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CAN A MULTI-SPECIES HABITAT CONSERVATION PLAN SAVE SAN DIEGO'S VULNERABLE VERNAL POOL SPECIES?

*JOHN BUSE**

One might ask, when all is said and done, “who cares about the fairy shrimp and the other vernal pool species?” Fairy shrimp, when they manage to survive to adulthood, are one-quarter inch fully grown. For the most part, they are hard to see by the naked eye. There are not many left, and if gone, who would miss them? Surely, the casual observer passing through the Southern California landscape would not notice one way or the other. The biologists tell us that every species has an essential and unique [role] to play in the food chain that supports us all. If the fairy shrimp ultimately become extinct in the San Diego region, they will cease to be a devourer of lower forms of life in the food chain, such as bacteria and micro-algae on clay particles, which could impact species below. Similarly, the fairy shrimp would not be available food for creatures above in the chain, such as waterfowl and toads, which look to them for their diet. In the microscopic view, the fairy shrimp may make little identifiable difference. But if this type of destruction is treated on a case-by-case basis as an unimportant loss, it does not take long before life on this planet is in jeopardy. Congress saw that threat when it enacted the Endangered Species Act. Congress demonstrated foresight by realizing that the country’s present understanding of the value of a myriad of life forms was not yet known, and that extinction should be prevented by protecting both the individual species and the ecosystems upon which those species depended for survival.¹

* Senior Attorney and Legal Director, Center for Biological Diversity. The author dedicates this article to the memory of the Honorable Rudi M. Brewster (1932-2012), who had the patience to give some very small creatures their day in court. The author also wishes to thank Dan Rohlf, Neil Levine

I. INTRODUCTION: WHO CARES ABOUT THE FAIRY SHRIMP?

The Endangered Species Act² (hereinafter “ESA” or “the Act”) protects some of the rarest and most charismatic mammals on earth, including polar bears, wolves, jaguars, and orcas. The ESA also protects less conspicuous species and their habitats. Not all species are equal under the law; for example, plants are afforded substantially less protection,³ and the Act excludes pest insects if their protection “would present an overwhelming and overriding risk to man.”⁴ But the ESA does provide a remarkable degree of taxonomic equality for most covered species, generally treating bears and burying beetles as equals.⁵ This equality infuriates opponents of the Act, such as trade associations and water suppliers who are not persuaded that Delhi Sands flower-loving flies and Santa Ana suckers merit the same conservation efforts as bald eagles and Florida panthers.⁶ Yet the Act recognizes that even small, non-charismatic creatures may provide essential ecological services.⁷

Judge Rudi M. Brewster’s lyrical reflection on the fairy shrimp in *Southwest Center v. Bartel*⁸ places the ESA’s taxonomically egalitarian approach in the lineage of *Tennessee Valley Authority v. Hill*, in which the United States Supreme Court observed that “Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet.”⁹ Judge Brewster’s recognition that the ESA is intended to avoid small, incremental losses to animals and ecosystems that most people may never notice did not change the law, since the ESA has

and Noah Greenwald for their assistance in preparing this article.

¹ Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1124 (S.D. Cal. 2006) (citation omitted).

² 16 U.S.C.A. §§ 1531–1544 (Westlaw 2012).

³ Compare 16 U.S.C.A. § 1538(a)(2) (Westlaw 2012) with 16 U.S.C.A. § 1538(a)(1) (Westlaw 2012).

⁴ 16 U.S.C.A. § 1532(6) (Westlaw 2012).

⁵ The federal government was slow to list invertebrates and plants, and the list of endangered and threatened species was imbalanced in favor of vertebrates for much of its history. D. Noah Greenwald et al., *Factors Affecting the Rate and Taxonomy of Species Listings Under the US Endangered Species Act*, in *THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION COMMITMENT* 65 (Dale D. Goble, J. Michael Scott & Frank W. Davis eds., 2006).

⁶ See *id.* at 63 (showing the effect of listing controversies).

⁷ See, e.g., YVONNE BASKIN, *THE WORK OF NATURE: HOW THE DIVERSITY OF LIFE SUSTAINS US* 109–10 (1997) (discussing ecological services provided by soil microflora and microfauna).

⁸ Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1124 (S.D. Cal. 2006).

⁹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178–79 (1978) (quoted in *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1125).

always embodied this principle. But his words are central to a remarkable ruling that invalidated part of the San Diego Multiple Species Conservation Program (“MSCP”).¹⁰ The San Diego MSCP is a “habitat conservation plan” (HCP). For thirty years, HCPs have been the premier tool for reconciling development with the conservation requirements of the ESA. HCPs have been quite successful in accommodating development; however, they have had a decidedly mixed record in achieving the ESA’s conservation goals. *Southwest Center v. Bartel* points the way forward by restoring species *recovery* to its rightful place as the primary criterion for evaluating the adequacy of HCPs.¹¹

II. THE MOST COMPREHENSIVE LEGISLATION FOR THE PRESERVATION OF ENDANGERED SPECIES

A. THE ENDANGERED SPECIES ACT

In the 1978 decision of *Tennessee Valley Authority v. Hill*, the Supreme Court called the ESA “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹² This observation is still accurate today, nearly forty years after enactment of the ESA.¹³ In *Tennessee Valley Authority*, the Supreme Court appeared to elevate the conservation of endangered species above most other considerations, holding that “[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”¹⁴ Additionally, the Court held that the ESA reflects “an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.”¹⁵ Subsequent ESA amendments and decisions have eroded to some extent the Supreme Court’s recognition that the ESA is intended to halt extinction “whatever the cost.” However, the Court’s emphatic admonition that “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording

¹⁰ CITY OF SAN DIEGO, MULTIPLE SPECIES CONSERVATION PROGRAM (1998).

¹¹ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1137.

¹² *Tenn. Valley Auth.*, 437 U.S. at 180.

¹³ The Endangered Species Act of 1973 supplanted earlier conservation efforts, including the 1966 Endangered Species Preservation Act and the 1969 Endangered Species Conservation Act. See DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 21–24 (1989).

¹⁴ *Tenn. Valley Auth.*, 437 U.S. at 184.

¹⁵ *Id.* at 185.

endangered species the highest of priorities,” remains in force.¹⁶

Moreover, the *Tennessee Valley Authority v. Hill* decision reflects an early and prescient recognition that the purpose of the ESA is to *recover* species. Thus, it is intended not only to “halt” but to “reverse the trend toward species extinction.”¹⁷ In other words, the ESA is intended to do more than merely ensure the survival of endangered species—it is intended to promote the recovery of species to the point where they no longer need the protections afforded by the Act.¹⁸

The ESA’s protections generally apply only to those species formally “listed” as endangered or threatened through a process described in Section 4 of the Act.¹⁹ An “endangered” species is one that is in “danger of extinction throughout all or a significant portion of its range,” while a “threatened” species is “likely to become an endangered species within the foreseeable future.”²⁰ “Critical habitat,” which contains the areas essential to the conservation of the species, is supposed to be designated concurrently with the listing.²¹

Once a species is listed, two primary conservation mechanisms apply. The first is Section 9 of the ESA, which prohibits any person from “taking” an endangered fish or wildlife species.²² “Taking” is broadly defined to include harassing, harming, pursuing, wounding or killing.²³ “Harming” includes “significant habitat modification or degradation where it . . . injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”²⁴

The second mechanism is Section 7 of the ESA, which directs all federal agencies to “insure” that actions they authorize, fund, or carry out are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse

¹⁶ *Id.* at 194.

¹⁷ *Id.* at 184.

¹⁸ *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted.”); see 16 U.S.C.A. § 1532(3) (Westlaw 2012) (equating “conservation” with recovery).

¹⁹ 16 U.S.C.A. § 1533 (Westlaw 2012).

²⁰ 16 U.S.C.A. § 1532(6), (20) (Westlaw 2012).

²¹ 16 U.S.C.A. §§ 1532(5)(A), 1533(a)(3) (Westlaw 2012). Critical habitat designation, however, rarely occurs concurrently with listing, and many listed species do not have designated critical habitat. See Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 BUFF. L. REV. 1095, 1107–08 (2010).

²² 16 U.S.C.A. § 1538(a)(1) (Westlaw 2012).

²³ 16 U.S.C.A. § 1532(19) (Westlaw 2012). See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704–05 (1995).

²⁴ 50 C.F.R. § 17.3 (Westlaw 2012).

modification of [critical habitat] of such species.”²⁵ If an agency’s action may affect listed terrestrial species, the agency must enter formal consultation with the United States Fish and Wildlife Service,²⁶ which prepares a “biological opinion” that evaluates the potential jeopardy and adverse modification of critical habitat that may result from the action.²⁷ Both the jeopardy and adverse modification analyses must consider the recovery of the affected species, not just their survival.²⁸ A biological opinion may also authorize taking of listed species through an incidental take statement.²⁹

From its inception, the ESA has been intended to conserve not only endangered species themselves, but also “the ecosystems upon which endangered species and threatened species depend.”³⁰ By all meaningful criteria, the ESA has been extremely successful. Listing correlates strongly with survival.³¹ When this Article went to press, there were 1,464 domestic species listed as endangered or threatened.³² Only two species have been removed from the list of endangered and threatened species as a result of extinction after listing: the dusky seaside sparrow and the Mariana mallard.³³ It is difficult to predict how many species would have gone extinct without the ESA. A study comparing the actual and projected extinction rate of listed species concluded that the Act has prevented the extinction of 227 species.³⁴

²⁵ 16 U.S.C.A. § 1536(a)(2) (Westlaw 2012).

²⁶ Hereinafter Fish and Wildlife Service.

²⁷ 16 U.S.C.A. § 1536(a)(2) (Westlaw 2012); 50 C.F.R. § 402.14(a) (Westlaw 2012). The Department of Commerce has parallel jurisdiction over marine species, including listing, consultation, and issuance of incidental take permits.

²⁸ 50 C.F.R. § 402.02 (Westlaw 2012) (regulatory definitions of “jeopardize the continued existence” and “adverse modification” of critical habitat); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 932–33 (9th Cir. 2007) (despite the regulatory definition’s reference to “both the survival and recovery,” jeopardy may result if an action significantly impairs recovery; jeopardy analysis must consider effects on recovery in addition to effects on survival); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (invalidating regulatory definition of “adverse modification” to the extent it requires appreciable diminishment of the value of the critical habitat for *both* survival *and* recovery).

²⁹ 16 U.S.C.A. § 1536(b)(4) (Westlaw 2012).

³⁰ 16 U.S.C.A. § 1531(b) (Westlaw 2012).

³¹ Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 *BIOSCIENCE* 360, 366 (2005). *But see* Paul J. Ferraro et al., *The Effectiveness of the US Endangered Species Act: An Econometric Analysis Using Matching Methods*, 54 *J. ENVTL. ECON. & MGMT.* 245, 255–56 (2007) (concluding the ESA works best when it is backed up by money for conservation).

³² CTR. FOR BIOLOGICAL DIVERSITY, unpublished data.

³³ *Id.* (eight other delisted species were initially listed after they were already extinct).

³⁴ J.M. Scott et al., *By the Numbers, in THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION COMMITMENT* 31 (Dale D. Goble, J. Michael Scott & Frank W. Davis eds. 2006).

In addition to preventing extinction, the ESA is also highly successful in promoting recovery. The concept of species recovery is incorporated in the ESA's definition of "conservation," which means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."³⁵ Species that are listed for longer times are more likely to be improving and less likely to be declining.³⁶ Species for which critical habitat has been designated for two or more years are more than twice as likely to be improving and less than half as likely to be declining as species without designated critical habitat.³⁷ A review of recovery trends among all threatened and endangered species in eight northeastern states found that ninety-three percent have increased in population size or have remained stable since being listed.³⁸

B. HABITAT CONSERVATION PLANS: LICENSES TO TAKE

In the 1982 amendments to the ESA, Congress established a limited exception to the take prohibition for activities subject to the Section 7 consultation process.³⁹ If an activity is performed or authorized by a federal agency, the federal agency may be authorized to take species through an incidental take statement included in the "biological opinion" issued by the Fish and Wildlife Service.⁴⁰ The authorized take must be truly incidental to the action, not the purpose of the action.⁴¹ Consistent with Section 7(a)(2), the authorized taking may not jeopardize the continued existence of any listed species or destroy or adversely modify the critical habitat of such species.⁴² Incidental take statements must specify the "reasonable and prudent measures" necessary to minimize the impact of the incidental taking on the listed species.⁴³ Federal agencies and their private permittees who comply with these measures and do not exceed authorized levels of take are exempted from liability for taking

³⁵ 16 U.S.C.A. § 1532(3) (Westlaw 2012).

³⁶ Taylor et al., *supra* note 31, at 361.

³⁷ *Id.* at 362. See Robbins, *supra* note 21, at 1104.

³⁸ KIERAN SUCKLING, CTR. FOR BIOLOGICAL DIVERSITY, MEASURING THE SUCCESS OF THE ENDANGERED SPECIES ACT: RECOVERY TRENDS IN THE NORTHEASTERN UNITED STATES 7 (2006).

³⁹ DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 78–79 (1989).

⁴⁰ 16 U.S.C.A. § 1536(b)(4) (Westlaw 2012).

⁴¹ 16 U.S.C.A. § 1536(b)(4)(B) (Westlaw 2012).

⁴² 16 U.S.C.A. § 1536(a)(2), (b)(4)(A), (B) (Westlaw 2012).

⁴³ 16 U.S.C.A. § 1536(b)(4)(C)(ii) (Westlaw 2012).

listing species.⁴⁴ Incidental take statements are one of the ESA's two principal means of reconciling economic development with the fundamental priorities of the Act, which the Supreme Court viewed as "affording endangered species the highest of priorities."⁴⁵

But what of non-federal activities that may affect listed species? Many, if not most, local land-use decisions have no federal involvement and are therefore not subject to the ESA's consultation requirement. Conversely, they are not eligible for the take exemption provided by an incidental take statement through the Section 7 consultation process. Congress addressed this dilemma in the 1982 ESA amendments by creating a permit system for non-federal applicants that is analogous to, but distinct from, the incidental take statement process.⁴⁶ This process is covered by Section 10 of the Act, which provides that the Fish and Wildlife Service may issue incidental take *permits* in connection with "conservation plans" that meet certain requirements.⁴⁷ A conservation plan must specify:

- (i) the impact which will likely result from [the] taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.⁴⁸

Section 10 conservation plans are subject to public review and comment.⁴⁹ Because approval of a conservation plan is a federal action, the plans are also subject to review under the National Environmental Policy Act⁵⁰ and intra-agency consultation pursuant to Section 7 of the

⁴⁴ 16 U.S.C.A. § 1536(b)(4) (Westlaw 2012).

⁴⁵ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

⁴⁶ See Christopher H.M. Carter, Comment, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 B.C. ENVTL. AFF. L. REV. 135 (1991).

⁴⁷ 16 U.S.C.A. § 1539 (Westlaw 2012). Prior to the 1982 amendments, non-federal parties could obtain exemptions from the ESA's take prohibition only for scientific purposes or to enhance the propagation or survival of listed species. U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF COMMERCE, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 1 (1996) [hereinafter HCP HANDBOOK]; Carter, *supra* note 46, at 155.

⁴⁸ 16 U.S.C.A. § 1539(a)(2)(A) (Westlaw 2012).

⁴⁹ 16 U.S.C.A. § 1539(a)(2)(B) (Westlaw 2012).

⁵⁰ 42 U.S.C.A. § 4321 (Westlaw 2012). See *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 980 (9th Cir. 1985).

60 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 6

ESA.⁵¹ Prior to issuance of an incidental take permit, the Fish and Wildlife Service must find that:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required [as being necessary or appropriate for purposes of the plan] will be met.⁵²

The term “habitat conservation plan” (HCP) does not appear in the ESA, but the term is now consistently used to describe the conservation plans contemplated by Section 10.⁵³ HCPs are the ESA’s other primary means of accommodating economic development with the demands of species protection. An HCP is essentially a bargain struck between the developer and the Fish and Wildlife Service; it allows activities that destroy or degrade the habitat of listed species to proceed in exchange for the conservation commitments described in the HCP.⁵⁴ Accordingly, private parties (or their municipal proxies, who have land-use authority and permit development within their jurisdictions) are allowed to destroy a certain amount of habitat, taking or even killing listed species, in exchange for setting aside habitat for the affected species.

The first HCP was commenced prior to the 1982 ESA amendments. The 1982 amendments ratified and were expressly modeled on the approach taken with the San Bruno Mountain conservation plan.⁵⁵ That plan was intended to allow controversial residential development within the habitat of the endangered mission blue butterfly south of San Francisco.⁵⁶ However, in practice, private applicants were slow to adopt the San Bruno Mountain model. In the decade following the 1982 amendments, the Fish and Wildlife Service issued only fourteen

⁵¹ I.e., when reviewing a conservation plan under Section 10 of the ESA, 16 U.S.C.A. § 1539 (Westlaw 2012), the Fish and Wildlife Service must consult with itself. 16 U.S.C.A. § 1536(a)(2) (Westlaw 2012). See *Friends*, 760 F.2d at 980–81.

⁵² 16 U.S.C.A. § 1539(a)(2)(B) (Westlaw 2012).

⁵³ HCP HANDBOOK, *supra* note 47, at 1–2.

⁵⁴ John Kostyack, *The Need for HCP Reform: Five Points of Consensus*, 16 ENDANGERED SPECIES UPDATE 47 (1999).

⁵⁵ Carter, *supra* note 46, at 156.

⁵⁶ *Id.* at 157–58; *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 979–81 (9th Cir. 1985).

incidental take permits.⁵⁷ The slow pace of HCP adoption may be explained in part by the ability of a private applicant to circumvent the HCP process by obtaining take coverage through the Section 7 process if its project requires any federal permit.⁵⁸ This practice remains widespread despite the increased pace of HCP adoption, suggesting that perverse incentives exist for non-federal applicants to utilize the Section 7 process instead of obtaining incidental take permits when there is even minor federal involvement.⁵⁹

From 1992 onward, the number of HCPs rapidly increased with vigorous promotion by Bruce Babbitt, President Clinton's Secretary of the Interior.⁶⁰ By 2005, the Fish and Wildlife Service had approved almost 450 HCPs covering nearly forty million acres.⁶¹ During this period of growth, the Fish and Wildlife Service also strongly promoted the development of HCPs that cover a range of both federally listed and unlisted species.⁶² These multiple species HCPs, or "MSHCPs", typically cover dozens of species and very large areas, and they provide take coverage for extended, multi-generational periods of time.⁶³ The permittees in multiple species HCPs are generally municipalities and public agencies, not individual landowners. For example, the Western Riverside County MSHCP approved by the Fish and Wildlife Service in 2004 covers twenty five listed and 121 unlisted species and 1.3 million acres, and it has a permit term of seventy-five years.⁶⁴ There are currently twenty three permittees participating in and covered by the Western Riverside MSHCP, including two state agencies, sixteen cities, and the County of Riverside.⁶⁵ The incidental take permits issued to these participants exempt private landowners and developers from take liability if they obtain valid land-use approvals from the plan participants. Thus, private landowners and developers are third party

⁵⁷ Jennifer Jester, Comment, *Habitat Conservation Plans Under Section 10 of the Endangered Species Act: The Alabama Beach Mouse and the Unfulfilled Mandate of Species Recovery*, 26 B.C. ENVTL. AFF. L. REV. 131, 133 (1998).

⁵⁸ Carter, *supra* note 46, at 163–65.

⁵⁹ Telephone interview with Neil Levine, Staff Attorney, Earthlaw and Earthjustice (Mar. 12, 2012). Mr. Levine represented plaintiffs in the San Diego MSCP case.

⁶⁰ Jocelyn Kaiser, *When a Habitat Is Not a Home*, SCIENCE, June 1997, at 1636–38.

⁶¹ Matthew E. Rahn et al., *Species Coverage in Multispecies Habitat Conservation Plans: Where's the Science?* 56 BIOSCIENCE 613 (2006).

⁶² *Id.* at 613–14.

⁶³ *Id.* at 615.

⁶⁴ *Id.*; U.S. FISH & WILDLIFE SERV., AMENDMENT TO THE BIOLOGICAL OPINION REGARDING ISSUANCE OF AN ENDANGERED SPECIES ACT SECTION 10(A)(1)(B) PERMIT (TE088609-1) FOR THE WESTERN RIVERSIDE COUNTY MULTIPLE SPECIES HABITAT CONSERVATION PLAN, RIVERSIDE COUNTY, CALIFORNIA 2 (2011).

⁶⁵ U.S. FISH & WILDLIFE SERV., *supra* note 64, at 1–2.

beneficiaries covered by the “umbrella” of the plan participants’ incidental take permits.⁶⁶

MSHCPs have been criticized by scientists and environmentalists for a number of serious flaws, including the failure to set aside sufficient habitat for covered species,⁶⁷ plans that are based around a few indicator species but fail to protect other covered species,⁶⁸ overbroad plans that respond to the permittees’ economic incentive to cover as many species as possible without providing localized scientific information for specific conservation needs,⁶⁹ plans that lack specific conservation actions because they cover species that are not confirmed present in the plan area,⁷⁰ the “striking lack of information on the basic biology of many species for which take permits had been given,”⁷¹ approval of HCPs that allow a net loss of habitat for listed species,⁷² and plans that are negotiated and largely finalized behind closed doors before they are released for public review.⁷³

Reports following the implementation of MSHCPs have noted other problems. Lands slated for conservation as essential habitat by the Western Riverside County MSHCP have been developed as a result of political pressure.⁷⁴ At the height of the housing market, land costs in Riverside County dramatically increased, making it more difficult than anticipated to acquire conservation lands in areas subject to the greatest development pressures and causing acquisition to lag behind the pace of development.⁷⁵ As a result, some of the large, contiguous conservation reserves described in the Western Riverside County MSHCP could not be assembled.⁷⁶ In some cases, conservation reserve lands can be acquired later at lower prices, but if key habitat areas are developed, they are forever removed from the MSHCP reserve system, leading to

⁶⁶ Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1128 (S.D. Cal 2006).

⁶⁷ Kaiser, *supra* note 60, at 1636.

⁶⁸ *Id.*

⁶⁹ Rahn et al., *supra* note 61, at 616.

⁷⁰ *Id.*

⁷¹ Elaine K. Harding et al., *The Scientific Foundations of Habitat Conservation Plans: A Quantitative Assessment*, 15 CONSERVATION BIOLOGY 488, 492 (2001). See PETER KAREIVA ET AL., NAT’L CTR. FOR ECOLOGICAL ANALYSIS & SYNTHESIS, UNIV. OF CAL., USING SCIENCE IN HABITAT CONSERVATION PLANS 45–46 (1999).

⁷² Kostyack, *supra* note 54, at 48.

⁷³ *Id.* at 52.

⁷⁴ Duane W. Gang et al., *Losing Ground: Ambitious Conservation Plan Applied Unevenly*, RIVERSIDE PRESS-ENTERPRISE, Dec. 8, 2006, www.biologicaldiversity.org/news/media-archive/RiversideCounty12-8-06.pdf.

⁷⁵ *Id.*

⁷⁶ *Id.*

fragmented habitats for some species.⁷⁷ A 2008 RAND report on the Western Riverside County MSHCP also concluded that funding mechanisms for acquiring conservation lands may not be adequate, depending on the direction of the regional housing market.⁷⁸

MSHCPs differ from each other in many of the details, and certain criticisms may not apply to all plans. However, one criticism is applicable to most multispecies plans is that MSHCPs are designed to maintain the survival of covered species, rather than to promote their recovery.⁷⁹ In contrast to the overall favorable recovery trend for listed species, a 2005 study estimated that forty to fifty percent of listed species covered by MSHCPs show declining trends.⁸⁰ A more recent study found that, while species covered by HCPs generally show improving recovery status, the evidence for the recovery benefits of MSHCPs is mixed, suggesting that the Fish and Wildlife Service's policy of encouraging MSHCPs "may be misguided."⁸¹ It is difficult to identify precise causes for the declining trends, but at a minimum, these results suggest that HCPs should focus on setting aside sufficient habitat to do more than keep covered species on life support and stay consistent with the ESA's "overriding goal of recovering endangered and threatened species."⁸²

C. HCPs IN COURT

While the growth in HCPs during the 1990s supported a small industry of commentary on both the benefits and drawbacks of HCPs, there have been relatively few published judicial decisions regarding the adequacy of HCPs. The San Bruno Mountain proto-HCP was upheld by the Ninth Circuit following a legal challenge.⁸³ In *Friends of Endangered Species v. Jantzen*, the plaintiffs challenged the Fish and

⁷⁷ *Id.*

⁷⁸ LLOYD DIXON ET AL., RAND INFRASTRUCTURE, SAFETY, & ENV'T, BALANCING ENVIRONMENT AND DEVELOPMENT: COSTS, REVENUES, AND BENEFITS OF THE WESTERN RIVERSIDE COUNTY MULTIPLE SPECIES HABITAT CONSERVATION PLAN, 162–63 (2008). This study anticipates that reserve assembly costs could be lower than 2007 estimates if the housing market downturn continues, as it has, but the Western Riverside County MSHCP faces a dilemma because a market downturn means lower prices for acquiring conservation lands, but also lower revenues to fund the plan. *Id.* at 162–64.

⁷⁹ See Kaiser, *supra* note 60, at 1636; Kostyack, *supra* note 54, at 49; Jester, *supra* note 57, at 182–87.

⁸⁰ Taylor et al., *supra* note 31, at 361.

⁸¹ Christian Langpap & Joe Kerkvliet, *Endangered Species Conservation on Private Land: Assessing the Effectiveness of Habitat Conservation Plans*, J. ENVTL. ECON. AND MGMT. (forthcoming 2012).

⁸² Jester, *supra* note 57, at 186. See also Langpap & Kerkvliet, *supra* note 81 (indicating that species covered by HCPs "benefit from inclusion in spatially larger plans").

⁸³ *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982–84 (9th Cir. 1985).

Wildlife Service's reliance on a biological study in authorizing the incidental take of mission blue butterflies.⁸⁴ Unfortunately for the plaintiffs, the House Conference Report for the 1982 ESA Amendments had specifically characterized this study as "independent," "exhaustive," and "extensive," and the Ninth Circuit deferred to the Fish and Wildlife Service in holding that reliance on the study was not arbitrary and capricious.⁸⁵ *Friends of Endangered Species* suggests that a legal challenge to the very plan on which Congress based Section 10's substantive standards for HCPs is unlikely to succeed, but it provides little guidance on interpreting those standards.⁸⁶

The challenge to the HCP for the Alabama beach mouse fared better.⁸⁷ In *Sierra Club v. Babbitt*, the plaintiffs focused on the adequacy of funding for acquisition of off-site beach mouse habitat intended to mitigate the effects of two beach-front residential development projects.⁸⁸ In a searching review of the administrative record, the district court found that there was no support for the proposed funding levels.⁸⁹ Specifically, the court found that the Fish and Wildlife Service ignored the advice of its own expert personnel and HCP Handbook regarding the inadequate funding, and improperly relied on speculative unnamed funding sources to make up any shortfalls.⁹⁰ The court concluded that the speculative HCP funding sources made it impossible for the Service to comply "with the strict ESA mandate that the HCP 'minimize and mitigate' the effects of the projects to the 'maximum extent practicable.'"⁹¹ Thus, the district court evaluated the adequacy of HCP funding in light of the applicant's Section 10(a)(2)(B)(ii) obligation to minimize and mitigate the impacts of the permitted taking.⁹² The effect of the incidental take permits on Alabama beach mouse recovery appears to have been an implicit consideration in *Sierra Club v. Babbitt*, where the court noted that an applicant for an incidental take permit must submit an HCP "that will—as the name plainly connotes—help 'conserve' the entire species by facilitating its survival and recovery."⁹³ The court noted that the beach mouse habitat had already been greatly reduced by previous development and hurricanes, and that the Fish and

⁸⁴ *Id.* at 981.

⁸⁵ *Id.* at 983.

⁸⁶ *Id.* at 982–84.

⁸⁷ *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274 (S.D. Ala. 1998).

⁸⁸ *Id.* at 1275, 1280.

⁸⁹ *Id.* at 1280–82.

⁹⁰ *Id.*

⁹¹ *Id.* at 1282.

⁹² *Id.* at 1279.

⁹³ *Id.* at 1278 n.3.

Wildlife Service acknowledged that the designated beach mouse critical habitat may be insufficient for recovery.⁹⁴ Against this background, it is difficult to avoid the conclusion that the proposed high-rise beach development, which would further fragment the beach mouse's hurricane-prone and already diminished dune habitat, would not impair the beach mouse's recovery.

Funding considerations and the feasibility of assembling an adequate conservation reserve were also factors in the 2000 district court decision invalidating an incidental take permit for the Natomas Basin HCP.⁹⁵ In that case, the HCP, which covered twenty-six species, including the endangered giant garter snake, was intended as a regional conservation plan "to promote biological conservation along with economic development and the continuation of agriculture within the Natomas Basin."⁹⁶ The plan's creators anticipated that the HCP would be used in connection with incidental take permit applications from the City of Sacramento, Sacramento County, Sutter County, and other applicants.⁹⁷ According to the HCP, mitigation fees collected from the permittees would be used to assemble "connected 400 acre blocks of reserve lands—with one block of at least 2,500 acres—for the benefit of the giant garter snake and to protect Swainson's hawk habitat and nesting areas."⁹⁸ The Natomas Basin HCP provided that habitat acquisition was to be executed in phases in advance of habitat conversion resulting from urban development. But as the court in *National Wildlife Federation v. Babbitt* noted, the only real phasing requirement was that "no more than one year shall elapse between receipt of a fee and expenditure of that fee in the purchase or other acquisition of mitigation land."⁹⁹ The problem was that, at the time the court reviewed the HCP, only the City of Sacramento had applied for an incidental take permit, and there was no certainty that Sacramento and Sutter counties would ever participate in the HCP.¹⁰⁰ Accordingly, there was insufficient evidence as to whether mitigation funding would be adequate in the event that only the City of Sacramento's lands were developed under the HCP, and "little or no analysis of the effect on the species of the City's permit considered on its own."¹⁰¹ The Natomas Basin HCP decision illustrates the perils of

⁹⁴ *Id.* at 1280.

⁹⁵ *Nat'l Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274 (E.D. Cal. 2000).

⁹⁶ *Id.* at 1280.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1281.

¹⁰⁰ *Id.* at 1298–99.

¹⁰¹ *Id.* at 1299.

proceeding with a regional HCP effort without having all the participants lined up, and without a specific evaluation of how listed species will be affected if only one permittee participates in the plan.¹⁰²

Other decisions have been more deferential to the Fish and Wildlife Service's findings supporting approval of an HCP. In *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, a district court in Texas upheld an HCP that permitted take of three species of cave-dwelling invertebrates found in karst limestone formations.¹⁰³ The court was not unsympathetic to the plight of the cave bugs and noted the applicant's desire "to profit from suburban consumerism by transforming Nature's beauty into upscale shopping venues accompanied no doubt by lovely, non-porous asphalt parking lots over a part of our water supply."¹⁰⁴ However, the court ultimately deferred to the Fish and Wildlife Service's conclusions, which it found to be supported by the record and, in contrast to the Alabama beach mouse case, not contradicted by the agency's own personnel.¹⁰⁵

Similarly, the same court that issued the Natomas Basin HCP decision upheld another Natomas HCP covering the same species.¹⁰⁶ The court distinguished the earlier case and found that the plan ensured the survival and recovery of covered species, ensured adequate funding, and mitigated the impacts of the incidental take to the maximum extent practicable.¹⁰⁷ With respect to the "maximum extent practicable" standard for mitigating the effect of permitted take, the court characterized the plaintiffs' position as advocating that the "maximum extent practicable requirement means that the plan must require the purchase of as much mitigation land as the particular developer possibly could afford while still going forward with the development." Whether or not this characterization is accurate, the court rejected this argument, concluding that:

The statutory language does not suggest that an applicant must ever do more than mitigate the effect of its take of species. Thus, if a permit authorized the destruction of one acre of habitat that normally supports one individual member of a protected species, it would not be necessary for the applicant to create 100 acres of new habitat that would support some 100 individuals of the species, even if the

¹⁰² *Id.* at 1299–1300.

¹⁰³ *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 202 F. Supp. 2d 594 (W.D. Tex. 2002).

¹⁰⁴ *Id.* at 597.

¹⁰⁵ *Id.* at 623.

¹⁰⁶ *Nat'l Wildlife Fed'n v. Norton*, 306 F. Supp. 2d 920 (E.D. Cal. 2004).

¹⁰⁷ *Id.* at 928–29.

particular developer could afford to do so.¹⁰⁸

This conclusion does not mean that an applicant need provide only one acre of substitute habitat to mitigate the destruction of one acre of habitat. Instead, the court deferred to the Fish and Wildlife Service's construction of Section 10(a)(2)(B)(ii), while recognizing that the agency has and may set higher mitigation ratios in other circumstances.¹⁰⁹

III. THE SAN DIEGO MSCP

A. PLANNING AND OPPOSITION

In rapidly urbanizing areas with a high potential for conflict between new development and habitat for listed species, local governments have strong incentives to develop large, regional MSHCPs.¹¹⁰ Predictably, some of the first regional MSHCPs were developed in southern California, where this conflict was most heated, particularly after the listing of the coastal California gnatcatcher as a threatened species in March 1993.¹¹¹ The southern California MSHCPs were primarily development-driven, not conservation-driven. Developers saw MSHCPs as a way to avoid having their projects derailed by gnatcatchers and other listed species.¹¹²

In December 1995, the Fish and Wildlife Service approved an MSHCP for Orange County covering the gnatcatcher and forty-one other species on 208,000 acres for seventy-five years.¹¹³ In August 1996, the Service approved the San Diego MSCP, which covered eighty-five species and over 580,000 acres in southwestern San Diego County for fifty years.¹¹⁴ The MSCP is intended to “streamline and coordinate existing procedures for review and permitting of project impacts to

¹⁰⁸ *Id.* at 928.

¹⁰⁹ *Id.* at 929 n.15.

¹¹⁰ *See, e.g.,* DIXON ET AL., *supra* note 78, at iii.

¹¹¹ Rahn et al., *supra* note 61, at 615; Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Coastal California Gnatcatcher, 58 Fed. Reg. 16,742 (Mar. 30, 1993). *See* WILLIAM FULTON, *THE RELUCTANT METROPOLIS: THE POLITICS OF URBAN GROWTH IN LOS ANGELES 201–23* (1997). The coastal California gnatcatcher is rare but has a range that includes large areas of southern California, including the coastal sage scrub habitats of San Diego, Orange, and Riverside Counties coveted by developers. *Id.*

¹¹² *See* Gang et al., *supra* note 74 (noting building industry perception that it is better off with Western Riverside County MSHCP than without plan); Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991).

¹¹³ *Id.*

¹¹⁴ Rahn et al., *supra* note 61, at 615; CITY OF SAN DIEGO, *supra* note 10, at 1-1–1-2.

biological resources.”¹¹⁵ The plan explicitly recognizes the severe threat to the region’s “biodiversity and long-term biological viability” posed by rapid urbanization of natural lands, noting that the MSCP planning area contains over 100 animals and plants that are federally or state-listed, proposed for listing, candidates for listing, or otherwise considered sensitive.¹¹⁶ The MSCP notes that “[r]ecent federal listings and proposed listings of species in the study area underscore the importance and urgency of habitat preservation in order to avoid species extinctions and the need for further listings.”¹¹⁷ The MSCP acknowledges, however, that the creation of plan was driven by the need to forestall limitations on new development associated with species listings.¹¹⁸ In particular, the MSCP observes that the gnatcatcher listing “has restricted the region’s ability to accommodate future growth and development in coastal habitats.”¹¹⁹

The San Diego MSCP contemplates participation by several cities and agencies, but the largest single incorporated portion of the planning area is the City of San Diego, which includes over 206,000 acres.¹²⁰ Indeed, the impetus for the entire MSCP came from the City of San Diego, and MSCP planning commenced in July 1991 as a way to address the mitigation needs of the City’s Metropolitan Wastewater Department.¹²¹ The City of San Diego adopted the MSCP in 1997.¹²² Also in 1997, the Fish and Wildlife Service issued its Section 10 findings supporting approval of the MSCP and issued a biological opinion.¹²³

The conservation model of the MSCP is simple. The “centerpiece” of the MSCP is the proposal to set aside for conservation 171,917 acres of vacant lands, which represents just over half of the natural lands in the planning area.¹²⁴ About 52,000 acres of the conserved lands would lie within the City of San Diego.¹²⁵ Based on establishment of these reserve lands, the MSCP deemed that eighty-five species are adequately conserved and “covered” by the plan, thus exempting MSCP participants

¹¹⁵ CITY OF SAN DIEGO, *supra* note 10, at 1-1.

¹¹⁶ *Id.* at 1-5.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 3-13.

¹²¹ *Id.* at 1-6.

¹²² Ernie Grimm, *Land Management Questioned*, SAN DIEGO READER, Feb. 16, 2006, www.sandiegoreader.com/news/2006/feb/16/land-management-questioned/.

¹²³ *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1129 (S.D. Cal. 2006).

¹²⁴ CITY OF SAN DIEGO, *supra* note 10, at 3-8; *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1129.

¹²⁵ CITY OF SAN DIEGO, *supra* note 10, at 3-13.

from take liability.¹²⁶ The MSCP does not itself establish the conservation reserve, but it sets target boundaries for the areas that will be dedicated and acquired during the fifty-year term of the plan.¹²⁷ The plan contemplates a mixture of federal, state, and local funding mechanisms for assembling the reserve.¹²⁸

The MSCP covers a diverse range of ecosystems, including wetlands.¹²⁹ Vernal pools, small seasonal waterbodies that form in clay-capped depressions, are one type of wetland.¹³⁰ Vernal pools are occupied by a unique set of species that are specially adapted to this unusual environment, including the endangered San Diego fairy shrimp and Riverside fairy shrimp.

Vernal pools are seasonal—the pools contain water in the short winter months but can be difficult to discern in the landscape during the long dry months. The fairy shrimp hatch, mature, reproduce, and inhabit the pools during their short life cycle. Fairy shrimp eggs lie dormant during the dry season, and may hatch in the next wet season. These fragile species are extremely sensitive to their environment (including a specific amount of water; a narrow range of water temperature; the water quality, chemistry, and salinity; the length of time the pool holds water before it percolates into the clay soil).¹³¹

In 1997, the Fish and Wildlife Service estimated that ninety to ninety-seven percent of vernal pool habitats in San Diego County had been permanently lost.¹³² The upland areas that drain into vernal pools—the vernal pool watershed—are critical to the hydrological and biological integrity of these wetlands.¹³³ According to the Fish and Wildlife Service, efforts to reintroduce vernal pool species into artificially created

¹²⁶ *Id.* at 3-22.

¹²⁷ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1129.

¹²⁸ CITY OF SAN DIEGO, *supra* note 10, at 4-1-4-21.

¹²⁹ *Id.* at 3-12-3-13.

¹³⁰ *Id.* at 3-21; *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1126.

¹³¹ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1126-27. *See also* Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the San Diego Fairy Shrimp, 62 Fed. Reg. 4925, 4926 (Feb. 3, 1997) (codified at 50 C.F.R. § 17.11(h) (Westlaw 2012)); Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for Three Vernal Pool Plants and the Riverside Fairy Shrimp, 58 Fed. Reg. 41,384 (Aug. 3, 1993) (codified at 50 C.F.R. § 17.11(h) (Westlaw 2012)).

¹³² Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the San Diego Fairy Shrimp, 62 Fed. Reg. at 4926. *See Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1127 (concluding that this loss was “irrevocable” in part based on evidence that vernal pools “cannot be ‘created’ and [that] there is no known method to replace destroyed pools”).

¹³³ Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for Three Vernal Pool Plants and the Riverside Fairy Shrimp, 58 Fed. Reg. at 41389.

habitat are unsatisfactory, and “the continued survival and recovery of the [vernal pool species] can only be assured at this time by the preservation and enhancement of the existing vernal pools and their associated watersheds.”¹³⁴

The MSCP’s treatment of vernal pools is convoluted. The MSCP, as originally issued, permitted the taking of vernal pool species but assumed that vernal pools and all other wetlands would be subject to regulation through the United States Army Corps of Engineers’ Clean Water Act Section 404 permitting program.¹³⁵ Thus, the MSCP assumed that any development that would impact a vernal pool would require a Section 404 permit and that the Army Corps would consult with the Fish and Wildlife Service regarding the effects of such development on listed vernal pool species pursuant to Section 7 of the ESA.¹³⁶ However, after approval of the MSCP, the United States Supreme Court issued a decision in 2001 indicating that “isolated” waters, including many if not most vernal pools, were not subject to the Army Corps’ permitting jurisdiction.¹³⁷

In December 1998, a coalition of fourteen environmental and scientific organizations challenged the City of San Diego’s incidental take permit for the MSCP in the United States District Court for the Southern District of California.¹³⁸ Opposition to the plan had been fermenting for several years, led by then-Southwest Center for Biological Diversity staff members David Hogan and Allison Rolfe.¹³⁹ Initially, vernal pool concerns were one part of a wide range of issues raised by MSCP opponents, which included objections to the adequacy of the proposed MSCP reserves and the proposed funding mechanisms for the

¹³⁴ Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the San Diego Fairy Shrimp, 62 Fed. Reg. at 4931.

¹³⁵ 33 U.S.C.A. § 1344 (Westlaw 2012); CITY OF SAN DIEGO, *supra* note 10, at 3-21–3-22.

¹³⁶ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1130.

¹³⁷ *Solid Waste Agency v. U. S. Army Corps of Eng’rs*, 531 U.S. 159 (2001). *See Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1130–33. It is doubtful whether the approach described in the MSCP would have been effective in conserving vernal pools and vernal pool species even if isolated wetlands had remained subject to the Army Corps’ permitting jurisdiction. The Fish and Wildlife Service has determined that the Section 404 permitting process and the Army Corps’ “no net loss” policy are inadequate to protect vernal pool habitat. *See Determination of Endangered Status for Three Vernal Pool Plants and the Riverside Fairy Shrimp* 58 Fed. Reg. at 41,388–89; *Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the San Diego Fairy Shrimp* 62 Fed. Reg. at 4935–36; *Endangered and Threatened Wildlife and Plants; Determination of Endangered or Threatened Status for Four Southwestern California Plants from Vernal Wetlands and Clay Soils*, 63 Fed. Reg. 54,975, 54,987 (Oct. 13, 1998) (codified at 50 C.F.R. § 17.12(h) (Westlaw 2012)).

¹³⁸ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1122.

¹³⁹ Levine interview, *supra* note 59.

plan.¹⁴⁰ But as the opponents' legal arguments coalesced, the focus narrowed to the MSCP's effectiveness in conserving vernal pools.¹⁴¹ By the time the complaint was filed, the focus had further narrowed to the 1997 incidental take permit's coverage of seven federally listed vernal pool species, including two invertebrates (the San Diego fairy shrimp and Riverside fairy shrimp) and five plant species (Otay mesa mint, California Orcutt grass, San Diego button celery, San Diego mesa mint, and spreading navarretia).¹⁴²

The lawsuit was filed after the City approved the Cousins Market Center project in Mira Mesa and allowed the destruction of all sixty-four vernal pools on the site, despite the MSCP's promises of vernal pool conservation and avoidance.¹⁴³ This project was based on vernal pool mitigation measures that the Fish and Wildlife Service had itself deemed inadequate, including vernal pool creation and fairy shrimp relocation.¹⁴⁴ This approval signaled to the plaintiffs that the MSCP was ineffective in averting the extinction of vernal pool species, much less in promoting their recovery.¹⁴⁵

B. THE *SOUTHWEST CENTER V. BARTEL* DECISION

The MSCP litigation stretched over a decade, culminating in Judge Brewster's October 13, 2006, decision granting the plaintiffs' motion for summary judgment and invalidating the City of San Diego's incidental take permit as it applied to the seven vernal pool species.¹⁴⁶

The court dealt first with the invalid assumption in the MSCP and the City's incidental take permit that impacts to vernal pool species would be subject to Army Corps of Engineers' Section 404 permitting process and further consultation between the Army Corps and the Fish and Wildlife Service.¹⁴⁷ Based on the United States Supreme Court's decision in *Solid Waste Agency v. U.S. Army Corps of Engineers*, the

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; telephone interview with Dan Rohlf, Clinical Director, Pac. Env'tl. Advocacy Ctr., Lewis & Clark Law Sch. (Mar. 6, 2012).

¹⁴² Rohlf interview, *supra* note 141; *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1123.

¹⁴³ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1154.

¹⁴⁴ *Id.* at 1153 n.23, 1154 n.24.

¹⁴⁵ The *Southwest Center* plaintiffs unsuccessfully attempted to obtain a temporary restraining order to block the destruction of the vernal pools associated with this project. Injunctive relief was denied because the vernal pool species had already been collected and moved to another site. *Id.* at 1154 n.24.

¹⁴⁶ *Sw. Ctr. for Biological Diversity v. Bartel*, 457 F. Supp. 2d 1070 (S.D. Cal. 2006), *opinion amended and superseded by Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d 1118.

¹⁴⁷ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1130–33.

court concluded that it was “highly unlikely that the [Army Corps] would exercise jurisdiction over the isolated vernal pools at issue in this case.”¹⁴⁸ Accordingly, the court agreed with the plaintiffs’ argument that the Fish and Wildlife Service had to reinitiate review (meaning the intra-agency consultation required by Section 7 of the ESA) of the incidental take permit as it applied to the vernal pool species.¹⁴⁹ The court also directed the Fish and Wildlife Service to consider the standards and other information contained in the recovery plan for the vernal pool species during the reinitiated consultation.¹⁵⁰ After the Fish and Wildlife Service issued the MSCP biological opinion, it released the final recovery plan for the vernal pool species in September 1998.¹⁵¹ It is not clear whether the court believed that the release of the recovery plan alone would trigger reinitiation of consultation, or whether the agency merely had to consider the recovery plan during the reinitiated consultation required by the *Solid Waste Agency* decision. But the court clearly expected that the recovery plan would inform the terms of the incidental take permit.

If timely completed, FWS would use the recovery plan to evaluate the sufficiency of the application for an ITP, particularly when the permit governs a large region for an extensive period of time. *Cf. National Wildlife v. Babbitt*, 128 F. Supp. 2d at 1283 (Natomas Basin HCP included provision for incorporating the recovery plan for the endangered snake when it was developed and approved). If the terms of the ITP were inconsistent with the strategies and objectives in the recovery plan, then FWS would need to explain why it reached inconsistent conclusions from the same evidence.¹⁵²

The court also took issue with the Fish and Wildlife Service’s efforts to distance itself from its own vernal pool species recovery.¹⁵³ The Service argued that the recovery plan is not a binding document and thus the Service is free to deviate from its findings and conclusions.¹⁵⁴ The court noted that the Ninth Circuit had not yet decided the issue, but that the Eleventh Circuit had held that the Service is not legally obligated

¹⁴⁸ *Id.* at 1133 n.3.

¹⁴⁹ *Id.* at 1130.

¹⁵⁰ *Id.* at 1136–37. The ESA requires the preparation of recovery plans for listed species that describe “site-specific management actions,” establish “objective, measurable criteria,” and estimate the time and cost required to carry out the measures needed to achieve the recovery plan’s conservation goals. 16 U.S.C.A. § 1533(f) (Westlaw 2012).

¹⁵¹ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1136.

¹⁵² *Id.* at 1136. *See also id.* at 1143 n.19 (showing the Fish and Wildlife Service issued incidental take permit “without the benefit of a Recovery Plan for the vernal pool species”).

¹⁵³ *Id.* at 1137 n.16.

¹⁵⁴ *Id.*

to implement a recovery plan because it does not have the force of law.¹⁵⁵ Judge Brewster “respectfully disagree[d] with the cases minimizing the importance of recovery plans.”¹⁵⁶ While this disagreement does not necessarily suggest that recovery plans *do* have the force of law and *must* be fully implemented, it indicates that the Fish and Wildlife Service may not simply ignore its own recovery plans.¹⁵⁷

The court found a further “egregious flaw” in the MSHCP’s treatment of vernal pools because the required mitigation for vernal pool impacts was limited by the “Assurances” contained in the MSHCP’s implementation agreement without any analysis of the impacts of the City of San Diego’s development plans on vernal pool species.¹⁵⁸ The mitigation was “ineffective, unstudied, and inadequate” for the vernal pool species but was locked in to the MSCP for the plan’s fifty-year duration.¹⁵⁹ The court viewed this approach as “effectively repealing the stricter protective ESA standards for the vernal pool species for fifty years.”¹⁶⁰ This result was a “clear violation” of Section 10 of the ESA, because it resulted in the issuance of an incidental take permit that “(1) will *not* ‘maximize to the extent practicable, minimize and mitigate the impacts’ of those takings, and (2) could ‘appreciably reduce the likelihood of the survival and recovery of the species in the wild.’”¹⁶¹

The court further emphasized the importance of species recovery and recovery plans in the portion of the decision dealing with the MSCP’s twelve-percent “cap” on the loss of additional vernal pool habitat. The plaintiffs argued that the Fish and Wildlife Service violated the ESA by approving the MSCP and authorizing the loss of twelve percent of the remaining vernal pool habitat in the planning area without analyzing the impact of this loss on the survival and recovery of the listed vernal pool species.¹⁶² While there was considerable dispute whether the MSCP allowed the loss of twelve percent of vernal pool habitat at all and how this cap was to be applied, the court reviewed biological opinions issued for subsequent projects that affected vernal pools and concluded that the Fish and Wildlife Service did in fact apply the twelve-percent cap as a measure of permissible vernal pool destruction.¹⁶³ The court agreed with the plaintiffs that this approach

¹⁵⁵ *Id.* (citing *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1139–40.

¹⁵⁹ *Id.* at 1146.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1156. The Fish and Wildlife Service argued that vernal pool destruction was limited

violated the ESA.¹⁶⁴ The twelve-percent cap allowed unavoidable impacts to vernal pool species to be mitigated by ineffective and unacceptable measures, was based on an undefined baseline of the amount of vernal pool habitat remaining, and did not allow for the assessment of the quality of the affected vernal pool habitat.¹⁶⁵ In addition, the twelve-percent cap was inconsistent with the scientific data available to the Fish and Wildlife Service, including the vernal pool species recovery plan.¹⁶⁶

The court noted that the Service was preparing the recovery plan at the same time that it was reviewing the City of San Diego's incidental take permit, and therefore had the relevant information regarding the needs and status of the vernal pool species on hand to inform the content of the incidental take permit.¹⁶⁷ In particular, the court cited the statement in the vernal pool species recovery plan that the "Riverside fairy shrimp and their associated watersheds should be secured from further loss and degradation in a configuration that maintains habitat function and species viability."¹⁶⁸ This and other recovery recommendations were directly in conflict with the MSCP's allowance of the "across-the-board destruction" of twelve-percent of vernal pool habitat.¹⁶⁹

Finally, the court addressed the adequacy of the San Diego MSCP's funding. The court observed that the City of San Diego relied on a variety of uncertain future actions to provide funding for the land acquisitions required for its portion of the MSCP, and the City expressly refused to guarantee that funds would be available.¹⁷⁰ In this respect, the court viewed the funding situation as similar to that in the Natomas Basin HCP case. In that case, the Section 10 findings were disapproved because "'of the City's explicit refusal to ensure funding' for the mitigation, 'the adequacy of funding depends on whether third parties decide to participate,' and 'no entity will be responsible for making up the funding shortfall.'"¹⁷¹ Accordingly, the court concluded that the Fish

not by the twelve-percent cap but by the MSCP's requirement that vernal pools are to "be avoided to the maximum extent practicable." *Id.* at 1147. The court concluded, however, that avoidance of vernal pools "to the maximum extent practicable" was a loophole that meant destruction of vernal pools up to the twelve-percent cap. *Id.* at 1147-51.

¹⁶⁴ *Id.* at 1152-55.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1154-55.

¹⁶⁷ *Id.* at 1155 n.25.

¹⁶⁸ *Id.* at 1155.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1156.

¹⁷¹ *Id.* (quoting *Nat'l Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1294-95 (E.D. Cal. 2000)).

and Wildlife Service “could not rationally conclude that the City will ensure adequate funding as the ESA requires.”¹⁷² Although the court noted that the lawsuit was focused on the seven vernal pool species,¹⁷³ this portion of the court’s ruling is applicable to the City’s funding mechanisms for its share of the entire San Diego MSCP—the flawed funding mechanisms are not limited to the vernal pool species or to the City’s ability to acquire vernal pool habitat.

The remedy in *Southwest Center v. Bartel* was two-fold. First, the court enjoined the Fish and Wildlife Service and the City of San Diego “from further executing pending site-specific projects under the [incidental take permit] affecting the seven vernal pool species.”¹⁷⁴ This injunction applied to three categories of activity: (1) “any and all pending applications for development of land containing vernal pool habitat”; (2) “those projects where the City has granted permission, but the development has not yet physically begun to destroy vernal pool habitat”; and (3) “further development where the permittee is presently engaged in the destruction of vernal pool habitat.”¹⁷⁵

Second, the court remanded the case to the Fish and Wildlife Service for reinitiation of consultation under Section 7 of the ESA for that agency to consider “revisions of the City of San Diego’s Incidental Take Permit at least on the seven vernal pool species.”¹⁷⁶ The court directed the Fish and Wildlife Service to “evaluate the impacts of the City’s HCP on the seven vernal pool species” and to consider the “standards and other information” in the vernal pool species recovery plan during the reinitiated intra-agency consultation.¹⁷⁷ The court further advised the Fish and Wildlife Service that “during or after that reinitiated consultation, the Service can consider whether it needs to seek modification or withdrawal of the MSCP, Subarea Plan, or [incidental take permit] with regard to covered vernal pool species.”¹⁷⁸

In 2010, the Fish and Wildlife Service canceled the portions of the incidental take permit covering the vernal pool species.¹⁷⁹ As a result of this cancellation, applicants for projects that may affect vernal pools within the City of San Diego are no longer exempted from liability for take of federally listed vernal pool species by the San Diego MSCP.¹⁸⁰ In

¹⁷² *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1156.

¹⁷³ *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 821 (9th Cir. 2001).

¹⁷⁴ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1162.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1132, 1137.

¹⁷⁸ *Id.* at 1132.

¹⁷⁹ *Sw. Ctr. for Biological Diversity v. Bartel*, 409 F. App’x 143, 145 (9th Cir. 2011).

¹⁸⁰ *Id.*

an appeal by the Building Industry Legal Defense Foundation and other building trade interveners of the scope of Judge Brewster's injunction, the Ninth Circuit concluded that the appeal was moot and directed the district court to vacate its injunction, "[b]ecause the portions of the [incidental take permit] that were the subject of litigation in district court no longer exist."¹⁸¹ The Ninth Circuit further observed that "the cancellation of the [incidental take permit] means that the City of San Diego no longer has authority to issue any permits affecting the vernal pool species. Consequently, there is nothing for the district court to enjoin."¹⁸² Following the Ninth Circuit's order, the district court vacated the injunction.¹⁸³

Although the injunction is gone, the cancellation of the incidental take permit accomplished much the same result as an injunction because, as Judge Brewster noted, the "permit *cannot be used or relied upon in any way* with respect to [the vernal pool species]."¹⁸⁴ In addition, the *Southwest Center* decision directs the Fish and Wildlife Service to consider specific vernal pool conservation demands, including the recovery of the vernal pool species, during any reinitiated consultation if and when the City of San Diego decides to prepare a new vernal pool HCP.¹⁸⁵ Finally, although the district court did not provide any specific relief in connection with its conclusion that the City's funding mechanisms for the MSCP were inadequate, that portion of the *Southwest Center* decision serves as a forceful reminder that adequate funding for any future vernal pool HCP must be assured.¹⁸⁶

A consistent thread in Judge Brewster's decision is the recovery of the vernal pool species. It did not escape the court's notice that the Fish and Wildlife Service, the agency that was developing the recovery plan for the vernal pool species, issued a permit that allowed the take of these species "without the benefit of a Recovery Plan."¹⁸⁷ The court further expressed concern that the MSCP Assurances left no room for the Fish and Wildlife Service to impose additional mitigation if it "found that a specific development project would impair the recovery of a vernal pool

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Sw. Ctr. for Biological Diversity v. Bartel*, No. 98-CV-2234-B(WVG), 2011 U.S. Dist. LEXIS 21163 (S.D. Cal. Mar. 3, 2011).

¹⁸⁴ *Id.* (emphasis added).

¹⁸⁵ *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1132, 1137, 1162 (S.D. Cal. 2006). The City of San Diego has stated that it will pursue a new incidental take permit for vernal pool species in connection with a new vernal pool HCP. *Sw. Ctr. for Biological Diversity v. Bartel*, 409 F. App'x 143, 145-46 (9th Cir. 2011).

¹⁸⁶ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1156.

¹⁸⁷ *Id.* at 1143 n.19.

species.”¹⁸⁸ In its review of the Fish and Wildlife Service’s approval of the incidental take permit, the court expressly applied a standard that requires HCPs to demonstrate that they facilitate *both the survival and the recovery* of listed species.¹⁸⁹ The court found the permit failed to meet the ESA’s requirements based on this standard.¹⁹⁰

IV. TAKING RECOVERY SERIOUSLY—A MODEL FOR A FUTURE SAN DIEGO VERNAL POOL PLAN

When the San Diego MSCP was first adopted, it was praised by then-Secretary of the Interior Bruce Babbitt as “a model to the nation for how to plan for and balance the needs of man and nature.”¹⁹¹ The decision in *Southwest Center v. Bartel* suggests that the San Diego MSCP is a poor model for vernal pool conservation. However, the *Southwest Center* decision itself is a model, or at least a blueprint, for any future San Diego vernal pool HCP. Moreover, in its proper focus on species recovery, the decision is instructive for all future HCPs.

MSHCPs provide many benefits, such as providing certainty to landowners and developers, allowing efficient processing of land-use permits by plan participants, and providing efficient administration of take authorization by the Fish and Wildlife Service. But it is not clear that these benefits provide any net conservation benefit in comparison to a world without MSHCPs. This is ironic because conservation plans purport to be about conservation.

It is purely speculative to judge the conservation benefits of an HCP in comparison to no HCP, but the situation in San Diego after the *Southwest Center v. Bartel* injunction was vacated provides an interesting non-speculative case study. After the Fish and Wildlife Service cancelled the City of San Diego’s incidental take permit for the seven vernal pool species, there was no take coverage and no HCP for these species.¹⁹² The post-HCP outlook for the vernal pool species is not significantly worse, and indeed is arguably better than when the HCP was in effect for these species. The vernal pool species are still listed and

¹⁸⁸ *Id.* at 1139. *See also id.* at 1146 (showing MSCP Assurances preclude Fish and Wildlife Service from making changes to the City’s incidental take permit “that may be necessary to ensure the survival and recovery of the vernal pool species”).

¹⁸⁹ *Id.* at 1129.

¹⁹⁰ *Id.* at 1123, 1127–28, 1129, 1146, 1147, 1155.

¹⁹¹ John Krist, *Court Ruling Offers Warning to Habitat Plan Negotiators*, 22 CALIFORNIA PLANNING & DEVELOPMENT REPORT 2 (2007).

¹⁹² *Sw. Ctr. for Biological Diversity v. Bartel*, 409 F. App’x 143, 145 (9th Cir. 2011); *Sw. Ctr. for Biological Diversity v. Bartel*, No. 98-CV-2234-B(WVG), 2011 U.S. Dist. LEXIS 21163 (S.D. Cal Mar. 3, 2011).

their take is prohibited by the ESA. Applicants for development projects have generally found other ways to obtain take coverage if their projects affect vernal pools, typically through the Army Corps of Engineers' Section 7 consultation process.¹⁹³ But these projects are still subject to review and the imposition of "reasonable and prudent" vernal pool measures to minimize vernal pool impacts by the Fish and Wildlife Service.¹⁹⁴

Not every project in the City of San Diego will qualify for take exemption through the Section 7 consultation process based on the involvement of the Army Corps of Engineers or some other federal agency. In such cases, projects that might affect vernal pools could presumably avoid the take prohibition by a combination of avoidance and mitigation measures. Both are problematic. While avoidance should be the main method of conserving vernal pools, activities that avoid direct vernal pool impacts can still significantly affect pools by altering the hydrology of the upland watershed areas surrounding the pools and introducing sediment and chemical pollutants.¹⁹⁵ In contrast, vernal pool mitigation measures typically involve some combination of on-site and off-site preservation, restoration, and/or creation of vernal pools. As both Judge Brewster and the Fish and Wildlife Service have observed, these measures are unsatisfactory and could still result in take of vernal pool species.¹⁹⁶ Nonetheless, if the post-HCP regulatory environment creates results in avoidance or mitigation measures that genuinely minimize vernal pool impacts, it appears to be a better conservation outcome than under the MSCP, which permitted a project even though it destroyed all sixty-four vernal pools on the development site.¹⁹⁷

In addition, the San Diego MSCP's non-coverage of vernal pool species has resulted in a more expansive critical habitat designation for at least one vernal pool species. In 2005, when the MSCP covered the vernal pool species, the Service designated critical habitat for the

¹⁹³ Even if the affected vernal pools are not subject to the Army Corps' permitting jurisdiction as a result of the decision in *Solid Waste Agency v. U. S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), there are often other waterbodies conveniently located on the development site that do support the Army Corps' jurisdiction and thus trigger interagency cooperation under ESA Section 7, 16 U.S.C.A. § 1536 (Westlaw 2012).

¹⁹⁴ 16 U.S.C.A. 1536(b)(2)(4)(C)(ii) (Westlaw 2012).

¹⁹⁵ Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for Three Vernal Pool Plants and the Riverside Fairy Shrimp, 58 Fed. Reg. 41384, 41389 (Aug. 3, 1993) (codified at 50 C.F.R. § 17.11(h) (Westlaw 2012)).

¹⁹⁶ *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1127 (S.D. Cal. 2006); Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the San Diego Fairy Shrimp, 62 Fed. Reg. 4925, 4926 (Feb. 3, 1997) (codified at 50 C.F.R. § 17.11(h) (Westlaw 2012)).

¹⁹⁷ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1154.

Riverside fairy shrimp but excluded most habitat within the MSCP planning area, even if it was deemed essential to the conservation of the species.¹⁹⁸ However, after the decision in *Southwest Center v. Bartel*, the Service designated critical habitat for the San Diego fairy shrimp within the MSCP planning area, specifically citing the decision as the basis for the more expansive designation.¹⁹⁹ Because critical habitat designation arguably provides more conservation benefit than HCP coverage (particularly if the vernal pools designated as critical habitat are not within the MSCP's reserve area), the San Diego fairy shrimp may be a beneficiary of this post-HCP environment.²⁰⁰

The City of San Diego has announced that it is pursuing a new incidental take permit for vernal pool species. Thus, whatever benefits these species derive from the post-HCP environment may not last forever. The minimum objective for any new vernal pool HCP should be to provide a clear conservation benefit in comparison to the world without a vernal pool HCP. Judge Brewster's decision in *Southwest Center* suggests how this objective may be met:

1. The new vernal pool HCP should facilitate both the survival *and* recovery of covered species.²⁰¹
2. The new vernal pool HCP should respect the recovery standards and recommendations of the vernal pool species recovery plan. This does not mean that recovery plan should have the force of law, but if the HCP is inconsistent with the recovery plan, the HCP and the associated incidental take permit should provide a reasoned explanation for the inconsistency and demonstrate that it is still consistent with the recovery objectives for the covered species.²⁰²
3. The new vernal pool HCP should have a guaranteed source of adequate funding for the lifetime of the plan.²⁰³

A new vernal pool HCP that fails to meet these criteria would merely repeat the errors of the previous HCP. Sound conservation planning and the *Southwest Center* decision both demand a better outcome for this second effort.

¹⁹⁸ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Riverside Fairy Shrimp (*Streptocephalus woottoni*), 70 Fed. Reg. 19,154, 19,159 (Apr. 12, 2005) (codified at 50 C.F.R. § 17.95(h) (Westlaw 2012)).

¹⁹⁹ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the San Diego Fairy Shrimp (*Branchinecta sandiegonensis*), 72 Fed. Reg. 70648, 70651 (Dec. 12, 2007) (codified at 50 C.F.R. § 17.95(h) (Westlaw 2012)).

²⁰⁰ The consultation process pursuant to Section 7 of the ESA, for example, expressly requires consideration of effects on designated critical habitat. 16 U.S.C.A. § 1536(a)(2) (Westlaw 2012).

²⁰¹ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1123, 1127–28, 1129, 1146, 1147, 1155.

²⁰² *Id.* at 1136–37.

²⁰³ *Id.* at 1156.

V. CONCLUSION

There are valid reasons for skepticism regarding the conservation benefits of MSHCPs. MSHCPs promise much but have delivered mixed results at best in recovering species.²⁰⁴ The Fish and Wildlife Service must consider species recovery when it conducts the jeopardy and adverse modification analyses during a Section 7 consultation.²⁰⁵ The Service must also prepare recovery plans for listed species. As Judge Brewster recognized in *Southwest Center v. Bartel*, these plans should inform the Service's other conservation actions, including the approval of HCPs.²⁰⁶ More fundamentally, the ESA is about recovery.²⁰⁷ It would appear to subvert congressional intent if the agency that is charged with recovering species could also hand out incidental take permits that impair recovery.²⁰⁸ The *Southwest Center v. Bartel* decision provides the basic outline for developing a new vernal pool HCP for the City of San Diego—or any HCP—that takes recovery seriously.

²⁰⁴ Langpap & Kerkvliet, *supra* note 81.

²⁰⁵ Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 932–33 (9th Cir. 2007); Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004).

²⁰⁶ *Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1136–37.

²⁰⁷ *Gifford Pinchot Task Force*, 378 F.3d at 1070.

²⁰⁸ One district court nonetheless ruled that the Fish and Wildlife Service could do exactly that. *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 43 (D.D.C. 2007). In a ruling that illustrates the perils of non-contextual statutory analysis, the court in *Spirit of the Sage Council* expressly disagreed with *Southwest Center v. Bartel*'s conclusion that HCPs must facilitate both survival and recovery, concluding that an incidental take permit could be issued if it impairs recovery, so long as it does not reduce the likelihood of both survival and recovery. *Id.* In effect, *Spirit of the Sage Council* reads the term “conservation” out of conservation plans prepared under Section 10 of the ESA, 16 U.S.C.A. § 1539 (Westlaw 2012).