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The Ecosystem Approach: New Departures for Land and Water, Closing Remarks

Joseph Sax*

In reflecting on the lessons to be learned from the presentations that were made yesterday, if I had to provide a slogan or theme, it would be "Making a Virtue of Necessity." Let me start by providing a little bit of background about some of the things that were discussed yesterday, and particularly, those matters like the habitat conservation planning (HCP) process and the Columbia/Snake River salmon issues, which concern problems of the Endangered Species Act (ESA, or the Act). 1

You heard, in several different ways, and beginning with Doug Wheeler's opening keynote speech,2 the words "crisis" and "crisis-driven" mentioned several times. But no one really spelled out in any specific way what the nature of that crisis was. It might be useful to put into the record here, by way of perspective, just what the nature of that crisis was, and how the development of the HCP process, and particularly matters like the "no surprises" policy arising out of it, fit together.

Although there were some important earlier developments, it might be best to begin the story in the spring and summer of 1994, when it became clear that a variety of issues raised by the application of the ESA to private lands was generating very strong pressures to significantly revise, and thereby to significantly weaken, provisions of the ESA relating to the regulation of private property.

That is the crisis that started everything—in particular, that the rather unqualified no-take provisions of the ESA3 seemed to have little flexibility. The question was how the Administration was going to respond to these increasing pressures on the Act. They were being revealed in the form of "horror stories," which in essence asserted

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883
that implementation of the ESA was destroying the value of property, and especially the homesites of families whose life savings were being threatened. These stories appeared in a variety of settings; some of them were grossly exaggerated, but all of them significantly raised the political temperature on this issue.

The conclusion was that it would be potentially disastrous for the ESA if it went through a congressional reauthorization in that atmosphere. I am now talking about the last half of 1994. But the Administration's concerns intensified in 1995, after the November 1994 election and the arrival of the 104th Congress.

That was step one, that it was important not to bring the ESA forward for revision at that time. The next question was, how can we effectively and fairly implement the Act in light of these ever-increasing pressures? It was deemed essential to show that we can make the ESA work, and make it work effectively, as it now stands.

So then we had to ask, how do you do that? There was really only one answer: somehow to find a way to enliven the relatively moribund Section 10 of the Act, which authorized the creation of so-called Habitat Conservation Plans (HCPs) as a way to allow some limited "take" of listed species. To that point in time, there had been very few such plans in effect. HCPs were viewed as being difficult to put together, and involving lengthy negotiations, little flexibility, and great expense.

And so, the question became, how do you do two things simultaneously? The first task was to bring the HCP into prominence and to get moving on a fairly rapid schedule so that the plans could play into the political pressures that were arising around the country. We needed a number of on-going HCPs that could demonstrate to skeptics that the Act could be made to work—that is to say, that you could bring land owners, who were subject to regulation under the Act, on a voluntary basis into arrangements for the administration of the Act, thereby reducing the temperature in endangered species "hot spots." The second task was, at the same time, not to undermine the fundamental mandate and fundamental purpose of the ESA, which is to ensure that listed species are not put into jeopardy.

Essentially, the decision was that the "no surprises" policy, or the so-called "a deal is a deal" policy, was the way to make both things happen. This policy was a way to bring landowners, as well as local governments, together; to bring them to the table in a kind of cooperative effort to seek a resolution of land management issues; and, at the

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5. Id. § 1539.
same time, to ensure that the fundamental mandate of the Act was not compromised.

The essence of the policy was to say to landowners: if you will agree to a plan based on the best knowledge we now have of what is needed to meet the requirements of the Act, your obligation will be finished. You will not later be called upon to put up more money or to contribute more land, even if more is later needed to protect the species. You will have the kind of certainty that is so important to business people and land owners. You will have a commitment about what you will be able to do with your land during a build-out or amortization period governed by the plan. If, as is undoubtedly going to be the case in some instances, new information develops about what really needs to be done to protect the habitat and to bring about recovery of the species, or if we find that what we thought would work will not work, then more will have to be done, but you will not have to do it. The government will have to bear the burden of what needs to be done, whether that means more investment in mitigation efforts, or land acquisition for set-asides beyond what has already been agreed upon.

That commitment is the essence of the “no surprises” policy. And it worked. That is to say, it worked in the sense of bringing the parties to the table and generating negotiations toward successful agreements in a number of places. Moreover, it created an atmosphere in which it was possible to go up on Capitol Hill and say, we are making this Act work. We could say, we have this Act, which has been so much criticized by those who have been skeptics or adversaries, which has been the subject of many “horror stories,” but if you look out there, the fact of the matter is that for any land owner who is willing to sit down and negotiate, we are confident that we can work out an arrangement that will meet the requirements of the Act and, at the same time, permit the economically productive use of private land.

That is the political dynamic that brought about this new kind of habitat conservation plan. Let me go on to say just one other thing about it, which goes to my point about making a virtue of necessity.

Some years ago—several decades ago—there was a strong effort to enact legislation that was, in one form or another, federal land-use planning. Those efforts never got anywhere at all. The notion of some kind of federally-based land management or land-use management was just thought to be a totally unacceptable idea politically.

Now, oddly enough, what has happened in the context of the ESA is that this very controversial statute has generated federally-led, environmentally-oriented land-use management for private as well as public land. It has done this via the ESA, which was not enacted for, and which was not really thought about as, having a significant impact.
on private land at all. Nonetheless, by means of imaginative implementation strategies, this law has, through the evolution of HCPs, given us tools to move toward ecosystem-based, landscape-based, habitat-based land-use management with a federal standard that shifts the fundamental perspective from commodity production to resource protection. HCPs have moved us away from the tract-based, artificial boundary sort of planning focus to some kind of habitat-based planning. We have also moved from a focus merely on the federal lands to a very broad coverage of a wide range of private, public, intermixed, local, state, and federal lands.

These are remarkable developments. They could not have been accomplished directly in any ordinary legislative process. They have come about indirectly as a kind of unintended consequence of the ESA: the habitat conservation planning going on in Southern California is really quite remarkable—nobody ever would have thought it was possible to have that kind of an effort, even a few years ago. What is going on in the Bay-Delta, as many of you know, came to pass following decades of failure to come to any kind of resolution of the ecosystem management issues there; and the events in the Pacific Northwest, in the wake of the spotted owl controversy, with the President's Forest Plan, have brought about cooperation among federal agencies of a kind that was unthinkable only a few years earlier and is still not going on in most places.

Some really extraordinary things are happening. They would not have happened but for the crisis with the Endangered Species Act. And they would not have happened but for the kind of innovation that the "no surprises" policy has generated. These are some of the benefits we have achieved by learning to manage in the atmosphere of crisis that is so characteristic of American politics.