characterized by a project-by-project, developer led, quasi-judicial approval process (often involving separate local, state and federal administrative actions). The new paradigm is proactive conservation planning, led by the public sector, collaborative (involving the "constituency of interests") and often facilitated. The result is an agreement bridging the chasm between the private and public sectors that addresses and reconciles development and its cumulative impacts on wildlife resources. An apt metaphor is the traditional American art of quilt making -- the patching together of individual sections or pieces of the quilt (the product of individual creativity) to express a consistent theme.

II. A BRIEF HISTORY OF CONSERVATION PLANNING

A. Pre-San Bruno (1946--1979).

World War II was followed by a euphoric period of unbridled development, together with an attitude that our every command would be fulfilled. In the late 1960s and early 1970s, with the adoption of legislation such as the Clean Water and the Endangered Species Acts, the excesses of development were addressed in the same command and control manner. That is, controls were grafted onto the existing project-by-project governance scheme of the early 1900s and the earlier more basic governance provided by individual land ownership. State and federal permits were to be one more step in the project approval process.

There were, however, seeds being sown of a more systemic approach. Although focused on individual actions, the conceptual base of National Environmental Policy Act of 1969 ("NEPA") was rooted in planning rather than regulation. NEPA called for systemic thinking (the consideration of and selection among alternatives that transcended the mission of the particular agency taking action) as well as collaboration (consultation and scoping). The NEPA logic is only now being fully appreciated and integrated with broader process improvements.

There was also an appreciation that the command and control approach by itself was inadequate. Then President Nixon, and John Ehrlichman, his domestic advisor, as well as Senator "Scoop"

Jackson had focused on the need for a national land use policy and program. A Water Resources Council had been established at the Cabinet level. Unfortunately, the national land use policy initiative was abandoned in the tumult of that time and the Water Resources Council withered during the Reagan Administration.

The San Bruno Mountain HCP is generally considered to be the model for the HCP paradigm. However, there were two efforts that were important precedents to our request in 1980 that the Fish and Wildlife Service ("FWS") collaborate in a "habitat conservation plan" in order to reconcile the conservation of the eco-system with anticipated development.

The first was Bolsa Chica. Bolsa Chica, or "small purse", is a 2,000 acre historic wetland on the coast in southern California. The historic tidal inlet was dammed at the turn of the century, leaving portions of the interior a remnant marsh, operated as an active oil field, crossed by earthquake faults and surrounded by archeological sites. A two-year effort, which commenced in 1988, to bring the "constituency of interests" together as the "Bolsa Chica Study Group" to craft a "special area management plan" under the Coastal Zone Management Act, failed. We had no model for collaboration to call upon. Specifically, the then Secretary of Resources and the California Coastal Commission (and at one point, the Assistant Secretary of Interior) were unwilling to provide the necessary shared leadership to convene a collaborative planning process, relying instead on the regulatory process.

The second precursor involved a series of vernal pools scattered over the mesa tops north of San Diego. The pools, formed during the spring within depressions in an impervious layer of soils, contained listed endangered plants and were within the asserted jurisdiction of both the United States Army Corps of Engineers and the California Coastal Commission. A regional "Vernal Pool Protection Program" was developed by a joint effort of the United States Corps of Engineers and the City of San Diego involving the "constituency of interests", allowing some ponds to be developed with an in-lieu fee of \$8,000 per acre. The fee was inadequate. The City had not truly accepted the required stewardship role. The funds went unspent and the resource was not properly conserved. The program failed to meet our early hopes.

In retrospect, these early precursors lacked critical components of the new paradigm. The Bolsa Chica process did not provide the "box" to keep the constituency at the table nor the commitment required to bring the effort to a successful conclusion. The Vernal Pool program lacked, among other things, the implementation agreement -- the assurances that we now have.

Throughout the country, other experiments were being conducted on ways to govern special natural resources. In general, they reflected the command and control paradigm. For example, it was common for states to establish special commissions with regulatory powers in order to govern areas of special concern. These included geographic area-focused regulatory efforts such as: the San Francisco Bay Conservation and Development Commission; the California Coastal Commission; the bi-state Tahoe Regional Planning Agency; the New Jersey Hackensack

Meadowlands Commission; New York's Adirondack Park Agency and the New Jersey Pinelands Commission.

In addition, Florida had adopted a comprehensive land development code and other states such as Vermont, Washington and Oregon had adopted state-level land controls addressing all of the state or particularly sensitive areas.

B. The San Bruno Mountain HCP (1979--1983).

Based on these antecedents, a three-year effort to develop an HCP for San Bruno Mountain articulated the new paradigm. The San Bruno Mountain area is a 3,000 acre, unique, wind and fog affected habitat, an isolated island of open space in a sea of urban development on the peninsula south of San Francisco.

The effort involved a county, three cities, numerous landowners, conservation groups and state and federal agencies. It required an amendment to ESA, adding Section 10(a). The documentation included the HCP, an implementation agreement, a joint state/federal environmental impact report/environmental assessment, and the first Section 10(a) permit. It covered 53 species and contained a "no surprises" provision. Included were three listed species; 2 butterflies and a snake. The federal actions were judicially attacked and validated (*Friends of Endangered Species v. Jantzen*), 596 F.Supp 518 (ND Cal 1984); affirmed 760 F2d 976 (9th Cir. 1985). The Callippe Silverspot butterfly, that had been proposed for listing as "endangered" and was the presenting issue, was never listed.

More than 80 percent of the lands were conserved as habitat and are operated by the county, in part with funds from charges levied annually on the development that was permitted. The HCP served as the model and basis for the enactment of Section 10(a) of the ESA (Conference Report), H.R. Report. No. 835, 97th Cong., 2d Sess. (1982). The new paradigm included the following elements:

- the "focal point" process, providing a forum for the constituency of interests and public sector leadership (rather than by private sector developer) to focus planning efforts on the specific concerns involved;
- consensus and reconciliation (not necessarily compromise) as the basis for the plan;
- the conservation plan as a multiple interest governance contract;
- eco-system/habitat focus (covering 51 species);
- the use of facilitation and common technical support;
- involvement of the constituency of interests; and,
- assurances in the form of an implementation agreement.

Concurrently, similar Special Area Management Planning processes under the federal Coastal Zone Management Act were being explored, although unsuccessfully, in Grays Harbor, Washington and Coos Bay, Oregon and Florida had established its "Section 380" Resource Planning and Management Committee Process to focus on areas of special concern.

C. A Period of Quiet Experimentation and of Regulatory Retrenchment (1983-1990)

For the decade following the San Bruno Mountain HCP, only a handful of HCPs were undertaken and adopted, including the following:

1. Coachella Valley Fringed-Toed Lizard, California HCP. The plan was completed in 1985 covering 200,000 acres, 17,000 acres of which were acquired as a preserve for the species. A portion of the acquisition funding was obtained from an impact fee on development within the historic range of the species.

2. North Key Largo, Florida HCP. The 12,000 acre island was inhabited by four federally listed endangered species: two rodents, a crocodile and a butterfly. The process commenced in 1984 and resulted in 1986 with a plan that contemplated two alternatives: nodes of development or acquisition. The acquisition alternative was, in effect, chosen and virtually the entire island was acquired by the state and federal governments at a cost of approximately \$40 million. Two relatively small Section 10(a) permits were

issued. The plan had been critical as a basis for determining the fair market value of the lands acquired. The entire process was conducted as a NEPA scoping process.

3. Metro-Bakersfield (California) HCP. This HCP covers 405 square miles of the San Joaquin Valley inhabited by several endangered species (kit fox; kangaroo rat, lizard and others). Begun in 1986, it was finally approved in the early 1990's. It included provision for an impact fee and the acquisition of conserved habitat on a pay-as-you-go basis.

4. Least Bell's Vireo HCPs (southern California). These HCPs (conceptualized as a master plan and individual plans for separate watersheds) were commenced in 1986. With a minor exception for Rancho San Diego, they addressed a single species, a migratory songbird that inhabited riparian areas. It was never completed, primarily because permitting could be accomplished under Section 7 of ESA on a case-by-case basis. Draft HCPs were used for consultations under Section 7.

5. Riverside County (California) Stevens' Kangaroo Rat ("SKR") short and long-term HCPs. These single species plans (the species is listed as endangered under both federal and state programs) covered approximately 565,000 acres, a substantial portion of the historic range of the species. The short-term plan was commenced in 1988 and took two and one-half years to complete. The long-term plan was just completed (eight years after the planning process

started). The plans will result in a series of preserves comprising approximately 41,221 acres of land. The program is overseen by a joint powers agency, the Riverside County Habitat Conservation Agency ("RCHCA"), with a board made up of representatives of the county and six cities.

The short-term HCP provided for the establishment of "study areas" that were to diminish and evolve into preserves to be managed by the RCHCA, with any interim loss (up to 4,400 acres) to be offset by an equal acreage ratably set aside as development progressed.

Local ordinances levied an impact fee of approximately \$2,000 per acre for lands developed within the historic range of the species. Revenues from this source are reaching \$30 million. In addition, other project mitigation in the area has resulted in revenues of an additional \$90 million. Prior to 1996, virtually no funding had been provided from state or federal sources. In connection with the long-term HCP, the state and federal governments have now committed to provide lands owned by the Bureau of Land Management as habitat, or for use in exchanges for habitat, together with \$41.7 million in funding.

6. Clark County Desert Tortoise HCP (Nevada). The plan covers 7,800 square miles, primarily publicly owned lands. In 1989, the HCP was commenced. A short and long-term plan were utilized. Impact fees are assessed for the preparation of the plan and for mitigation. A significant factor is that a major amount of the lands involved are federally

owned. Accordingly, much of the contemplated conservation is accomplished through federal land planning and management. The sale and exchange of federal lands will also provide revenues for the implementation of the conservation plan.

D. A Shift in National Policy and the Establishment of the NCCP Program (1990-Present).

Prior to 1990, the FWS staff nationwide viewed HCPs with skepticism and, in many cases, as "habitat development plans". In that year, a shift occurred within the Department of Interior. The context was the growing conflicts between wildlife conservation and development within southern California, identified by E. O. Wilson as one of the 18 global hot spots of biodiversity (The Diversity of Life), 262-263 (1992). Then Assistant Secretary of Interior, Constance Harriman, and Director of the Service, John Turner, led a policy shift calling for a major focus on HCPs to address issues such as the California gnatcatcher, which was then being considered for listing as "endangered" under ESA.

However, the increased focus of the FWS on the Gnatcatcher resulted in increasing conflict involving a concerned development constituency, a relatively zealous FWS field office and dedicated conservationists, with a conservative wind rising in the background. In response, the then newly elected Governor Wilson and his Secretary for Resources, Douglas Wheeler were asked to, and did, provide the key leadership required to address the growing storm of conflict. This leadership resulted in

legislation in 1991 providing for the Natural Community Conservation Plan Program ("NCCP"). Upon election, the Clinton/Babbitt Administration joined with the Wilson Administration in a collaborative effort to address the problem.

Early steps included the establishment of a Scientific Advisory Board and an NCCP Advisory Group to establish a framework for the program. There was also an attempt to avoid the listing of the species under ESA and the California Endangered Species Act ("CESA") and thereby to encourage private sector and local agency participation. The focus, however, quickly shifted to relatively autonomous and varied conservation planning efforts in Riverside, Orange and San Diego counties (and recently, Los Angeles County), with the State advisory organizations fading in the background.

The NCCP, multiple species programs are flexible and vary significantly based on the underlying circumstances.

1. Riverside County

The Riverside County effort, described above, represents a model for governance of such efforts as well as local funding; however, State and federal funding has been lacking and, together with delays in permit processing, has threatened the HCP program.

The Riverside County effort predated the NCCP. With the completion of the SKR HCP, the RCHCA is moving to fill out the plan to be an NCCP. Interestingly, the SKR was also a state listed species and the take of the species under the

HCPs relied upon permission provided by the State Department of Fish and Game under Section 2081 of the California Endangered Species Act. Dicta in a recent appellate court discussion questioned whether the "management" (allowed by the statute) contemplated take to allow for development.

2. San Diego County

There are three San Diego County efforts:

The **Multiple Species Conservation Planning** program ("MSCP") is led by the City of San Diego's Clean Water Program, generally focusing on the 581,649 acres (900 square miles) of land in the southwest area of the county;

The **Multiple Habitat Conservation Program**("MHCP"), is led by the San Diego Association of Governments, focusing on the 524,585 acres of land in the northwestern portion of the county and,

The **Multiple Habitat Conservation and Open Space Plan** program led by the County, focusing on the remaining unincorporated lands in the eastern portion of the county.

The MSCP has recently received conceptual approval as to the San Diego City areas, by the San Diego City Council, subject to, among other things, the establishment of a funding framework within eighteen months. Of the total planning area extending over six local jurisdictions (and with significant state and federal holdings), there is more than 300,000 acres of habitat,

with two-thirds being privately owned. To accommodate growth over the next 20 years, it is anticipated that an additional 457,000 housing units will be required. The plan contemplates that 164,326 acres of habitat will be conserved, providing assurances for 57 species (including the California gnatcatcher).

Anticipated costs range from \$433 to \$751 million, including: acquisitions: \$271 to \$513 million; financing: \$17 to \$88 million; and, operation: \$145 to \$150 million. State and federal governments will fund one-half of the acquisition costs (although the sources of funds have yet to be identified).

It is anticipated that more detailed "subarea plans" will be adopted by each jurisdiction and these plans, together with local regulations, will determine the extent of conserved habitat and developable lands within the area. A major tension in this regard has been over the delineation ("hard lines") of lands to be considered for preservation. Some jurisdictions have moved toward "harder" lines, while others have chosen more policy-oriented standards.

The MHCP is still in draft. It is anticipated that it will provide coverage for approximately 95 species.

These efforts have been driven by "working groups" reflecting the "constituency of interests": local agencies, developers, conservationists and others.

3. Orange County

There are two major planning efforts underway in Orange County:

-- Central and Coastal: with an approximately 39,000 acre preserve (18,527 acres of coastal sage scrub; 6950 acres of chaparral; 5,732 acres of grassland; 940 acres of woodlands; and, 2,113 acres of marsh and riparian areas).

-- South County: will include a preserve of approximately 95,000 acres.

The Central and Coastal NCCP has recently been approved in concept by the County Board of Supervisors. The South County NCCP will follow shortly.

The planning effort has been directed by the County in close collaboration with the two major landowners: The Irvine Company and the Santa Margarita Company in cooperation with the Transportation Corridor Agency that has major projects in the area and other public landowners (e.g., the Department of Agriculture with respect to the Cleveland National Forest) and utilities, and with detailed review by the conservation interests and more general review by the public.

4. Utilities and military reservations.

Some utilities have moved separately to prepare subarea plans covering their corridors and holdings. In addition, federal military facilities (e.g., the Pendleton Marine Corps lands extending twenty miles along the coast) are preparing management plans in coordination with the NCCP program.

III. THE DIFFICULTIES

The difficulties in conservation planning range from a lack of an understanding of the process of change to the invention of specific elements of the new order.

A. The lack of a model for change.

The most significant difficulty is our lack of a model for the process of change; in this case, changing from a project-to-project, reactive, command and control governance scheme to an anticipatory landscape conservation program. How do we know that a change is needed? Who takes the lead? What are the steps? Are there identifiable elements? There is currently a great deal of work being done on this issue. Some is very theoretical, such as that with respect to complexity theory and evolution. Other work is more focused, such as the work on "collaborative or focused planning". See the bibliography below.

B. General difficulties include the following:

1. Not having adequate and well accepted institutions in place to facilitate change and to understand and evaluate the change contemplated -- the existing and the new paradigm and the difficulty of change.

2. The difficulty of overcoming the fears of change, of loss and abandonment; investments in the status

quo (personal position, power, money, prestige); and, those who profit from resisting the change (Michael E. Porter and Claas van der Linde, Green and Competitive, in the Harvard Business Journal, September - October 1995) argue for accepting the challenge of innovatively crafting the regulatory context as well as the private sector response in order to promote increased economic competitiveness. I am convinced that a carefully crafted national program on the acquisition of wildlife habitat in coordination with the planning for urban infrastructure would increase the economic competitiveness of our urban regions. With increasing global competition, such an effort could be very significant.

3. Reconciling conflicts.

4. Addressing issues of risk and the need for assurances.

5. Determining the right sequence, the critical path, to move efficiently to the new order.

C. More specific difficulties in moving to proactive conservation planning include:

1. Historic disregard of wildlife conservation and its externalization and economic decision making.

2. Overcoming the systemic fragmentation within the culture and for the constituencies of interests to learn to

work collaboratively (e.g., to use neutral facilitation processes).

3. **The breadth of the constituency** of the interest and the need for coordination, education and communication among them.

4. **Regulatory agency staffs have had difficulty shifting** from a reactive, deductive, regulatory mode to a planning mode. This includes a difficulty in shifting from a pyramidal hierarchy for permitting to a more horizontal planning model.

5. **The private sector has had difficulty** relinquishing control of the process (although shared with the public sector).

6. **The major substantive issue is** the sharing of the burdens of the program. Without such sharing, there is great resistance.

7. **Economic disruption.**

8. **Time and delay** in reaching agreements and making decisions.

9. **There has been a need to invent** and promulgate specific programmatic elements and principles, including:

a. **Assurances:** policies such as the "no surprises policy"; and regarding anticipated levels of development (e.g., density transfer arrangements); the HCP implementation agreement (a major innovation); and sharing of the risk regarding unforeseen circumstances.

b. **Broad species "coverage":** (multiple species, unlisted species, habitat and natural areas and systems). The San Bruno Mountain HCP was a multiple species, eco-system plan. Subsequent HCPs were single species focused, primarily due to the resistance to change of lower agency staffs.

c. **Arrangements to overcome unnecessary economic disturbance:** Delays in the listing of a species (e.g., the Calippe Silverspot Butterfly), use of Section 7 consultations (the Desert Tortoise), Section 4(d) special rule (Coastal California Gnatcatcher) and the short-term HCP (SKR). Often these arrangements were accompanied by assurances that reasonable further progress would be made in completing the plans and programs if on-going take was allowed.

d. **Funding for planning, acquisition and maintenance:** Historically, following the institution of command and control measures, the burden of wildlife conservation was left by default to new development, project-by-project. However, the broad scale demand

for assured wildlife conservation, required a much larger funding commitment. New sources of funding have been identified: impact fees, real estate transfer taxes, benefit assessments, tax increment financing, proceeds from public land sales and regional project utility-and-infrastructure-related mitigation measures. The resulting income stream has been the basis, in some cases, for early loans. The sources continue to be inadequate, particularly early funding. Early funding, particularly when matched with other measures, could avoid a significant amount of economic disruption. A recent report of the Growth Management and Environmental Law Institutes based on a year long dialogue (in which I participated as one of three facilitators), suggests the establishment of a Conservation Funding Bank providing an early non-interest bearing federal loan of significant magnitude (e.g. \$500 million with respect to southern California), to be repaid from local and regional sources.

e. The development of standard provisions and documents (but with flexibility), including: plans, agreements, and underlying analyses; simplified environmental assessments; and single multiple party agreements.

f. More expedient and coordinated NEPA compliance, of environmental assessments (San Bruno Mountain) and scoping processes (North Key Largo).

g. Approaches for providing predictability by establishing "hard lines" or standards as to what is required for conservation, but without unduly leaving business at risk.

h. Reconciling concerns regarding the Federal Advisory Committee Act and the convening of conservation planning work groups. These included ignoring the requirement or distinguishing the effort as a "scoping" effort or by avoiding "recommendations".

D. *The future.* The more difficult issues for the future are the underlying ethical considerations. Conservation planning envisions the lands being set aside will serve as conserved habitat for existing eco-systems. How should these systems "evolve", or be allowed to "evolve", in the future? What is significant: a species, a habitat, an eco-system, evolutionary significant units? What is our role? Are we to decide this? Who are "we"? What is the process of change? of evolution?

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