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REGIONAL HABITAT CONSERVATION PLANNING:
THE CALIFORNIA GNATCATCHER EXAMPLE

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WHO GOVERNS THE PUBLIC LANDS:
WASHINGTON? THE WEST? THE COMMUNITY?

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This outline represents the views of the author in his individual capacity and does not represent the official position or views of the U.S. Department of the Interior. Portions of this outline have appeared in an article by Ira Michael Heyman, "Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation." 25 Pacific Law Journal 2 (Jan 1994).

I. Introduction

The Endangered Species Act's (ESA) strict and powerful provisions reflect an unequivocal commitment by the Federal government to the preservation of plants and animals. Through its far-reaching provisions, the Act has impacted large development projects for the sake of both obscure and beloved species. Not surprisingly, where the Act shows its teeth, conflict often follows. As we witnessed in the Pacific Northwest, the political, environmental, and economic fallout from the imposition of drastic and immediate measures to protect an endangered species can be severe. The saga of the spotted owl is but one of many stories of what my boss, Secretary Bruce Babbitt, calls "national train wrecks," that have spurred us to consider the question of whether these collisions are inevitable - simply the price we pay as a society to maintain the integrity of our biological heritage. We think they are not.

Under the watch of Secretary Babbitt, the Department of the Interior (DOI) has been investigating an approach that enhances the ESA's potential to preserve wildlife and to minimize collisions. The approach moves the Act's focus away from the protection of single species, and toward the preservation of habitats supporting many species. This

approach facilitates planning in advance, rather than crisis management. It also creates opportunities to balance conservation and development in a sensible way.

The Interior Department is currently testing this approach in southern California in cooperation with state and local officials. The program links the ESA with the state enacted Natural Communities Conservation Planning (NCCP) process to facilitate the planning of the region's ecosystems. This joint operation is designed to provide greater protection for the species inhabiting the landscape and lesser disruption to the economic interests of the region than each government could achieve on its own.

II. The Endangered Species Act in General

A glance at the core process of the ESA illustrates that it calls for crisis management. Most listings proceed from petitions filed with the Fish and Wildlife Service (FWS) of the Department of the Interior by individuals and organizations. The FWS carries on a biological investigation if a prima facie case seems evident on the basis of information proffered by the applicant and it concludes whether the species threatened or endangered. If it concludes that either is true, a "take" of any of the species is a federal crime unless an exemption is granted. "Take" is much broader than kill - it includes nearly everything detrimental to the species which the Act covers.

Ideally, as the ESA is constructed, there would be prompt investigation on every qualifying petition. Realistically, however,

investigations can be costly and time consuming, and the FWS budget is inadequate. At any time, therefore, there are hundreds of candidate species awaiting processing. Undoubtedly, some species fail during the wait. The ESA, interestingly, provides no criteria for scheduling investigations and the FWS's attempts to construct priority criteria have been less than satisfying and have differed in various regions of the country.

The problem with the ESA is that it only comes into play when a species is imperiled. The characteristic processes of the Act do not anticipate potential troubles in the future. The stated purposes of the ESA underscore this: "The purposes of this Act," it states, "are to provide a means whereby the ecosystems, upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species" The Act does not seek to preserve ecosystems important to the sustenance of many species in order to prevent them from becoming endangered or threatened. The bite of the Act comes later. Thus, a crisis is at hand when the process begins. Secretary Babbitt speaks of avoiding trainwrecks. The ESA is designed to produce them.

III. Existing Provisions That Ameliorate Collisions

There are two provisions in the ESA which seek to ameliorate collisions. One involves public lands [section 7] where Federal land agencies (and private applicants for permits on the public lands) can avoid criminal and civil penalties for "take" by consulting with the Fish and

Wildlife Service where actions might jeopardize the continued existence of endangered or threatened species or destroy habitat critical to their survival. If a project is contemplated, the proponent agency (or applicant) does a biological assessment. If in the Service's opinion the action or project can go forward as planned, or under added terms and conditions, without jeopardizing the species' survival, the action goes forward.

This public agency process helps moderate confrontations by formalizing a reviewing process before the Agency makes irreversible or irretrievable commitments of resources. The reviewing process, however, even if well followed, is largely an exercise of due diligence. It prevents inadvertent destruction of species. But it does not provide direction well in advance of the intended action and hence does not articulate a planning basis for land management. Moreover, even a good investigation does not provide complete assurance for species not picked up in the assessment that might still frustrate aspects of the desired project. This is less a problem in a legal sense on public land than private, except where a permit holder's investment is jeopardized.

The second process for ameliorating collisions is designed for the private land owner. It is the habitat conservation plan that specifies how the landowner plans to assure that contemplated development will not unduly impinge on listed species. This might be by so designing the project that important habitat is preserved. If the Fish and Wildlife Service is satisfied, after public hearings, that any destruction of species pursuant to the plan will not appreciably reduce the likelihood of the

survival and recovery of the species, the plan is approved and the applicant is exempted from liability for incidental takes of the species.

Decisiveness is a problem, however, given all the uncertainties that attend a prediction of biological behavior. Often, and understandably, FWS personnel want to delay decision until more studies are accomplished despite the injunction that decisions should be made on the basis of the best available scientific information. Delay, of course, can be the end of a development project because parties must be held together, options are expensive, and interest and taxes normally must be paid.

The effectiveness of the habitat planning process is also hindered by piecemeal application. Preparation of a plan generally begins when an individual landowner proposes to develop a tract that is home to a listed species. The terms and conditions of the incidental "take" permit are parcel-specific, usually tailored to the needs of the species on the site. The project-by-project nature of the process means that plans are often developed in isolation and judgements about the rules for development are made on a fragmented basis. It is difficult to know how pieces fit together, and whether preservation opportunities have been optimized. Without the benefit of comprehensive, large scale planning, the necessary elements of a viable set of reserves, such as the scope, location, shape, are often difficult to determine.

The process is designed for large land developers -- ones who likely have enough land to devote to habitat protection, as well as development,

and have the funds necessary to carry on the required biological and planning studies and to pay holding costs. Each conservation plan is specially sculpted. It is not a process that is well adapted for the use of owners of small parcels.

IV. Planning and Regulating in Advance

Advance multispecies planning, as a compliment to the species by species approach, solves a multitude of policy, planning, and legal problems inherent in the ESA. This is why we see the regional conservation planning approach in southern California as a model to be applied elsewhere. The framework for the model looks like this: a county or city general plan incorporates a conservation element (perhaps combined with the open space element) that identifies critical habitat for numbers of species. The important habitat is defined on a regional ecosystem basis by a regional or State agency under relevant statutory and regulatory guidelines, and an implementation strategy for protecting the lands so identified in a systematic way. Development would be permitted under rules that protect needed habitat or prohibited completely in some areas. Finally, the Federal Fish and Wildlife Service reviews the program and is empowered to exempt the whole of the cooperating political jurisdictions from species "taking" limitations, if it was satisfied that the multispecies plan adequately protected presently listed species and targeted nonlisted species. The exemption could be ended for substantial departures from the plan thus leaving the Service as a monitor, but not a direct regulator.

Note how many problems of the Act are addressed by this approach.

First the approach ameliorates the problem of total species coverage by choosing out habitat protection as the organizing principle for the application of regulation. Thus priority is determined on the basis of "rich" habitat, the sustenance of which will seek to assure survival of species before they need to be listed as well as listed ones. Of course, some species will be lost by reliance on this process. But they are being lost now because energy and money are limited and they are never reached under the case-by-case approach.

Secondly, the approach also moderates the balancing problem by integrating habitat conservation into a process where other needs are also portrayed. The likelihood of making better accommodations between conservation and development where all is being planned together is much greater than where species preservation is a last-minute add on.

Finally, the approach also addresses notable legal and planning problems. It creates geographic and temporal zones of relative certainty. If the conservation element permits development in particular places, developers, local officials and environmentalists know where these are. If the element prohibits development, or conditions it under performance standards, another kind of certainty is created and the market can adjust itself to the reality. Moreover, the very act of designation focuses argument on the important values at stake and minimizes the probability of future destructive change in the regulations. Furthermore, the approach provides certainty with respect to the impact of future listings on development and land use plans. Advance planning helps avoid the

collisions of crisis management.

Advance designation also aids in the assessment of the costs of critical habitat conservation and suggests means to minimize the need to acquire property into public ownership. Also, by identifying properties which probably must be acquired, it arms local conservancies with important information to guide their acquisition programs. Additionally, "zoning" of this sort permits the designation of transfer zones for purposes of establishing a market for development rights which will tend to minimize acquisition requirements. Finally, advance designation gives time to organize those institutions necessary to manage habitat and to determine the means for raising funds to operate them.

There is a serious limitation, as well as a heady opportunity, offered by the multispecies planing approach. The limitation is that the Federal Government, alone, cannot conceivably create and administer a land planning and regulation system on private lands within the States. Even if constitutionally permissible, pervasive Federal land planning and zoning is a political impossibility. The opportunity, however, is that fashioning such a system would stimulate a creative federalism with States and local governments playing a major role in both planning and management and with the Federal role -- with respect to private land -- limited to setting standards and monitoring performance. This is a much more appropriate role for Federal officials than to be the equivalent of zoning administrators.

V. Testing the Approach in southern California

Regional planning of ecosystems is underway in Orange, Riverside, and San Diego Counties. The Federal Government is an active participant in two regards. It has joined the California effort by agreeing to permit incidental taking of a threatened species under the Federal law -- the gnatcatcher -- on lands for which NCCP plans have been approved. It has also provided appropriations to help fund the scientific efforts that underlie the preparation of the plans.

The California approach addresses the three important needs I previously identified: (1) It protects species before they are on their last legs. (2) Ideally, it acts in advance of conflict and produces relative certainty as to what lands are and are not sensitive for species protection, thus letting the market absorb the information and act consistently. (3) It provides a rich opportunity for State/Federal interaction with local folks doing land planning and regulation and Federal officials exercising oversight to assure that these will protect endangered species. Moreover, it provides a good model for national adoption which could be stimulated by modest amendments to the Federal ESA.