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James A. Kraft

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HABITAT BASED, MULTI-SPECIES HCPs: LESSONS FROM THE NORTHWEST

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BIODIVERSITY PROTECTION:  
IMPLEMENTATION AND REFORM OF THE  
ENDANGERED SPECIES ACT

Natural Resources Law Center  
University of Colorado  
School of Law  
Boulder, Colorado

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# **Habitat Based, Multi-Species HCPs: Lessons From the Northwest**

by James A. Kraft

## **Summary**

Added to the Endangered Species Act in 1982, the voluntary habitat conservation planning process and other flexibility in the Act have been little understood and little used by private landowners except until only recently. Many landowners have viewed the HCP process as an infringement on their private property rights. Moreover the cost of preparing an HCP, undergoing the Section 7 consultation process and complying with NEPA has limited the HCP tool to only those landowners with significant financial, legal and scientific resources. Nevertheless, private landowners and state resource agencies across the country are today considering HCPs to help protect numerous listed species.

This growth in interest in HCPs stems in part due to the desire to lessen the economic impact resulting from the ESA's prohibition on taking and in part due to the Department of Interior's policies offering regulatory incentives. These incentives, including pre-listing agreements, multi-species permits, the "No Surprises" policy and safeharbor agreements provide valuable regulatory certainty to the private landowner. In fact, a handful of landowners have come to the conclusion that the regulatory certainty provided by an HCP is worth pursuing notwithstanding the high costs. This choice becomes clearer when the costs of an HCP are balanced against the alternative of living with Section 9 take restrictions for current and future listed species or litigating against the government for a "regulatory taking." The regulatory relief and certainty offered by the HCP process can outweigh the concern about the financial and human resources needed to develop a plan as well as private property that is diverted from economic use to species and habitat

preservation.

Two trends underlie the growth in interest in HCPs. The first is the shift to ecosystem based planning rather than trying to manage for one species at a time. Inherently, it makes more sense to plan for a larger landscape and multiple species rather than for individual species using a piecemeal approach.

Second, government policy recognizes that private lands should share the same goal but play a different role in species conservation. While private lands may be needed to aid species conservation, the primary obligation should rest on public lands. Thus, the President's Forest Plan addresses most of the conservation needs in the Pacific Northwest. Federal planning documents have pointed out, however, that there still is a need for contributions in certain sensitive areas from private lands. Government policy recognizes that the most effective manner to obtain such contributions is to provide voluntary incentives to align the interests of private property owners with the needs of wildlife.

Plum Creek timberlands in the central part of Washington state offer a perfect case study for these two trends. Plum Creek lands support the highest density of spotted owls and habitat on private lands in Washington State. The U.S. Fish and Wildlife Service draft recovery plan for the spotted owl indicated that Plum Creek lands would be essential to the conservation of the owl. Moreover, numerous other listed species are also found on or near our lands including marbled murrelets, salmon, bull trout, caribou, lynx, gray wolves, and eagles, to name a few. With the presence of so many species, Plum Creek is and will be highly impacted economically by the ESA.

Until the President's Forest Plan, there was no settled policy direction for federal lands in the Pacific Northwest. This made it very difficult to plan for private lands. Today, with the judicial approval of the President's plan, the direction for federal forests is largely

settled. This has allowed private landowners such as Plum Creek to define their roles within the larger landscape.

With federal policy finally coming into focus, Plum Creek launched a massive effort nearly two years ago to develop a scientifically credible HCP that had three primary objectives: (1) provide a balance of habitat throughout the ecosystem for all species; (2) obtain predictability and flexibility to manage timberlands economically while contributing to the conservation of the spotted owl and numerous other species, and (3) reduce the impact on habitat and species resulting from lawful forest management activities.

After employing a team of twenty independent scientists, numerous lawyers, and NEPA consultants; after spending over \$1.2 million to develop the plan and the associated NEPA analysis; and after committing to spend millions more throughout the life of the HCP, Plum Creek, working with the USFWS and NMFS, is close to having achieved these objectives at the time of this writing. Negotiating the plan took close to 18 months and, while arduous, would not have been possible without the commitment of the Department of Interior to the HCP process. In particular, it was of crucial importance to have open lines of communication to keep the negotiations on track.

Plum Creek's HCP accomplishes the biological goals noted above by providing a comprehensive, ecosystem based approach to managing habitat for all species whether they are listed or not. The HCP provides that a diversity of stand structures will be provided throughout the life of the permit for 16 groups or "guilds" of species which we have termed "life forms." In the planning area there are 285 vertebrate species within the 16 life forms. Our management activities will thus be planned in space and time to ensure an adequate mix of all forest structure stages and protected special habitat throughout the planning area. Results will be monitored and adjustments made if the targets set forth in the HCP are not met or if emerging science shows a need for a change.

In addition to these overarching measures, riparian buffers are established beyond what is required by state regulation to contribute to the conservation of fish habitat and riparian dependent species. Plum Creek will also conduct detailed watershed analyses in all of the 20 watersheds in the 400,000 acre HCP planning area and manage in accordance with the prescriptions that result. These analyses and prescriptions are not static; they are to be monitored and revised at designated intervals throughout the life of the permit. Spotted Owl nesting, roosting and foraging habitat is to be maintained at a minimum of 8% of our ownership. We will employ a set of best management practices for grizzly bears. We will reduce operations which may disturb wolves and defer harvest around den sites. Mitigation is also provided for special habitats such as wetlands, snags, talus slopes and caves.

All of the mitigation in the HCP is designed to complement the President's Forest Plan which creates large late successional reserves, adaptive management areas, and critical watershed protection areas on the federal lands that are intermingled in the area. Taken together, the federal and private efforts offer a broad long term solution to the conservation issues in this area.

The HCP and its habitat benefits for listed and unlisted species is to be implemented pursuant to a contract between Plum Creek and the USFWS and NMFS. This contract, referred to as an Implementation Agreement ("IA"), incorporates the commitments set forth in the HCP and provides the legal mechanism for providing Plum Creek with long term regulatory certainty.

Regulatory certainty is provided through the implementation of the incidental take permitting process and numerous policy innovations. Plum Creek will receive a fifty year incidental take permit for four currently listed species: the spotted owl, the grizzly bear, the gray wolf and the marbled murrelet. While this provides certainty for currently

listed species, if additional species in the planning area should subsequently become listed after completing the HCP, then the plan would have to be re-done and additional mitigation measures designed. To avoid this uncertainty, Plum Creek's HCP provides mitigation for unlisted species noted above, and the IA contains a "pre-listing agreement." Pursuant to this agreement, the Services have agreed to add after listed species to Plum Creek's incidental take permit by amendment, absent "extraordinary circumstances." Extraordinary circumstances have been defined in the IA to mean jeopardy to the species in question. Thus, Plum Creek will be able to manage its lands for the long term secure in the knowledge that it has already provided comprehensive mitigation and subsequent listings of species will not require reworking the HCP.

To obtain this assurance from the Services, Plum Creek provided the mitigation noted above for numerous unlisted species even though there is no legal requirement to do so. Through this and other such voluntary efforts, future listings may be unnecessary. The pre-listing agreement is thus a win/win situation for both the permittee and the environment.

Closely tied to the concept of pre-listing agreements, is the "No-Surprises" policy adopted by the Department of Interior. This policy provides that once an HCP is approved, absent extraordinary circumstances, a permittee will not be required to provide additional mitigation so long as the permittee is complying with the terms of the HCP. Thus, once a package of mitigation is agreed upon, the landowner will not normally be asked to do more. This policy provided a powerful incentive to Plum Creek to do the multi-species HCP and is incorporated in Plum Creek's IA.

While Plum Creek thus obtains management certainty, the question has been raised what happens if the HCP is not working as intended or if there are unforeseen circumstances. Such biological uncertainty is addressed in Plum Creek's HCP and IA through the ongoing watershed analysis process and the concept of adaptive management. First the



watershed analysis process will lead to site specific changes in management based upon actual results achieved. Moreover, the monitoring provided in the HCP will lead to consensual amendments to the HCP should the results show that changes are merited. The monitoring and research anticipated by the HCP are designed to measure whether the HCP is working and evaluate changes that may be warranted.

A final element of Plum Creek's HCP is an incentive to provide habitat beyond the initial 50 year phase of the permit. Under this incentive, referred to as a "Safeharbor" agreement, the incidental take permit will continue for up to another 50 years so long as Plum Creek maintains habitat in the planning area above baseline levels called for in the HCP. This incentive thus aligns Plum Creek's economic interests with-- not against --the interests of continued species conservation. Once again species will benefit and Plum Creek will continue to have regulatory certainty.

Plum Creek's experience with the ESA provides some valuable lessons as Congress considers reauthorization of the Act. The cost and complexity of preparing HCPs should be reduced to make this tool available to more landowners. This could be achieved by streamlining the NEPA process since much of the analysis required by NEPA is already required by Section 10. Moreover, the requirement that the Services consult with themselves under Section 7 appears only to add cost and little value. Finally, the pre-listing process and the No-surprises policy should be codified to eliminate the need to develop contractual mechanisms to achieve this incentive. While Plum Creek's HCP indicates that the ESA can be made to work, reforms can and should be made to make the process work better for species and landowners.

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Assistant to the General Counsel for major natural resources holding company. (1984-1989)

*Associate. Milbank, Tweed, Hadley & McCloy. New York.*

Negotiated and drafted documentation for a variety of complex financings. (1982-1984)

*Educational Consultant. Mombusho (Japanese Ministry of Education) English Fellows Program. Tokushima Prefecture. Japan.*

Taught and worked in the prefecture's schools and educational bureaucracy. (1978-1979)

*Assistant Editor. The Look Japan Ltd., Tokyo. Japan.*

Edited, wrote and translated articles for Look Japan, an English language public relations magazine. (1976-1977)

### EDUCATION:

*Harvard Law School. J.D. June. 1982.*

Elected Notes and Comments editor, Harvard International Law Journal.  
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*Harvard College. B.A. in East Asian Studies. June. 1978.*

Honors thesis analyzed Japan's newspaper coverage of the Cultural Revolution in China.

**PERSONAL BACKGROUND:**

Born March 8, 1955 in Seattle, Washington. Married with two children. Avid squash player. Serve as Trustee, Secretary and General Counsel for Pacific Northwest Ballet. Chair of the 1995 Cystic Fibrosis Foundation Stairclimb fundraising event. Fluent in Japanese. Member of the Bar in Washington and New York.