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# The Statutory and Constitutional Mandate for a No Surprises Policy

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# The Statutory and Constitutional Mandate for a No Surprises Policy

*Fred P. Bosselman\**

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## INTRODUCTION

In California, the United States Fish and Wildlife Service (FWS) and the California Department of Fish and Game (DFG) (collectively, the "wildlife agencies") have negotiated agreements with a number of local governments and landowners proposing to undertake development of land or resources. These agreements mandate the protection of large areas of habitat in exchange for guarantees by the wildlife agencies that those agencies will pay for any additional conservation measures required in the future. Throughout this Article, I refer to these agreements as "assurances agreements," and the underlying policy on which they are based as the "no surprises policy."<sup>1</sup>

This Article propounds the following thesis: for large scale land-use plans, a carefully designed no surprises policy is: 1) mutually beneficial to rare species, natural communities, and private landowners; 2) mandated by the federal Endangered Species Act (ESA);<sup>2</sup> and 3) a way of satisfying constitutional requirements that landowners mitigate in rough proportion to their impact on land or resources.

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1. The details of both the state and federal no surprises policies are subject to modification as this is being written. The state recently issued proposed guidelines for public comment. See CALIFORNIA DEP'T OF FISH & GAME, NCCP GENERAL PROCESS GUIDELINES (Draft issued for public comment, June 1997) [hereinafter NCCP PROCESS GUIDELINES]. A proposed federal rule on the no surprises policy was issued in May. See U.S. DEP'T OF THE INTERIOR, FISH & WILDLIFE SERVICE, No Surprises Rule, 62 Fed. Reg. 29,091 (proposed May 29, 1997).

2. See 16 U.S.C.A. § 1531 et seq. (West, WESTLAW through P.L. 105-22).

## I

## BENEFITS OF ASSURANCES AGREEMENTS

The assurances agreements approved in California are based on the state's Natural Community Conservation Planning Act<sup>3</sup> (NCCP Act) and on Section 10(a) of the ESA.<sup>4</sup> The NCCP Act requires that these agreements protect entire natural communities on a regional scale.<sup>5</sup> In Southern California, where initial NCCP efforts have been concentrated,<sup>6</sup> the plans have identified an extensive network of lands to be set aside as a reserve for wildlife protection. The agreements provide that much of that land is to be dedicated to the reserve as mitigation for proposed future development.

Assurances agreements based on this type of NCCP plan benefit both species and landowners by recognizing that the needs of each will change over time in ways that cannot be predicted. While increasing the certainty of investments in land development, the agreements do not in any way restrict the ability of the wildlife agencies to demand additional mitigation measures in the future;<sup>7</sup> they merely require that such measures be financed by the state or federal taxpayers, rather than local taxpayers or landowners.<sup>8</sup>

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3. See CAL. FISH & GAME CODE § 2800 et seq. (West, WESTLAW through 1995-96 Reg. Sess. and 1st-4th Ex. Sess.).

4. See 16 U.S.C.A. § 1539(a) (West, WESTLAW current through P.L. 105-22, approved June 27, 1997).

5. "The plan identifies and provides for the regional or area wide protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth." CAL. FISH & GAME CODE § 2805(a). On the legal implications of the need for large scale habitat preservation to protect biodiversity, see generally Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869 (1997); WILLIAM J. SNAPE III, *BIODIVERSITY AND THE LAW* (1996); J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?* 66 U. COLO. L. REV. 555 (1995).

6. The area south of urban Los Angeles has been widely recognized as one of the most important concentrations of rare species in the nation. See Jon Paul Rodriguez et al., *Where are Endangered Species Found in the United States?* ENDANGERED SPECIES UPDATE Mar.-Apr. 1997, at 1 and figs. 1 & 2.

7. Perhaps the most articulate expression in opposition to assurances agreements on this ground is Kimberley K. Walley, an attorney with the Washington law firm of Meyer & Glitzenstein: "[U]nder this new approach to HCPs, if either (a) circumstances change or listed species which show that changes in the HCP are needed to conserve the species or (b) species which are not listed at time of the HCP are subsequently listed and their habitat falls within the HCP area, the types of, and instances in which additional mitigation measures may be implemented are substantially limited." *Proposed No Surprises Policy: Hearings Before the Comm. on Resources of the House*, 104th Cong. (1996), available in WESTLAW, USTESTIMONY File, 1996 WL 433280 (testimony of Kimberley K. Walley) [hereinafter Walley testimony].

8. See Michael A. O'Connell & Stephen P. Johnson, *Improving Habitat Conservation Planning: The California Natural Community Conservation Model*, ENDANGERED SPECIES UPDATE, Jan.-Feb. 1997 at 3. See generally Jon Welner, Note, *Natural Community Conservation Planning*, 47 STAN. L. REV. 319 (1995).

The fact that these plans and their implementing agreements have been supported in Southern California by most major environmental organizations<sup>9</sup> and building industry groups<sup>10</sup> suggests that these entities anticipate benefits for both species and the economy. This part of the Article will describe these benefits: first, the benefits derived from increased funding for biological mitigation; and second, the benefits resulting from contractual commitments that exceed the scope of what could be required under existing law.

### A. *Advantages for the Endangered Species*

#### 1. *Increasing the Amount of Mitigation*

Certainty about future regulatory obligations may increase the value of land, leading in turn to a greater ability of landowners to afford biodiversity protection measures. Thus, an important advantage of assurances agreements is simply that they free up funds needed to address species problems.

The wildlife agencies' power to limit the take of existing individuals of a species may be of limited value if funds are not available to address the causes of that species' decline.<sup>11</sup> In areas where development is occurring, the status quo often involves ongoing degradation of habitat from a number of causes, such as invasion by cowbirds or exotic vegetation, pollution-related damage, or feral cats.<sup>12</sup> Therefore, preserving the status quo may sometimes harm species more than allowing development.<sup>13</sup>

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9. See O'Connell & Johnson, *supra* note 8, at 1. See also Dwight Moling, *The Coastal Sage Scrub Solution*, NATURE CONSERVANCY, July-Aug. 1997, at 16; Dennis Pfaff, *Dividing Up Land for the Future*, SAN FRANCISCO DAILY JOURNAL, July 14, 1997, at 1. For a more critical view, see MICHAEL JASNY, NATURAL RESOURCES DEFENSE COUNCIL, LEAP OF FAITH: SOUTHERN CALIFORNIA'S EXPERIMENT IN NATURAL COMMUNITY CONSERVATION PLANNING (1997).

10. See Lynn R. Dwyer et al., *Avoiding the Trainwreck: Observations from the Frontlines of Natural Community Conservation Planning in Southern California*, ENDANGERED SPECIES UPDATE, Dec. 1995, at 5.

11. See J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. LAW 1107, 1115-16 (1995).

12. The San Bruno Mountain plan that served as the prototype for the original HCP provides a good example of such conditions.

13. One of the most famous maxims of the environmental movement is Aldo Leopold's: "A thing is right only when it tends to preserve the integrity, stability and beauty of the community, and the community includes the soil, waters, fauna and flora, as well as people." Curt Meine, ALDO LEOPOLD: HIS LIFE AND WORK 499 (1988). Although Leopold, a highly esteemed wildlife biologist, died before today's "conservation biology" movement, his writings suggest that he would have supported today's commitment to adaptive management. See GARY G. GRAY, WILDLIFE AND PEOPLE: THE HUMAN DIMENSIONS OF WILDLIFE ECOLOGY 213-221 (1993); J. Baird Callicott, *Do Destructive Ecology and Sociobiology Undermine Leopold's Land Ethic?* 18 ENVTL. ETHICS 353, 372 (1996) (suggesting that Leopold today would advocate that "A thing is right when it tends to

Neither the ESA nor the California Endangered Species Act (CESA)<sup>14</sup> empowers the wildlife agencies to force private landowners to protect species, no matter how scarce the species. Thus, the statutes only affect the private landowner who takes some affirmative action to create incidental take of a species.

Assurances agreements based on large scale plans can convert the power to prevent take into a specific mitigation obligation. This obligation benefits species in three important ways: the reduced regulatory uncertainty substantially increases land values; the procedural formalities behind a signed agreement require the wildlife agencies to more carefully and comprehensively evaluate the merits of various approaches; and the quantification of a landowner's obligation enables efficient re-negotiation where species conditions change and a new type of mitigation is required.

*a. Land Value Promotes Species' Value*

Assurances agreements increase the market value of land by reducing regulatory uncertainty, as discussed in Part II.B below. As bargains between the government and land developers enhance the market value of land, developers can afford to contribute more to the protection of species.<sup>15</sup>

*b. Agreements Focus Biologists' Attention*

The context of binding agreements for mitigation financing encourages each affected party to study carefully the biological issues and to define clearly the nature of the mitigation desired. This approach alleviates a problem common to permit-based mitigation, wherein the less formalized nature of requirements inhibits meaningful enforcement.<sup>16</sup>

Biologists participating in Southern California's NCCP process relied heavily on the conservation guidelines proposed by the SRP.<sup>17</sup> The guidelines helped them to identify potential conflicts between the best strategies for regional habitat conservation and the best strategies

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disturb the biotic community only at normal spatial and temporal scales. It is wrong when it tends otherwise.”).

14. CAL. FISH & GAME CODE § 2055 et seq. (West, WESTLAW through 1995-96 Reg. Sess. and 1st-4th Ex. Sess.)

15. See JOHN J. KIRLIN & ANNE M. KIRLIN, CALIFORNIA TAX FOUNDATION, PUBLIC CHOICES-PRIVATE RESOURCES 44-45 (1982).

16. This problem has been so prevalent in California that the legislature amended the California Environmental Quality Act to try to encourage more specific mitigation and monitoring measures. See CAL. PUB. RES. CODE § 21081.6 (West, WESTLAW through 1995-96 Reg. Sess. and 1st-4th Ex. Sess.). See MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 207-09 (9th ed. 1996).

17. See Dwyer et al., *supra* note 10, at 7.

for individual species protection.<sup>18</sup> Furthermore, the guidelines encouraged the design of large reserve areas, an alternative that would not have been available in smaller scale HCPs.<sup>19</sup>

The debate over appropriate conservation guidelines promoted analysis of key issues underlying the science of conservation biology. For example, is the process of protecting an ecosystem by protecting its weakest members viable? Conversely, will protection of the ecosystem as a whole be enough to protect its component species? Which, if any, species actually represent "umbrella species" that can serve as proxies for an entire natural community?<sup>20</sup> To what extent are standard principles of conservation biology, such as the desirability of large refuges and physical connectivity, applicable to a landscape that is so heavily interdigitated? By engaging scientists in these and other issues, the Southern California NCCP program fostered increased scientific research.<sup>21</sup>

### c. *Quantification Facilitates Future Modification*

The third benefit to species derives from the adaptability of assurances agreements to changes required for future management. By quantifying the amount of a landowner's mitigation obligation, these agreements facilitate changes in the performance of that obligation.

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18. For a discussion of the need to prioritize discrete conservation goals for individual projects to pursue those goals at the appropriate scale and for the appropriate value, see Mark W. Schwartz, *Conflicting Goals for Conserving Biodiversity Issues of Scale and Value*, 14 NAT. AREAS J. 213 (1994).

19. See CALIFORNIA DEP'T OF FISH & GAME, SOUTHERN CALIFORNIA COASTAL SAGE SCRUB NATURAL COMMUNITY CONSERVATION PLANNING CONSERVATION GUIDELINES 8 (1993) [hereinafter NCCP CONSERVATION GUIDELINES]. For a concise summary of the current wisdom on reserve design, see EDWARD O. WILSON, THE DIVERSITY OF LIFE 337-39 (1992). Much evidence for the value of large reserves comes from studies of forests. See, e.g., John Terborgh, *Preservation of Natural Diversity: The Problem of Extinction Prone Species*, 24 BIOSCIENCE 715 (1974); Chandler S. Robbins et al., *Habitat Area Requirements of Breeding Forest Birds of the Middle Atlantic States*, WILDLIFE MONOGRAPHS, July 1989, at 1.

20. For example, rare species may not be the best "umbrella" species for testing overall habitat quality. See Dwyer et al., *supra* note 10, at 6. See Brian H. Walker, *Biodiversity and Ecological Redundancy*, 6 CONSERVATION BIOLOGY 18 (1992) (arguing that the best way to minimize species loss is to maintain the integrity of ecosystem functions, not by focusing on individual species).

21. For a concise summary of major issues in conservation biology research, see generally RESEARCH PRIORITIES FOR CONSERVATION BIOLOGY (Michael E. Soule & Kathryn Kohm eds., 1989). Dennis Murphy, as Chairman of the scientific review panel (SRP), put constant pressure on program participants to fund increased research. As a part of the NCCP program, an intergovernmental coordinating team has succeeded in channeling money from a variety of sources into over fifty separate research projects relating to the biota of the coastal sage scrub and neighboring habitats. See generally PETER A. STINE, RESEARCH GUIDANCE TO ADDRESS THE NEEDS OF LAND MANAGERS, COASTAL SAGE SCRUB NATURAL COMMUNITY CONSERVATION PLANNING, NCCP CORE GROUP REPORT (1997).

While seemingly counter-intuitive, this proposition is apparent to people familiar with the land development process.

Because the biggest obstacle in negotiating mitigation financing plans is agreeing on the initial set of requirements, assurances agreements help species by specifically defining obligations at the outset of mitigation. The typical land developer cares far more about the cost of mitigation than the nature of particular mitigation requirements.<sup>22</sup> Once the requirements are specified, as they are under assurances agreements, a developer can factor the costs into his or her calculations. Should changed circumstances necessitate modified requirements, the developer can readily evaluate the new cost against a previously-determined fixed cost.<sup>23</sup> Thus, the agreements establish built-in flexibility for change.

## 2. *Enlarging the Scope of Regulation*

Assurances agreements based on plans for large scale habitat conservation give plants and animals greater protection than existing laws in the following ways: 1) the protection on private lands of threatened and endangered plants that are not protected under Section 7 of the ESA; 2) the protection of habitat not covered under Section 9 of the ESA; 3) the creation of ongoing adaptive management programs; 4) the proactive recognition of the habitat needs of species that are not presently listed under the ESA; and 5) increased connectivity among habitat systems, providing for the species' movement needed to foster genetic transfer and maintain predator relationships.

### a. *Protection of Plant Species*

The ESA protects plants substantially less than it does animals.<sup>24</sup> According to the HCP Handbook, the status of plant protection under the ESA is as follows:

[T]he ESA does not prohibit the incidental take of federally listed plants on private lands unless the take or the action resulting in the take is a violation of state law . . . Although take of listed plants does

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22. See Dean J. Mischynski, *Land-Use Controls and Property Values*, in *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* 75, 101-03 (Donald Hagman & Dean Mischynski eds., 1978).

23. Obviously, the cost to the developer may involve some elements that require complex evaluation. In southern California, developers frequently dedicate canyons that are hard to develop and that provide added value as open space to future purchasers. This has been mutually beneficial because these areas provide the most needed habitat. If future changes required an equivalent amount of flat land instead of canyons, the cost to the developer would be greatly increased. This result would not be possible under these agreements unless the government provided additional compensation.

24. For a concise review of the ESA's applicability to endangered plants, see RICHARD LITTELL, *ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION* 37-38 (1992). For his views on its protection of trees, see *id.* at 39.



not require a section 10 permit in most cases, the names of any plants addressed in the HCP can be placed on the permit at the request of the applicant when it is issued.<sup>25</sup>

Assurances agreements can considerably increase the protection of plants in several ways. First, many large scale plans address listed and unlisted plant species not otherwise subject to Section 7 consultation requirements, in order to provide landowners with certainty in the event that such plants are subject to Section 7 in the future.<sup>26</sup> Second, plants not located in areas designated as "critical habitat" for listed animal species can be protected by plans embracing more extensive land areas. Third, provisions for long-term restrictions on land frequently result in very real protection for plants not specifically addressed in plans.<sup>27</sup> Finally, many plans provide for the active management of committed lands to help assure the health of habitat systems, which can directly or indirectly benefit individual plant species.<sup>28</sup>

#### *b. Protection of Habitat Systems*

Assurances agreements can protect habitat unoccupied by listed species—habitat that may be hard to protect under the ESA. The Supreme Court's interpretation of the ESA regulations, preventing "significant habitat modification or degradation" only if "it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or shelter,"<sup>29</sup> limits the ability of the FWS to maximize habitat value through regulation.<sup>30</sup> By contrast, agreements based on large scale plans may protect habitat whether or not it is occupied by a sensitive species at any given time.<sup>31</sup>

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25. U.S. FISH AND WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE, HABITAT CONSERVATION PLANNING HANDBOOK 3-17 to 3-18 (1996) [hereinafter HANDBOOK].

26. See Final Joint Environmental Impact Report and Environmental Impact Statement Regarding Take Authorization for Implementation of the County of Orange Central and Coastal Subregion Natural Community Conservation Plan, 8-51 to 8-64 (May 1996).

27. The reason for this protection is that surveys for plant species are often difficult to carry out comprehensively and many protected plants on dedicated properties are not identified until after the actual dedication of particular parcels of land.

28. For example, the removal of invasive plant and animal species, long-term fire management, and watershed protection may all benefit rare plant species.

29. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S.Ct. 2407, 2412-14 (citing 50 C.F.R. § 17.3 (1994)).

30. Frederico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 20-21 (1996). Experience with critical habitat determinations has shown that, when proceeding to identify such habitat on a species-by-species basis, the net result often does not resemble what scientists consider to be true habitat systems in terms of the "ecosystem" context defined by the purpose clause of the ESA. See NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 75-76 (1995) [hereinafter NRC].

31. See O'Connell and Johnson, *supra* note 8, at 3.

The problem of unoccupied habitat can be particularly acute where the relevant planning area includes a mix of habitats, as in Southern California. There, a mosaic of natural habitat systems includes the coastal sage scrub and many others.<sup>32</sup> Species that depend on the coastal sage scrub for breeding may also depend on neighboring habitats for sustenance.<sup>33</sup> Public-private conservation planning at a broader habitat level may address the specific requirements for species movement necessary to promote the transfer of genetic material and maintain vital predator relationships.<sup>34</sup>

*c. Adaptive Management Programs*

Assurances agreements provide a framework of funding and cooperation on the part of public and private landowners for the long-term adaptive management of habitats. Although proactive management practices—such as eradication of invasive species, restoration of degraded habitat, and fire management—clearly benefit both the biodiversity and long-term sustainability of ecosystems,<sup>35</sup> the existing regulatory and land ownership structure often provides insufficient incentive for private management activities. For example, regulatory take prohibitions do not establish an affirmative obligation for private landowners to commit to, or even allow for, management of habitat located on their lands. Indeed, a landowner can generally comply with regulatory mandates by simply avoiding harm, rather than by undertaking proactive management. However, both the funding and the permission of private landowners are often essential to effective habitat management.<sup>36</sup>

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32. See NCCP CONSERVATION GUIDELINES, *supra* note 19, at 2.

33. See NRC, *supra* note 30, at 85-87, 95-97.

34. Smaller scale HCPs may also provide essential “connectivity” functions for species movement between larger protected habitat areas. Small-scale public-private HCP partnerships thus have a significant role in protecting connectivity needs between protected habitat areas and in protecting narrow endemics. For plant species that may not be adequately protected under ESA regulatory mechanisms, small-scale HCPs can prove essential to biodiversity on a regional, as well as local, basis. See NRC, *supra* note 30, at 99-102. See also Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 316-21 (1997) (comparing the relative scale of approved HCPs and finding that, “[h]istorically, most property owners have applied for Incidental Take Permits on an individual basis in connection with specific land-use projects”).

35. See William R. Jordan, III, *Ecological Restoration and the Conservation of Biodiversity*, in BIODIVERSITY II 371, 375-381 (Marjorie Reaka-Kudla et al. eds., 1996); NRC, *supra* note 30, at 185-86.

36. With regard to narrow, endemic species, particularly listed plants that may not be protected under the ESA, the participation of private landowners is essential to assure that the management needs of such species are addressed. Likewise, small-scale HCPs involving narrow endemics can help ensure that invasive ornamental plant species and other indirect impacts of urban communities do not result in the loss of such species.

Adaptive management is not an end in itself.<sup>37</sup> The goal of these programs is to promote species' recovery<sup>38</sup> and regenerate ecosystems that will be self-sustaining to the greatest extent possible.<sup>39</sup> But where patches of habitats are closely intermingled with areas of intense urbanization and recreation, active management will remain an important component of natural community protection for a long time.<sup>40</sup>

*d. Protection of Unlisted Species*

The Supreme Court has noted that "[t]he plain intent of Congress in enacting [the ESA] was to *halt* and *reverse* the trend toward species extinction, whatever the cost."<sup>41</sup> In furtherance of these goals, Congress intended the 1982 habitat protection amendments to the ESA to encourage public-private partnerships that could address both listed and unlisted species.<sup>42</sup> By addressing the needs of unlisted species before they have declined to a level requiring protection under the ESA, HCPs can help halt and reverse the trend toward extinction.<sup>43</sup> Preventative measures will invariably provide more options for

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37. The conservation guidelines for the NCCP scientific review panel (SRP) emphasized that,

[U]nder present conditions, few [coastal sage scrub (CSS)]-dominated lands are of sufficient extent to be self-sustaining. A status quo of "benign neglect" management likely will result in substantial further losses of CSS biodiversity. . . . The CSS community is inherently dynamic and should be managed to retain its capacity to support the broad range of CSS species over the long term. Under an adaptive management regime that provides for natural successional dynamics, a reserve system that consists of smaller habitat areas that are appropriately managed could have a greater likelihood of maintaining CSS biodiversity than a system of larger habitat areas that are unmanaged.

NCCP CONSERVATION GUIDELINES, *supra* note 19, at 2-3.

38. See Cheever, *supra* note 30, at 27-31. Most large scale HCPs and NCCPs are designed to promote species recovery. Frederico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109, 191-94 (1992). According to the HCP Handbook, applicants for HCPs should consult recovery plans to help identify conservation strategies. See HANDBOOK, *supra* note 25, at 1-15.

39. See Bryan G. Norton and Robert E. Ulanowicz, *Scale and Biodiversity Policy: A Hierarchical Approach*, 21 AMBIO. 244, 247-48 (1992). Ideally, a plan would return the area to a self-sustaining, stable condition, although ecologists have found it difficult to define ecosystem stability. See STUART L. PIMM, *THE BALANCE OF NATURE* 4-14 (1991).

40. Usually, continued management of the planning area is assumed to be needed: "It is usually not possible to return an ecosystem to some prior pristine condition, however. Many ecosystems have been so altered that it is difficult to decide what prior condition we might want to return to." NRC, *supra* note 30, at 201.

41. Tennessee Valley Authority v. Hill, 437 U.S. 153, 173 (1978).

42. See HOUSE CONFERENCE REPORT ON ENDANGERED SPECIES ACT AMENDMENTS OF 1982, H.R. CONF. REP. NO. 97-835, at 31 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2872 (1982). "Although the Conservation plan is keyed to the permit provisions of the Act which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species." *Id.* at 30, 1982 U.S.C.C.A.N. at 2871.

43. "Congress also intended that HCPs could include conservation measures for candidate species, proposed species, and other species not listed under the ESA at the time an HCP."

habitat protection than the reactive measures that become necessary when a species reaches a crisis stage requiring ESA listing.<sup>44</sup> Moreover, community level habitat planning—as opposed to species-based proscriptions—benefits species at all levels of survival, thereby addressing management needs most comprehensively.

### *B. Benefits to Landowners*

Landowners in areas slated for urban development, such as Southern California,<sup>45</sup> benefit from assurances agreements in at least three ways: first, reduced regulatory uncertainty enhances the immediate value of their land; second, the agreements facilitate negotiation of changes in development plans necessitated by market conditions; and third, over the long run, the agreements will reduce the cost of processing development permits.

#### *1. Predictability*

A landowner's ability to develop in the existing regulatory environment may be limited significantly by the risk of future regulatory changes.<sup>46</sup> This observation follows from the nature of the process by which developers determine how much they are willing to pay for land. A company first decides whether a market exists for its development.<sup>47</sup> If such a market exists, the company usually options or contracts to buy land on the condition that all required permits can be obtained.<sup>48</sup> A feasibility study is then performed to assess the project's profitmaking potential.<sup>49</sup> Finally, financing commitments are arranged.<sup>50</sup> The typical role of the development company involves buying land, preparing it for development, and then selling it. The company profits from the difference between the prices at which it buys and then sells the land.

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44. The wildlife agencies strongly urge HCP applicants to plan for the protection of unlisted as well as listed species. See HANDBOOK, *supra* note 25, at 4-1 to 4-4.

45. Experience suggests that landowners benefit from these agreements in other circumstances as well, such as those where the landowner will be managing the land for timber production.

46. Recent decades have seen a rapidly evolving pattern of regulations of land use to achieve environmental objectives. "[T]he land use issues that have arisen since the 1960s will continue to have a great impact on the real estate development process . . . [T]he ground rules governing real estate development have irrecoverably changed." JOHN MCMAHAN, PROPERTY DEVELOPMENT 52 (2nd ed. 1989).

47. See *id.* at 131-79.

48. See *id.* at 127-29.

49. "Once sufficient market demand for one or more land uses on a particular site has been established, a preliminary analysis of the financial feasibility of a project should be made." *Id.* at 251. For a summary of the feasibility analysis process, see ALFRED A. RING & JEROME DASSO, REAL ESTATE: PRINCIPLES AND PRACTICES 268-71 (10th ed. 1985).

50. See MCMAHAN, *supra* note 46, at 251-52.

Advance knowledge of regulatory requirements minimizes risk because a company can budget compliance into its cost estimates.<sup>51</sup> Assurances agreements address the predictability problem by guaranteeing developers that they will only have to pay a certain amount for compliance even if the regulatory scheme changes after they have invested time and resources in the process described above.<sup>52</sup>

## 2. *Flexibility*

Because of the wide variety and rapidly changing nature of development products, development companies need flexibility to adapt to future market changes.<sup>53</sup> However, it is difficult to write general rules to govern all types of potential future development. Negotiated assurances agreements can offer much-needed flexibility. If the landowner later changes the type of development in accordance with market needs, the agreement can be re-negotiated from a position in which the landowner's existing rights are easily quantifiable.

On the other hand, too much flexibility may represent a burden: the flexibility to approve generally implies a reciprocal flexibility to disapprove, and under such conditions, regulators may be more subject to political or community pressure;<sup>54</sup> moreover, flexibility may provide regulators with greater power, and therefore greater potential for abuse.<sup>55</sup> The negotiation of an agreement requires both sides to establish parameters within which future flexibility can be negotiated.

## 3. *Processing Costs*

By integrating the regulatory processes of both state and federal wildlife agencies with those of local governments, the NCCP program can result in huge savings to landowners in the form of reduced

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51. See ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING, REP. TO PRESIDENT BUSH AND SECRETARY KEMP 4-2 (1991) [hereinafter NIMBY].

52. Dwyer et al., *supra* note 10, at 7. See Craig Anthony Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 30-36 (1991).

53. For a description of changes in the products of the development process in southern California, see Joel Garreau, *EDGE CITY: LIFE ON THE NEW FRONTIER* 261-301 (1991). Rigid rules reduce the developer's ability to vary the nature and design of the development product with possible adverse effects on marketability. See NIMBY, *supra* note 51, at 2-9.

54. See DANIEL R. MANDELKER, *LAND USE LAW* 302-03 (3rd ed. 1993) (noting, however, that many courts overturn zoning decisions when based more on community pressure than on "legitimate zoning purposes").

55. Anticipation of flexibility may increase land cost; if everyone knows that the regulators make changes readily upon the request of any developer, the expectation of such changes may be factored into the cost the developer must pay for raw land. See Deborah L. Freeman, *Reinitiation of ESA Section 7 Consultations Over Existing Projects*, 8 NAT. RESOURCES & ENV'T 17 (1993) (discussing flexibility in the form of reinitiating § 7 consultations with changed circumstances).

processing costs.<sup>56</sup> A major real estate development often requires many years from start to finish.<sup>57</sup> Therefore, developers are affected by and must adjust to rapid and frequent changes in consumer preferences.<sup>58</sup> Faster processing of development approval reduces the risk of obsolescence resulting from changes in the market.

### C. *A Problem in Common*

The above discussion demonstrates that sensitive species and land developers share a common problem: each must adapt to a dynamically changing environment if it is to survive. The real estate market is notoriously cyclical and erratic, and advances in biological sciences suggest that the natural landscape is equally unstable.

Thus, for both the species and the landowner, assurances agreements not only have important present benefits, but also facilitate adaptation to changing conditions. This ability to adapt to change is a key reason why the agreements appeal to both species advocates and landowners: the agreements reflect a sensitivity to the way things really work in both the real estate market and ecological sciences.

## II

### STATUTORY MANDATE FOR ASSURANCES AGREEMENTS

This part of the Article examines whether the assurances agreements established in connection with the NCCP program meet all relevant federal and state statutory requirements.

#### A. *Authority to Protect Systems*

The validity of these agreements depends on whether the federal and state wildlife agencies have the authority to adopt agreements aimed at protecting not only individual species, but entire natural communities.

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56. See NIMBY, *supra* note 51, at 7-9. Importantly, NCCP agreements combine federal, state, and local land-use controls relation to wildlife into a single process. O'Connell and Johnson, who represented The Nature Conservancy in the negotiations leading up to the original NCCP plans, concluded that one important reason why "NCCP has much to offer" is that the program "streamlines state and federal species regulations into a single package with clear and predictable requirements . . . ." O'Connell and Johnson, *supra* note 8, at 3. Dennis Murphy, Chairman of the NCCP program's scientific review panel (SRP), has further emphasized that the removal of uncertainty from those parts of the landscape that were suitable for development was a key to success in the negotiations: "[b]y establishing managed habitat reserve systems under NCCP, lands are freed for development or resource extraction elsewhere." Dwyer et al., *supra* note 10, at 5.

57. For a concise description of the process of financing long range income-producing land development, see WILLIAM B. BRUEGGEMAN ET AL., *REAL ESTATE FINANCE* 497-502 (8th ed. 1989).

58. See FRED E. CASE, *INVESTING IN REAL ESTATE* 75-77 (2nd ed. 1988).

### 1. *The ESA's 1982 Habitat Protection Amendments*

Prior to 1982, the ESA relied on what Oliver Houck has termed the "miner's canary" philosophy: hoping that the weakest members of an ecosystem would serve as effective surrogates for the ecosystem itself, so that active protection of the former would result in overall protection for the latter.<sup>59</sup> However, the Supreme Court recently acknowledged that the Act's 1982 habitat protection amendments provide regulatory tools for both halting species extinction and reversing the trend toward extinction.<sup>60</sup> By authorizing Section 10(a) habitat conservation plans (HCPs), Congress recognized that prohibitions on take could slow species extinction, but only collaborative efforts, involving both the public and private sectors, would be able to "reverse the trend" toward extinction.<sup>61</sup>

While many of the ESA's specific regulatory mechanisms are species-oriented—for example, listing and take provisions are defined in relation to species, subspecies, and distinct populations—Congress' statement of the Act's fundamental purposes also focused on protection of habitats. In *Sweet Home*, the Supreme Court extensively reviewed the ESA's provisions pertaining to habitat protection.<sup>62</sup> In upholding the FWS' definition of "harm" to include habitat modification, the Court focused in significant part on the central purpose of the ESA:

[T]he broad purpose of the FESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. . . . As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ." Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation.<sup>63</sup>

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59. "The ESA is many things, but it is very much a surrogate law for ecosystems. Endangered species are the 'miners' canaries' for the health of something larger, which we have not yet attempted to protect in a more holistic way." Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say about Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 301 (1995).

60. See *Sweet Home*, 115 S.Ct. at 2412-14 (1995). In *Sweet Home*, the Supreme Court cited its prior holding in *TVA v. Hill*: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward extinction . . . . This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.* (quoting 437 U.S. 153, 184 (1978)).

61. In the case of some species, the listing process may occur too late in a species' decline to "halt" its trend toward extinction. See, e.g., DAVID W. STEADMAN, *Human-Caused Extinction of Birds*, in BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES 139 (Marjorie L. Reaka-Kudla et al. eds., 1997).

62. See 115 S.Ct. at 2412-15.

63. *Sweet Home*, 115 S.Ct. at 2413-14 (quoting 16 U.S.C.A. § 1531(b) (West, WESTLAW through P.L. 105-22, approved June 27, 1997)).

## 2. *Surmounting the Limited Utility of a "No Take" Rule*

Importantly, even if the ESA's goals<sup>64</sup> had not included protection of broader communities, NCCP agreements could represent the mechanism needed to ensure protection of individual species because such species clearly depend for their long-term survival upon the continuing viability of their habitat.<sup>65</sup>

Restrictions on take are simply not sufficient to protect an entire species. From the standpoint of a sensitive species, the power to prevent take of individuals may be of little value absent conditions favorable to the long-term reproduction and survival of the species. Moreover, although Section 9<sup>66</sup> has been interpreted to make it a crime to take a species by destroying its habitat,<sup>67</sup> sound scientific planning for protection of natural communities may seek either to enlarge or to reduce particular areas of habitat that Section 9 would otherwise protect—for example, in response to species migration or cyclical population trends.<sup>68</sup> In some cases, the take of an individual serves as a proxy for damage to the species as a whole; in other cases, the extent to which individuals are taken is of limited relevance to overall prospects for species survival.<sup>69</sup> Thus, measures such as NCCPs, that go beyond take limitations, are often crucial to species protection as mandated by the ESA.

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64. Immediately following the Act's purpose clause, the "Policy" section of the ESA states that it is "the policy of Congress that all Federal Departments and agencies . . . shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C.A. § 1531(c)(1) (West, WESTLAW through P.L. 105-22, approved June 27, 1997).

65. In the early years of the ESA, there was little emphasis on large scale habitat issues. See Christopher A. Cole, *Species Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U. L. REV. 343, 359-61 (1992); Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 287-304 (1991).

66. See 16 U.S.C.A. § 1538 (West, WESTLAW through P.L. 105-15, approved May 15, 1997).

67. But in *Sweet Home*, the Court suggests that it may be difficult to prove take without carcasses. See Cheever, *supra* note 30, at 50-52 (discussing O'Connor's concurring opinion, which defines harm in terms of "actual death or injury to identifiable animals;" also noting that such a standard conflicts with the ecosystem approach and with itself, at least to the extent that it would not include breeding disruptions, which involve no harm to individual animals). Because Section 9 makes it "unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered] species . . ." it has necessarily been interpreted on a species-by-species basis in regard to each particular endangered species. 16 U.S.C.A. § 1538(a)(1) (West, WESTLAW through P.L. 105-15, approved May 15, 1997).

68. See, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996). Such a controversy currently surrounds the killing of bison that have moved out of Yellowstone Park. Some people fear they carry brucellosis, and that, in moving, they may infect cattle on neighboring ranches. Todd Wilkinson & Doug Peacock, *The Yellowstone Massacre*, AUDUBON, May 15, 1997, at 40.

69. For the majority of species in decline, the most serious threat is habitat destruction, not over-hunting or over-harvesting of the species. See NRC, *supra* note 30, at 35.



### 3. *Protection of Unlisted Species*

The ESA defines "conservation" as "scientific resources management," reflecting a congressional intent to promote the best available techniques of conservation biology.<sup>70</sup> A broad consensus of conservation biologists supports the use of natural community planning.<sup>71</sup> Thus, even where a landowner proposes measures that would better protect an individual species in exchange for less protection for a natural community, the FWS retains authority to insist on an approved natural community plan.<sup>72</sup>

### 4. *The "Practicability" Standard*

ESA Section 10(a) requires the FWS to find that an HCP "will, to the maximum extent practicable, minimize and mitigate the effects of the taking."<sup>73</sup> Those opponents of assurances agreements who believe that they do not provide enough protection have argued that the FWS is required to squeeze every ounce of mitigation out of private landowners who are impacting sensitive species.<sup>74</sup> These arguments emphasize the word "maximum," while ignoring the word "practicable."

But agreements that impose open-ended obligations on landowners are not "practicable" because not even the richest landowner can guarantee to back up a blank check. The word "practicable" is well-defined in common usage as "[c]apable of being done, effected or put into practice, with the available means."<sup>75</sup> As discussed above, the limited utility of the "no take" power for the wildlife agencies severely hampers their ability to promote active management of natural communities on private land. Thus, the agencies' "available means" for affecting private land are actually quite limited.

Landowners will bargain to provide extensive mitigation of natural habitat if they receive value in exchange, and the predictability, flexibility, and reduced processing costs associated with assurances agreements create such value. Because the ability to negotiate assurances agreements is one of the wildlife agencies' few "available means," I believe that the agencies should seek such agreements when

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70. See 16 U.S.C.A. § 1532(3) (West, WESTLAW through P.L. 105-22, approved June 27, 1997). The definition also spells out a variety of specific management techniques.

71. See generally *Symposium on Exploring an Ecosystem Approach to Endangered Species Conservation*, ENDANGERED SPECIES UPDATE, Jan.-Feb. 1993. See also NILES EL-DREDGE, *THE MINER'S CANARY: UNRAVELING THE MYSTERIES OF EXTINCTION* 209-29 (1992).

72. See HANDBOOK, *supra* note 25, at 3-37 to 3-39.

73. 16 U.S.C.A. § 1539(a)(2)(B) (West, WESTLAW through P.L. 105-15, approved May 15, 1997).

74. See Walley testimony, *supra* note 7.

75. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1517 (2nd ed. 1987).

it appears that they can provide the maximum benefit to the species in comparison with other available means.<sup>76</sup>

### 5. *Cooperation with the States*

The ESA specifically provides that the FWS consider state efforts to protect a species that is being considered for listing.<sup>77</sup> The FWS has often relied on state efforts in choosing to list species as threatened rather than endangered.<sup>78</sup> Section 6 of the ESA further encourages the FWS to enter into cooperative agreements with “any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species.”<sup>79</sup>

### 6. *Summary of Ecosystem Protection Issues*

The objective of preserving entire ecosystems has become well accepted,<sup>80</sup> and the history of the ESA shows an increasing trend toward broader forms of protection.<sup>81</sup> In order to meet the statutory requirement of maximum practicable mitigation, the FWS needs to strive for assurances agreements that will broaden the means available for natural community protection.

#### *B. Authority to Commit to Funding of Future Mitigation*

In the agreements negotiated under recent HCPs, the key promise of federal and state governments is to assume responsibility for mitigation necessitated by unforeseen future circumstances. Beyond the simple authority to undertake a broader systemic approach, the next set of important issues involves the statutory authority of the FWS to commit to paying for possible future changes in the assurance plan that may be needed.

#### 1. *Statutory Authority for Long-Term “Assurances”*

Congress intended the 1982 habitat protection amendments to enlist private sector involvement in meaningful, proactive habitat con-

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76. See Arnold, *supra* note 52, at 16-18 (suggesting that the agencies should equate the “maximum extent practicable” with the point at which incremental mitigation of a developer’s impacts would cost too much in loss of the project’s benefits).

77. See 16 U.S.C.A. § 1533(b)(1)(A) (West, WESTLAW through P.L. 105-22, approved June 27, 1997).

78. See Houck, *supra* note 59, at 287-91. Professor Houck criticizes the FWS’ practice, but does not claim that it violates the ESA.

79. 16 U.S.C.A. § 1535(c)(1) (West, WESTLAW current through P.L. 105-15, approved May 15, 1997).

80. See note 98, *infra*. Animal rights groups have criticized this objective, arguing that protection of natural communities rather than individual animals is “ecological fascism” because it places the interests of the group ahead of the interests of the individual. See TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 361-62 (1983).

81. See Ruhl, *supra* note 11, at 1143-44.

servation planning efforts: "To the maximum extent possible, the Secretary should utilize this authority under this provision to encourage creative partnerships between the public and private sector. . . ." <sup>82</sup> The FWS further emphasized that the HCP process was intended to create a climate of partnership and cooperation that would "reduce conflicts between listed species and economic development activities." <sup>83</sup>

Signalling its intent that HCPs should truly be public-private partnerships, Congress made clear that HCPs are a voluntary habitat protection program. <sup>84</sup> Individual species receive a variety of benefits under a properly functioning HCP: private financial resources supplement limited federal funding; essential habitat areas are often preserved; and comprehensive conservation programs are developed and promptly implemented. <sup>85</sup> Consequently, to enlist much-needed private sector participation in this voluntary program, Congress indicated that assurances must be provided:

[T]he Secretary may . . . approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. . . . Permits of 30 or more years duration may be appropriate in order to provide adequate assurances to the private sector to commit to long-term funding for conservation activities or long-term commitments to restrictions on the use of land. <sup>86</sup>

Clearly, Congress understood that listing species alone—without proactive habitat protection, restoration, and management efforts funded and implemented pursuant to Section 10 HCPs—would not secure long-term protection for the ecosystems upon which listed species depend. These commitments depend, in turn, on the certainty provided by reciprocal assurances. <sup>87</sup>

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82. H.R. CONF. REP. NO. 97-835, at 30, *reprinted in* 1982 U.S.C.C.A.N. at 2871.

83. HANDBOOK, *supra* note 25, at 1-2.

84. Participation in the southern California NCCP plans is also voluntary in the sense that individual landowners could opt out of the plan and seek the full range of individual permits that would be applicable; however, few have done so. *See* O'Connell and Johnson, *supra* note 8, at 3. A landowner who sought to opt out of the plan would face imposing time and cost burdens in negotiating an independent permit, but when the regional planning process has bogged down, the FWS has sometimes encouraged individual landowners to file for permits while the planning process is pending. *See* Thompson, *supra* note 34, at 316.

85. *See* the FWS' explanation of the function of the proposed rule on the no surprises policy. 62 Fed. Reg. 29,094-95 (1997).

86. *See* H.R. CONF. REP. NO. 97-835, at 30-31, *reprinted in* 1982 U.S.C.C.A.N. (beginning page, 2871-72).

87. *See* No Surprises Rule, 62 Fed. Reg. 29,092-95.

To further the intent of Congress, the current FWS regulations contain an “assurances” provision deriving from the above-quoted language of Section 10’s legislative history:

(4) Duration of permits. The duration of permits issued under this paragraph shall be sufficient to provide adequate assurances to the permittee to commit funding necessary for the activities authorized by the permit, including conservation activities and land use restrictions. In determining the duration of a permit, the Director shall consider the duration of the planned activities, as well as the possible positive and negative effects associated with permits of the proposed duration on listed species, including the extent to which the conservation plan will enhance the habitat of listed species and increase the long-term survivability of such species.<sup>88</sup>

## 2. *Providing for Unforeseen Circumstances*

The Secretary has also enacted regulations addressing another element of congressional intent. According to the legislative history of the 1982 amendments, long-term HCPs should include “procedures” for addressing unforeseen circumstances that might arise over the life of a long-term Section 10 HCP:

It is also recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation, the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances.<sup>89</sup>

Consequently, the FWS’ Section 10 regulations contain a provision requiring that HCPs define such procedures.<sup>90</sup>

Congress recognized that assurances to landowners are vital to eliciting necessary land and funding commitments, while at the same time requiring procedures for addressing unforeseen biological circumstances that may arise over the course of plan implementation. Over time, the FWS has become increasingly aware of the tension created by providing both plan certainty and plan flexibility. Significant development projects often take many years to complete; therefore adequate assurances must be made to the financial and development communities that an HCP permit will remain valid for the life of the project.<sup>91</sup>

Agreements negotiated pursuant to Section 10(a) can articulate the functional relationship between the “unforeseen circumstances” and “Duration of Permit”<sup>92</sup> provisions of the FWS regulations in a

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88. 50 C.F.R. § 17.22(b)(4) (1997).

89. H.R. CONF. REP. NO. 97-835, at 31, *reprinted in* 1982 U.S.C.C.A.N. 2872.

90. *See* 50 C.F.R. § 17.32(b)(1)(iii)(C)(2) (1997).

91. *See* No Surprises Rule, 62 Fed. Reg. at 29,092.

92. *See* 50 C.F.R. § 17.32(b)(4).

manner that will further the congressional intent of the 1982 amendments and the basic purposes of the ESA by: 1) specifying the scope of the assurances to be provided to HCP permittees, the circumstances under which those assurances will remain in effect for the duration of the permit, and how any determination regarding unforeseen circumstances will be applied to the HCP conservation program in the context of these assurances;<sup>93</sup> and 2) specifying the functional criteria that will be used to determine when unforeseen circumstances procedures will be initiated.<sup>94</sup>

In summary, as the Supreme Court has clearly indicated, a central goal of the ESA is to protect "the ecosystems upon which . . . species depend."<sup>95</sup> Congress intended the 1982 habitat protection amendments to serve as a vehicle for attaining both long-term habitat protection goals and the protection of individual species.

### C. *Specificity of Mitigation Commitments*

#### 1. *Background*

Mitigation began with the practice of mandatory dedication of parks and school sites in subdivision regulation<sup>96</sup> and was incorporated in statutes such as NEPA and CEQA as a test for the significance of environmental impact.<sup>97</sup> Today, mitigation is a pervasive technique for neutralizing many types of costs or impacts created by land development.<sup>98</sup>

Typical NCCP agreements require developers to pay fees to be used for the acquisition and operation of land or other programs for the protection of the natural community. Thus, although much mitigation under the NCCP plans has involved the dedication of land for public use, modern forms of mitigation increasingly substitute the payment of specific sums into a fund earmarked for a particular purpose. Often called "impact fees," such payments provide economies of scale and flexibility to address conditions that may change in the future.<sup>99</sup> The use of a fund that will provide moneys for such adaptive management that may be needed in the future enhances the flexibility with

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93. See HANDBOOK, *supra* note 25, at 3-19 to 3-32.

94. See *id.* at 3-28.

95. *Sweet Home*, 115 S.Ct. at 2413.

96. NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW 353-74 (1985).

97. Mitigation is "the key" to any substantive aspect of NEPA. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 968 (2nd ed. 1994). See also MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 152-55, 239-79 (9th ed. 1996).

98. For a review of cases and as an example of the central role played by mitigation in California environmental law, see *Sinclair Paint Co. v. State Board of Equalization*, 15 Cal. 4th 866 (1997).

99. MANDELKER, *supra* note 54, at 422-25 (discussing the use of impact fees, the statutory authority for them as well as their constitutionality).

which all elements of the natural community can be maintained. Courts have encouraged the use of such payments because they provide a convenient way of measuring the proportionality of the fee to the impact.

## 2. *Fish and Wildlife Service Requirements*

The FWS has required permit applicants to make commitments that any funds they provide for future mitigation will in fact be devoted to mitigation of the effects of the project for which they are offered, since an applicant for a Section 10 incidental take permit retains the duty to minimize and mitigate the impact of the incidental take to the maximum extent practicable.<sup>100</sup> The Regional Solicitor of the Department of the Interior has recently opined that, such mitigation banks “would only be feasible in the context of an HCP or HCP/NCCP that fully analyzes impacts, identifies appropriate and achievable conservation goals to be met through mitigation, and ensures that required mitigation is implemented.”<sup>101</sup>

## 3. *State Statutory Issues*

The California NCCP Act allows the Department of Fish and Game (DFG) to “permit the taking, as provided in this code, of any identified species whose conservation and management is provided for in a department approved natural communities conservation plan.”<sup>102</sup> Such a plan must provide for “protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth.”<sup>103</sup>

The terms used in the statute are sufficiently specific to identify the type of mitigation needed. The definition of the term “taking,” as provided in the Fish and Game Code, has been analyzed in recent opinions of the Legislative Counsel.<sup>104</sup> The term, “conservation,” has a long history in regard to wildlife and is broadly defined in CESA. “Management” refers to the need for ongoing activities that ensure that the natural community maintains the characteristics necessary to support the species over the long run, and a growing body of literature

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100. Memorandum from David Nawi, Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, to Field Supervisor, Carlsbad Field Office, Fish and Wildlife Service, re: Proposed Mitigation Conservation Bank 2 (May 9, 1997) (on file with author) [hereinafter Nawi Memorandum].

101. *Id.* at 1.

102. CAL. FISH & GAME CODE § 2835. On September 28, 1997, the Governor approved amendments to the Fish and Game code that make clear that no state law prohibits incidental takings if authorized by a permit, NCCP, or HCP. See CAL. FISH & GAME CODE § 2081.1 (1997); NCCP PROCESS GUIDELINES, *supra* note 1, at 3.

103. *Id.*

104. See CAL. FISH & GAME CODE 80-87 (West Supp. 1997).

explains the importance of such adaptive management as a conservation measure.<sup>105</sup>

The use of fees for the mitigation of impacts to natural habitats is not novel, or even unusual.<sup>106</sup> Fees that are earmarked for the conservation and management of species identified in the plan would meet the statutory standard. The specific criteria for the use of the funds should be spelled out in the plan or its implementing agreement. The authority of the NCCP Act to allow take of state-listed species is self-contained and does not rely on other sections of the Code.<sup>107</sup>

Under the California Environmental Quality Act (CEQA),<sup>108</sup> an Environmental Impact Report must set forth mitigation measures that can be adopted at the time that the development is approved.<sup>109</sup> The applicable guidelines give lead agencies great flexibility in the formulation of mitigation measures.<sup>110</sup>

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105. See, e.g., Steward T.A. Pickett et al., *The New Paradigm in Ecology: Implications for Conservation Above the Species Level*, in CONSERVATION BIOLOGY: THE THEORY AND PRACTICE OF NATURE PRESERVATION AND MANAGEMENT (Peggy L. Fiedler and Subodh K. Jain eds., 1992); Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 CHI.-KENT L. REV. 875 (1994); A. Dan Tarlock, *Environmental Law: Ethics or Science*, 7 DUKE ENVTL. L. & POL'Y F. 193, 205-210 (1996).

106. See Thomas W. Ledman, Note, *Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation*, 45 FLA. L. REV. 835, 854-56 (1993).

107. See NCCP PROCESS GUIDELINES, *supra* note 1, at 3. The ESA does not preempt state regulation of endangered species, so where state-listed species are found, permission to take species must be obtained from the state, even if the same species are also federally listed. Littell, *supra* note 24.

108. CAL. PUB. RES. CODE §§ 21000-21178.1 (West, WESTLAW through end of 1995-1996 Reg. Sess. and 1st-4th Ex. Sess.).

109. See CAL. PUB. RES. CODE § 21100(b)(3) (West, WESTLAW through 1995-96 Reg. Sess. and 1st-4th Ex. Sess.).

110. See Guidelines for Implementation of the California Environmental Quality Act, CAL. CODE REGS. tit. 14, § 15130(c) (1997). The case law supports the adequacy of mitigation measures in which funds are made available for future mitigation tailored to needs that will become more specific as events occur. The leading case on the adequacy of mitigation measures approved several such measures proposed by the University of California in connection with one of its medical research facilities. See *Laurel Heights Improvement Ass'n v. The Regents of the Univ. of Cal.*, 47 Cal. 3d 376, 418, 420 (1988). The Fourth District Court of Appeal recently approved a mitigation plan that deferred mitigation for the California gnatcatcher until the future NCCP plans were completed. See *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1393-97 (1995) (discussing other decisions regarding deferred mitigation). See also *Concerned Citizens of South Central Los Angeles v. Los Angeles Unified Sch. Dist.*, 24 Cal. App. 4th 826, 840-41 (1994) (finding that relocation assistance funding is adequate and replacement housing need not be constructed). When a fund is created to finance future mitigation, it is important to provide "specific performance criteria articulated at the time of project approval." *Sacramento Old City Ass'n v. City Council of Sacramento*, 229 Cal. App. 3d 1011, 1029 (1991) (holding only that an agency may articulate specific criteria at the time of approval). The criteria need to provide realistic assurance that adequate mitigation will take place. See *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal. App. 4th 182, 195 (1996) (holding an environmental impact report inadequate for containing insufficient information about the source of water for a project, the impact of acquiring sufficient water, and the mitigation

## III

## CONSTITUTIONAL NEED FOR ASSURANCES AGREEMENTS

This part of this Article discusses constitutional issues regarding assurances agreements, which must comply with constitutional rules that limit both the amount that the government may demand of private citizens and the extent to which the government may make enforceable promises as part of these agreements. Both the takings and contract clauses of the Constitution are best satisfied by a carefully designed and implemented no surprises policy.

*A. Limits on Exactions*

To what extent may wildlife agencies impose on private landowners the burden of protecting biodiversity without exceeding the limits on regulation imposed by the Supreme Court's interpretation of the takings clause of the Constitution?<sup>111</sup> If the burden on the landowner assumes the form of land dedications or fees, these requirements must comply with the law relating to development exactions.

*1. Supreme Court Cases*

Formerly a state law issue,<sup>112</sup> the Supreme Court has recently taken an interest in the topic of development exactions, which first confronted the Court in *Nollan v. California Coastal Commission*.<sup>113</sup> The California Coastal Commission adopted a policy that required any homeowner who wished to expand a structure to dedicate a public right-of-way along the beach. The Court held that this requirement, as a permit condition for rebuilding or expanding a house, was an unconstitutional taking. Although a permanent physical occupation<sup>114</sup>

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necessary to deal with those impacts); *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 728 (1990).

111. The history of unsuccessful property rights challenges to the administration of the ESA is carefully analyzed in Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369 (1994). Some commentators have expressed concern that the Court's willingness to support protection of biodiversity is hampered by the Court's limited understanding of, and appreciation for, those issues of environmental protection that transcend immediate health and safety threats. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1455 (1993); Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5, 67 n.323 (1996). If this proves to be correct, it will be particularly important to design agreements that fit within the parameters of programs previously approved by the Court.

112. An extensive body of state law deals with the limits imposed on development exactions. See Fred P. Bosselman & Nancy E. Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EXACTIONS (James E. Frank & Robert M. Rhodes eds., 1987).

113. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

114. A permanent physical occupation amounts to a taking *per se*. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).



could be required as a permit condition, where "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition . . . the essential nexus is eliminated," and a taking occurs.<sup>115</sup>

In *Dolan v. City of Tigard*,<sup>116</sup> the Court addressed another aspect of development exactions: the limits on the amount of the exaction itself. The city in this case had demanded that the owner of a plumbing shop dedicate land for a floodway and bikepath. First, the Court held that because there was no absolute need for a *dedicated* floodway, as opposed to the property remaining as privately-owned open space, *Nollan's* nexus requirement was not satisfied with regard to the floodway.<sup>117</sup> Second, although the Court found there was a nexus relating to the bikepath,<sup>118</sup> the amount of the exaction must be roughly proportional to the impact of the proposed development on the public service or facility for which the dedication is required.<sup>119</sup> The Court remanded the case for a determination of the proportionality of the exaction to the claimed impact.<sup>120</sup>

In most states, the *Dolan* decision does not change substantive state law except that it transforms a formerly state law issue into a federal constitutional question. In other words, most states already had similar requirements as part of their state common law of land-use.<sup>121</sup> Procedurally, however, the Court stated that the government bears the burden of demonstrating both the existence of the nexus and the rough proportionality of the exaction to the impact of the project.<sup>122</sup> State laws were not consistent on the issue of burden of proof.<sup>123</sup>

The *Dolan* opinion left open some important issues. First, do these tests apply only in the context of adjudicative proceedings?<sup>124</sup> Second, would the test be different if the legislation specified the

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115. 483 U.S. at 836.

116. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

117. See *id.* at 395.

118. See *id.* at 387-88.

119. See *id.* at 395-96. For a discussion of the importance of proportionality in the law of development exactions, see Bosselman & Stroud, *supra* note 112, at 96-101.

120. See *id.* at 396.

121. See, e.g., *Banberry Development Corp. v. South Jordan City*, 631 P.2d 388 (Utah 1981); *White Birch Realty Corp. v. Gloucester Twp. Municipal Utilities Authority*, 80 N.J. 165, 402 A.2d 18 (1970).

122. See 512 U.S. at 391 & n.8.

123. See generally Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis: A Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301 (1996); Daniel Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

124. See 512 U.S. at 391 n.8; Daniel J. Curtin, Jr. et al., *Nollan/Dolan: The Emerging Wing in Regulatory Takings Analysis*, 28 URB. LAW. 789, 793-95 (1996).

amount of the exaction?<sup>125</sup> And finally, does it matter that a land dedication was required in both *Nollan* and *Dolan*? Would the same test have applied to a fee?<sup>126</sup>

A number of state appellate courts have already interpreted *Dolan*. In general, the exactions they have overturned are those that the government requested simply because the landowner happens to own a piece of land located where the government would like to establish a public use.<sup>127</sup> When governments tailor exactions to the nature and extent of the developments, courts are more likely to uphold them.<sup>128</sup> And most state courts insist that any fee imposed as a development exaction be earmarked for the purpose of mitigating the impacts of development.<sup>129</sup>

## 2. California Law

The *Nollan* and *Dolan* decisions clearly establish that the takings clause of the Constitution limits the extent to which land development may be asked to bear the cost of its impacts. The issue was addressed comprehensively by the California Supreme Court in *Ehrlich v. City of Culver City*,<sup>130</sup> a case involving a development's impact on recreation. In discussing earlier United States Supreme Court decisions on the required relationship between the mitigation and the impact, the Court characterized *Dolan*'s "rough proportionality" as "an 'intermediate' level of constitutional scrutiny."<sup>131</sup>

In *Ehrlich*, the California Supreme Court specifically endorsed the use of an impact fee as a permissible method of mitigating recreational impact.<sup>132</sup> Protection of biodiversity has at least as strong a her-

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125. See Matthew J. Cholewa & Helen L. Edmonds, *Federalism and Land Use After Colan: Has the Supreme Court Taken Takings from the States?*, 28 URB. LAW 401, 430-35 (1996).

126. See 512 U.S. at 393 ("The difference to petitioner, of course, is the loss of her ability to exclude others."); Cholewa & Edmonds, *supra* note 127, at 423-27. Professor Thompson suggests that it is impossible to "glean conclusive guidance" from the existing decisions about the applicability of the *Nollan* and *Dolan* cases to the administration of the ESA because of the "fact-sensitivity of takings jurisprudence, and the numerous loose ends in the cases." Thompson, *supra* note 34, at 339-343.

127. See, e.g., *Schultz v. City of Grants Pass*, 131 Or. App. 220 (1994); *J.C. Reeves Corp. v. Clackamas County*, 131 Or. App. 615 (1994); *The Luxembourg Group, Inc. v. Snohomish County*, 76 Wash. App. 502 (1995).

128. See *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994); *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Board*, 23 Cal. App. 4th 1459 (1994); *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15 (1994). As amended in 1997, the California Fish and Game Code requires mitigation to be "roughly proportional in extent to the impact of the authorized taking on the species." CAL. FISH & GAME CODE § 208(b)(2) (1997).

129. See Curtin et al., *supra* note 124, at 799.

130. See *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

131. *Id.* at 880.

132. See *id.* at 882.

itage of public purpose as the desire for recreation or some of the aesthetic preferences recognized as valid by the *Nollan* opinion.<sup>133</sup> The *Ehrlich* court stated that the amount of such a fee must be tied closely to the actual impact of the land-use change and remanded the case for such a determination.<sup>134</sup>

The *Ehrlich* opinion thus says that a California development fee need not meet more restrictive constitutional standards than the land dedication standards applied by the *Dolan* Court.<sup>135</sup> California state court decisions have been generally favorable to such fees, but only if they are carefully computed according to standards that seem equivalent to the proportionality demanded by *Dolan*.<sup>136</sup>

### 3. *Constitutional Limits on Habitat Dedication*

Habitat conservation plans rely extensively on tradeoffs through which landowners either dedicate habitat for conservation purposes or pay money into a fund that will accomplish the same purpose.<sup>137</sup> Where the landowner is proposing to destroy wildlife habitat as an incidental result of land development or resource extraction, the *Nollan* nexus test is readily met.<sup>138</sup> Arguably, a nexus can even be found where the landowner's activity is only part of an overall development

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133. See *Nollan v. California Coastal Commission*, 483 U.S. at 836. For an analysis of protecting biodiversity as a public purpose, see Houck, *supra* note 59, at 316-21 (citing California cases).

134. In its discussion, the court provided examples of ways in which such a fee might be computed, one of which is particularly relevant to impacts on wildlife habitat:

[The city could] require plaintiff to transfer, so to speak, the restricted land use designation at the Overland Avenue site to a comparable parcel plaintiff owns within the city, thus returning the city to the status quo as it existed prior to approval of the condominium project, that is, with a similar parcel of vacant land reserved for recreational use as an inducement to the development of private recreational facilities. If the city decides, however, that such a restricted land use transfer is impracticable, it may surely levy an in-lieu exaction to accomplish the same objective. Such a fee would serve the same purpose as do all development fees: providing the city with a means of escaping the narrow choice between denying plaintiff his project permit altogether or subordinating legitimate public interests to plaintiff's development plans.

12 Cal. 4th at 884.

135. The Ninth Circuit has also endorsed development fees using similar standards. See *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

136. Although the *Ehrlich* court said that the *Dolan* analysis would not apply to fees of general applicability, as opposed to those negotiated on a case-by-case basis, the California courts seem to use proportionality analysis in their evaluation of the validity of such fees as a matter of state law. See, e.g., *Russ Building Partnership v. City and County of San Francisco*, 199 Cal. App. 3d 1496, 1511-16 (1987), *aff'd in part*, 44 Cal. 3d 839 (1988). See also CAL. FISH & GAME CODE § 2081.1 (requiring that mitigation of authorized incidental takings be "roughly proportional in extent to the impact of the authorized taking on the species").

137. See *supra* parts I.A.1.a. and I.A.1.b.

138. See *supra* note 138.

process that contributes to habitat destruction.<sup>139</sup> The more difficult issue will be demonstrating that the amount of the mitigation exacted from the landowner is roughly proportional to the impact of the landowner's activity on the habitat.<sup>140</sup>

Assurances agreements make it possible to meet the standard of rough proportionality by providing quantifiable limits on the amount of the exaction. Although the *Dolan* case made it clear that the ratio between the share of the impact created by the landowner and the share of the exaction demanded from that landowner need not be exact,<sup>141</sup> it would be difficult to compute even a rough ratio if the landowner's obligation was so open-ended that it could not be quantified.<sup>142</sup> Assurances agreements, therefore, provide one potential vehicle for satisfying the constitutional limits on exactions.<sup>143</sup>

### B. *The Agencies' Power to Commit to Future Funding*

In a recent opinion, the United States Supreme Court addressed the circumstances in which the Federal Government may bind itself to assume the costs of changes in future regulations.<sup>144</sup> The case involved contracts between the Federal Home Loan Bank Board and various savings and loan associations (S&Ls). The contracts were interpreted to contain promises by the Board that the Federal Government would continue to allow the S&Ls to use certain accounting methods favorable to them if the contracting S&Ls would agree to take over other insolvent S&Ls. This, in turn, would alleviate the financial pressure on the federal deposit insurance fund.<sup>145</sup> However, Congress later abolished the favorable accounting rule, causing severe financial distress to the S&Ls that had entered into the contracts.

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139. See Ruhl, *supra* note 11, at 1115-1117 (discussing the expansion of the meaning of "take" for § 9 purposes to include habitat modification).

140. See *supra* part III.A.1.

141. See 512 U.S. at 395-96 ("No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic generated.").

142. In some cases, of course, a landowner's obligation may have some open-ended elements, but they will involve risks that are perceived as so remote that they would not affect an appraisal of the value of the land as a practical matter. But in endangered species "hot spots," such as southern California, the cost of open-ended obligations to expend whatever it takes to protect any species that may become endangered or be perceived at an increased risk would be highly unpredictable, making tailoring an exaction or fee to the possible impact of a proposed development more difficult.

143. The assurances agreements will obviously meet the test of rough proportionality if careful biological analysis has gone into the document. The scope of this article precludes any detailed discussion of the nature of such analysis herein.

144. *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996).

145. 116 S.Ct. at 2441-43.

They sought recovery in the court of federal claims, which found in their favor on the liability issue.<sup>146</sup>

In the Supreme Court, the government argued that a federal agency could not have promised that regulations would not be changed in the future. The Court agreed. However, it construed the contracts not to bar changes in the regulations, but rather to promise that the government would hold the S&Ls harmless if such changes occurred.<sup>147</sup> Thus, it interpreted the contracts to be "risk-shifting agreements" under which the S&Ls were now entitled to "the benefit of promises by the government to insure them against any losses arising from future regulatory change."<sup>148</sup> To the argument that the government could not barter away the regulatory power, the Court responded that "a contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty."<sup>149</sup>

The agreements negotiated under the Interior Department's assurances policy are similar to the S&L contracts in that they do not promise that the regulations will remain unchanged; rather, they promise that the federal and state governments will assume responsibility for any costs imposed by such changes. As long as they make those promises in unmistakable language that is no more ambiguous than the language the Court found to be "unmistakable" in *Winstar*,<sup>150</sup> then if the Federal Government should later breach an assurances agreement, the landowner's remedy would be a contractual claim in the Court of Federal Claims for compensation under the Tucker Act.<sup>151</sup>

#### CONCLUSION

In summary, properly drafted and implemented assurances agreements can benefit both native biota and human landowners, satisfy statutory requirements, and help protect conservation plans against constitutional challenges. Such agreements are an important tool in an overall program for biodiversity protection.

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146. *Winstar Corp. v. United States*, 25 Cl. Ct. 541 (1992).

147. The Court stated: "We read this promise [to allow the favorable accounting rules] as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence." 116 S.Ct. at 2452.

148. *Id.* at 2458.

149. *Id.* at 2462.

150. *See id.*

151. 28 U.S.C. Section 1491(a)(1) (1997). Where a contract remedy is available in the claims court, a takings claim may not be brought in the federal district court. *See, e.g., Bay View, Inc. v. Aetna, Inc.*, 105 F.3d 1281 (9th Cir. 1997).