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UNIVERSITY OF CALIFORNIA
RIVERSIDE

The Role of Social Capital and Collaborative Negotiations in Multiple Species Habitat
Conversation Plans

A Dissertation submitted in partial satisfaction
of the requirements for the degree of

Doctor of Philosophy

in

Political Science

by

Nancy A. Jimeno

June 2012

Dissertation Committee:

Dr. Juliann Allison, Chairperson

Dr. Shaun Bowler

Dr. Thomas Scott

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The Dissertation of Nancy A. Jimeno is approved:

Committee Chairperson

University of California, Riverside

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Dedicated to

my husband, T. Mark Jimeno

and my mentor, Professor David L. Schaefer

ABSTRACT OF THE DISSERTATION

The Role of Social Capital and Collaborative Negotiations in Multiple Species Habitat
Conversation Plans

by

Nancy A. Jimeno

Doctor of Philosophy, Graduate Program in Political Science
University of California, Riverside, June 2012
Dr. Juliann Allison, Chairperson

Habitat Conservation Plans (HCPs) were established by Congress in 1982 as an amendment to the way the federal Endangered Species Act is implemented on private property. HCPs are an example of a negotiation structure that is established within a legal framework which acts as an “institutional channel” mandating collaborative negotiations and consensus-based decision making. This dissertation examines how competing stakeholders, working within a collaborative negotiation process toward a common goal, establish Multiple Species Habitat Conservation Plans (MSHCP). I argue that the collaborative negotiation model inherent in the MSHCP process fosters social capital that acts as a catalyst, drawing those with divergent ideologies and opposing interests into productive negotiations and toward reaching a workable compromise. Participants negotiate their own regulatory terms, working under a strong legal framework that provides assurances that their “voices” have been heard. While the result may be a

consensus that is not preferred by individual participants, it is a consensus that participants as a whole agree they are willing to live with. When a compromise is reached, it is deemed legitimate and is therefore less likely to face legal challenge.

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Chapter 1: The Role of Social Capital and Collaborative Negotiations in MSHCPs

California is at the epicenter of conflict over land use and the environment. Developers eager to build and environmentalists adamant about conservation have long been at odds over what the former characterizes as accommodating inevitable growth and the latter pejoratively deems urban sprawl (Calthorpe and Fulton 2001). California boasts the highest population in the country with over 37 million residents¹ and its population is projected to grow to nearly 48 million by 2020.² And, while most states in the U.S. have less than 50 species listed as endangered under the federal Endangered Species Act (ESA), California with 313 listed species is one of only three states with over 100 listed species.³ Only Hawaii has more listed species with 380, while Florida is a distant third with 118.⁴ These two factors came together to create the perfect storm of controversy in California. The state's land developers, aware that the regulatory power of the ESA had the potential to destabilize the housing market (Scott, et al, 2006) lobbied congress to amend the act and establish habitat conservation plans (HCPs). The plans were born of a collaborative negotiations model that had its genesis in group therapy practices at UC Berkeley and was adapted to negotiations surrounding intractable environmental disputes. The nascent method brought a variety of stakeholders to the table in San Bruno California in order to hammer out a compromise between developers and the local environmental community over development and endangered species (Marsh, 2010). This dissertation

examines how competing stakeholders, working within a collaborative negotiation process toward a common goal, establish Multiple Species Habitat Conservation Plans (MSHCP).

Central Argument

I hypothesize that the collaborative negotiation model inherent in the MSHCP process fosters social capital that acts as a catalyst, drawing those with divergent ideologies and opposing interests into productive negotiations and toward reaching a workable compromise. Participants negotiate their own regulatory terms, working under a strong legal framework that provides assurances that their “voices” have been heard. While the result may be a consensus that is not preferred by individual participants, it is a consensus that participants as a whole agree they are willing to live with (Gray 1989, Meadowcroft 2004). When a compromise is reached, it is deemed legitimate and is therefore less likely to face legal challenge (Ayers and Braithwaite 1992). Empowering participants to negotiate their own regulatory terms promotes compliance because the terms are particular to the participants and do not stand on vague language or unreasonable regulations that do not pertain; greater efficiency results as participants understand first-hand the risks and benefits of regulations they write themselves (Ayers and Braithwaite 1992). The process can be seen as a contemporary instance of the importance that Tocqueville attributed to “decentralized administration;” that is to say, it allows people at

the local level to determine policies that, while of national importance, are better understood and designed at the local level.

Methods

Researchers such as Gray (1991), Beatley (1995) and Wondolleck and Yaffee (2000) use case studies to demonstrate how collaborative processes have led to successfully resolving seemingly intractable natural resource and growth related conflict. I approach my analysis drawing on their theoretical framework and applying it to my own case studies. I also wanted to know how the participants themselves came to make sense of the actions of the other participants and whether those perceptions were influential in determining an outcome. Therefore, I remained open to allowing the unfolding of the case studies to modify my framework and determine my conclusions.

My research compares the MSHCPs of Orange and Riverside counties. I conduct case studies of the development of three complex plans each of which spans a multitude of local and regional jurisdictions, two in Orange County (Central/Coastal and Southern Subregion) and one in Western Riverside County (WRC MSHCP). I also include a fourth HCP, the Stephen's Kangaroo Rat in Western Riverside, because of its influence in shaping the WRC MSHCP. These two county's plans work well for the purposes of the study because both have strong development pressures, a host of endangered and

threatened species and habitat, as well as conflict over land use. Additionally, each county varies in land ownership patterns, utilizes differing political structures in MSHCP development, but has adopted dissimilar implementation agreements, *all under the same regulatory scheme*. An analysis of two plans negotiated in the same county (Orange County) and under a single jurisdiction brings to light what influences outside of the political structure itself shape the plans; the addition of a third plan in (Riverside County) allows for comparisons and contrasts between counties.

While each MSHCP is specific to its particular geography, the structure of local jurisdictions, and other circumstances, those who participate in negotiation of the plans are derived broadly from a common set of actors – land owners, federal and state wildlife officials (e.g., the U.S.F.W.S. and the C.D.F.G.), conservation scientists, local, regional and statewide land use officials, conservation and environmental groups (e.g., the Sierra Club and its associated local organizations, The Endangered Habitats League, The Nature Conservancy, The Center for Diversity, etc.), property rights advocates (e.g. The Farm Bureau Federation), etc. I conduct in-depth interviews with members of this “core” group of participants from each plan. As participants were interviewed and suggested other knowledgeable actors to be interviewed, that person’s contact information was procured and an interview arranged. This method of “rolling interviews” made it possible to mine a wide array of perspectives from stakeholders. Interviews were conducted in a location where the respondent would be comfortable - either in the participant’s home, business office or in a mutually agreed upon public place, such as a Starbuck’s coffee house. I worked from a common set of questions in all three case studies, while allowing each

respondent to tell his or her own narrative without interruption, other than for clarification of concepts and terms.

I included in my interviews stakeholders who may have had an interest in the process but were either kept on the periphery of, or left out entirely from plan development. A critical component of this inquiry is to examine how “who participates” is integral to developing an implementation agreement, when limiting participation is deemed appropriate, and the barriers to and criteria for participation in development of MSHCPs. Additionally, how the barriers to participation and the political challenges inherent in their development have shaped MSHCPs. The question of who participates is critically important because although who participates and who does not, which issues are addressed in negotiations and which are not, appear to be merely process questions, these process questions are crucial to the outcomes of each plan (Innes and Booher 1999). A careful examination of these “unwritten rules of the game” brings to light the “assumptions, motivations and biases” that influence decisions associated with plans (O’Leary and Bingham 2003: xi). It will additionally shed light on why it is that participants have been willing to invest considerable time and effort on developing the plans, and to understanding the institutional factors that make it feasible and/or desirable, or difficult to do so.

All interviews were recorded with respondent’s permission. I personally transcribed each interview within twenty-four hours and then erased each. For an objective, overarching perspective on negotiations, I was able to access transcribed minutes of formal

stakeholder meetings (although minutes were only available in the case of the Western Riverside MSHCP). Several of those interviewed offered copies of relevant legal and personal correspondence. In some cases, correspondence to and from local elected officials, and to and from state and federal wildlife officials were included. All were considered in my analysis.

Although the implementation policies and institutional arrangements differ between MSHCPs, in order for the plans to act as an efficient model of land use planning there must be common benefits that can be associated with the plans. To test the efficacy of MSHCPs a model of land use planning based on species conservation and collaborative negotiations, in each of the plans I compare the time and transaction costs of stakeholders. Some of the corporate and interest group participants interviewed were unwilling or unable to disclose exact expenditures associated with the plans; in those cases I relied on the participants estimations (for example, whether or not the MSHCP regulatory scheme had diminished or increased the frequency of litigation). However, virtually every participant interviewed was able to estimate the legal cost and time savings associated with implementing respective plans.

I begin my the first of three case studies with Orange County's initial HCP, which was established under California's Natural Communities Conservation Plan (NCCP/HCP). The politically powerful Irvine Company, the major landowner in the county, was a pioneer in spearheading the effort. Orange County's Central Coastal NCCP became the proto-type for its successors and paved the way for more complex multiple

species HCPs. The Central Coastal NCCP/HCP was the genesis of a changing decision-making paradigm that has meant including habitat protection and collaborative negotiations in land use decisions at the county's wild lands-urban interface.

In order to understand the atmosphere surrounding the Western Riverside MSHCP (WRMSHCP), it was important to examine its predecessor, the Stephen's Kangaroo Rat (SKR) HCP. During the SKR HCP planning stage, privately held property included in the SKR Study Area was subject to land use restrictions for years in order to hold it for potential acquisition and incorporation into the SKR Reserve. The attendant loss of use and value to the land left those affected angry and bitter. The SKR HCP created a groundswell of community opposition and set the stage for a skeptical public when officials later proposed the WR MSHCP.

The WR MSHCP case study focuses on the planning stage that brought together a variety of participants with goals that were often at odds, and yet they were able to hammer out an agreement. The WR MSHCP was one leg of the three-pronged, comprehensive Riverside County Integrated Project (RCIP), a multi-agency effort initiated by the Riverside County Board of Supervisors to prepare for and shape the county's projected growth. It was one of the most complex and ambitious MSHCPs in the country. It held the promise of reducing the need to list new species, of fulfilling compliance with state and federal environmental regulations, and of mitigation for future infrastructure and development. All of which officials hoped would mean avoiding litigation from interest groups that had slowed infrastructure expansion. Unlike Orange

County's plan, the WR MSHCP involved thousands of landowners and was vastly more complex and challenging.

The final case study is the Rancho Mission Viejo Company's (RMV) failed NCCP/HCP. The family owned RMV began this multiple species HCP as a means to comply with environmental regulations and to streamline the permitting process for a proposed development project that would be the largest in the county's history. The hope was that an NCCP/HCP would diminish the surrounding community's expected opposition and the attendant litigation from environmental groups. The plan was abandoned by RMV when the county approved entitlements prior to the plan's completion.

Review of the Literature

This dissertation builds on the work of scholars who have established collaborative environmental negotiation models (Crowfoot and Wondolleck 1990; Durant, O'Leary and Fiorino 2004; Burgess and Burgess 1995; Blackford and Matunga 1995; Innes and Booher 1999; Wondoleck and Yaffee 2000) as an alternative to traditional methods of environmental conflict resolution, in particular as it relates to land use. I begin with the work that explains *traditional land use decision making methods* and associated conflict has been managed. Since an important goal of adopting less contentious methods is to

avoid costly and time-consuming law suits, I address literature that focuses on adversarial legalism (or over use of litigation to resolve disputes (Kagan 2004)) and its deleterious effects.

Property rights are often at the core of environmental disputes where land use is part of the equation. While the courts have long recognized that government must fairly compensate property owners when land title is taken for public purpose, regulatory takings doctrine would indicate that compensation is also warranted when government regulates to the point of denying the owner's use of the land (Wise 2004). For decisions reached collaboratively to be sustained and deemed legitimate, there needs to be enough stakeholders participating to be deemed a fair representation. Fairness and expediency need to be balanced, both of which are influenced by *who participates and who does not*. Next I examine *emerging collaborative approaches to environmental negotiation*. This body of literature establishes the basis of the argument for adopting less competitive, more cooperative decision-making methods and describes how those methods would be implemented. My research adds to that body of knowledge, but transitions to a different dimension by specifically *bridging collaborative negotiations with social capital*.

Traditional Methods of Resolving Environmental Conflict

Since the establishment of early forms of environmental governance in the late 1960s and early 1970s, land use disputes related to environmental issues were resolved through bureaucratic control by big government and big business (Meadowcroft 2004). These so called “command and control” “top down” conflict resolution methods are generally regarded as processes that encourage a “battle mentality” and create an adversarial “us versus them” stance, resulting in intractable conflict, invariably leading to protracted and expensive legal resolution (Amy 1987; Yafee 1994; Porter & Salversen 1995; O’Leary, et al, 2004). Rather than resolving the conflict, these methods led to “deciding” the issue in court (Blackburn and Bruce 1995). Douglas Amy (1987) argues that the drawbacks to traditional dispute resolutions that span the legal, legislative, and administrative processes include, across the board: expense, limited access, delays, lack of expertise, and a lack of legitimacy resulting from unilateral decisions and win-lose approaches that encourage the losing party to continue the conflict. Amy adds that the “adversarial nature of litigation assumes that one side is right and the other is wrong, and often overlooks compromises that could fulfill the needs of both parties.”⁵

The failure of traditional legal, legislative, and administrative arenas to effectively resolve environmental conflict is a common theme in the literature; litigation in particular draws concentrated criticism as a means of environmental dispute resolution from those who find fault with traditional methods and argue for alternative processes (Bingham

1986, Gray 1989, O'Leary 1995). As the environmental movement began to take hold in the early 1970s, the frustrations and failings of traditional legislative and administrative policy-making institutions led to using litigation as a source of empowerment and leverage. The time and expense it took to mount a defense against the law suits forced administrative agencies to take heed of environmental concerns (Meadowcroft 2004). Historically, filing a lawsuit, or in some cases the simple threat of a lawsuit was the only means available to stakeholders to compel some parties to a dispute into negotiations (Amy 1987). When comparing litigation to alternative dispute resolutions it is important to take into account that a number of resolutions begin with the threat of, or filing of a lawsuit (Bingham 1986; Mangerich and Luton 1995). Indeed, although a major goal of establishing a MSHCP is to avoid litigation, the plans are often begun because a law suit had been filed and the players decide that seeking a plan is preferable to a court battle.

Adversarial Legalism

Kagan (2001) describes adversarial legalism as a method of dispute resolution that readily seeks recourse through litigation. Adversarial political and legal methods of dispute resolution have impeded economic development and left complex environmental issues to be decided by entities unfamiliar with and often far removed from the problem (Kagan 2001). Litigation that challenges the adequacy of a development project's environmental impact statement (EIS) is a strategy commonly used by environmental and

citizen groups to delay a project, often with the additional benefit of bringing recalcitrant developers to the table. Over the last couple of decades however, fragmented interests, increased judicial review of administrative actions, and shrinking natural resources has meant costly impasse and intractable disputes plus bitter battles at both the policy and grassroots levels (Wondolleck and Yaffee 2000, Kagan 2001, Lewicki and Gray 2003). Kagan (2001) argues that resorting to litigation is the consequence of fragmented institutional structures that suffer from “the relative *absence* of institutions that channel contending parties into less expensive and more efficient ways of resolving disputes...”⁶

The adversarial nature of court processes “tends to polarize disputants as well as discourage open communication, sharing of information and joint problem solving.”⁷ Kagan argues that court-based dispute resolution fails to rely on “discretionary judgment, bargaining, and informal processes,”⁸ and instead is controlled by formal legal rules invoked by disputant’s lawyers. Rather than debate salient issues, through their lawyers contesting parties present “novel legal arguments,” first in one judges’ court and then in another if dissatisfied. This combination of legal contestation and litigant activism, described by Kagan as *adversarial legalism*, “enables ideologues or opportunists to use the law as a tool for extortion”⁹...” [and] is a markedly inefficient, complex, costly, punitive, and unpredictable method of governance and dispute resolution.”¹⁰

The expense of litigation and the inevitability of appeals limit participation to large, well-funded stakeholders whose resources cannot be depleted due to delays, such as those caused by backlogged court dockets or delays brought about intentionally by those

seeking to prolong the dispute (Amy 1987; Gray 1989). The cost of delays associated with litigation not only adds uncertainty for developers whose projects may prove untenable due to indeterminable interest rates and rising building costs, but can also exacerbate environmental problems that go unaddressed as protracted litigation drags on (Amy 1987). Smaller, less well organized groups and individual stakeholders in particular find that the “transaction costs” of litigation limit their participation. Overcoming transaction costs is particularly prohibitive for prospective participants lacking in human resources such as higher education and elevated occupational status (Lubell et al 2002). A number of researchers also point out that a major shortcoming of litigation is its inability to address the *underlying* concerns that brought participants to the point of conflict in the first place; whereas litigation may *decide* an issue, court decisions that address the procedural rather than the substantive environmental issues of a dispute are ultimately incapable of bringing resolution to a conflict and lead instead to future lawsuits (Ryan 1995; Susskind et al 2000; Bingham 1986; Amy 1987; O’Leary et al 2004). Building human relationships that make it possible to establish trust and reach the point of open communication are essential to dredging up what lies under the surface of conflict.

Property Rights

Property rights in elementary economics texts are defined as a system that “forms the basis for all market exchange.”¹¹ Cole and Grossman contend that “assumptions of well-defined property rights underlie all theoretical and empirical research about functioning markets;” the authors also argue that, “the allocation of property rights affects the efficiency of resource use.”¹² However, they add that given the importance of a definitive theory of property rights, one would assume that there is a consensus regarding what property rights *are*, but no such consensus exists (Cole and Grossman 2001). In some instances property rights in the environmental conflict resolution literature are characterized as an obstacle to the protection of natural resources and the public good. Privately owned land is approached as a common pool resource; therefore, regulations that diminish the value of private property are seen as justified as long as they serve public objectives and are approved through majoritarian democratic processes (Emerson and Wise 1997). Negotiations over curbing environmental problems and stemming the use of natural resources on publicly owned land, although challenging, is vastly different from doing so when private property is at stake (Wondolleck and Yaffee 2000).

Durant, et al (2004) argue that in order to achieve a “balance” between prudent regulation and property rights, government is obligated to limit “economic development and other land uses that diminish the collective well-being,” while property owners “must respect the government’s duty” to restrict the property owner’s “right to develop the

resources they own for profit or enjoyment.”¹³ Balance thus defined has engendered a rise in property rights lawsuits premised on the “takings clause” of the U.S. Constitution, which is based on the logic that the use of private property is a basic right that cannot be taken without just compensation. The bulk of the lawsuits are attributable to regulatory mandates imposed on property owners who argue that, while a regulation may not physically remove the property from the owner’s possession, it denies the owner a portion of the “bundle” of rights that constitute his or her property rights, and goes too far toward denying the property owner economically viable use of privately held land (Wise 2004). However, although living within a constitutional framework assumes that some individual liberties are relinquished in order to ensure the overall good of the community, “the government has a perverse incentive to foist the costs of environmental improvements for the community on the fewest individuals possible,”¹⁴ leaving those whose property is threatened relying on the courts for protection.

Success in the courts by property rights groups has meant an expanded regulatory taking doctrine that has constrained the ability of natural resource managers to implement environmental regulations and “persuaded some that a move away from command-and-control regulation is a necessity.”¹⁵ The movement away from top down decision making and “command and control” governance toward collaborative models of environmental governance implies an inclusive deliberative process that, theoretically at least, redistributes decision making power, and seeks to transform the concept of property rights (Wise 2004). Several of the participants interviewed for this dissertation defined property rights from vastly different points-of-view. Whereas property owners whose

families had lived on the land for more than a century thought of the land as defining the family and key to their ancestor's legacy, federal and state wildlife officials viewed the land as a public good and were puzzled that property owners were fiercely opposed to relinquishing the use of their property if it would mean protecting endangered species.

Limits on Participation

Madison, seeking a means of avoiding “temporary or partial considerations” by legislators, theorizes in Federalist 10 that “the public voice, pronounced by the representatives of the people, will be more consonant to the public good if pronounced by the people themselves,” and warns that “the representatives must be raised to a certain number, in order to guard against the cabals of a few; and...they must be limited to a certain number, in order to guard against the confusion of a multitude.” Today, effective participation in legislative processes is not balanced as Madison suggests, rather it is often limited to those with the resources to engage in professionally contracted activities, such as lobbying. But seeking to influence legislators does not assure that one's voice will be heard when environmental issues are being decided (Meadowcroft 2004). And, due to the controversial nature of environmentally-based disputes, the legislators who write the laws themselves tend to lack consensus, therefore, related legislation tends to be vague. Ambiguous legislation then leads to conflict, as the administrative arena struggles

to interpret and implement policy that affects parties who have been effectively left out of the process but who are nonetheless affected by its outcome (O’Leary 2004).

The decision of who to include in negotiations is often one that forces organizers to choose among several competing stakeholders. Including a reasonably representative number of stakeholders in reaching a resolution conveys a sense of fairness and legitimacy to the process (Gray 1989). Indeed, a number of scholars have attributed the failure of traditional methods of dispute resolution to notions of whether a process is “democratic” enough (Dahl 1956, Barber, 1984, Pincetl 1999, Thomas 2001), that is to say, whether the process includes input from a reasonably broad spectrum of stakeholders. Limited participation in what is characterized as a “closed process” is deemed likely to guarantee subversion of the “social good” and is perceived as not in “the public interest” (Meadowcroft, 2004). Meadowcroft argues that a changing American political character where interest groups have become the dominant source of political participation has made inclusive processes all the more vital to conflict management. His theory is that group-based deliberative processes have become particularly important as environmental policy decisions have evolved from the simple consideration of pollution control to more complex notions and broader issues of integrated ecosystem management and of ecologically sustainable development.

In California for example, the California Environmental Quality Act (CEQA) requires Environmental Impact Reports (EIRs) be submitted for major projects, but the “scoping” meetings and public hearings associated with the reports do not require that

stakeholders be included in negotiations, nor are stakeholders expected to come to an agreement regarding the scale, form, or mitigation of negative externalities associated with a project. The reports require only that a framework for mitigating impacts be included; no face-to-face negotiations are required. Input from the public is limited to a solicitation of comments and a public hearing. The comments submitted by stakeholders and citizens at large are required to be addressed, although without debate or discussion, and largely through refutations posted on the websites of public agencies.¹⁶ The unintended consequence of the requisite public hearings is that they act as a mechanism for grand standing and tend to exacerbate rather than quell tensions (Gray 1989; Wondolleck and Yaffee 2000). Additionally, land use officials are merely expected to *consider* the views of interest groups and stakeholders opposed to a proposed project or with environmental concerns; there is no requirement that their preferences be incorporated into a project.¹⁷

Restricting input from a public that perceives a project as one in which negative externalities are expected guarantees an acrimonious response. The problem is magnified by traditional “proposal and review” decision making models that address individual development projects from a narrowly-defined, one-by-one basis, without consideration for adjacent jurisdictions, patterns of private and public land ownership, or natural resource management (Feldman 1995, Porter & Salvensen 1995, Thomas 2001, Lubell et al 2002). Local land use officials then find themselves frustrated when the existing regulatory framework does not take into account the broader ramifications of project approvals. Only later is the project found to be at odds with federal and state mandates,

requiring consideration of eventualities in adjacent jurisdictions, over which they have little influence and no authority. Jurisdictions that make a decision regarding development that in fact will affect areas outside that jurisdiction often take into account only the economic and political fallout in their own sphere of influence. Projects that will raise revenue or are politically expedient are granted development permits, even if the impact is detrimental to the surrounding jurisdictions and does not account for the broader interests and concerns of various stakeholders; future activities are not taken into account, increasing the possibility of future conflict over land use governance decisions and the protection of limited natural resources (Porter and Salvensen 1995).

HCPs were begun with the notion that including a plurality of stakeholders in a deliberative process that allowed broad input would make it possible to reach a compromise and therefore less likelihood that legal resolution would be sought. Determining who ought to take part in negotiations and who ought not is vital to shaping the process and its outcome. Gray (1989, p.66) defines a legitimate stakeholder broadly as having “the perceived right and capacity to participate in the negotiations,” adding that “[t]hose actors with a right to participate are those impacted by the action of other stakeholders;” she adds that disputes over legitimacy are common and result from historical relationships that influence perceptions about participants’ willingness to be open to opposing view-points during negotiations. Although this definition seems too inclusive to some, others argue that a consensus-based resolution is achieved only when an array of participants are included, because although resource users span political and administrative boundaries, they jointly affect the environment (Lubell et al 2002). Adding

more interests to the mix is thus seen as less likely to inhibit implementation, as the voices of all concerned have been heard (Innes and Booher 1999). Seidenfeld (2000) warns however that achieving a non-adversarial process by empowering stakeholders depends on avoiding the inclusion of groups that would seek to undermine (Seidenfeld uses the term sabotage) the collaborative nature of negotiations.

Emerging Models of Collaborative Methods

Barbara Gray, who has studied environmental conflict and collaborative processes for over thirty years, defines collaboration as “1) the pooling of ...tangible resources, e.g., information, money, labor, etc., 2) by two or more stakeholders, 3) to solve a set of problems which neither can solve individually.”¹⁸ Wondolleck and Yaffee broaden the definition of collaboration by adding collaborative relationships, and including: “multi-party working groups trying to solve common problems or solve disputes, interagency information networks, and simple relationships such as an agency staff member participating in community-based development.”¹⁹ Collaborative negotiations are characterized in the literature as an alternative method that comes to agreement before final decisions are in place and thus avoids escalation of the conflict and protracted legal battles (O’Leary, et al 2004). One fundamental difference between traditional processes and collaborative processes stems from notions of public participation. In an attempt to diffuse conflict and reach effective and timely decisions, communities, environmental

groups, and governments themselves have, over the last couple of decades begun to “emphasize the involvement of ‘stakeholders’ and the general public in making and implementing environmental policy.”²⁰ The dynamics of collaborative processes contain the possibility for emergent solutions that would not have been envisioned had disputants remained in separate “camps;” collective decision making offers a means of opening negotiations when traditional processes come to an impasse (Gray 1989).

The process of establishing a collaborative negotiation project is an education of sorts, in that it incorporates legal and scientific information about the environmental issue under dispute with participant’s local knowledge and experience (Beierle and Cayford 2003). Ort (2007) argues that while science and economics may be helpful in diagnosing the important dimensions of environmental problems, science is unable to gauge whether a particular population is willing to risk environmental consequences in the name of economic benefit and economic analysis is incapable of incorporating the non-economic value of “an ethical appreciation of biodiversity.”²¹ He therefore concludes that the application of deliberative, participatory processes intent on negotiated compromise is, to date, the optimal approach in lieu of a single, correct, objectively rational solution to environmental policy questions (Orts 2007).

Ayers and Braithwaite (1992) claim that empowering participants to negotiate their own regulatory terms promotes compliance because the terms are particular to the participants and do not stand on vague language or unreasonable regulations that do not pertain; greater efficiency results as participants understand first-hand the risks and

benefits of regulations they write themselves. Empowerment in and of itself, as well as empowerment outside of formal, rigidly construed regulatory structures may play a vital role in developing alternative methods of conflict resolution (Ayers and Braithwaite 1992). Habitat Conservation Plans (HCPs) are an example of a negotiation structure that is established within a legal framework which acts as an “institutional channel” mandating collaborative negotiations. Since the terms are particular to the participants, and the process incorporates regional knowledge and legal assurances that agreements are protected, the result is perceived as a balance of interests that is less likely to be challenged than are traditional top-down decision-making processes.

The body of literature examining collaborative environmental resolutions describes the process from a number of perspectives with an array of models. Emerson et al (2003), for example, use the terms environmental conflict resolution (ECR), environmental dispute resolution (EDR), and alternate dispute resolution (ADR) almost interchangeably, explaining that ECR and EDR are various ADR techniques applied to environmental conflicts. These models are similar to those advanced by other researchers (Crowfoot and Wondolleck 1990; Durant, O’Leary and Fiorino 2004; Burgess and Burgess 1995; Blackford and Matunga 1995; Innes and Booher 1999; Wondolleck and Yaffee 2000), although minor operational aspects vary. The participatory nature of these processes provides relief for a citizenry often denied access to negotiation sessions in legislative, administrative and judicial systems (Emerson et al 2003). Wondolleck and Yaffee (2000) give a hopeful evaluation of collaborative processes, concluding with a recipe for success

that suggests adherents “[m]ix thoroughly, provide adequate resources, and stand out of the way” (p.247).

Empirical examples of collaborative approaches to environmental conflict are the weakest link in the literature. While there is no shortage of claims regarding the benefits (and drawbacks) of collaborative environmental dispute resolution, there is a paucity of empirical evidence to back up the literature making the claims. O’Leary (1995) laments for instance, that conclusions regarding the efficacy of collaborative environmental negotiations often cite little or no empirical evidence and are based largely on “thoughtful speculation,” adding that few scholars have studied alternative methods through such standard empirical methods as comparative case analyses and interviews. She adds that much of what is known regarding what contributes to the success and failure of environmental conflict negotiation are “commonsensical conclusions” that tend to reflect the experiences and theories of the authors themselves as mediators without offering comparative empirical evidence (O’Leary, 1995).

My research suggests that collaborative negotiation processes alone do not account for the conflict resolution evident in the consensus that leads to signed MSHCP agreements. I examine the plans through a lens that combines the influence of collaborative processes with the social capital that was established among participants during the negotiation process.

Social Capital

The MSHCP collaborative process itself provides the circumstances under which social capital develops. Social capital makes it easier to build common ground as a pivot point on which to base negotiations. Robert Putnam defines social capital as “connections among individuals – social networks and the norms of reciprocity and trustworthiness that arise from them.”²² He adds that “[f]requent interaction among a diverse set of people tends to produce a norm of generalized reciprocity.”²³ Putnam argues that a society characterized by reciprocity is more efficient than a distrustful society because more is accomplished when each exchange does not need to be immediately balanced; a factor that may point toward social capital as means of diminishing “transaction costs” of participation in collaborative negotiations processes.

Coleman (1988) explains that just as the materials that form tools and machinery, when paired, change and become productive “physical capital,” social capital develops from the change due to relations among persons when skills and knowledge come together to facilitate an action. He also stresses the notion of repeated interactions as essential to developing social capital. Coleman cites the example of the ethnic-dominant Jewish wholesale diamond industry to describe how social capital makes possible the exchange of valuable goods without the need for formal, written assurances and expensive bonding. Hence, the close ties of kinship, synagogue, and business within a

small “closed community” are at risk if either side does not fulfill its obligation to fair transaction.

Putman (1993), Coleman (1988), and Lesser (2000) each suggest that social capital makes possible the achievement of particular goals that would not otherwise be possible. All three authors posit that social capital develops through repetitive interaction. The logic of collective action remains problematic because, as public choice theory claims, commitment to on-going participation in the policy process is spotty at best (Jordan and Maloney 1997). Ostrom (1990) and Ritchey-Vance (1996) argue that social capital, when born of participatory practices, acts as a mechanism for maintaining involvement over time. Long term participation in a public policy project in turn develops a common context and language that is shared by participants (Putnam 1993). Each of the MSHCPs I examined had protracted planning stages in common (six years was typical) and in each case a majority of the participants remained engaged in the process throughout, even when it was not necessarily in his or her best interest to do so. Therefore studying the role of social capital in the collaborative negotiation process under the structure of MSHCPs raises insights not achievable without combining both dimensions.

The three MSHCPs I examined are an ideal example of collaborative negotiations at work within an institutional structure that “channels” participants toward developing social capital; therefore it provides new insights not achievable through a “single lens” perspective because both dimensions come into play in the plans. Analyzing the plans not only holds the potential of modeling a less contentious and more efficient means of

environmental land use decision making and governance, its utility may be applicable to intractable political disputes on a broader scale.

Overview of the Dissertation

In theory, the HCP negotiation process takes into account the importance of grounding natural resource decision making in science, but also considers the import of tempering the top-down government agency style of regulation by giving voice to land owners and interest groups. Those who developed the initial process understood that “the deep significance of this approach was that it allowed generally ‘place-based’ local, state and federal institutions...together with private interests, *by agreement* [emphasis original] to collaboratively address regulatory concerns, in which they all had an interest.”²⁴ I argue that MSHCPs create processes in which the voices of a broad spectrum of interests are heard. When participants perceive that they have been represented in the process, they have incentives to work out a compromise and are more willing to reach a voluntary agreement without exclusive reliance on litigation, top-down control, formal structures and tight boundaries. Further, the resulting policy is perceived as reasonable and legitimate, and the outcome is accepted as a rough balance among interests, due in part to the trust that develops as a byproduct of social capital.

Chapter 2 provides the background of the ESA, including the legal and historical events leading to the development of HCPs and the expansion of the plans to include multiple species in the form of multiple species habitat conservation plans. Also covered is the crucial legal challenge to guarantees under HCPs, the “No Surprises” ruling and its still tenuous outcome.

Chapters 3 - 4 provide a descriptive picture of the development and negotiation phases of Orange County’s NCCP/HCP and Western Riverside County’s Stephen’s Kangaroo Rat HCP and MSHCP respectively. I present an overview of the history of land development and in each county and the driving forces in each county for adopting the plans.

Chapter 5 investigates Orange County’s Rancho Mission Viejo NCCP/HCP plan proposal that was halted by an extended family of landowners who found themselves at odds with the local community and state wildlife officials. Locals were adverse to adding 14,000 homes adjacent to an already densely-populated area. And the California Department of Fish and Game was unwilling to allow the family to place their land under a conservation agreement incrementally, demanding that all of the land slated for conservation be conserved at the onset of development.

Chapter 6 is an analysis of the conflict resolution under taken within the MSHCP framework. This chapter looks at what surfaced during the planning stages of these HCPs and what lessons were learned during the process.

Chapter 7 addresses stakeholder expectations as compared to policy outcomes and discusses the future of this method of public conflict resolution, including alternatives, necessary changes and other predictions. This chapter also examines the generalizability of this model of conflict resolution and provides examples of how this form of collaborative negotiations in particular has lead to proposed changes in regional land use and environmental protection.

Chapter 2: Legal and Historical Background of HCPs

In this chapter I explain the genesis of the amendment to the ESA that became operationalized as HCPs. I also describe the court case that convinced Congress that the unintended consequences of the ESA's inflexible provisions resulted in what one federal judge called an "absurd" interpretation of congressional intent - halting a multi-million dollar dam project just prior to its completion. The Tellico Dam case is a legislative and legal struggle that brought disputes over polarized interests related to balancing environmental protection with economic growth to a head. It is the case of a tiny fish called a Snail Darter that brings an infrastructure project to its knees.

Although the Endangered Species Act (ESA) was not implemented as land use law, its provisions dramatically affect the expectation of use of property by private landowners and the economic activities of land development and agriculture. Habitat Conservation Plans (HCPs) were established by Congress in 1982 as an amendment to the way the federal Endangered Species Act is implemented on private property. The Section 10 amendment to the ESA was the result of a compromise reached in the late 1970s by an array of stakeholders involved in conflict over a highly contested development on San Bruno Mountain, California. The first HCP was the product of an agreement that would permit development on the mountain to proceed, while ensuring long-term protection of the federally listed mission blue butterflies discovered on the mountain. The United States Fish and Wildlife Service (FWS), with sufficient evidence from "credible

scientists,”²⁵ agreed to issue a permit to the developer for limited take of the listed butterflies in return for a conservation plan that included dedication of almost 87% of the butterfly’s habitat.²⁶

Under the amended Endangered Species Act’s (ESA) Section 10(a), Habitat Conservation Plans (HCPs) provide a permitting mechanism that allows private landholders, local governments, and developers to apply for an “incidental take permit,” so called because it allows for a “take” (defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to engage in any such activity or to modify the species’ habitat (§1532 (19)) of listed and endangered species during the course of “otherwise lawful activities, provided that those activities [are] conducted according to a scientifically approved conservation plan (or HCP).”²⁷ In other words, a “take” may be authorized if carried out while undertaking a lawful activity such as construction, but not if the harmful action is undertaken solely with the goal of harming species or habitat. Hence, development is directed onto specific areas with the least biological impact, while the HCP in turn preserves habitat in areas deemed most likely to promote long-term survival of endangered species.

Because individual HCPs do not consider overall regional conservation, the species by species and project by project regulations of HCPs became impractical both ecologically and economically. Individual HCPs are an expensive and drawn out process that relies on ad hoc negotiations with unpredictable outcomes and unspecified time deadlines (Loew, 2000). Additionally, conservationists argued for preserving contiguous

habitat and not simply protecting individual species one at a time on a project by project basis without regard for the importance of conserving well-connected networks of land for wildlife migration and mating. This notion became salient in the early 1990s in tandem with California's interest in seeking a means to bring regulatory control of wildlife protection back to state agencies, albeit with federal oversight. Meeting this goal meant adopting a broader, regional approach to compliance, taking into account the lack of multi-species, multiple habitat consideration of HCPs and the need to protect entire ecosystems and to anticipate situations in which species may become threatened or endangered; hence, the establishment of Multiple Species Conservation Plans (MSHCPs). These plans are basically broad species take permits that allow economic land use and provide for regional landscape-scale ecosystem conservation planning.

Notwithstanding the conservation goals of MSHCPs, the plans have been implemented in order to provide regulatory relief and to balance competing economic and conservation goals through a collaborative process. While each MSHCP is specific to its particular geography, the structure of local jurisdictions, and other circumstances, a common set of actors and stakeholders tend to participate in collaborative negotiation processes of the plans. Those typically involved include developers, landowners, environmental and conservation groups (e.g., The Sierra Club and its associated local organizations, The Endangered Habitats League, The Nature Conservancy, The Center for Diversity, etc.), federal and state resource agencies (e.g., the U.S.F.W.S. and the California Department of Fish and Game (CDFG)), local governments and consultants, and legal counsel associated with direct stakeholders. Craig W. Thomas equates HCPs to

Don Corleone's offer that cannot be refused: the ESA essentially compels land holders to "forego all use of certain natural resources, act illegally and risk enforcement, or prepare an HCP...a difficult deal to refuse."²⁸ In this regard, Multiple Species Habitat Conservation Plans (MSHCPs) are a model that establishes "the institutional structures" that, as Kagan suggests, "channels contending parties into less expensive and more efficient ways of resolving disputes."²⁹

The considerable enforcement authority of the ESA levels the political playing field, making MSHCP stakeholders relatively dependent on one another, and therefore less likely that one interest will dominate, as with "traditional" mechanisms (Thomas, 2001). Consensus must be reached within a designated timeframe or the process is at risk of being reverted to command and control methods. Instead of bickering over development project-by-project, the plans call for biologists to delineate "reserve networks and long-term programs designed to conserve and manage species legally 'covered' by the plan, allowing development to proceed in less ecologically sensitive areas."³⁰ Theoretically, participants negotiate which portions of proposed projects will be developed and which will be dedicated for conservation; consultants then draft a plan, working with the participants to set up a system for mitigation of environmental impact (all of which must meet the approval of wildlife agencies). In return, the landowner seeks diminished regulations; developers in particular expect that a project will not be stopped in its tracks once the plan has been permitted.

Ideally, collaborative, area-wide plans offer something for everybody. Developers gain greater predictability, reduced regulatory burdens, and a streamlined permit process. Moreover, such plans offer developers certain economies of scale: the cost of conducting environmental studies and of acquiring sensitive lands to preserve can be spread among many developers. Environmentalists receive greater assurance that environmentally valuable natural areas will be protected in perpetuity and that individual development projects will not ultimately consume an entire ecosystem. And federal agencies reduce the number of individual permits they must process (Porter and Salvesen 1995, p.5).

A former Sierra Club official with considerable experience negotiating for open space and wildlife protection in Southern California compared typical negotiation mechanisms to collaborative MSHCPs processes noting that: “the mainstay of my job was fighting individual projects; the impact of fighting [for open space and wildlife protection] was negligible. Occasionally developers would agree to some land set aside, but local officials rarely turn down a project – it was so frustrating. For years I thought there had to be a better way that would end up with conservation. As development was negotiated, maybe one out of a hundred builders would set aside land in a *coordinated* fashion. MSHCPs make a lot of sense in this regard.”³¹ Likewise, building industry officials admit that when “the extreme views” of environmental interest groups are not “at their backs,” developers are “offering more [open space] than they would have without the MSHCP process in place.”³² Indeed, when considerable decision-making authority is granted participants negotiating MSHCPs there is evidence of moderation

and flexibility on both sides. However, while the plans are beneficial to developers and large landowners seeking mitigation assurances from wildlife agencies (in order to meet regulatory requirements), smaller private landowners are not as willing to accept the tenets of plans in which they had little or no input and within a process that encumbers their property for conservation while others receive mitigation points.

At first glance, the Endangered Species Act (ESA) may seem as the unlikely godfather of contractual, ecosystem-based land use planning achieved through collaborative negotiations. In fact, its absolute prohibitions proved to be strong evidence of the need to abandon command and control regulatory systems. California's traditional land-use decision-making and negotiation methods have been described as questionably democratic (Thomas, 2001), offering only limited public participation in the form of so-called "scoping sessions" and "public comments" periods that often leave the concerns of the public unheard and unaddressed. Disputes over proposed projects are thus left unresolved, even as development approvals and permits are granted. California's land-use officials are then faced with hostile interest groups that are left with little recourse other than to file suit against developers and against local jurisdictions. The result has meant entangling proposed development and infrastructure in time-consuming delays involving public administrators and developers, expensive litigation for all sides, political gridlock, and highly polarized stakeholders that are averse to compromise and negotiation.

HCPs are an example of a negotiation structure that is established within a legal framework which acts as an “institutional channel” mandating collaborative negotiations and consensus-based decision making. The goal is to empower participants to negotiate their own regulatory terms within the scope of the law, engendering a compromise that will be deemed legitimate by participants when they feel that their voices have been heard. Since the terms are particular to the participants and the process incorporates regional knowledge and legal assurances that agreements are protected, the result is perceived as a balance of interests that is less likely to be challenged. Analyzing the plans not only exhibits the potential of a less contentious and more consensual means of environmentally integrated regional land-use planning; their utility may be applicable to seemingly intractable political disputes over other policy issues.

The Legislative and Legal Background of HCPs

In the early 1970s, environmental quality was at the forefront of political and social concerns salient to Americans. Comparing polls commissioned by the White House (conducted by Opinion Research of Princeton, New Jersey), reveal that concern over protecting the environment among the U.S. public jumped from 1% in 1969 to 25% in 1971.³³ The environmental movement quickly became a base of constituent support that led to such unlikely environmentalists as President Richard Nixon, under whose administration environmental policy became entrenched as an arena for implementation of strong Federal legislation. The increasingly educated and urban middle-class

population began to demand that environmental degradation be addressed and they came to believe that Federal regulations were the appropriate means to do so.

This change in popular awareness supported passage of legislative victories for a string of environmental policies. Among these were the National Environmental Policy Act (1970), the Coastal Zone Management Act (1972) and the Federal Pesticide Control Act (1972), the Endangered Species Act (1973). Paul G. Rogers, who served as Chair of the House Subcommittee on Health and the Environment during the 1970 Clean Air Act deliberations, notes that the regulations were not immediately effective, but that “Congress knew that a central element in any successful approach to air pollution control (and, indeed, environmental protection generally) would have to be a change in attitude about the value of environmental protection.”³⁴ Ultimately, that meant incorporating more strictly enforced regulations and deadlines in order to compensate for 1960s regulations and standards that were met with resistance and extended time lines. Rogers argues however, that within the Congress of the 1970s a consensus began to emerge counter to the conventional thought of the time, which had been that continued economic progress meant unavoidable industrial pollution. In its place evolved a profound attitude shift towards the belief that in order to be successful environmental legislation and economic growth “can, and must, be accomplished hand-in-hand.”³⁵

The history of the Endangered Species Act of 1973 (ESA) in particular reflects a legislative struggle that brought disputes over polarized interests related to balancing environmental protection with economic growth to a head. The ESA was meant to

strengthen protections of endangered species by adding subspecies, ecosystem conservation, and aesthetic values as considerations to be taken into account, and including two categories of protection: endangered, for animals and plants in immediate danger of extinction, and threatened, for plants and animals likely to become endangered in the future (Yaffee 1994). Early versions included language that mandated protections only when practicable and when protection did not interfere with the government's primary objectives. The final version of the 1973 legislation was passed without this qualification. Indeed, the Supreme Court characterized the ESA as "the most comprehensive legislation passed for the protection of endangered species by any nation."³⁶ The Act was passed with virtually unanimous support from Congress,³⁷ although the broad support the legislation enjoyed was subsequently tempered as some of its unintended consequences became apparent.

The Snail Darter and the God Squad: Construction of the Tellico Dam

One of the first and arguably one of the most important examples of employing the ESA not as a means of preventing extinction but as a tactic to reverse infrastructure construction is the Tellico Dam case. Congress initially allocated funds to the Tennessee Valley Authority for the Tellico Dam in 1967; construction of the dam would hold back the Little Tennessee River and flood 16,500 acres of valuable farm land in the surrounding area and create 30 miles of reservoir. In 1973 a previously unknown species

of perch known as the Snail Darter (*Percina Imostoma tanasi*) was discovered near the mouth of the river by a University of Tennessee scientist. Thirty years later, Z.J.B. Plater, the law professor who represented the tiny fish in the ensuing “legal war” would write that the case is often “depicted as the Most Extreme Environmental Case There Ever Was,” and that “in terms of human governance...if you scratch away at the surface of almost any controversy in environmental law, pretty soon you will be looking at some of the most fundamental questions of democratic government.”³⁸

A few months after the fish was discovered, Congress passed the ESA and by 1975 the Secretary of the Interior declared the Snail Darter endangered and the intact river its “critical habitat,” noting that construction of the dam would trigger Section 7 of the ESA that stipulates that “Each Federal agency shall...insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered or threatened or result in the destruction or adverse modification of habitat of such species...”³⁹

Armed with the Secretary’s declaration, local citizens and environmentalists who had been seeking a means of stopping construction of the Tellico Dam filed suit in District Court. The court denied relief and dismissed the case arguing that and it would be “absurd” to think that congress would halt construction on a multi-million dollar project so close to completion. Since construction of the damn had begun before the ESA was enacted, the court added that it had also taken into account the continued congressional allocation of funding of the project after the ESA was passed. Indeed, throughout legal

proceedings, the House Appropriations Committee maintained that a Federal project so close to completion should not be halted and the committee continued funding the dam.

The Senate Appropriations Committee went further, announcing to the Senate that

This committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act,⁴⁰ funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.⁴¹

The 6th District appellate court reversed the lower court's decision arguing that the only relevant legislation was the Act itself and enjoining construction of the dam until such time as either congress exempted the Tellico Dam from the ESA or the fish was no longer found to be endangered. The Supreme Court subsequently heard *Tennessee Valley Authority vs. Hill* 437 U.S. 153 (1978), arguing that congressional appropriations meant to fund a project did not render the project legal when such action was a violation of federal law; to assume that it did so would be contrary to "the doctrine of disfavoring repeals by implication." Additionally, the Court held that the language of the ESA "admits of no exception"⁴² regardless of the sacrifice of public expenditures; the Court also refused to "pre-empt congressional action by decreeing what accords with 'common sense and the public weal.'"⁴³ The Court also ordered that work on the dam be halted.

Following the court's decision, congress enacted legislation exempting the Tellico Dam from the ESA (H.R. 4388, 1979 Public Law, 96-69) and the area was flooded.

Dissenting opinions issued by the Court were prescient. Justice Blackmun filed a dissent in which Justice Powell joined, citing the lower court's claim that Congress could not have intended the "absurd result" that strict adherence to Section 7 of the Act had wrought in the Tellico project. Justice Rhenquist's dissent argued that the traditional powers of judicial equity are meant to be the instrument of balance between the public interest and private desires that allows adjustment and discretion when applying a decree to the particulars of a case. Justice Rhenquist concluded that "interest on one side of the balance was more than outweighed by other equally significant factors."⁴⁴

The Tellico Dam case resulted in a three-pronged reaction. The ruling first of all demonstrated that if Congress had any doubts about the ESA's potential to wreak political havoc, Tellico Dam erased them. The ruling also made it clear to Federal wildlife agency decision makers that unless the ESA were modified, the absolute mandate of Section 7, as interpreted by the *Tellico* court, would take precedence over all other considerations and significantly raise the importance of non-game wildlife in land-use decisions.⁴⁵ That prospect was the impetus for Congress to create the "God Squad Committee," designed as a "pressure valve" to temper the provisions of the ESA, and to "soften" in particular the affects of Section 7. The God Squad, a cabinet-level Endangered Species Committee, was established by Congress in an amendment to the ESA (§7, (e) (1). The Committee consisted of seven high-ranking administration officials

and one person appointed by the President, whose task was to represent the affected states. The Committee had the authority to exempt agency action from ESA provisions, albeit with substantive requirements that “there are no reasonable and prudent alternatives to the agency action; the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; the action is of regional or national significance,”⁴⁶ as certified by the Secretary of the Interior. Despite the congressional amendment to Section 7, the *Tellico* decision stimulated environmental groups to focus their strategy for wildlife protection on filing court cases against Federal agencies under the ESA. During the Spotted Owl controversy for example, in a matter of weeks in late 1992, environmental groups filed suite against the Bureau of Land Management (BLM), the Forest Service (FS) and the Fish and Wildlife Service (FWS).

While federal agency activities surrounding Section 7 consultation provisions were at the forefront of ESA disputes and subsequent amendments for the first decade of the ESA, Section 9 of the Act, not having elicited controversy, was left intact by a Congress reluctant to amend its less contentious provisions. Section 9 makes it a criminal offense for any person to “take” an endangered fish or wildlife species, defined as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” The reach of Section 9 was extended when the 9th District Court broadened the definition to include prohibiting the modification of habitat under specific circumstances with what became known as the *Palila* cases.⁴⁷ The *Palila I* ruling prohibited actions that harmed not only the entire species, but also actions that harm

individual animal; *Palila II* extended the definition of “harm” to include actions that prevent recovery of species, and found that proof of “harm” does not require proof of death (Dwyer, et al, 1995:729). (The *Palila* cases remained the leading cases for interpretation of the “take” provision in subsequent cases.) Perhaps more important, the seemingly insignificant change to the definition in *Palila I* established Section 9 prohibitions on *non-federal* lands, severely restricting the activities of private land owners and opening the door to the creation of habitat conservation plans (Thronton 1991:621).

The economic implications of Tellico Dam and the threat to land use officials of civil and criminal penalties under Section 9 related to the *Palila* case, led to considerable congressional antagonism towards the ESA. Questions were raised in House debate about the accuracy and objectivity of listings and the need for such listings in the face of job loss due to aborted public projects, most of which still owed millions of dollars on bonds issued to pay for dams, power plants, etc. Concern was expressed as well that proposed housing and commercial development in districts across the country were put on hold indefinitely (Congressional Record – House, October 14, 1978) with the looming threat of species discovery. Given that over 75% of all endangered species are found on private property (U.S. Department of Agriculture NA-PR-03-97), the inflexible provisions of the ESA made it apparent to land owners that the best course of action to ensure future economic use of their property was to “take” any endangered species discovered on their land before it could be discovered, or to clear land of vegetation that an endangered species might inhabit.

Members of Congress called for “some reasonable sense of balance and compromise” between the energy and development needs of the country and the “desire to preserve our very precious and important natural heritage;”⁴⁸ others argued that designating vast lands as critical habitat without “careful analysis of what is actually needed for survival of species” was “going too far,”⁴⁹ and still others argued that a comprehensive suite of considerations should temper critical habitat designations, i.e., “social, ecological, economic, scientific, technological...as well as any other local or national concerns.”⁵⁰ Congress amended the ESA in 1982, addressing the concerns related to what some argued was arbitrary critical habitat designations. Section 2 (3)(b)(1)(A) mandated designation of endangered species, threatened species, or critical habitat be determined “*solely on the basis of the best scientific and commercial data available...*” once written scientific documentation was available, however, economic considerations could be addressed.

Butterfly Meadows: The ESA Comes to California

Due to events on California’s San Bruno Mountain, Congress also included a political pressure valve to its amendment of the ESA in 1983: the Section 10 (a)(1)(b) amendment established “incidental take permits,” which allow for the take of a federally listed endangered or threatened species, if the taking is incidental to, and not the purpose of otherwise lawful activity and is in accordance with the terms of a HCP. Essentially, the

permits act as permission for private landowners to avoid Section 9 prohibitions against taking, within prescribed limits.

The San Bruno Mountain controversy was a long and difficult conflict begun in the 1960s between successive landowners, who wanted to develop the land on the San Francisco Peninsula and environmentalists, who wanted the land to be set aside as open space. The conflict led to an out-of-court settlement between the landowner and San Mateo County. The county negotiated a purchase of nearly 2,000 acres and the landowner agreed to donate over 500 acres for a park (amounting to a total of two thirds of the mountain); in addition, the landowner agreed to an abbreviated development project. Less than a month after the agreement between the county and the landowner was finalized, the FWS proposed listing of the Mission Blue and Callipe Silverspot butterflies found on the mountain as endangered, placing most of the remaining land approved by the county for development at risk of designation as critical habitat for the insects.

Rather than step back into the fray, a planning process was adopted that included the landowners, local officials, California's Department of Fish and Game (CDFG), the FWS (the federal agency tasked with enforcing the ESA), and environmental groups in negotiations over a plan that would resolve in advance conflicts over the natural resources and the economic interests of the mountain. The process had its roots in group therapy models which were the subject of research at the University of California in the 1960s.⁵¹ Stakeholders came together over a course of several months to deliberate and hammer out a plan that theoretically would balance competing interests and lead to a

result that, while it may not satisfy all participants, each agreed it possible to live with the result. Developing this initial plan was a risky leap of faith; although this is known as the first HCP in the U.S. (stakeholders reached agreement in 1982), the plan lacked official ESA authorization until passage of the Section 10 Amendment (adopted in 1983). The San Bruno Mountain plan established strict guidelines for developing the land in accordance with biologically-determined criteria for protection of the butterflies, drawing funding from proceeds of the development in order to manage the land and acquire habitat (Thornton 1991:622). Guidelines for the plans require assurances specifying

(A)(i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures as the Secretary [of the Interior] may require as being necessary or appropriate for purposes of the plan... (B)(i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking; (iii) the applicant will ensure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild...(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.⁵²

These terms and conditions, according to congressional records, were set in place with the understanding that entire ecosystems were of concern in a broader context, outside of protection of an individual species; this allowed protection of unlisted species to be included in a plan. The House Conference Committee on the ESA Amendments of 1982 emphasized that “to the maximum extent possible” the plans should be developed “encouraging creative partnerships between the public and private sectors and among government agencies,” in order to fulfill the intention that the plans become an “institutional framework” to reduce conflict under the ESA.⁵³ Importantly, the committee noted that development and implementation of the plans would be expensive, perhaps in the millions of dollars, and due to the need for long-term permits (the report notes that significant development projects take many years to complete), “adequate assurances” to the development and financial communities were included in the amendment to provide “sufficient incentives” for private sector participation.⁵⁴ The “assurances” and “incentives” promised to the private landowner came to be known as the “No Surprises” provision.

No Surprises

Arguably the most controversial provision of the amendment, “No Surprises” referred to the notion that once a plan was in place, the landowner would not be forced to re-

negotiate the plan in the event of a reasonably unanticipated changed circumstance affecting a listed species, nor would further mitigation be imposed under subsequent listings. In other words, once a HCP was permitted, even if a species present was listed at a later date, no new protection requirements would be imposed. The “No Surprises” provision added certainty for the developer or private landowner. And, as legislators noted, the public would benefit as well from the “positive effect expected on the environment because these assurances act as an incentive for non- Federal entities to seek HCPs and to factor species conservation needs into national resources management decisions.”⁵⁵ Indeed, between 1982 and 1993 only 34 plans were approved; the “No Surprises” rule was added in early 1994 and by 1998 the number of HCPs approved had quickly risen above 200.⁵⁶

In July of 1998 a legal challenge to the “No Surprises” rule was brought in *Spirit of the Sage Council, et al vs. Gail Norton, U.S. Secretary of the Interior, et al*, the plaintiffs arguing that the “No Surprises” extended unprecedented regulatory assurances to Incidental Take Permit (ITP/HCP) holders without requiring that the plans be compatible with species protection and recovery and was therefore a violation of the ESA. The plaintiffs contended that issuance of an ITP/HCP under the ESA obligated the permit holder to promote recovery of species covered by that permit.

While the court was considering the case, the USFWS introduced the “Permit Revocation Rule” (PRR), limiting the circumstances under which an HCP may be revoked in light of “No Surprises” thus compelling the plaintiffs to file an additional

complaint. The additional action argued that the PRR implementation had violated the Administrative Procedures Act's (APA) "notice and comment" requirements and that the USFWS's PRR standard for revocation of an ITP/HCP was improperly drafted in discretionary rather than mandatory terms (*Spirit of the Sage Council, et al vs. Dirk Kempthorne, Secretary of the Department of Interior, et al*) and should be struck down. The case lasted nine years and initially in late 2003 resulted with the court granting Spirit of the Sage Council a memorandum opinion and order finding that the PRR had violated the APA, remanding and vacating the PRR, and remanding the No Surprises Rule. In mid-June 2004, the court enjoined the U.S. Fish and Wildlife Service from issuing Incidental Take Permits containing No Surprises assurances.⁵⁷ Although in late June of 2004 a memo to its regional FWS directors in California and Nevada added that the order did not prevent the agents from approving Incidental Take Permits that did *not* contain the "No Surprises" assurances.⁵⁸ By December of 2004 the USFWS had complied with the public notice and comment procedures (over 250 comments were received) as required by the APA and the "No Surprises" provision was reestablished.⁵⁹

The final ruling on Spirit's facial challenge to "No Surprises" was issued in August of 2007, with the court concluding that the "No Surprises" rule followed the congressional intent of the Section 10 (a) permit in that it established "adequate assurances" to private land holders with an incentive to apply for ITPs and was therefore consistent with the ESA. The court also decided that the ESA does not require that ITP/HCPs promote or maintain the protection or recovery of species and that the permit revocation standards are discretionary rather than mandatory because the FWS have the

responsibility of a thorough investigation prior to revocation and the authority to exercise discretion when so doing, therefore it is rational to phrase the rules in discretionary terms.⁶⁰ Plaintiff's allowed their appeal to the facial challenge to go beyond its statutory limitation, therefore limiting further challenge to "No Surprises" and to its application in a particular ITP/HCP. The decision in this case established the legal assurances necessary to begin establishing HCPs on broader scale.

Conclusion

The Tellico Dam case made the economic and political risks of the ESA's inflexibility clear to Congress. Congress responded by amending the ESA and forming the Endangered Species Committee, which had the authority to exempt government actions affected by the ESA. The Palila cases, however, broadened the definition of take to include non-Federal lands. As a result, actions on private land, such as home building, became subject to the ESA's provisions, making it possible for the discovery of endangered species to halt the construction of housing. After Palila, groups seeking to halt or slow development could invoke the ESA when endangered or threatened species were discovered on wild lands at risk of being developed.

San Bruno Mountain is an example of a local grass roots environmental interest group employing an endangered species to do just that. The mountain was originally

slated to have 200 million cubic yards shaved from its peak in preparation for expanding San Francisco International Airport and to add 8,500 homes and two million square feet of commercial development. The Committee to Save San Bruno Mountain fought in court for twenty years to stop the plans. Discovery of endangered butterflies on the mountain led to a collaborative effort that brought the County of San Mateo, the FWS and CDFG, the surrounding local governments and the Committee to Save San Bruno Mountain together to negotiate a plan that would allow for limited development if a plan were established that would protect the most biologically sensitive portions of the mountain. The San Bruno HCP resulted in protection of the entire mountain; however, 295 acres, as agreed, have been developed. Nearly 2,000 acres are protected into perpetuity and an extra 800 acres of land owned by the developer have been incorporated into the HCP as mitigation for impact on the Callipe Silverspot's habitat. If not a definitive blue print for future HCPs, San Bruno Mountain did become an example of the possibility of future plans.

The No Surprises suit nearly brought the HCP model to a halt. The Executive Director of the Spirit of the Sage Council, the plaintiff in the case, took part in the WR MSHCP's Advisory Committee. It is important to note that she left the committee of her own accord, insisting that the ESA should not have been amended and that the premise [of HCPs] is illogical and dangerous and that the plans were not meant as conservation plans but are instead development plans.⁶¹ It is difficult to determine whether the No Surprises law suit was the result of her experience on the Advisory Committee but her fellow committee members complained that she refused to compromise on any points.

The No Surprises law suit highlights that the HCPs hinge on the plan's legal framework and the certainty it provides for all stakeholders, but property owners and developers in particular.

Chapter 3: California's Initial Regional-Scale HCP

In this chapter I describe how the largest single land holder in Orange County, California, the Irvine Company, developed the prototype for HCPs in California and across the country. The Gnat Catcher is the small bird discovered on Irvine Company land that had been slated for development. The Company's executives used their political clout to bring a powerful and varied group of wildlife officials, state and local politicians, and environmental activists to the table to hash out an agreement to conserve the larger portion of the property and conserve the remainder. In the process, the Irvine Company fundamentally changed how it viewed its legacy as stewards, not simply owners, of the land.

The first landscape scale HCP was initiated by Orange County, California's Irvine Company, whose vast land holdings covered a large portion of the county. The Irvine Ranch land was originally purchased in the late 1800s, derived from former Spanish and Mexican land grants. The grants were later given valid title from the U.S. Board of Land Commissioners, per the Congressional California Land Claims Act of 1851.⁶² Use of the land focused largely on cattle ranching, although the Irvine Company eventually scaled back its livestock business and became primarily an orchard and crop-growing enterprise. In 1960s the Irvine Company sought to develop a large portion of its land and build homes and business properties for the county's growing population to accommodate the

influx of newcomers to the region. As more dwellings were needed when the county began to grow to the south, the vast Irvine Ranch land holdings made it possible for noted architect William Pereira to design the city of Irvine, one of the first planned cities in the United States.⁶³ Pereira sold his vision of “people of economic diversity living in an environment that respected the natural surroundings”⁶⁴ to the Irvine Ranch Company, which had “acres and acres of empty land”⁶⁵ and was eager to develop land that was no longer economically tenable exclusively for agricultural use, cattle grazing, or as fallow land.

In 1983 Irvine Ranch Company Chairman Donald Bren bought out five of his partners at the Irvine Ranch Company, which gave him close to 90% of the company, and following several years of merging various holdings became the principal owner and CEO of The Irvine Company in 1996. Bren retained Pereira’s urban planning model that served to guide the design of the initial phases of the community, developing a mixture of single and multi-family dwellings built in “villages” connected by pedestrian paths and bridges. As the now-incorporated city of Irvine grew, it found itself at the center of conflict over development of the remaining Irvine Company land, “and at the heart of efforts to resist it.”⁶⁶ In 1986 Irvine voters elected a slow-growth council; the movement that campaigned to elect the new council also spawned the slow-growth advocacy group Citizens for Sensible Growth and Traffic Control.

In 1987 the group took part in drafting a countywide slow-growth initiative to be added to the June, 1988 ballot. The required signatures were submitted in a coffin,

“representing the death of continued growth in the county.”⁶⁷ However, Orange County continued to grow in spite of their threats, as in-migrants from across the country and established residents raising new families added to the county’s population and to the need for additional dwellings; the initiative ultimately failed. A former senior vice president of residential sales and marketing for the Irvine Company remembers the push to get multi-family housing in particular completed before single family homes were occupied, in the hope of avoiding contention over surrounding development that had long been planned: “[Irvine Company executives] defined “no-growthers” as ‘the last person to close escrow.’ In an effort to deflect the contention over growth, we established a policy that is still in use today of erecting signs on Irvine Company property that announce future land-use plans of undeveloped parcels. For example, a sign might say, “The Irvine General Plan shows this ‘so many acres’ as future residential.””⁶⁸ This practice met with limited success in reducing the inevitable conflict from residents who moved into the community then sought to halt the establishment of the remainder of the community as planned.

California’s planning and zoning laws were evolving to reflect the desire for expanded public participation in land-use decisions. Environmental Impact Reports (EIRs) required by the California Environmental Quality Act (CEQA) mandated a public review period following completion of the draft EIR. According to the California Governor’s Office of Planning and Research, the state’s land-use law:

“provides that aggrieved agencies, project opponents, and affected residents may bring suit against the land-use decisions of state and local agencies. In practical terms, nearly anyone can sue once a project has been approved...when the prerogative to bring suit is abused, lawsuits can delay development, add uncertainty and cost to the development process, make housing more expensive, and damage California’s competitiveness.”⁶⁹

The ensuing legal battles place development projects in a holding pattern that can last for years, often rendering them financially and politically untenable.

Eventually, a mobilized citizenry and a combination of federal, state and local regulatory constraints in the name of the environment with growth controls that limit the number of dwellings in an area made residential and infrastructure development so complex and arduous that according to UC Berkeley urban scholar John Landis, “[n]o one, save perhaps a few land-use attorneys, completely understands California’s developmental approvals process.”⁷⁰ The process had become very contentious, expensive and drawn out.

As Orange County came close to being “built out” and critical decisions about the remaining developable land became fertile ground for controversy, the county became a particularly appropriate model of a changing paradigm that began to take hold even in the midst of a county whose politicians and land-use officials were known for their developer-friendly policies. A combination of environmental and growth-limiting

activists had become a formidable obstacle to Orange County's developers who found themselves faced with the threat of expensive law suits and delayed projects, when targeted by advocates seeking a voice in land-use decisions (or hoping to halt projects altogether). The interest groups found themselves at odds with the political power of developers and believed that their concerns would only be taken seriously under threat of legal action, which they began to employ, initially with checkered success. The ESA's regulatory strength, however, held the promise of affording them the clout necessary to significantly shape the development process.

Discovery of species listed as threatened or endangered on property slated for modification due to development triggers Section 9 of the ESA. This provision of the ESA prohibits taking of listed fish or wildlife, a designation that the FWS broadened to include modification of habitat critical to the endangered species' breeding, feeding, and behavioral patterns. The California gnatcatcher (*Polioptila californica*) became the perfect species for interest groups to petition for listing under the ESA. It is a small, gray bird that is fussy about its habitat. The species is found only between the Los Angeles basin and northern Baja California, "on land that is undeveloped, not too high, not too steeply pitched, and, for the most part near the ocean, which is to say that Gnat Catchers inhabit some of the most expensive real estate in the world."⁷¹

The Irvine Company, seeking to ease conflict over development of their vast land holdings by referencing the San Bruno Mountain model of collaborative negotiations, under the auspices of a federally permitted habitat conservation plan, was instrumental in

crafting legislation at the state level (AB 2172) that set a path toward implementation of the first large-scale multiple species habitat conservation plan in California, the Natural Communities Conservation Plan (NCCP). The drive to introduce the legislation was instigated by the proposed listing of the California gnatcatcher under the Federal ESA.

Former Interior Secretary under the Clinton Administration Bruce Babbitt writes that the people of California were “ready to accept Federal leadership” in working out “the conflict between habitat conservation and development,” because of the anxiety over growth. However, officials at the state and county levels and leaders of the local development community weren’t as keen to relinquish their power over land-use decisions as Babbitt claims. Monica Florian, an Irvine Company executive whose efforts were key to adoption of the NCCP, wrote to Doug Wheeler, Secretary of California Resources Agency under Governor Wilson, suggesting that preservation of coastal sage scrub, habitat vital to a number of species and itself in danger of disappearing, would in turn protect the small bird, making it possible to avoid its listing and that of other species as well. According to Babbitt, in the early 1990s when the proposed listing of the California gnatcatcher -- a bird reliant on Southern California’s coastal sage scrub for nesting and foraging -- was sent to his desk, he did not pay sufficient attention to the land-use implications:

[Coastal] sage scrub extended across much of the best (and highest priced) undeveloped land remaining between Los Angeles and San Diego. And that meant, under law, the land could not be disturbed unless and until such time as we

could work out a habitat conservation plan that would permanently dedicate enough coastal sage scrub habitat to guarantee survival of the species. By placing the gnatcatcher on the endangered species list, we [would], by operation of law, drop a blanket development moratorium on much of the remaining developable in the fastest growing real estate market in California.⁷²

The Irvine Company fully understood the implications that the proposed listing of the California gnatcatcher would pose to development throughout the county. Landowners who violate the take provision (Section 9) of the ESA face both civil and criminal penalties from \$25,000 to \$50,000 *per violation* and up to a year in prison. Further, both the government and private individuals have the power to bring an injunction against take of a listed species. Indeed the two major points of debate in the state legislature that challenged adoption of the NCCP/HCP process from the beginning concerned the strength of regulatory enforcement needed as “incentive” to implement the voluntary program and the assurances that once a plan was in place no further requirements would be imposed (the “No Surprises” provision) on the NCCP should species not covered under the original agreement be discovered. The proposed California legislation departed from the Federal ESA’s habitat conservation plan (HCP) project by project concept in that its focus was characterized as a “pro-active,” broad, ecosystem approach that would, according to Florian, “eliminate the need for species listing; but if future listing of a species already covered by the NCCP did prove necessary, no mitigation beyond that

designated in the NCCP would be required,”⁷³ the notion that later proved to be a sticking point in negotiations (and became the basis of conflict over the No Surprises policy).

Bruce Babbitt writes that California Secretary Wheeler’s considerable effort to institute the NCCP on a voluntary basis met with little success because it lacked “meaningful regulatory sanction,” which would have been provided by listing the gnatcatcher as endangered under the Federal ESA. Wheeler counters that his office opposed listing of the gnatcatcher because it believed that landowners would be less likely to participate in a mandatory federal program, instead devoting their effort to fighting the listing and the potential liability under Section 9 of the Federal ESA.⁷⁴

Indeed, Babbitt was up against conflicting interests on several fronts: The Irvine Company informed him that it would consider joining building industry groups in filing a legal challenge to an “endangered” gnatcatcher listing by the Federal government;⁷⁵ California Governor Pete Wilson was unwilling to cross the development interests and sought instead to implement the NCCP on a voluntary basis, refusing to list the gnatcatcher at the state level; the Natural Resources Defense Council (NRDC), an environmental advocacy group, had petitioned for the gnatcatcher listing and sued the state of California over protection of the bird under the state’s own California Endangered Species Act (CESA), arguing that there were fewer than 2,000 nesting, surviving pairs in the state; President Clinton expressed concern that his performance was being weighed against his campaign pronouncement that “[y]ou can be both pro-environment and pro-growth;”⁷⁶ and there was Babbitt’s own public claim that

“[r]esource development, the creation of jobs, the sustaining of communities, can be reconciled with a high degree of environmental protection,”⁷⁷ all of which contributed to Babbitt’s decision to change “not the [ESA] so much as how it’s applied.”⁷⁸ Calling his decision a “political compromise,” Babbitt took the middle ground on the gnatcatcher and on March 25, 1993, listed the bird as threatened instead of endangered.

Listing the gnatcatcher as threatened enabled the use of Section 4 (determination of critical habitat solely on the basis of scientific and commercial data) and Section 6 (authorizing the Interior Secretary to enter into cooperative agreements with any state that establishes and maintains a program for conservation of threatened species) in support of the NCCP. Under the “threatened” listing, taking of gnatcatchers would be allowed as long as it occurred during activity conducted in accordance with the NCCP. If a landowner chose not to participate in the NCCP, the section 4(d) rule would no longer apply and the land would be subject to a typical project by project FWS review under the Federal ESA.

Although the NCCP Act’s provisions were similar to Section 10 (a) of the Federal ESA, which granted incidental take permits (ITPs), there were some fundamental differences. While NCCPs allow “taking” of listed species, just as under an HCP agreement, instead of following standards for reducing the impact of the taking, the plans call for an agreement that conserves land and manages a broad group of species, including those *not* listed as endangered or threatened, in the hope of avoiding future listings. Thus the NCCP would fulfill compliance with both state and federal endangered-

species laws without imposing new regulations or rules, and with the added incentive of assurance to enrolled landowners of no further conservation requirements beyond the original agreement, the “No Surprises” provision. Conservation biologists acting as a “scientific advisory panel” would assess applicable lands and determine which areas were most biologically sensitive; those areas set aside for conservation would act as mitigation for development of the least biologically sensitive areas.

California’s state assembly passed the NCCP (AB 2172) unanimously in June of 1991. An amendment was added in July of that year making it possible to eventually expand the scope of the program beyond the southern California region in case Orange County’s pilot program proved a workable solution to the political impasse over growth and conservation. Babbitt explains that Orange County was chosen as a pilot program due to the advantage of having “just one landowner who really mattered: the Irvine Company...[which] was actually just one person, a share holder named Donald Bren...accustomed to having things done his way and to public officials who understood who was really in charge.”⁷⁹ Even with the support of the Wilson administration at the state level and the Clinton administration at the federal level, it took a concert of people in positions of power to implement Orange County’s first NCCP.

Orange County's NCCP

Intended as the “prototype” of multiple species HCPs, Orange County’s Central Coastal NCCP paved the way for the more complex multiple-species HCPs, although it earned the reputation for being what one county land-use official called an “odd duck,” owing to its comparative simplicity and its almost ad-hoc negotiation structure.⁸⁰ The development phase of the plan was the responsibility of the county as the lead agency. County officials generally knew where the broad areas of development would be and the extent and type of development the Irvine Company planned because the company already had entitlements in place when the institutional structure of the negotiations began to take shape. This meant that the company was not tasked with concurrent negotiations with the county, the California Department of Fish and Game (CDFG), and the U.S. Fish and Wildlife Service (FWS). Thus, in this case at least, negotiations over the NCCP basically came down to negotiating over the mitigation for the planned development, that is, 1) how much land would be dedicated for preservation, 2) how much money would need to be endowed to manage the land and how to attain the necessary funding, and perhaps most important, 3) which lands would be dedicated for preservation.

Prior to the introduction of the NCCP, resource agencies would negotiate a HCP on a project-by-project basis with the landowner, deciding which land was set aside in a conservation easement but with no management program associated with the land. Without an endowment in place to manage it, the land would languish in a state of

neglect, lacking improvements to the habitat and a determination of the biological and environmental consequences of conserving the land. The so called “adaptive management” program established through a NCCP recognizes that stewardship of the land is more than simply placing an easement over the land; it also means examining the biology at a landscape level and establishing biological connections to surrounding lands. In addition, adaptive management entails biological monitoring and re-evaluation of the plan to track compliance with implementation agreements, measuring the status of protected species, and subsequently “adapting” or revising conservation strategy as necessary.⁸¹ As a result, a portion of negotiations would involve assurances that the financial backing was in place to support the plan for the length of the permit.

The county began the Central Coastal plan by establishing a non-profit entity, the Nature Reserve of Orange County, to act as a coordinative body that would facilitate communication among the landowners and manage the open space that was the subject of negotiations. The Irvine Company had leased out the land for cattle grazing, which destroyed much of the native habitat. In some areas there was little left other than invasive and exotic plant materials, which meant that the land needed to be restored. Although the Irvine Company was the major landowner and the only private landowner, the Metropolitan Water District (MWD), Southern California Edison (SCE), and the Transportation Corridor Agency (TCA) were quasi-public entities that held limited interests in portions of the land as well. The TCA was seeking to build a 67-mile network of toll roads throughout the county and had met with strong resistance from environmental groups. Whereas the Irvine Company put up the land for the NCCP, the

other landowners donated funding, including a partial (2/3) endowment from the TCA for the management of the land, which is required once permits are granted by the resource agencies. According to the county's planning director, this initial NCCP was mainly "done top down, [negotiating] with the resource agencies...Babbitt wanted it to happen, Wheeler wanted it to happen, and the Wilson administration supported it, so they more or less used their political clout and pushed the permits through."⁸² While this assessment may be technically accurate, it does not account for the years of negotiations at the local level that were not as visible but still vital to the plan's outcome.

If the process were to reflect the original participatory intent of HCPs, various "stakeholders," such as land owners, local land-use officials, environmental groups and state and federal resource agents would have to work collaboratively to hammer out a plan proposal and submit it formally to the California Department of Fish and Game (CDFG) and the U.S. Fish and Wildlife Service (FWS) for approval. The county's planning director notes however, that a significant impediment to initiating the negotiation phase of the plan was that there was no definitive model nor were there performance standards for how to establish a negotiation framework for broad-scale HCP permitting. Landowners seeking a NCCP/HCP are not legally required to establish a consensus process during the development phase of a plan. Only the applicants or signatories to the permit (the landowners), local land-use officials, and the resource agencies are required to participate in negotiations. An Irvine Company executive maintained that it was the regulatory hammer of the ESA and not legal threats from the environmental community that compelled the company to seek a collaborative solution.⁸³

However, if they also initiated the process with the intent of gaining “certainty” that they could proceed with development without the constant threat of lawsuits halting their projects, meeting that goal meant that the environmental interests, historically their keenest adversaries, would have to be invited to take part.

A key participant and wildlife scientist who was the Director of the Audubon Society’s Starr Ranch Preserve contended that the Irvine Company, for all its vocal support of the NCCP, would not have invited them to the bargaining table had the environmental groups that took part not been well- organized, experienced, and had “several law suits under their belts” and the threat of more hanging over the Company’s head: “Without that, there would be no other reason to talk to us.”⁸⁴ This was certainly the case when it came to the TCA’s long-fought legal battle over its proposed transportation corridors. According to the TCA’s general counsel, “The NRDC brought multiple cases with the intent of halting the TCA’s proposed transportation corridors. They sued under the ESA, the Clean Water Act (CWA), the National Environmental Quality Act (NEPA), the Coastal Act; we had lots of pieces of litigation. [The TCA] ended up winning them all, but frankly, it was a huge and expensive battle.”⁸⁵ “Still, the litigation fees are not the big costs; the real huge expenses are found in the associated construction delay. The Foothill South [transportation corridor] delay costs were three million dollars a month.”⁸⁶ The TCA was ready to work out a solution with environmental interests included. Those who were included as environmental stakeholders were not part of the negotiations between the applicants and the resource agencies, as these are considered private. Instead, a secondary or advisory committee that

included decision-makers from the signatory group met with the stakeholders on a regular basis over a six-year span to negotiate the shape of the NCCP.

Who to include and exclude in negotiations was a decision shared by the several permit applicants. In this case, the environmental elites themselves pressured the NCCP applicants to exclude what the Starr Ranch Sanctuary Director called environmental “hardliners” from participation in the negotiation process. He explained that “this was appropriate because *we* had put forth the effort. Although it’s for the public good, it’s *our* deal and we could involve who we want and keep some people out. Not so much because of their beliefs regarding conservation, or how valid their positions were, but because their contention and lack of flexibility put a cog in the works...we needed to make progress, move the process along...the point was to reach resolution.”⁸⁷ He and his colleagues saw themselves as scientists who understood the biology of the land in question; rather than simply seeking “open space” they considered themselves advocates for science-based conservation that would protect the land and preserve the ecosystem.

Irvine Company executives had argued from the beginning that introducing a conservation/economic development balance would separate the “no-growthers” and the NIMBYs (not in my backyard) from the serious conservationists;⁸⁸ they readily agreed that participation needed to be limited and concluded that they needed a “core group” who could “speak for and to the environmental community,” acting as representatives and keeping the members of their respective organizations informed as negotiations progressed.⁸⁹ One of the most influential participants, a scientist with years of activist

experience as president of a self-described grass-roots preservation organization, the Laguna Greenbelt, underscored her Audubon colleague's position on limiting participation to those who came to the table willing to reach a compromise. She argued that the whole point of negotiating is that "you have to care that it works for the other person with whom you are negotiating, otherwise it's a win/lose situation and that is antithetical to a process based on compromise. The best participants are those who don't take it personally."⁹⁰

The Nature Conservancy (NC), a conservation advocacy organization known for non-confrontational methods, was also invited to participate when negotiations became difficult "in order to insure that there was a sustained participation by key players...so that they wouldn't drop off and then later say that they didn't participate, therefore they didn't like the results."⁹¹ The NC's representative, who acted as a facilitator during an impasse in negotiations, noted that some who wished to take part were excluded because of their "pathological hatred" for the Irvine Company and their resistance to allowing any regulatory compromise under the NCCP that would permit use of the land for development. "What we needed," he commented, "were people that were two things – one, committed to the [NCCP] process and clearly understood what they wanted to get out of it, because that way they had a measure of whether the process achieved the intended goal they hoped to reach. And two, understood that a compromise meant that portions of the land would in fact be developed."⁹² Those who were left out of the negotiations became known as the "fringe folks" and included a group that professed to promote biological diversity and had gained a reputation for waiting until completion of a

plan in order to file suit against it, and several “neighborhood groups” that sought to halt development entirely, or at least to slow the pace of growth in Orange County.

A major point of impasse for all of the proposed plans was the previously mentioned “No Surprises” provision, which stipulated that in the event of a new species listing after a NCCP/HCP was permitted, no further mitigation would be required. An Irvine Company senior executive recalled that he had “nearly walked” when the environmental contingent balked at the “No Surprises” part of the plan. At that point he offered an ultimatum that the “No Surprises” provision remain as part of the plan or “that’s it.”⁹³ The development community understood the provision to be their all-important “certainty” and to provide the legal framework that was their incentive to participate. Without it, they would be open to continually re-negotiating the entire plan with each added listing. The Orange County environmentalists acquiesced, but the founder of the Spirit of the Sage Council, who had been marginalized as a MSHCP participant in the adjacent county of Riverside, filed suit against the federal government to stop “No Surprises.” Her unorthodox manner and fierce opposition to HCP’s kept her on the side lines of the advisory committee in western Riverside County’s negotiations; hence she felt that her only option was to pursue legal action. She argued that the plans were “politically based, not species based.” She may have been one of the “fringe folks,” but had the final ruling been in the Spirit of the Sage Council’s favor, the plans would have broken down.

Local anti-growth groups and inflexible environmental organizations weren't alone when it came to digging in their heels when compromise was called for. Natural resource agents, both at lower and higher levels, looked at the compromise as a threat to their professional reputations. As other California counties began to propose plans, resource agency staff, tasked with evaluating the plans, was stretched thin, causing the process to be drawn out. Since there is no statutory time limit for processing a plan, the FWS often prioritized its time and staffing allocations without consideration for the applicant's timetable. It was Interior Secretary Babbitt who pressured federal resource agencies to assign top-tier personnel to take part in negotiations and review of the proposed Orange County plan; similar pressure was put on the CDFG and FWS staff that approves the permits.

Adopting the view of some of the more extreme environmental groups, the agents, trained as biologists and not as bureaucrats or government officials, reasoned that the ESA provided them the authority to halt all development in its tracks, so any action that did not work to stop development was viewed as failure. The wildlife resource agents saw themselves as being in the business of protecting the environment; compromise therefore was tantamount to defeat. It would be better *not* to compromise and hold up the permitting process and to be taken to task by agency management than to be perceived by one's agency peers as cooperating with the "enemy" (NCCP applicant) and making the process easier than was necessary.⁹⁴ The county planning director complained that the agents seemed not to understand that "decision making in a regulatory agency sometimes means making decisions antithetical to the personal beliefs and principles that brought

one to that field in the first place.”⁹⁵ The agents wanted the decisions to be made with the biology as the primary guide and the politics left out of the equation.

During the course of the negotiations, the environmental organizations argued over “where the wildlife is on the land, the import of connectivity for animal migration and that watersheds be left untouched (meaning that the tops of hills would be left undeveloped), while the Irvine Company was interested in hill tops for views and open meadows for golf courses.”⁹⁶ The crux of the argument between the development interests and the environmental interests was distilled down to the definitive statement by one scientist-participant: “They have a different view of the land.”⁹⁷ Over six years of negotiations, the differences began to soften and a more nuanced and integrated understanding of the land began to take its place.

The representative of the Nature Conservancy made it clear that they weren’t advocates for either side; they believed that the NCCP was good for conservation and their role was to make sure that the outcome led to its successful application. As a skilled facilitator, their representative was able to steer the negotiations away from bickering over which land should and should not be preserved, to a focus on protecting the species and habitat critical to species survival.⁹⁸ The Irvine Company later lamented not having negotiated for more land for recreation. Nonetheless, the company agreed to preserve 3,000 acres it had not intended to donate as the result of recommendations from wildlife scientists who had audited the land for coastal sage scrub, the gnat catcher’s all-important habitat.⁹⁹ Seeking further common ground, the NC facilitator also led participants toward

adopting the mantra, “we may not agree on much, but we agree on money,” referring to the considerable effort expended in seeking financial resources necessary to complete the funding gap in the NCCP’s endowment. He likened the NCCP negotiation process to that of a shot gun wedding, and implementing it to making the marriage last 50 years (the typical length of an incidental take permit).¹⁰⁰ Nature itself played a part in mediating the negotiations as well. The Audubon director suggested that some of the meetings be held at the Starr Ranch Sanctuary in a historic bungalow, where discussions often fell to a hush as a herd of deer would walk by the window. Whenever negotiations were held at the sanctuary, reminders of what a preserve would look like and what was being protected surrounded participants.

Aside from the resource agents, who sent biological and geographical information to the stakeholder meetings but did not personally attend, the participants came to know, respect and trust one another. These close relationships may not have been as readily developed had a broad base of participants been included in negotiations. NCCPs are premised on the notion that economic development and conservation are compatible and those unwilling to entertain a compromise would render the process intractable. During the six years of negotiations, the participants had developed “social capital,” defined by Robert Putnam as a community’s “web of horizontal cooperative relationships built on trust.”¹⁰¹ Virtually every participant interviewed mentioned that the trust developed during years of repeated interactions was essential to becoming willing to listen to one another’s ideas, respect each other’s goals, and learn from the knowledge each brought to the table.

Edward Weber and Anne Khademian (2008) argue that knowledge sharing and integration enhance collaborative capacity. Additionally, resolving particularly difficult and seemingly intractable problems and integrating knowledge will be an “ongoing effort as the [challenging] problem takes on different dimensions and participants in the... effort change.”¹⁰² The integrated basis of knowledge that emerged from the collaborative effort necessary to negotiate the NCCP became the genesis of a changing paradigm related to land-use and the protection of habitat for the county’s land-use officials, for the Irvine Company, and for the adjacent counties working on their own HCPs. The Director of the Starr Ranch adds that through the negotiation process, lawsuits were avoided and vastly more land was protected than would have been the case without the NCCP. The social capital that developed as a result of relationships that were formed during the six years of negotiations was essential to reaching a final agreement. Participants admit that it was getting to know and care about the welfare of one’s fellow stakeholders that built trust among the group. Without the trust that took six years to develop, noted one participant, “everything may not have been on the table. Some of us would have held back and we never would have come to a lasting agreement.”¹⁰³

Conclusion

The final agreement, signed in 1996, enrolled 21,000 acres in a reserve managed by the Nature Reserve of Orange County (NROC). “The implementing agreement of the

NCCP/HCP signed by all participants is in effect until 2071, with the understanding that the reserve lands will be permanently protected.”¹⁰⁴ Eventually, negotiations led to the county mapping out three “sub-regions” with open space (Central, Coastal and Southern) in which NCCPs were expected to be formed and a single “matrix” area that consisted of long-developed urban space. NROC now boasts of 37,000 acres in a reserve that protects a suite of 39 species. Under the NCCP, the county created a legal framework for those landowners inside the Central-Coastal sub-region but outside of the reserve, making it possible for them to cover their mitigation fees for development by paying a fee to the reserve. Not only do these funds go toward mitigation for development under the California Environmental Quality Act, the NCCP has the added benefit of allowing the developer to avoid negotiation with wildlife agencies over incidental take permits.

Having one major landowner made the negotiation process in the Central Coastal NCCP less cumbersome than its successors for a number of reasons, but particularly with regard to the biological studies and data collection that necessitate access to the land. Access to privately owned land isn’t always possible with fractured ownership of biologically connected lands, as was the case in MSHCPs in northern San Diego and western Riverside counties, both of which were initiated while Orange County’s plans were taking shape. Nonetheless, Orange County’s NCCP/HCP has served as an example of collaborative land-use planning based on the integration of economic development and conservation that Western Riverside County sought to emulate.

Chapter 4: The Stephen's Kangaroo Rat HCP and its Effect on the Western Riverside Multiple Species Habitat Conservation Plan

In this chapter I describe the Stephen's Kangaroo Rat (SKR) HCP and how it influenced planning of the WR MSHCP. The presence of SKR throughout the county meant that the land came under an economic cloud of uncertainty that led land owners to threaten the county with legal action, claiming inverse condemnation. The SKR HCP set the stage for skepticism when the WR MSHCP was proposed. The WR MSHCP was proposed as a means of mitigation for the County's future infrastructure and growth and of decreasing the possibility of environmental- related litigation. I focus on the plan's Advisory Committee, who were responsible for shaping the design of the plan's criteria area (explained below) and the process by which landowner's and the County could negotiate the acquisition of reserve land.

Introduction

During the building boom of the 1980s, the fast-paced growth in Riverside County was beginning to change the character of the landscape, spreading thousands of homes into agricultural areas and transforming the rural valleys and hillsides into suburbs. In contrast to other large California counties, more than 80% of the growth came not from “natural growth,” – the difference between births and deaths – but from people moving into the county from outside its borders, in large part due to the lower cost of housing relative to

coastal and northern portions of the state. Despite the slow growth sentiment that had become strong in Riverside County during 1980s, Measure B, a “growth management” initiative, was turned down by voters in November of 1988.

The loss prompted activists to seek growth control by focusing attention on discovery of threatened and endangered species in the county, thus relying on the state and federal wildlife agencies to control growth under the regulatory authority of the state and federal Endangered Species Acts. The Stephen’s Kangaroo Rat (*Dipodomys stephensi*) served as the perfect candidate to fit the role. The Stephen’s Kangaroo Rat (SKR) is a seed-eating, nocturnal rodent about two inches long with long, kangaroo-like legs. SKR’s habitat range is almost entirely confined to Western Riverside County and portions of San Bernardino, California.¹⁰⁵ A survey of the Stephen’s Kangaroo Rat had been undertaken by the California Department of Fish and Game as early as 1972 when the tiny rodent was found “in healthy abundance” throughout Western Riverside County and to a lesser extent in San Bernardino County. The author warned that the SKR’s future abundance “may change rapidly in the face of development.”¹⁰⁶ Indeed, by the 1980s the SKR population was decreasing significantly and it was placed on the federal endangered species list in 1988. Its discovery on land slated for development and on agricultural land triggered the necessity of take permits if these activities were to continue on the rat’s critical habitat.

Following the 1988 listing of the SKR, in 1990 Riverside County established the Riverside County Habitat Conservation Agency (RCHCA) to plan the Stephen’s

Kangaroo Rat Short-term HCP. By 1995 over 30 million dollars had been spent implementing the Short-term SKR HCP. During those five years the majority of private property under consideration for an SKR reserve was virtually unusable due to regulatory constraints.

Private Property Owners' SKR HCP Experience

One of the most challenging obstacles facing those who sought to establish the Western Riverside Multiple Species Habitat Conservation Plan (WR MSHCP) was the bad blood created during the execution of the county's SKR HCP. The development stage of the plan became highly controversial, prompting the county's affected land owners to claim that designation of their land as possible HCP sites for the SKR, "unfairly placed thousands of properties under a cloud of uncertainty."¹⁰⁷ In 1990 the Riverside County Habitat Conservation Agency (RCHCA), a joint powers authority chartered by the county and acting as the lead agency, approved an interim HCP for the SKR and designated 79,177 acres (37,221 acres private land and 41,956 acres public land) a two year "Study Area" while a permanent reserve for the rodent was in the planning stages. The RCHCA, consisting of nine board members, immediately established a strict prohibition against a SKR "take." During the planning stage, only 4,400 acres (or 20% of the 30,000 acres deemed occupied by SKR) were authorized as eligible for an "incidental take provision" that would allow for take of the SKR while carrying out otherwise lawful activity, and

then only for “essential public utility projects, and only with the specific approval of USFWS and CDFG.”¹⁰⁸

The take limitation generated virtually unanimous agreement among affected property owners that the plan was not in their best interests. Those whose land fell within the acreage deemed occupied by SKR were hamstrung by the short-term HCP’s absolute prohibition against incidental take, and those within the broader Study Area had their land placed in legal and economic limbo, which meant that they did not know whether the land would be subject to restricted use (or deemed totally restricted), acquired by the RCHCA, or a combination of both. Many landowners sought to have their property removed from the Study Area, claiming that the restrictions amounted to inverse condemnation since the time it would take to determine the conservation acreage needed meant that productive land would be left fallow.

The Borel family, who farmed over 10,000 acres, much of which was inside the Study Area, explained that CDFG officials flagged each SKR burrow on their land, requiring a 60 foot circumference buffer around each burrow, and limiting soil disking to 6 inches deep. (Disking is performed by towing a farm implement made of a row of vertical, sharpened disks approximately 18” in diameter behind a tractor to grade the soil.) The 60 foot requirement made it impossible to navigate farm equipment properly and the 6 inch limit was not deep enough to turn the heavy clay soils, which was needed to eliminate the invading weeds. A family member complained that “there were large portions of the property that we couldn’t farm because our farm implements couldn’t fit

between the radius we needed to stay away from each burrow and to reach the majority of the land we needed to farm.”¹⁰⁹ Each time the land was disturbed an expensive Environmental Impact Review (ERI) was required; to complicate matters, the wildlife agencies repeatedly argued that the biologists the family hired to write the EIRs did not meet their requirements and the reports would have to be re-written. The family eventually received an allocation of take under the interim HCP but it was limited to 37 acres of planting, four times a year or 148 acres, over a total of 370 acres. For the Borel family, “the [HCP] process and the cost of farming under their regulations were becoming futile.”¹¹⁰ The effort to gain regulatory relief by landowners through removal from the Study Area led to two amendment processes resulting in 39 boundary modifications to the Study Area. This in turn meant a lengthy documentation process, including NEPA and CEQA review, along with individual EIRs for each amendment. FWS personnel noted that the modification process “itself contributed to additional delay in preparing the long-term plan”¹¹¹ as did the numerous law suits filed by both property owners and environmental groups, which also drained the RCHCA’s financial resources.

The Morger family, for example, attempted to remove their 950 acre parcel of land from the SKR study area through the boundary modification process and was denied relief. While the property was under the Study Area an offer to purchase the land was made by the Baldwin Company, an Orange County land development firm, for approximately 18 million dollars. The offer was withdrawn when the family was denied a boundary modification permit by the FWS even though they offered to donate “major rat areas” for the SKR conservation and promised to fund acquisition of “additional rat

property.”¹¹² The Morgers filed suit against the FWS, the CDFG and the RCHCA claiming that placing their property under the SKR Study Area had, in effect, been a taking for public purposes without just compensation. The RCHCA countered that it was possible the property would eventually be released if it was not found to be necessary for establishment of a preserve and would, therefore, be free of development restrictions. But the Morger’s attorney argued that eventual release of the property wouldn’t change the fact that the taking occurred while the restrictions were in place and that the offer to purchase was lost at that time.¹¹³ Before the long-term HCP was in place the RCHCA had already spent 1.3 million dollars on litigation.¹¹⁴ Regardless, in order to meet the provisions of the federal ESA and California’s own ESA, a mitigation strategy for protection of the SKR through establishment of a preserve was necessary.

Adding to local angst over the SKR HCP planning was the FWS absolute prohibition against disking as a means of brush abatement around structures. However, annual weed abatement by disking is required of landowners by county law and enforced by the county’s fire department. (Dichotomous regulatory mandates whereby federal law contradicts state and/or county law were not untypical when single species HCPs were initially established, and provide one of the strongest rationales for adopting MSHCPs and NCCPs that “fold” agreements from all jurisdictional levels into a single overarching plan.) When property owners approached the FWS about the opposing regulations they were advised to mow the brush. The Domenigoni family, one of the largest land holders in Western Riverside, notified the U.S. Senate Committee on the Environment, subsequent to a report on the SKR controversy by the General Accounting Office, that

mowing was “not only infeasible, but likely to spark on rocks in our terrain and ignite the dry chaparral...Mowers are designed to cut grass and lawns, the blades on a mower are much smaller and they spin horizontally at high speeds, leav[ing] the roots and stubs of cut vegetation intact, requiring more frequent clearing.”¹¹⁵ Not only were the landowners threatened if they cleared the land for fire protection purposes, but also, in July of 1990, Riverside County Fire Captain Paul Smith received a letter from the FWS “emphasiz[ing] that the County could be considered a responsible party if any Stephen’s kangaroo rat was taken subsequently to issuance of a public weed abatement notice...disking...in potential habitat of this species puts the county and landowner at risk of violating Section 9 of the Endangered Species Act. Section 9 prohibits the ‘taking’ of listed species without necessary authorization. Civil and criminal penalties can be levied against responsible parties.”¹¹⁶

In October of 1993 a large brush fire broke out near the Riverside County town of Winchester that burned 77,000 acres and destroyed 29 homes. Yshmael Garcia, then 66 years old, who was left homeless in the blaze, testified in Washington D.C. (at the expense of the Riverside County Farm Bureau) before a senate hearing on the fires that the less effective “mowing” of the brush that the FWS allowed in lieu of the more effective disking “didn’t stand up to the flames.”¹¹⁷ Garcia was contradicted by a FWS official who cited a General Accounting Office report noting that the fire was so large “positively nothing could have stopped it,” however, “[t]he report omitted the views of fire officials that the federal prohibition on farming, plowing and grazing fields fueled the intensity of the fire.”¹¹⁸ Those who ignored the FWS restriction against building a

traditional fire break and disked close to homes and barns, claimed that it was no coincidence that their homes escaped the flames.

Michael Rowe, a Winchester landowner whose home was located in the path of the fire had been notified in a letter from the FWS that his land had “the potential presence of the federally listed endangered SKR...in the vicinity of [his] proposed fire break.” The letter warned Rowe that the law forbids, “annoying the rat to such an extent as to significantly disrupt normal behavioral patterns, which include breeding, feeding or sheltering.” The letter added that if he ignored this warning, he could be “liable for both state and federal prosecution.”¹¹⁹ Rowe complied with the letter until the fire bore down on his home, when he rushed out to dig the firebreak that saved his home. Word of Rowe’s actions quickly spread among the landowners in the SKR study area when he was featured on ABC TV’s “20/20.” These events set the tone for the congressionally-mandated public participation that is at the core of the HCP process.

The tone set by the controversy over the SKR HCP planning and negotiation phase influenced the framework of the Western Riverside MSHCP. (The Rowe family’s fire experience for example, led to the MSHCP’s flexible boundaries policies, mentioned later.) Many of the same participants who took part in negotiating the SKR plan were later involved with the county’s MSHCP. Participants were appointed by the County Board of Supervisors, that claimed to include all of the stakeholders they “could imagine”¹²⁰ to form a Technical Advisory Committee to offer recommendations for the interim plan. The committee included land developers, homebuilders, environmental

groups, county planners, farming interests, and representatives of organized groups of affected landowners. That committee disbanded when the interim plan was complete and work began on the permanent HCP. Most of the committee members remained involved and participated as the Advisory Committee (AC) to the signatories to the HCP, including the lead agency (in this case the county and participating cities under the RCHCA), which with the FWS and CDFG combined formed the Steering Committee.

Together, the committees that worked on the long-term plan were tasked with negotiating which land would be included in the reserves for the SKR. An acre of SKR occupied habitat had to be purchased or a land exchange agreed upon, or placed under a conservation easement as mitigation for every acre of land property owners desired to build upon or otherwise develop. The long-term plan eventually established seven core reserves totaling more than 41,000 acres (91% of which was privately owned), set aside from within a planning area of 533,000 acres.¹²¹

Participation and Negotiation – SKR Experience Shapes the WRMSHCP

Participants in the long-term SKR HCP were selected on the basis of what the RCHCA called key players whose “activities and decisions directed the outcome of the conservation negotiations.”¹²² In other words, those interviewed by the county to participate were formal representatives of local and regional conservation, agriculture, and development interests. (Defining stakeholders by their professional affiliation is at

odds with the theoretical literature that defines a legitimate stakeholder as one who perceives themselves as simply having the capacity to participate and is impacted by the actions of other stakeholders.) Small property owners were not included, and as a result, were not represented; in fact, many were never notified that a conservation planning process in which their land was considered was underway. Environmentalists complained that they were outnumbered by property owners, the Building Industry Association, and the Farm Bureau and that they were under-represented on the AC. While there was general agreement that the negotiation phase was open to public input, input was nonetheless limited by procedural rules. Although time was allotted for public comment, it was limited to three minutes per comment card, and forty one of the forty five public meetings were held during the work week and between 9 A.M. and 5 P.M. Holding the meetings during the typical work day effectively limited attendance to those who either worked for the government agencies involved in the planning or the employees of the private companies with interest in the outcome of the plans.

The extent to which formal participants felt they had influence over the plan varied widely.¹²³ In general, the wildlife agencies thought the public “really did influence the shape [and] substance” of the long-term plan, while landowners felt that their input “was wasted – that it was nothing but window dressing” and conservation advocates thought the public had too much input, which they thought led to not enough privately held land set aside for the SKR.¹²⁴ Members of the AC negotiated on a consensus basis and felt that only when they spoke as a whole and were in agreement did the Steering Committee and the RCHCA board incorporate AC suggestions into the plan. AC members felt that the

Steering Committee was “holding them at arm’s length” since they were not signatories to the final permit. An AC member with considerable experience in conservation negotiations noted, however, that the committee was highly polarized throughout the negotiation phase and the lack of agreement led to individual political struggles for the favor of the RCHCA board.¹²⁵ This was a learning experience for the SKR AC members who later participated in the MSCHP and it led to adopting pre-negotiations procedural agreements in order to avoid a similar scenario with the MSHCP.

An important issue in the SKR HCP that also shaped the MSHCP was the contention over who would shoulder the costs of species protection. Where would funding come from to purchase property slated for conservation and what about the financial impact of the attendant delay in land acquisition when monies weren’t readily available? The county set a “mitigation fee” of \$1,950 per acre for landowners and developers within the study area; the fee was applied whether SKR habitat was present on the property or not. (Once the long-term HCP was in place, the fee was lowered to \$500 per acre, although it remained at the original amount for building permit applicants.) The RCHCA admitted that purchasing property to provide a HCP with enough land to ensure protection of the species and earn mitigation assurances from the wildlife agencies was “beyond the purchasing power of the RCHCA.” Moreover, “[d]espite aggressive pursuit of available funding sources and Congressional lobbying...the RCHCA received no financial assistance from the federal government for implementation...” although the State of California “contributed approximately \$2.7 million in grants and land purchases.”¹²⁶

Property owners, developers and local politicians saw the mitigation fee as “clearly unfair.” The county attorney expressed considerable concern over the cost of potential inverse condemnation lawsuits from property owners who were “stuck,”¹²⁷ unable to sell their land while the possibility of it being included in a reserve was being determined and uncertain whether there would be funds to purchase the land if it was deemed necessary for acquisition under the HCP.

When a recession in the early 1990s began to slow the pace of developer fees, the acquisition of land for SKR reserves was further delayed, engendering hostility from landowners. The limited time of wildlife agency staff was drawn away from regulatory tasks in order to address the complaints resulting from the delays, leaving their permitting work unfinished and extending the finish date even further. The number two official at the Department of the Interior came to Riverside County several times in order to keep apprised of the SKR HCP progress, and in his words, “to stave off Riverside County from leading a potential national revolt against the EPA” over short falls in funding to purchase reserve land.¹²⁸ The plan was not completed until 1996. By this time, preliminary work on the Western Riverside MSHCP had already begun, with several participants involved on both fronts; plan advisors vowed that they would seek to avoid the pit falls of the SKR HCP but many landowners remained skeptical of the process.

The WRMSHCP Background

The WR MSHCP began as a three-pronged planning effort that included development of a new General Plan and a strategy for building transportation infrastructure, which made necessary the third element – mitigation for infrastructure through means of a multiple species HCP that would in turn comply with state and federal endangered species laws. According to former Riverside County Board of Supervisors member Tom Mullen (who later became the Director of the Riverside Conservation Authority), the Western Riverside MSHCP began as a means to accelerate the process of building transportation infrastructure in order to proactively prepare for the region’s growth. The Southern California Association of Governments (SCAG) predicted an 83% increase in the region’s population by 2025¹²⁹ and in 1988 the county’s voters had passed a half-cent sales tax increase for upgrading existing infrastructure and to fund future infrastructure.

As soon as projects began, they were mired in law suits brought by environmental groups claiming that the county hadn’t adequately examined the environmental impact of the projects. “While the wait for the law suit ran on, due to the time value of money, there were significant increases in the costs of materials and labor – in some cases, the material costs had almost doubled,” notes Mullen. “Clearly environmental laws, namely NEPA and CEQA, were being used in an attempt to stop, or at the very least to delay the transportation infrastructure.”¹³⁰ Since CEQA is essentially enforced by the community affected on a case-by-case basis, private and commercial development projects were

more difficult for environmental interests to curtail in terms of time and cost efficiencies. The [environmental groups'] focus was thus on more publicly-visible projects.”¹³¹

The Board of Supervisors had also wrestled with the county's General Plan that since 1982 had been updated in piecemeal fashion. The western portion of Riverside County is a vast mixture of agricultural, suburban, and rural land use forms spanning fourteen municipal jurisdictions with a host of small and large landowners and public and quasi-publicly owned land. By the 1990s, home building and the shopping centers and schools that accompany fast-paced growth meant that developers were frequently coming before the Board requesting amendments, “so there wasn't a cohesive picture of where the county was headed and what it would look like.”¹³² Mullen's solution¹³³ to these issues was the three-pronged planning approach that became The Riverside County Integrated Project (RCIP). The transportation planning portion evolved into a sister project that became the Community Transportation and Acceptability Process (CETAP).¹³⁴ The proposed project was met with mixed reaction.

From the perspective of biologist and Public Lands and Deserts Director Ilene Anderson of the Center for Biological Diversity, the MSHCP was proposed “[i]n an effort to expand urban development in the face of alarming declines of many plants and animals in the region...[and] is one of the most complex and risky habitat conservation plans ever attempted.”¹³⁵ Anderson argued that CETAP would promote “urban sprawl at the expense of endangered plants and animals” and was nothing more than “mitigation for the destruction of imperiled species.”¹³⁶ The building industry, which had found itself

just as mired in litigation over environmental issues as the county did, was looking for certainty and a stream-lined permitting process that met wildlife agency requirements and “got the Fish and Game [CDFG] and FWS off [their] backs.”¹³⁷ The county’s farming industry and many smaller property owners, who were in some cases still struggling with the provisions of the SKR HCP, were skeptical about the prospect of the county adopting a multiple species HCP that wouldn’t have a negative affect on their property values and property rights. The single species plan seemed tenuous to those who argued that the plan would be superfluous as soon as the next species listed as threatened or endangered was discovered in the county. It was amid this contentious atmosphere that county officials, along with state and federal wildlife agencies began the Western Riverside MSHCP/NCCP in 1998.

A Place at the Table: Who Participates?

The county sought to harness the efforts of its own land use officials, a variety of representatives for property owners and environmental groups, and to prepare a regional conservation plan that would be submitted to the FWS and the CDFG for approval. When take permits are issued by the agencies, the county is granted authority to administer the take allowances to property owners by means of sub-permits. The WRMSHCP/NCCP was begun by the county; the county, participating cities and the wildlife agencies were legal signatories to the plan. As such, they were not legally bound to include non-

signatories in the planning and negotiation process but county officials knew that without the participation of a number of key stakeholders, the plan would become mired in legal challenges.¹³⁸ Therefore, the county established two core committees, the Preparation Committee and the Advisory Committee. With an unprecedented plan of this size, the planning committees comprised a larger group of state, county, city, and wildlife officials than had participated in previous MSHCPs, while the Advisory Committee (AC) or “stakeholder” group largely remained the size of previous, smaller plans.

Theoretically, HCP planning and negotiations is a process that is stakeholder driven and open to broad public participation. When asked how the county decided who would participate, Mullen stated that “it had to be stakeholder driven, so we needed the property owners and environmentalists at the table if we were going to avoid litigation ...we were completely open with regard to participation.”¹³⁹ This may have been the case with regard to the formal participants, whose representation of participating municipalities, scientific evaluators, and wildlife agencies was vital to attaining the final take permit. However, for those who were “informally” participating (or who requested to be a stakeholder) in a so-called “advisory” position, that is to say, not *legally* required for the plan to be completed, inclusion was not guaranteed simply by the desire to be included in the process. A “fringe” group, some of whom began as Advisory Committee members and some, who were not included, disagreed with Mullen’s depiction of the AC as broadly inclusive.¹⁴⁰ Disputes over who should be a stakeholder are not uncommon in collaborative processes and are often due to historical relationships that influence perceptions of legitimacy (Gray, 1989). For those who had participated in the SKR HCP,

relationships established during negotiations made it clear which stakeholders were willing to compromise and which were inflexible. As will become apparent, acceptance as a legitimate stakeholder *within* the AC meant embracing the notion of willingness to compromise.

The Preparation Committee, which came to be known as the Steering Committee included approximately 90 members who were formal representatives and/or employees of state, county, and municipal political entities.¹⁴¹ Sign-in sheets handed in over the six years of planning indicate that between 20 and 30 members attended each committee meeting, with Riverside County Transportation and Land Management Agency's Richard Lashbrook serving as project manager until his retirement. The Advisory Committee (AC) included approximately 30 members, most of whom were owners of large property spreads or representatives of groups organized by property owners, building and development industry representatives, and representatives of environmental groups. Gary Wanczuk, whose family had owned a large swath of land in the western portion of the county for several generations, initially served as Committee Chair. After Mr. Wanczuk's death, his sister, Gail Wanczuk-Barton, served as Committee Chair. Most of the AC members had served in the same capacity on the SKR planning committee. The county had hinted to SKR HCP participants that a multiple species plan was under consideration, and several of those who had been or were still involved with those negotiations were asked by the county, or they themselves requested, to be included as stakeholders.

The Executive Director of the Endangered Habitats League (EHL), Dan Silver, a Los Angeles physician who stopped practicing medicine in his forties to advocate for environmental causes, participated as an AC member in this MSHCP/NCCP, as well as MSHCP/NCCP plans in Orange and San Diego counties. Silver has been accused of being an environmental “venue shopper,” and academic researchers raised serious questions about the legitimacy of his organization.¹⁴² Regardless, Silver is considered an influential activist for the protection of wildlife and land conservation in the environmental community and as a legitimate stakeholder by land use officials and wildlife agencies throughout southern California. Virtually none of Silver’s fellow AC members interviewed for this research objected to his inclusion in the process; rather, his participation was seen as essential to reaching timely agreements and he was held in high regard by the majority of his AC colleagues.

Silver was also asked to participate on the advisory committees of the General Plan and CETAP, which he described as “a huge commitment and investment in time,”¹⁴³ considering that he spent six years commuting from Los Angeles to Riverside throughout the process. Coming from a different perspective, the Riverside County Property Owner’s Association, a small lobbying firm based in Orange County representing a group of developers with land holdings in Riverside County was approached by the Board of Supervisors rather than having to request inclusion in the project. Their Director received a letter from the county’s Transportation and Land Management Agency (TLMA) inviting their participation in the MSHCP AC.¹⁴⁴ The Property Owner Association’s

representative accepted the invitation in an effort to “make sure that the land that was regulated was fairly compensated...property rights was [their] big issue.”¹⁴⁵

When asked whether any one group stood out as *lacking* representation on the committee, a participant who had also served on the SKR plan noted that, not unlike the SKR HCP, hundreds of smaller land owners were not only unrepresented at the table, but many knew nothing of the plan until close to its finalization in 2004.¹⁴⁶ There were also those who sought a place at the table and were explicitly denied inclusion, as well as those who were implicitly denied inclusion through stipulations placed on their input. A representative of the Borel family, who saw her family’s land depicted in a map announcing the beginning of the RCIP in a local newspaper, went to the county seeking information about attending the meetings and decided that it would be in her family’s best interest if she requested a spot on the committee. When she attended one of the initial meetings as a member of the public, she was turned down, because, in her view, she expressed her strong emotional reaction to the possibility of her family’s property being taken for a reserve.

Borel did attend the meetings for the first couple of years of negotiations; soon after the meetings began, those not on the committee were relegated to sitting along the wall, behind the committee members who sat at a U-shaped table. She made it clear upfront that the county wouldn’t get “one clod, not one speck of soil” from her family’s land for a reserve, since they’d already lost hundreds of acres for the SKR HCP. Borel was later told that her input must be limited to asking questions of the committee.¹⁴⁷ The Center for

Biological Diversity's Ilene Anderson was turned down as well, in her view because "I had some biological issues I wanted addressed. I was told to write out my concerns and what I wrote would be sent to the Steering Committee, but doing that would be awkward. How can you have discussion and clarify points or even be assured that the committee members read what you wrote? I would have written a tome and not been able to engage in discussion."¹⁴⁸ The Center for Biological Diversity (CBD) is known for its policy of "systematically and ambitiously" using lawsuits against government entities "by relying on donated time from *pro bono* attorneys at large firms [and] a full time staff of prominent environmental lawyers and scientists..."¹⁴⁹ Since a major objective of proposing the MSHCP was to avoid litigation that was slowing infrastructure and development, and given that the Board of Supervisors was aware of the CBD's reputation for bringing "no holds barred action on behalf of the world's most endangered animals and plants,"¹⁵⁰ Anderson was denied a seat at the table and remained seated along the wall during the meetings.

Leeona Klippstein, Executive Director of The Spirit of the Sage Council, was offered a seat at the AC table early in the process. She had attended a conference in September of 1999 at UCLA sponsored by The Society of Environmental Journalists, where she heard Mullen speak, saying that the proposed MSHCP would be an open, participatory and transparent process. She publicly challenged his assertion that the meetings were inclusive and in response he arranged for her membership on the AC. Klippstein had a reputation for organizing environmental groups in an effort to oppose any amendment to the ESA and she was not shy in making her views known. She also

began to push for more open meetings where the public would have a chance to speak, and once the public was given the ability to comment, a string of smaller land owners came to the meetings complaining that they were feeling left out a project that involved their property and they weren't being represented in the process. The meetings became so drawn out with interruptions that Klippstein's AC colleagues agreed to formalize the meetings, although Klippstein complained that "they became almost like city council meetings where we sat at a table while the public sat apart like an audience and they were given three minutes to speak but none of the AC members responded."¹⁵¹ She began to object to the process itself: "I began beating them over the head with science [because] the plans were not being developed in a scientifically correct manner...I suggested workshops [on the ESA] but was turned down."¹⁵²

Klippstein was philosophically opposed to the notion of a take provision from the start and angry that other environmental groups represented on the committee were "willing to give too much." She made it clear during AC meetings that she would not bend when it came to species protection and that meant she would not agree to incorporation of the No Surprises¹⁵³ provision of the HCP regulations into the MSHCP. The Spirit of the Sage was actively fighting No Surprises, which, Klippstein said, "made the Board of Supervisors hostile" toward her. Asked by the committee chair to sign an agreement saying that she would not object to the recommendations agreed upon by the AC, she refused. Since consensus was the essence of the process, there was little point in Klippstein remaining on the committee. She decided that she would "rather spend [her] time filing lawsuits" because "without the courts I had no voice;"¹⁵⁴ after attending

meetings on and off for two years, she stopped coming. Klippstein followed through with her threat. The legal challenge Klippstein filed in the name of The Spirit of the Sage against the No Surprises provision temporarily brought the HCP process to its knees.

Klippstein and Borel both complained that the time and places where the meetings were to be held “was never publicly announced” and that they were held at inconvenient times, always during work hours. Although coming to the MSHCP meetings from decidedly different points of departure, both came to the same conclusion: the meetings were frequent and went on for several years, so full participation by someone who was not retired, wealthy, or employed by a government entity or an interest group was financially and logistically nearly impossible.

Shaping a Consensus Method

The county hired a consulting firm to “facilitate the process” of bringing together stakeholders with opposing goals to take part in revamping the county General Plan and helping them to find a means of achieving “common ground.” Consultants from a company known as The Planning Center wrote a fifteen point agreement that they called the “Consensus Planning Principles” that was also meant to apply to the MSHCP AC and appeared as if it were endorsed by the AC. The agreement is described as being submitted to the Board of Supervisors for review by “a coalition of building industry, property

owners, and environmental interest groups” who sought to develop a plan with “sufficient measures of certainty, providing for a high quality of life, including reasonable accommodation of future growth, housing, biological and multiple species resources, agriculture, watersheds and scenic landscapes.”¹⁵⁵ The list of planning principles also declares that participants agree to reach consensus on such disparate notions as “promoting the continued viability of agricultural lands...” and “integrating a comprehensive Multiple Species Habitat Conservation Plan” while “acknowledge[ing] the rights of private property owners.” The planning principles also include that maps should be drawn considering “the availability of infill sites...proximity of existing infrastructure...conformance with the policies of communities of interest...reduction in land consumption per capita compared to current modes of development...encourage[ment] a wide range of housing choices...”¹⁵⁶ What the document lacked was an explanation of the manner in which the consensus planning principles listed by consultants would be actualized, given that the stakeholders approached the process from positions that were at odds, not only with the list of “principles” but with one another.

The MSHCP AC members decided to lay down their own ground rules for negotiations, agreeing that the Planning Center’s fifteen points plan wouldn’t work for them. The essence of the HCP process is that these are consensus-based plans but the players in the MSHCP AC knew from having worked together to hammer out a plan for the SKR that they were not beginning on “the same page.” With that notion as its point of departure, the AC decided from the beginning that they “didn’t want the ‘extremes’ to

dictate the outcome of the process,” and that “each [member] had to be willing to negotiate, to compromise, and to look at the big picture.”¹⁵⁷ The AC members decided that rather than agreeing to a set of principles that were in reality specific policies, they would hold to a process by which they would come to a consensus. They decided that with a “majority rules” vote expressing the preferences of the majority, although a majority of members would see their preferences met, there would be a minority whose ideas are left out of the mix; hence, the advisory policies formed would tend to lead to contention in the future.

It was agreed that in a consensus, the group would be 100% behind the policy suggestions that would be presented to the Board of Supervisors, even if none of the members were entirely pleased with the outcome of negotiations. The AC agreed that if they did not reach consensus, they did not move ahead.¹⁵⁸ Asked whether the AC ever came to an impasse using this method, AC members acknowledged that they in fact had come to impasse on occasion. To resolve an impasse, members decided that when one member, or a group of members, were strongly opposed to a policy recommendation to be sent to the Board of Supervisors, that group would write a “paper” explaining the reason for the dissenting opinion and their own group’s recommendation in its stead.

As the MSHCP process began to take shape, the Steering Committee proposed policy “alternatives” in the form of “strategy papers” and memos for the AC to review. The AC designed what they called a “matrix” that broke down the policy into phrases that the committee members would each evaluate using these instructions:

Per the 12-12-02 AC Meeting, it is requested that all members respond to each statement (or as many as you can) with ‘agree,’ ‘disagree,’ ‘not applicable,’ or recommended wording to which you can agree...Consensus will be noted where applicable and effort will be made to achieve consensus where possible....Further, acknowledging that the matrix does not represent all the concerns with relation to the Draft [MSHCP plan], it is requested that those with concerns be prepared to articulate them in concise fashion at the [next] AC meeting.¹⁵⁹

This was a “tool” with which the AC members intended to gauge overall agreement when they were presented with a large number of proposals to consider. One matrix, for example, listed 50 points for the committee to evaluate. The AC decided addressing every issue point-by-point would make meeting times too long and time could well be wasted on points with which there was already agreement. On the points where there was strong consensus, the AC could report back to the Steering Committee quickly and on those that proved contentious, the committee would deliberate further.

Negotiating the WRMSHCP

The Steering Committee and the AC were tasked with two basic goals: first, to leave the local community and its landowners significantly better off under the existing burden of

the ESA, and second, to provide for the sensitive species in Western Riverside County in a manner that is acceptable to the Resource Agencies and results in a MSHCP permit.

The crucial elements of a regional HCP of this scope are twofold: acquiring land in order to form a reserve system for those species the participants decide to cover under the HCP, and establishing a plan to manage the reserve system over the length of the HCP, both of which must meet the minimum biological criteria determined by the resource agencies or face the risk of permit denial. The participants understood that the most challenging part of the negotiations would be deciding which land was needed for a reserve system and how the land was to be acquired. This was a particularly difficult undertaking since much of the land necessary to assure that the resource agency's biological criteria were met was the property of many private landowners; therefore success was heavily reliant on their cooperation.

The AC was instructed that even if the MSHCP did meet the biological criteria, but failed to protect habitat and species as designed during implementation and operation, the ESA coverage (take permits) could be revoked at any time.¹⁶⁰ Additionally, there was the problem of finding a funding source when it was necessary to purchase land, which, while not their responsibility, if not met would make their efforts superfluous. However, as one AC member who served as Chair argued, "the county and the cities realized that there were big, looming growth problems that had to be solved. Even if the economy slowed, there would eventually be a tremendous amount of development coming to the Inland Empire and they had to address what it would like look and how it would be possible given the regulations under the ESA. They've got to have roads, housing and

services to accommodate the influx and that will mean making hard decisions about how the regulations are met.”¹⁶¹ For that to happen, the county needed political consensus from a meaningful sample of representatives from the region, which is how the AC saw themselves. But even with political consensus, the county was taking what Mullen called “a leap of faith” when it came to funding land acquisition; the lack of definitive funding sources became the Sword of Damocles over the MSHCP.

The AC began negotiations with the county’s original estimate that approximately 40,000 acres of privately held land would be required for a comprehensive preserve to cover listed species, which would include land the county set aside for the SKR reserve, plus land the county had already designated as open space. Gail Barton-Wanczuk (who chaired the AC following the death of her brother, who had been the chair) noted that initially the AC’s goal was “to cover as many species and get as many under the MSHCP as [they] could, perhaps 40,000 to 60,000 acres of private land, which sounded reasonable considering so much private land was already reserved under the SKR HCP.”¹⁶² But the wildlife agencies began to argue for the protection of species that weren’t listed, including proposed and candidate species and as the list of species to be covered by the MSHCP grew, so did the number of acres to be acquired, from 40 to 65 to 85 thousand acres to accommodate the need for more habitat.

Finally, county officials formed a RCIP subcommittee – with the members chosen from the MSHCP Steering Committee, consisting of the FWS, the CDFG and Dudek & Associates (the environmental and engineering company that had examined the land for

the county) – that issued a “Planning Agreement” to be signed by the MSHCP participants; the agreement changed the acreage to a higher estimate. The county had established that the “Plan Area” would include a total of 1,259,000 acres of land; the subcommittee decided that the MSHCP goal would be to conserve a “core” or “reserve” property of approximately 510,000 acres of land within the Plan Area, 357,000 acres of which were owned by public/quasi-public agencies (e.g., utility companies, special districts, and water department holdings) and was therefore already under county control. That would leave 153,000 acres of privately owned land for the AC and the Steering Committee to negotiate over, but taking away the AC’s part in deciding how much land to preserve established a feeling with some on the committee that their input was, from the beginning, not considered in a crucial decision.

AC members began to wonder whether the Steering Committee had “done their best” for local landowners. That is to say, was there a chance that the MSHCP could be deemed adequate by the wildlife agencies if only 120,000 acres had been slated for conservation? Could they have “gotten away” with less land? The AC requested to see minutes of the Steering Committee meetings to answer those questions and discovered that there were none kept, while the county required the AC to do so. The AC’s chairman asked to be included in Steering Committee meetings but was turned down, which was their privilege; the Steering Committee meetings were not open to the public. They were told that an AC representative could not attend Steering Committee meetings “when negotiations with signatories [were] taking place,” because “we can’t have *everyone* at the table.”¹⁶³ It wasn’t until close to the end of the process that Project Manager

Lashbrook formally met with AC representatives for their verbal input rather than relying on written memos.

The AC had agreed early in the process that they would sit down with maps of the Plan Area in front of them and “do a deal – this land for development, this land conserved – a ‘rough cut’ deal.”¹⁶⁴ The AC thought they should look at several reserve system alternatives and wanted to know what, in terms of mitigation assurances, they could expect with the acreage estimates they were beginning to develop. The FWS, however, didn’t give a clear indication of what assurances they could offer for how much or which land. The FWS refused to commit to establishing specific conservation criteria because, they argued, to do so would mean that they would, in essence, be designing the reserve system they themselves would be sanctioning and could therefore be held liable if landowners sued when their land was slated to be part of the reserve or sued by environmental groups seeking more conservation than the final plan included.¹⁶⁵ One AC member called it a “biological game of Marco Polo”...admitting that, in theory the FWS hesitancy made sense, adding however, that “we weren’t asking for a *final* commitment; we *were* asking for a commitment based on whether say, if we conserved ‘x’ areas, they would examine our submission and evaluate it within six months, and if so, we were willing to work with their direction and reach a goal that was realistic and achievable.”¹⁶⁶

The AC felt as if “they were being ‘arm wrestled’ because [they] knew that connectivity between parcels of land for preservation was important for species migration but just how much, and which land, was left a mystery. “We thought – if the FWS would

just give us a sense of where we needed to go with the plan area maps, but instead they would say ‘bring me a rock, no, not that rock’ which is a ridiculous waste of time. But [FWS] have the power; they have the power over permits.”¹⁶⁷ AC members complained that “the FWS wouldn’t return phone calls and ignored our pleas for some direction so that we wouldn’t be wasting our time, but they refused to live up to their commitment; after all, the FWS did sign the Planning Agreement, agreeing that they would do this.”¹⁶⁸ A terse memo was sent to the FWS (copied to AC members and RCIP committee members) by the Building Industry Association’s (BIA) representative on the AC, who argued that the AC had

entered into the negotiations based upon commitments from the FWS that we would reach a ‘go – no go’ scenario, in which they would give us rough estimates of the number, general location, and size necessary to obtain approval for a MSHCP covering the species identified by the AC. This problem MUST be resolved as the MSHCP Advisory Committee cannot function effectively as long as the U.S. Fish and Wildlife Service are permitted to arbitrarily violate terms of our Planning Agreement. FWS failed to provide criteria...necessary to comply with the Federal Endangered Species Act. FWS made it very clear that they will not fulfill this commitment. This first step is essential to the planning process and we are either held up without this information or must resort to uneducated guesses about the requirements of a plan that will comply with FWS standards.¹⁶⁹

This tug of war over conservation and species criteria and which land would and which would not meet reserve requirements became a significant point of contention between the AC and the FWS. One of the FWS representatives explained that some of the AC members “saw things differently than the FWS did. When the AC said ‘what rock?’ and we said ‘this rock,’ they said ‘no, not that rock,’ they didn’t want to hear the criteria...they would discount what we were saying about the criteria we said we needed because they didn’t want an area [of land] to be conserved.”¹⁷⁰ The FWS biologists on the AC felt that the dispute was aimed at the FWS as an institution and at their policies and not at the FWS representatives on the AC themselves; this, despite the fact that the conflict with the FWS’ regional office remained throughout. (This may or may not have been an accurate estimation of the dispute but at the very least it speaks to the respectful interaction that by all accounts was maintained throughout the project’s development.)

A number of AC members, however, questioned whether FWS representatives communicated AC concerns to their superiors on the Steering Committee. The senior FWS representative on the AC argued that when the AC came to something close to unanimous advice for the Steering Committee, the advisory position was passed on to FWS directors. The senior representative added that with regard to which land was best conserved and which not, the advice would have been that “the Farm Bureau thinks this, the Endangered Habitat League thinks this, but there was no single, general opinion on virtually any issue.”¹⁷¹ In response to the BIA memo in which several AC members

threatened to walk out of negotiations if the FWS did not offer mitigation assurances criteria, the FWS gave the AC a presentation on what sort of landscape system would meet their criteria, although the AC was not completely satisfied with the lack of specific information.

Congressional Hearing in Hemet

As frustration grew over what some AC members felt was intentional lack of cooperation from the FWS, a congressional hearing with the House of Representatives Committee on Natural Resources (106th Congress) was arranged in the Western Riverside city of Hemet. The hearing was chaired by the Hon. Richard Pombo of California and attended by five of his fellow congressmen; four from California and one from Idaho. Eighteen speakers testified with prepared statements, including representatives from the Steering Committee, the AC, and the county, as well as representatives of various water districts, municipalities, environmental groups, school districts, and the FWS Operations Manager, Field Manager, and the Counsel to the Assistant Secretary of the FWS. Rep. Pombo began the hearing expressing his concern that the ESA was being used “as a tool to stop growth and economic development...particularly here in the West,” adding that the ESA “is used very selectively, not to truly save endangered species, but as a means to allow federal agencies to dictate federal policies...to local communities on everything from urban sprawl to land use policies.”¹⁷² Rep. Ken Calvert, the local delegate to congress,

testified that the number of complaints about the FWS implementation of ESA regulations had “sky rocketed” in the six years since he had been in office and that as a result, he had called for a General Accounting Office (GAO) audit of the FWS practices in his district. Calvert said he understood that “Southern California is the most densely populated region in the U.S. and one of the fastest growing, which has resulted in growing pains that include additional stress on habitat. Riverside County’s first encounter with ESA problems was the fringe toed lizard, followed by the Stephen’s Kangaroo Rat which took years to complete at a cost of \$42 million. But the Carlsbad¹⁷³ employees have not consistently dealt with us in good faith.”¹⁷⁴ Several speakers testified to having hired reputable biologists to survey their land for species, only to be told by the FWS that they needed to do more surveys or that those that had been done were “inadequate” and another was needed; others complained of unreturned phone calls and even de-listing petitions being ignored.

Notable testimony was also presented by former Assistant Counsel to the White House and former General Counsel of the National Endowment for the Humanities, Hugh Hewitt (representing the Lockheed Martin Company, which was also represented on the AC by William Sullivan) requesting a systematic audit of the Carlsbad office by the GAO, specifically to “address systematic problems in the administration of the Endangered Species Act.” In particular, Hewitt cited the FWS’s “refusal to process Section 10 (a) permits in a timely fashion.” Hewitt testified that the process by which the FWS reviewed incidental take permits equated to a Star Chamber court ruling: “These permits are written so as to require that all survey data generated on private property be

turned over to the [FWS], and they are also written so as to enable the Carlsbad office to revoke or not renew the permits of biologists without appropriate judicial safeguards or checks upon this power.”¹⁷⁵ Mike Spear, the FWS regional manager countered that the service was redoubling its efforts to “improve and achieve cooperation, rather than confrontation, when working with the many entities that have a vital role in species recovery.” Spear added that the number of protected species had increased by 30% in five years and the number of HCPs had surged and “combined to generate a significant increase in workload pressures.”¹⁷⁶ He ended with a plea to the congressional committee for increased funding for FWS ESA implementation in FY 2000 in order to expedite consultation and permitting, warning that without increased funding, “in California and across the country, people will continue to be frustrated by our inability to respond quickly to their needs.”¹⁷⁷

Rep. Helen Chenoweth quipped that while Spear came before the committee asking for more dollars, “it does not take more dollars to return a phone call...you have a major mess on your hands in this Carlsbad office.”¹⁷⁸ The challenge, according to Spear’s written testimony, is especially difficult for the Carlsbad office that as of the hearing date was tasked with overseeing 1,367,946 acres of previously approved HCPs, aside from working on the WRMSHCP, the largest HCP proposed to date. But Spear acknowledged that implementing the ESA was difficult where private property was in the mix and that there would be “disagreements over science” and “differences over terms of process.”¹⁷⁹

Disagreements Over Science, Differences Over Terms of Process

The county decided early on not to do a “hard-line” HCP as was done in Orange County in which boundaries of the plan are definitively set. Rather, the Steering Committee decided that due to the “blow back” over the SKR HCP from property owners, and in an effort to avoid inverse condemnation law suits, a flexible boundaries process would be adopted. This was a policy that was unique to the WRMSHCP, not having been attempted anywhere else; using flexible boundaries was deemed necessary because once study areas were mapped and boundaries drawn for the SKR HCP, lands lost value virtually overnight. The BIA Director argued in a memo to the AC and Steering Committee that “our fear is that what are now analysis tools and ‘straw man’ examples will be translated into firm boundaries and geographic limits of preserves. Once that happens, the land is devalued, economic loss occurs and families and businesses are irreparably damaged.”¹⁸⁰ The Steering Committee used General Information System (GIS) maps taken from aerial photographs and biological survey information gathered by Dudek & Associates (i.e., the distribution of species habitat) as a tool to aid in negotiating which land could be included in a “Criteria Area” within the entire Plan Area.

Initially, the maps were drawn with “bubbles,” indicating the biological aspects of the land. Later in the process, the Criteria Area was divided into “criteria cells,” each consisting of 160 acres (four cells therefore equal one square mile). Property owners whose land fell within a criteria cell became subject to MSHCP “reserve assembly

compliance” and they were no longer able to develop portions of their land without approval from the joint powers authority that later was administered as the Riverside Conservation Authority (RCA). Conversely, it was not set in stone that a particular cell would be part of the reserve. Most of the criteria area that was privately held was located in unincorporated portions of the county and within six of the fourteen participating cities. But with criteria cells, 320,000 acres had to be biologically “described” so that the 153,000 acres of reserve could be accomplished in a number of configurations, thereby providing the flexibility that the SKR HCP lacked.

The county sought input from a Scientific Advisory Committee (SAC), comprised of University of California scientists, to fulfill its obligation that the plans be science based. The data base used to gather biological information for the plan originated with the plan’s initial Science Advisor, UC Riverside’s Thomas Scott, who was also an AC member. In the early 1990s Professor Scott was awarded a small grant to build on his existing species occurrence data base for Western Riverside County. In part he sought to collect the data with the goal of establishing certified, peer reviewed accurate data that would stand against amateur claims from environmental groups and stand on its own as a target over which environmental conflicts could be waged in place of personal attacks.¹⁸¹ The SAC was asked not to pass judgment on whether a policy or proposal was bad or good but to limit their examination of various proposals to “1) review of species selected by the county for coverage and the process by which these selections were made; 2) review of the process by which the data would be brought into the system (a priori); 3) review of the use of data in preserve planning (a posteriori), review of Dudek products

and policy committee requests for process changes; and 5) review of plan for validity based on data and approach.”¹⁸² According to Scott, the farthest his committee went with regard to influencing decision making was to identify consequences, costs, and benefits of a particular action. An AC member, however, counters that the SAC overstepped its mandate when its members suggested policy direction and did not “stick to the scientific facts.”¹⁸³ In fact, the SAC’s argument was that there wasn’t adequate data collected to make sound biological decisions (with respect to protecting species under a MSHCP), given that the county hadn’t budgeted enough resources to adequately fund the data base project. The county convened a Scientific Review Panel (SRP), chaired by UCR’s Professor Michael Allen, to examine the early stage reserve alternatives that the AC and the Steering Committee had agreed upon; the SRP echoed Scott’s concern, warning that “the data already available in GIS format may drive the biology used rather than the reverse...[c]oncern was expressed with the data quality by all of the SRP members, ranging from those who have been involved in the process for many years to those new to the effort.”¹⁸⁴

The county, nonetheless, allowed Dudek & Associates to use the data to produce the MSHCP documents, supplemented by data collected toward the end of the negotiations by Scott and his UCR colleagues. Still, the lack of data prompted the Steering committee to err toward adding more species for protection under the MSHCP rather than focusing on those the SAC recommended for protection.

While the SAC felt that they had the data to develop a plan to cover 40-50 species, the Steering Committee argued that covering a larger number of species would better protect the county from the prospect of future listings, which held the possibility of having to re-write the plan in the event of new listed species being discovered in Western Riverside.¹⁸⁵ The SAC contended that to add more species for protection would mean adding more land to the reserve design; this led to vigorous debate between the county and the Farm Bureau, with support for the Farm Bureau from the BIA. The BIA's Executive Director argued that the MSHCP would not succeed unless the stakeholders understood that it "is a compromise project, it was never intended to be a purely science driven enterprise. We knew that it was a politically driven construct that the 'feds' came up with under [Interior Secretary Bruce] Babbitt because the ESA was kaput, it didn't work. We are, at the end of the day, fulfilling a federal mandate, the ESA...we are fixing a problem left to us by the old guard 'growth, growth, growth' thinking by saving species. We lose precious habitat if we don't compromise on a set of rules that all sides can agree to and instead decide to litigate and turn to the typical 'us versus them' pattern of land use planning."¹⁸⁶

Although the scientists complained that "the data were over extended...often we didn't even know where the species were..." the wildlife agencies "got what they wanted" and were willing to allow the plan to permit. Scott acknowledged that "too much data can expose how much of a compromise the MSHCP 'sausage' had to become for passage."¹⁸⁷ Eventually a compromise was reached with 146 species covered, although

there is little agreement among participants interviewed whether this number is or is not accurate.¹⁸⁸

The Challenge of Establishing Reserve Land Acquisition Processes

At the time the WRMSHCP was being negotiated, land prices were escalating rapidly, and the county, working under the assumption that the land values would only either maintain or rise, thought it best to act as quickly as possible. Their goal was to acquire land before much of the value of land under the criteria cell “umbrella” made piecing together a reserve system that would meet compliance with the resource agencies’ permit provisions prohibitively expensive. They also were under the assumption that by the year 2040, all developable land in the Western Riverside would have been “used up,”¹⁸⁹ which added to the sense of urgency regarding the pace of land acquisition that rising prices had already generated. The process by which the county would acquire land for the reserve system, as many other aspects of the MSHCP, was initiated with the goal of avoiding the conflict associated with the SKR HCP. The flexible criteria cells were a step in the right direction and the participants felt that rather than simply announce to landowners that their property was needed for conservation due to species listing as had been done with the SKR, they would develop and make available to landowners a systematic means of negotiating land acquisition. Mullen maintained that the county would pay “fair market value” for purchased land. But participants in both committees agreed that, aside from

purchasing property needed for the reserve, property owners would also be offered “incentives” in trade for all or a portion of their land.

The county contracted with the Rand Corporation to do a study to determine what they could expect to spend to attain the agreed upon 153,000 acres of privately owned land. They estimated that it would take approximately \$1.5 billion to acquire the land, which the county figured could be spread out over the first twenty five of the plan’s seventy-five year span.¹⁹⁰ Aware that they did not have funding to purchase land for the reserve, the county sought a method of acquiring land that would rely on a negotiation process with landowners and developer exactions. The only funding initially committed to the project was \$50,000 from the Southern California Association of Governments (SCAG) and a portion of the \$37 million dollars allocated by the county to cover hiring consultants to plan the entire three-pronged RCIP.

The Habitat Transaction Method

An initial method for landowners to negotiate with the county agency that would administer the MSHCP was designed by Todd Olson, a contractor hired by the county. Olson’s proposal was the Habitat Transaction Method (HTM), a complex set of strategies and formulas based on a system of “tradable conservation credits” underpinned by his theory that “[c]onservation is not the enemy of private property if owners of private

property are rewarded for conservation just as they are for other uses.”¹⁹¹ Olson theorized that once the biological value of land is quantified, and “a measurement standard is established, it becomes possible to compare the conservation value of various actions, such as permanent land set-asides, restrictions on the level or type of future development, habitat restoration or enhancement [and] habitat management. What remains is a means to translate the conservation value of such actions into economic value,”¹⁹² which proved difficult without a definitive funding source. His solution, which he promoted as a “market-based” approach, employed an “incentive-based” system of “tradable conservation credits” that could be sold from one landowner, who wasn’t interested in building, to another landowner desiring to develop their land. Although ostensibly a market based method, Olson describes a portion of the funding to purchase the preserve as “implementation options” made possible by “obtain[ing] public funds in the form of federal and state grants, local bond measures, etc.”¹⁹³

In the summary proposal the county hired Olson to write, he argued that with the HTM compliance with biological criteria are assured because developers “pay-as-you-go” and development is “continually monitored” to assure that “biological criteria are never precluded from being satisfied.”¹⁹⁴ This vague assertion made no more sense to the AC than Olson’s “mitigation ratio” for “public share acquisitions” scheme that weighted the value of land using a “Priority Zone Multiplier” that adjusted value depending on whether the land stood alone or was located on the edge of other reserve land. Olson claimed that with this method “Public Share Agents” would be “retained” by the county

to determine his mitigation ratio and “safety nets” scheme that would “trip” an “Alert Trigger” when minimum conservation objectives were not met.¹⁹⁵

Olson, with the aid of Dudek and Associates, had devised a five zone mapping system for purposes of biological analysis of the land in order to determine its habitat value, but offered no rationale for the assignment of relative habitat value to each zone. The BIA warned that since Zone 1 and Zone 2 were designated as zones in which 90% to 70% of the land was necessary for the reserve, “Anyone finding their property in either of those areas will clearly conclude that their economic development opportunity has been severely or wholly lost;”¹⁹⁶ the implication being that the HTM could lead to court cases the county was seeking to avoid. Moreover, added the BIA’s Executive Director, who was privy to Steering Committee discussion, “Lacking willing sellers, condemnation may have to be considered if all other avenues of acquisition fail...perhaps a combination of conservation units sales, bonuses and tax incentives will make ‘must have’ acquisition palatable and keep the issues out of court.”¹⁹⁷

When Olson brought his proposal before the AC, they deliberated on its merits and shortcomings and decided that it was more a complicated, idealistic theory than a practical, workable way to assemble the reserve. Both state and federal wildlife agencies agreed with the AC, noting that the HTM was a process they could neither “trust nor predict;” given the importance of connectivity for wildlife feeding, breeding and migration, this was deemed unacceptable with regard to the outcome of the reserve configuration.

The HANS Process

At this point, the AC members formed a subcommittee to develop an acquisition and negotiation process for reserve acquisition. A key principle the committee agreed on was that the private land, that is to say, land that was not part of the public/quasi-public acreage, was to be acquired through a “fair market value” compensation scheme, on a voluntary basis from willing sellers. Their rationale was that they did not want to re-create the “Study Areas” model employed under the SKR HCP, in which landowners were stuck indefinitely “in a cloud of uncertainty and regulation, unable to use, develop or sell their land.”¹⁹⁸ The subcommittee understood however, their biggest obstacle was that although planning was premised on the theory that funding was “expected” from local, state and federal funds (one third from each), the county had made it clear that actual funds on hand were limited. That admission drove the subcommittee to add alternative forms of compensation, such as development incentives, that they agreed would need to be part of the negotiation process.

The AC subcommittee began their deliberations in early 2003 by examining various “types of property owners,” how the MSHCP would affect the land owners, and the best way to assemble a reserve given the biological parameters suggested by the established Criteria Area. Among the ownership categories they examined were those whose property was not located in areas where reserve assembly was needed; it was determined that these property owners would pay a simple fee that would go toward paying for land

that did need to be acquired and would also give them assurances that if listed species were found later on their property they would have already fulfilled their species protection obligation and no further action would be required. For property owners whose land was within the Criteria Area for possible inclusion in the reserve, this land was broken down into descriptive categories, such as vacant lots, agricultural, and property anticipated to be developed (currently and in the future). And although some AC members felt that habitat protection superseded property rights, the SKR's sobering experience led the subcommittee to agree to "a pragmatic respect for property rights" as a "political compromise to move the plan forward."¹⁹⁹ Respecting landowner's property rights would entail differing policies for each category. For example, "for property owners wishing to maintain existing uses, it meant leaving them alone; for owners wanting to build a single family home...letting them do so with the least interruption to the process; for farmers, exempt agricultural uses as much as possible; and for those wanting to develop on a larger scale, use the county's most concise existing development permitting process."²⁰⁰

The subcommittee proposed that acquisitions be funded not only by cash purchases²⁰¹ but also through incentives, such as fee credits, including density bonuses, streamlined permitting, land exchanges, density transfers and tax incentives for developers that set aside acreage for species protection; landowners could also negotiate a combination of these. In response to negative community reaction to the SKR HCP, the subcommittee added time frames under which the county would be required to respond to property owners seeking land use permits; the county was given 45 days to decide

whether the land in question was needed for the reserve (all or a portion of the property) and the 120 days following the decision to negotiate terms of the agreement. Following six months of “intensive effort” developing a negotiation method that would aid landowners in navigating through the regulatory process, the subcommittee presented their proposal to the AC as a whole; they unanimously passed the recommendation and named it the Habitat Evaluation and Acquisition Strategy (HANS). The HANS recommendations were accepted by the RCIP as a whole and written into the plan. The AC remained part of the RCIP for another year, debating the role of agricultural lands in the MSHCP.

Conclusion

The Western Riverside MSHCP was signed by the county, the USFWS and the CDFG, in January of 2004; all 14 cities involved in the planning signed an agreement with the county to participate in the MSCHP. In February of 2004 the county established the Western Riverside County Regional Conservation Authority (RCA), a Joint Powers Authority, the agency that is responsible for executing the MSHCP, with an initial budget just under \$600,000 from the county’s General Fund, to be repaid by the RCA once it established a funding source. The RCA estimated that acquisition of the required 153,000 acres would cost approximately \$1.5 million, which included management of the preserve, administrative costs, biological monitoring, and adaptive management over a

twenty five year period. As of this writing, the WRMSHCP is in its eight year of a twenty five year process and has to date acquired 44,953 acres of land.²⁰² The WRMSHCP is scientific and social process that is still evolving.

Summary

Although local, state, and federal officials themselves were more involved in the MSHCP Steering Committee, their leadership understood the import of gaining political consensus from the AC, most of who were landowners themselves and those representing the interests of landowners. Allowing the AC to aid in shaping the Criteria Area and thus participate in designing the reserve, contrasted with the SKR HCP in which the AC felt they had little input and that the reserve was adopted without consideration for those who owned the land.

WR MSHCP AC members began their task aware that they were not “on the same page.” Despite their differences, WR MSHCPAC members found it possible to negotiate which land they deemed best and which least suited to be incorporated into the Criteria Area. The consultant hired by the county to develop a negotiation process included dichotomous goals that AC members felt would not have led to a consensual agreement. The AC was able to develop a negotiation process between land owners and the county themselves that they agreed was fair and understandable, the HANS process. As the

literature indicated (Ayers and Braithwaite 1992), empowering participants to design their own regulatory terms outside of formal, rigidly construed structures imparts legitimacy to the outcome and leads to greater efficiency because participants understand the risks and benefits of their own agreements.

Chapter 5: Rancho Mission Viejo's Failed NCCP

In this chapter I describe the Rancho Mission Viejo Company's attempt to include a NCCP/HCP as part of its strategy to attain development permits for its Ranch Plan. The planned development will be the largest in Orange County's history, which alone would be expected to generate controversy in a region of environmentally-aware residents. But the privately-owned land is also the last remaining, large parcel of undeveloped land in the County. To add to the complexity, the family that owns the land and has maintained a working ranch within its borders for over 100 years, sees it as a financial legacy for its descendants and intends to build out the land incrementally. Since NCCP/HCPs are designed prior to development, and with upfront commitments from all sides, employing the HCP negotiation model proved untenable in this instance. Nor was the typical NCCP/HCP negotiation model employed as the Ranch Plan was debated. In its stead, a member of the Board of Supervisors brought together stakeholders who could voice their concerns and desires, but who were not heeded with regard to the shape of reserve design.

Introduction

Orange County began with the city of Santa Ana as the dominant urban center, surrounded by miles of open space to the south and small towns such as Orange, Yorba Linda, Tustin, and Fullerton to the north and east. Without the benefit of municipal

governments to facilitate development, county government has assumed the leadership role in planning the county's southerly growth. Thus, the Orange County Board of Supervisors and the county planning commission, handling the bulk of the planning function for the county, "have effective responsibility for shaping the Orange County of today."²⁰³ The Board's direction of comprehensive planning in the southern portion of the county is possible because the land to the south consists of large, privately held contiguous parcels of land, remnants of Spanish ranchos and the land surrounding Mission San Juan Capistrano.

The major private land holder in the southern reaches of the county is the O'Neill-Moiso family, descendants of Richard O'Neill, who purchased the land in 1882 from San Francisco financier James Flood. Large portions of the land that reach to Northern San Diego County were taken by the U.S. Department of War during WWII as a training camp for Marines, known today as Camp Pendleton. The southern part of the county started to grow in the late 1960s and the need for homes became a more profitable enterprise than was the family's traditional ranching. The O'Neill-Moiso family and several financial partners, doing business as the Santa Margarita Company, developed a portion of the land to the north and east that became the cities of Mission Viejo and Rancho Santa Margarita. In the mid-1990s, having shed their previous partners and doing business as the Rancho Mission Viejo Company, LLC, in partnership with Arizona-based DMB Associates, they developed the unincorporated towns known as Las Flores and Ladera Ranch. The remainder of Rancho Mission Viejo (RMV) land straddles the historic Ortega Highway, spreading to the north and south, and touches the eastern boundary of

the city of San Juan Capistrano; the city named for the mission that is the economic and social focal point for the city's residents. The O'Neill-Moiso family still runs a working cattle ranch and leases a small portion of land to private businesses.

The Ranch Plan

San Juan Capistrano's close-knit residents have fought hard to maintain the Western-equestrian character of the area and have gone as far as providing hitching posts in front of several businesses to give the city the distinctive atmosphere that draws tourists to the historical mission. When a member of one of the city's historical families dies, virtually the entire population of the city and its local officials take part in a traditional funeral procession, led by the mission's Catholic priest, to a private cemetery reserved for the honored founding families and the descendants of the local native Juaneno Indians.

San Juan Capistrano's residents are very involved in their community and boast broad participation in a weekly town hall style coffee meeting held by local newspaper reporter Jonathan Volzke. Anyone wishing to speak during the meeting is encouraged to do so and attendees listen respectfully to one another and debate the issues in the same manner. Residents seeking political office, city officials testing the waters before proposing a policy, anyone opening a new business or utility companies pitching permits to update facilities know to make the initial presentation at the "coffee chat" before

approaching city officials. If it doesn't meet approval at the coffee chat, chances are good it will meet the same fate at city hall. Local politicians quickly find themselves out of office if they do not do the bidding of the city's power elite. Residents of the small city are renown in the county for their ability to organize and successfully halt unwanted residential and commercial development; they like their city to remain as it is.

In November of 1991, RMV announced plans to again partner with DMB Associates to develop the Ranch Plan, the largest planned development project ever proposed in Orange County's history. Development would be in clusters, spread throughout 23,000 acres, with 14,000 residential units, with 60 acres dedicated to senior housing and three mixed use commercial centers; 15,000 acres would be left as open space. The RMV management team was aware that the planning and decision-making processes surrounding the largest piece of remaining developable land in the county would be fertile ground for controversy. They acted strategically and aggressively to inform and persuade the surrounding communities, interest groups, and land use officials to support the proposed project.

RMV hired a retired Marine Corps colonel who was well liked in San Juan Capistrano as a public relations representative to attend the coffee chats. "The Colonel" as he was affectionately called, acted as RMV's "folksy" spokesman, championing the Ranch Plan to the community. RMV also invited several influential local residents to on-site tours of the project called "windshield tours," that included a four-wheel drive tour of the proposed development area and a tail-gate picnic. RMV made no requirement that

attendees favor the proposed project; indeed many who were fervently opposed to the development were invited to take part. The tours allowed for a close-up inspection of large parcels of the land that had been used for years for several enterprises, such as gravel and concrete pits, a large portion of which was leased out to commercial nursery farms, a former silica mine, and a hunt club.

A Perfect Storm

From its nascent planning stages and throughout the permitting process, RMV also gave several in-depth presentations at the coffee chat, promoting the economic benefits of the Ranch Plan and answering concerns regarding its negative externalities. In spite of their efforts, the permitting phase of the plan became the “perfect storm” of controversy, intersecting issues of public policy, property rights, growth management, the environment, species and habitat preservation, and the role of public participation in the process. Regardless of the controversy surrounding the proposed development, the county Board of Supervisors holds the ultimate authority to approve or disapprove development projects; public input and suggestions from the Orange County Planning Commission are considered, but the final decision rests in the hands of the Board. The Chairman of the Board of Supervisors, Tom Wilson, was a close friend and political ally of the O’Neill-Moiso family; a photograph of Wilson and RMV Chief Executive Officer, Anthony “Tony” Moiso, was conspicuously displayed at the RMV headquarters.

Discovery of the threatened California Gnatcatcher and its habitat on RMV property complicated the planning process. In the early 1990s, the California Gnatcatcher was found to be at risk due to the decline of its natural habitat, the Coastal Sage Brush, depleted through development. Since both were discovered on RMV property, both the federal ESA and state's CESA added an additional layer of regulations to the process which gave the project's opponents a tool with the potential to halt development. Initially RMV applied for a HCP that they figured would suffice to protect the tiny bird and its habitat. Due in part to Western Riverside's SKR HCP, the efficacy of HCPs had come under increasing criticism from all sides. HCPs were being carried out on a project-by-project and species-by-species basis without measures in place to protect the overall habitat and ecosystem of endangered species. This led to uncertainty for landowners and developers.

Had RMV initiated a typical development scenario, a development plan would have been filed, the mandated environmental studies conducted and the conclusions submitted, and a land use plan adopted by the county, followed only then by negotiations with federal and state wildlife agencies. The role of the public would have been limited to that required under CEQA and public hearings at the county level. Instead, RMV voluntarily submitted the proposed project to enrollment in, and funding, of the NCCP²⁰⁴ and the SAMP/MSAA (Special Area Management Plan/Master Streambed Alteration Agreement), which addresses impacts to aquatic resources subject to the requirements of the federal Clean Water Act (CWA) and the state Fish and Game code. RMV began a scientific study of the wildlife, habitat, and urban runoff associated with the land,

subjecting the land to the largest private conservation process of its kind. The lead science advisor on the project characterized the land as “one of the last vignettes of primitive North America...a unique circumstance both socially and politically with 30,000 acres in the hands of a single land owner, adjacent to three million people;”²⁰⁵ any proposal that would disturb the landscape was bound to draw the close scrutiny of environmental groups that would not hesitate to use the legal system to stop development. RMV had joined the Irvine Company’s early lobbying effort to establish the NCCP. They had closely observed the Irvine Company’s legal struggles with environmental activists seeking to stall development and wildlife agencies pressuring the company for more regulation.²⁰⁶ Hoping to avoid a similar conflict, RMV started the process of enrollment in a NCCP/HCP with state and federal wildlife agencies and delayed the permit application submitted to the county.

California’s NCCP is a voluntary program that was designed to conserve areas of contiguous habitat from impending development in order to protect broad populations of listed species and to avoid the need for future listings under the ESA while permitting a limited “taking” of endangered species and its habitat “impacted by human changes to the landscape.”²⁰⁷ Enrollment in an NCCP requires that the participant enter into a planning agreement that includes a comprehensive “Adaptive Management”²⁰⁸ plan for conservation of multiple wildlife species (not simply those listed under the ESA), subject to approval by the CDFG and the U.S. FWS. In return landowners who submit to the permitting process are accorded “a degree of economic and regulatory certainty regarding the cost of species and habitat protection...”²⁰⁹ Determination that NCCP applicants’ land

meets stringent habitat conservation guidelines means that federal and state agencies must review a draft of the proposed Adaptive Management plan and examine evidence that adequate funding is in place. When these requirements have been met the participant is issued a limited “take” permit. An applicant is not required to take on the task of NCCP adoption just because they have listed species on their property; an HCP will suffice. But they need both state and federal “incidental take” permits to move forward with development, and the more comprehensive NCCP is recognized by both federal and state agencies as sufficient to mitigate for a “take” of any covered species.²¹⁰

Besides species and habitat conservation, enrollment in the NCCP further subjects the project proposal, “in cooperation with the parties to the planning agreement, [to] a process of public participation throughout plan development and review to ensure that interested persons...provide input to lead agencies [and that] draft documents associated with the NCCP...shall be made available for public review and comment for at least 60 days prior to the adoption of that draft document.”²¹¹ Fulfillment of the NCCP’s public participation requirement cost RMV a nearly two year delay in submission of project approval documents. However, while input was provided, the participants interviewed for this research claimed that their input did not influence the project.

Public Input – Empowered Participation vs. Democracy

Supervisor Tom Wilson, whose district included the proposed Ranch Plan property, initiated a public-private coalition of “interested participants” to take part in a project that would “define community goals and issues related to the proposed development.” The South County Review and Evaluation (SCORE) program²¹² was promoted as an inclusive, collaborative project, with the stated goal of “maintain[ing] positive and constructive communications among all potentially interested parties including members of the Ranch Plan development team, county staff and appointed officials, representatives of neighboring jurisdictions, representatives of community interest groups, and members of the public at large.”²¹³ The SCORE process, facilitated by a professional consultant, was meant to define community goals and issues related to the proposed development, focusing on governance, suitability of development, protection of historic sites, and open space.²¹⁴ Although their Vice President of Entitlements was nominally a SCORE member, RMV had little to do with the SCORE process. However, RMV representatives did make presentations that provided technical and legal explanations of the NCCP/SAMP process, and updated members on the scientific studies of the property.

Dan Silver, the Executive Director of the Endangered Habitats League (EHL), who was a member of the WRMSHCP’s AC, notes that the SCORE program was not comparable to Western Riverside’s AC, where the members’ political consensus was imperative if the plan were to be accepted by the myriad landowners. He contends that

“SCORE members had no significant input; our input didn’t really change anything, we had no impact on what happened to the land.”²¹⁵ RMV claimed, however, that the SCORE members’ input was taken into account but was not the definitive consideration when planning which portion of the land to conserve, which to develop, and development placement alternatives. Their effort to create a reserve design that adhered to NCCP guidelines was in part an attempt to decrease the probability that law suits would be brought by environmental groups claiming (under CEQA provisions) that the plan was flawed. RMV argued that changes to proposed residential and commercial placements would be made on the basis of ecosystem decisions and negotiated in consultation with state and federal wildlife agents and not with SCORE participants or local activists.

RMV held six public scoping meetings and three public workshops at the city’s community center on week night evenings, and a particularly large meeting on a Saturday morning in the local public high school gym. At each meeting environmental scientists and engineering experts working on the project were made available for public inquiries; all public testimony taken during the meetings became part of the public record and was submitted to the county Planning Commission and the Board of Supervisors. Principles and guidelines for the NCCP/SAMP created by state, federal and county agencies were explained at the initial workshop. The public invitation announced that

A working group has continued to review all of the sub regional planning information in order to provide input for formulation of a Preliminary Draft

NCCP/HCP and Environmental Impact Report... To provide focus for this coordinated planning effort, the NCCP/SAMP working group has distilled the enormous body of information assembled to date into a set of draft NCCP/HCP principles... these guidelines and principles are built upon the broader tenets and recommendations of the Scientific Review Panel, the Science Advisors Report, and the U.S. Army Corps of Engineers and California Department of Fish and Game tenets. [T]hese guidelines... are intended to provide an objective and common set of planning considerations and recommendations as an additional resource for use by lead agencies and the public participants in selecting and evaluating a reserve program and restoration and management alternatives.²¹⁶

The Director of the Endangered Habitat League suggested that RMV be required to leave as open space considerably more than the two thirds of the property the RMV offered (15, 121 acres out of 22,815 acres) to the County. He waved off the importance of RMV's property rights as "rhetorical philosophy," arguing that the gauge of how far local government could go in restricting land use should be determined by whether or not there is any "remaining economic use"²¹⁷ once the habitat has been protected. He added that he was upset that the SCORE process had not been carried out as a deliberative, democratic body that would vote on a development plan which would then be presented to local land officials, as he had expected.²¹⁸

A similar perspective was expressed by one SCORE participant affiliated with the Sierra Club, who gave testimony at a public meeting that “he didn’t want to lose open space to profit,”²¹⁹ speaking as if the land were publicly owned. Assessing SCORE, he also complained that, although discussions were productive and the process a success as far as members “getting to know what other parties wanted and seriously considering each other’s ideas,” the process was not democratic and “no votes were taken...”²²⁰ The participant quoted here viewed SCORE in a positive light overall, as did the majority of participants, who each evaluated the process as beneficial in fostering better understanding of the NCCP and the decisions RMV was making in regard to placement of development. He added, however, that it seemed as if the Ranch Plan was proceeding on an inevitable course and their voices were not being heard. There was unanimous complaint that their input had made little difference with regard to development placement and demands for more open space.²²¹

NCCPs and Negotiations

Publically promoting the land as taking part in the NCCP gave RMV the advantage of demonstrable evidence that they were acting in good faith to avoid development in areas where the NCCP study found that contiguous habitat and wildlife corridors were imperative if species were to be protected. Those seeking to curtail or alter RMV’s project used the NCCP to their advantage as well. Soon after the plans to develop the

land were made known to a wider portion of the public, interest groups began campaigns to either halt or substantially reduce the proposed development. Public “scoping” meetings and County Planning Commission hearings which were held in the cities adjacent to RMV land became highly confrontational, standing room only, theatrical venues that attracted local media attention. Residents from the surrounding cities, a number of their elected officials, and members of environmental organizations came to express concerns and objections to the size and potential environmental impact of the proposed project, while a small but well-prepared minority came forward in support of RMV.

The public hearings became so raucous and confrontational during RMV testimony that RMV personnel declined to attend, leading to accusations that the public was not being heard. With the state-mandated three minutes to speak in a public forum, the majority of those who came to the podium at the locally-held Planning Commission meetings shouted displeasure at the prospect of adding development on the RMV land. Each time testimony denouncing some aspect of the Ranch Plan was given, the audience cheered with approval and the moderator was forced to stop the meeting and quiet the crowd. Many who spoke referred to the property as if it were public land, characterizing it as “our children’s inheritance” and demanding that the land must be left “‘as is’ for future generations.”²²² The same crowd voiced concurrence with one resident’s objection to what he called “the ‘peoplization’ of south [Orange] County,”²²³ while simultaneously expressing their endorsement of the NCCP as a viable means of mitigation and compromise in their fight to protect the environment.

When RMV would not agree to a planning alternative limiting development to 800 acres (less than 4% of the property) and began to move ahead with county building permits, a coalition of environmental groups encouraged members to write to land use officials stating that the Ranch Plan did not meet NCCP standards²²⁴ and therefore should not be approved. The bulk of the testimony expressed anger over increased population and crowding, warning of the deleterious environmental effects that would be wrought if the land were developed. The County Planning Commission chairman acknowledges that he was puzzled throughout the process that activists never came forth with specific scientific evidence to back up their claims regarding habitat and environmental issues that pertained to NCCP guidelines.²²⁵

RMV's original intent, which was made public during work shops and in detail in SCORE meetings, had been to navigate the Development Agreement and NCCP processes concurrently, thereby establishing habitat corridors prior to creation of proposed "construction bubbles" that indicated alternatives of construction placement. Opposition aimed at the project intensified further when RMV announced their decision to seek the General Plan Amendment and Zoning Change (GPA/ZC) prior to the completion of the NCCP. The official county explanation for the change of sequence was that the ability to proceed concurrently had eroded due to state and federal wildlife agencies' personnel scheduling and budgetary problems, and resource demands due to "prolonged processing" of a similar, larger habitat conservation plan in adjacent Riverside County.²²⁶ The CDFG had taken agents off RMV's NCCP to work on the WR MSHCP. RMV decided that the delays in completion of the NCCP and the indefinite

time table surrounding completion of NCCP document review by wildlife agencies were unacceptable and thus decided to submit their GPA/CZ prior to NCCP completion.

Reaction from the community was swift. Well known community activist, Shirley Grindle, wrote a widely-read opinion piece in the L.A. Times arguing that

DMB Associates teamed with [RMV president] Moiso in 1996 when Ladera Ranch was assembled piecemeal from the rest of Rancho Mission Viejo. It is once again partnering with him in circumventing the NCCP program. DMB obviously has no sentimental ties or appreciation of the land and looks upon Rancho Mission Viejo as just another business venture. This explains in part why the proposed plan does not preserve irreplaceable sections of the ranch that have tremendous wildlife and habitat value but instead shows development in these areas. While Moiso has reneged on a promise to participate in the NCCP program, the Irvine Co. voluntarily went through it... The NCCP program is the best and only hope for a win-win situation that keeps the Moiso family financially whole and leaves to Orange County's children the legacy they deserve. There will be a lot of attention to this process. It will be up to the Board of Supervisors to make sure the rules are applied equally to both major landowners in this county. If the NCCP program was good enough for the Irvine Co. lands, no less should be expected for Rancho Mission Viejo.²²⁷

During the Board of Supervisor's hearings to address the GPA/CZ, the bulk of the testimony in opposition to the project reflects strong objection to granting county approval without a concurrent NCCP process.²²⁸ Environmental advocates argued that once the Development Agreement was in place, RMV would never complete the NCCP process, that the County had promised a concurrent process and should not renege, and that going ahead would mean endangered species and habitat would not be protected. Virtually every interest group opposing some aspect of the project saw the NCCP as their primary negotiating tool, viable only as long as the Development Agreements and the NCCP were proceeding concurrently. Environmental groups claimed that once the Development Agreement was in place, it would be more difficult to pressure the landowner into adjusting development of the land to suit habitat conservation. They argued that Development Agreements in hand, the value of the property would rise, making public purchase of the land, a proposition suggested in virtually every public scoping session, out of reach. That solution, however, had been a "non-issue" from day one, as RMV made it clear to the county that they would not consider an outright sale of the property because the O'Neill-Moiso family planned to develop the land slowly, as a trust, so as to benefit the youngest members of their family.²²⁹ Regardless, the county had recently suffered a bankruptcy at the hands of corrupt officials and was unable to make an offer on such a large purchase; indeed, the county refused a large parcel of the land that RMV offered for a regional park, citing the county's inability to afford management of the land.

Had the wildlife agency review process been timely, the expected concurrent process may have ended in a very different scenario with both sides of the table reaching what might have been an uncomfortable compromise, but a compromise that both could have accept.²³⁰ State wildlife agencies acknowledge that they were delayed in processing the scientific review documents due to a lack of staff, a factor that was exacerbated by state budget cuts and the WRMSHCP, which drew away personnel qualified to comment on and make changes in the draft NCCP. A factor also pertinent to the delay however, was that the reviewers found it difficult to interpret biodiversity data and to implement NCCP guidelines policies. An employee of the California Department of Fish and Game, as one of those tasked with reviewing the submitted draft documents, admitted that the habitat design guidelines were “blurry [and] not well-defined...we had no idea where we were going with the habitat conservation [portion of the NCCP],”²³¹ a factor which slowed the review process even before department staff were called away to Riverside County.

Without defined guidelines for establishing a reserve design for species conservation, the state agent was challenged to do his job with few resources. The agent’s supervisor added that the state wildlife agencies are under-funded in relation to their workload. Moreover, due to state budget problems, minimal staffing would not be alleviated any time soon.²³² With this in mind, RMV made a business decision to seek preliminary agreements with the County. RMV’s Government Relations executive noted that in seeking County approvals RMV was not asking for anything different than had already been concluded through the conservation data from the unfinished NCCP.²³³

Currently, the estimated timetable for state agencies to complete the review process is approximately two years, although that estimate is not guaranteed. RMV contended that absent some impetus to mobilize the wildlife agencies to complete the review and permitting process, they were forced to proceed without a complete conservation plan. Having already delayed the project in order to accommodate scientific study of the land and to allow for expanded public participation, RMV made the decision to go ahead with preliminary approvals on the county level. Although RMV maintained that the NCCP would still go ahead as planned, activists viewed the decision as RMV walking away from the table and characterized it as such in public hearings and to the media. Once the GPA/CZ was submitted to the county, RMV “decided to shift gears and slow down the NCCP.”²³⁴ Hence, the stage was set for a legal confrontation that may have otherwise been averted.

When the Orange County Board of Supervisors granted RMV unanimous approval of its GPA/ZC, a coalition of environmental groups sued the County of Orange for approving the project, “alleging, among other things, that the county did not adequately address the project’s effect on sensitive habitat.”²³⁵ The City of Mission Viejo filed suit against RMV for inadequate infrastructure planning, arguing that the city should be compensated for widening of arterial streets and intersections to handle the expected traffic increase. RMV had already agreed to pay \$144 million to improve traffic in and around the proposed development, \$50 million more than what a project of this size would normally be assessed by the county.²³⁶ RMV settled with the environmental groups, agreeing to eliminate two golf courses and residential development in the San

Mateo watershed and in Chiquita Canyon, a total of 1,800 acres less development. The City of Mission Viejo settled for an extra \$16 million in infrastructure upgrades and 60 acres of senior housing; both lawsuits were settled in less than a year.

Ultimately, the NCCP was left at a stalemate. Although the U.S. FWS agreed to a take permit, in light of what they deemed adequate biological analysis of the land, the CDFG for their part refused to permit the NCCP. The county's Transportation Corridor Agency had plans to extend a toll road that ended in the community of Las Flores, through RMV land south to connect with the I-5 Freeway at San Onofre, which lies just south of San Clemente. If that scenario did occur, the CDFG argued that RMV's NCCP would have to include language stating that they would be willing to set aside more land, over and above what had been agreed to up to that point, as mitigation for the environmental impact of the toll road construction and for the toll road itself. The CDFG's argument was that "During our review of the potential consequences of the Transportation Corridor Agencies' [sic] toll road...we identified a plausible scenario whereby build-out of the NCCP reserve may not be achieved even though the vast majority of RMV's development would have been achieved. Without the assurance that the non-developed portions of San Mateo watershed would be dedicated to the NCCP, the worst case conservation scenario falls well short of assuring the big picture conservation advocated by RMV, and necessary for the Department [of Fish and Game] to issue a NCCP permit."²³⁷ RMV decided that since their biological surveys were thorough, and that they had accurately determined that they only had "some gnat catchers, the arroyo

toad and a couple of protected plants,” it was in their best interest to agree to a HCP that would cover only those species that were evident on RMV property.

Mixed Participant Evaluation of the Processes

Had RMV’s NCCP been submitted concurrently with the GPA/ZC it may have been instrumental in making negotiation rather than litigation the primary form of compromise and the desired outcome. SCORE participants were told that their “reactions” to construction placement alternatives and densities were encouraged, but lacking formal planning expertise and with the wildlife agencies making reserve placement decisions, they were never actually empowered to make final planning decisions. Disappointment in the participatory element of the process stemmed from a notion of democracy held by those SCORE members who thought that alternative development bubbles should be the subject of deliberation and decided within a majority rules model. RMV claims that the SCORE meeting minutes were read and evaluated and became part of the documented input from a myriad of contributors; the Orange County Fire Authority for example, contributed valuable input based on providing emergency services for the proposed Ranch Plan.

The SCORE process was not intended as fulfillment of the participatory requirement for the NCCP, which was met in the public NCCP workshops. Nor was

SCORE meant as RMV's relinquishment of its business interests or property rights to the public. RMV's project proposal entailed business decisions made vulnerable to criticism by making the process more accessible to the public than would have been required outside of NCCP enrollment. The landowner testified that he had "melded the [development] plans with County needs; each process evolved to the [Orange County Board of Supervisor's] staff recommended alternative, and changes were made in keeping with SCORE and EIR [public] comments;" which, he added, was "not an easy decision in the face of relentless criticism."²³⁸ But although the process had its detractors, there was still a shared sense among participants that the participatory process itself was not at fault. Rather, it was the fact that RMV did not instigate the SCORE process and did not want to be "forced to opening [their] project [to stakeholder input] again and subjecting it to the actions of somebody [they] had no control over"²³⁹ that was the basis of their trepidation. In fact, literature distributed by advocacy groups and newspaper interviews with interest group representatives reflect endorsement not only of SCORE, but in particular of the NCCP process. In one instance, a SCORE member noted that "the NCCP process for Rancho Mission Viejo could become a model for California and other parts of the country."²⁴⁰

Conclusion

Concurrent completion of the NCCP and the Development Agreement permit documents would have been the optimal scenario. It appeared that strong economic and legal

incentives ensured RMV's NCCP completion. But the O'Neill-Moiso family's notion of leaving a legacy from which their children and grandchildren could benefit was at odds with the CDFG's insistence that all the land placed under the proposed NCCP be placed under a conservation agreement prior to beginning development; whereas the family's aim was to conserve surrounding portions of land incrementally, while the land is developed in phases. Moreover, the State Department of Finance insisted that the CDFG hold the endowment monies to be set aside for managing the conserved land. The state would be able to invest the endowment monies and realize a gain from the investment; RMV would then have to request funds from the CDFG to manage the land, which they found distasteful, reasoning that they could establish a private foundation to do the same.²⁴¹ The Development Agreements obtained at the local level do not pertain to the NCCP, which have yet to be granted. Having adopted the NCCP for the northern and central portions of the County on land owned by the Irvine Company, the habitat conservation picture in Orange County would be completed with a contiguous reserve system connecting the southern portion of the county had RMV's NCCP been approved.

Summary

In sum, this was the first time the NCCP had been applied to a project of this scope in a manner that intended to bring interest groups, stakeholders and the landowner to the table throughout the planning process. Amid a surge of conflict the NCCP remained a point of departure and consensus on which the issues at odds could be negotiated. Regardless of

the outcome of the NCCP, the habitat conservation research project incorporates scientific principles of biodiversity into the planning process rather than simply surrendering to the desires of environmental and no-growth advocates or exclusively to the business interests of developers. Reframing land use conflict from a perspective that rises above particular interests and finds common ground on which to negotiate may serve to ease conflict over land use and protect the ecosystem while providing for economic development.

C.W. Thomas' study of public participation in HCPs is pertinent in two regards – first, Thomas makes the point that a developer's desire for certainty regarding future species listings and the activist's confidence in the promise of conservation tends to level the playing field by making actors dependent on one another for a mutually beneficial outcome. Second, Thomas admits that, while one might argue that the "moral character" of [NCCPs] is compromised by implicit or explicit threats of litigation, the process nonetheless brings both parties to the table and keeps them there for extended periods (Thomas, 2001). Indeed, RMV's effort to create a reserve design that adhered strictly to NCCP guidelines was in part an attempt to decrease the probability that law suits would be brought by environmental groups claiming that the plan was flawed.²⁴²

Included among those who thought the process was valuable was a local planning expert, representing the Urban Land Institute as a SCORE member, who noted that his role was not to persuade his fellow members toward consensus, but to contribute his comments and concerns. This understanding of the SCORE process as being a forum to

voice concerns but without the power to force RMV to do their bidding, more closely reflects the objectives as described in the SCORE summary documents; objectives which, according to RMV's Government Relations executive, were made clear at the initial SCORE meeting.²⁴³ Taken from another perspective, one county land use official commented that contributors to SCORE were not locked into, liable for, or in any way financially responsible for the process or its outcome.²⁴⁴ SCORE was not intended as an experiment in deliberative democracy, it was meant to serve as a means to maintain communication between the landowner and interested parties, and nothing more. The EHL, the Sierra Club and the NRDC cited the incomplete NCCP as evidence that RMV was not acting in the best interests of the environment, the interest groups never abandoned their commitment to the NCCP process itself, although NCCPs have diluted the comparative advantage activists had under the ESA prior to habitat conservation plans.²⁴⁵

Chapter 6: Lessons Learned From the MSHCP Process

In this chapter, for the most part, I allow the participants themselves to describe how the relationships established (or not) during negotiations influenced the MSHCP process. Trust was a word that came up often in interviews, and, as it turns out, trust was an essential ingredient in developing the social capital that acted as the “grease” that “lubricated” negotiations. Conversely, the lack of trust in RMV’s NCCP process meant holding SCORE members at arm’s length and not granting them meaningful input in the process, and perhaps denying themselves the political consensus they sought.

Relationships Matter

Those interviewed for this research were each asked open-ended questions and encouraged to relate the story of his or her involvement in respective HCPs. Virtually all respondents, of their own accord and prior to being asked the prepared question about establishing relationships, brought up the importance of relationships and trust in the negotiations. Participants for the most part acknowledged that the reference to relationships was among stakeholders within the negotiating group (Western Riverside’s AC, for example) in which he or she took part. Susskind et al (2000) found that in negotiations surrounding environmental issues in particular, it is essential that parties establish and maintain trusting relationships if common goals are to be met. They note

that although it is possible to conduct successful negotiations between conflicting parties, it is much more productive when a measure of mutual trust has been reached.²⁴⁶

Therefore, to better understand what this meant to participants, each was asked to define trust. The respondents generally took trust to mean that another person will act in a particular manner under a given circumstance; and can be counted on to act consistently in such a manner, and that this understanding is mutual.

The Executive Director of the BIA, who participated in the WR MSHCP both on the AC and as a Steering Committee member, called trust “the central most important thing that is essential to making the plans work...”²⁴⁷ He added that the WR MSHCP was so complex and complicated that no one person or group could claim to hold expert understanding of how the plan was developing. As a result, participants had to be able to trust the information that other participants brought to the negotiations. Developing trust was made more difficult by the existing dynamic among stakeholders, many of whom had served together on earlier HCP committees. Prior interaction meant that many of the participants in each of the three case studies came to the MSHCP process with preconceptions about fellow participants. For example, the BIA Director quoted here came to the process already having experienced conflict over development with many of the representatives of environmental groups involved in the MSHCP. He admitted that he was used to being on the defensive when faced with environmental groups and no-growth advocates seeking to shrink, redesign or halt development. But he found as the AC was working on the preliminary ground rules for the MSHCP that the goals of each side were surprisingly aligned. In fact, he noted that the WR MSHCP experience had resulted in

“an operating relationship between the mainstream serious environmental groups and the building industry that, years later, continues to benefit the county.”²⁴⁸ Jeffery Ruben et al (1994) argue that preconceptions about others involved in negotiations have a strong influence on how participants view the statements and actions of other participants. Actions and words that would have otherwise seemed innocuous are attributed to disingenuousness, or worse. The Nature Conservancy representative, who helped facilitate negotiations for the Orange County NCCP, for example, said: “I am used to environmental battles and stating my preferences as hard as I can. And [in the NCCP negotiations] we are talking about a process that in order to work requires consensus with people I don’t really like who were sitting across the table from me.”²⁴⁹ But these preconceptions, according to participants, dissipated over the course of negotiations, which speaks to both Coleman’s (1988) and Putnam’s (1993) definition of social capital as a process that develops with repeated interactions and leads to trust.

The Director of the Laguna Greenbelt, who served on the Irvine Company’s NCCP negotiation committee, said that after six years of meeting every three weeks, participants came to know each other well. Speaking about the need to establish relationships within the committee, she said, “Well, you have to, you can’t go on if you don’t. That’s the whole point of negotiating, you have to care that it works for the person you are negotiating with, otherwise it’s an ‘I win, you lose’ situation and that doesn’t bring about compromise.”²⁵⁰ With regard to trust within the relationships established during negotiations, she added, “When we were trying to negotiate which land would be incorporated in the NCCP, each of us had to feel secure that the person you were

negotiating with wasn't lying to you. You had to trust that everything was on the table; we had to trust that [the Irvine Company representative] was not holding back, that there was not something [the representative] was not telling us. That was the problem we had prior to the NCCP process, there was no trust."²⁵¹ This opinion about the NCCP process fostering trust, which those interviewed had not experienced in previous environmental negotiations, was reflected in particular by participants who brought years of experience in negotiating environmental issues to the process. EHL Director Dan Silver, who participated in all three case studies, opined that the structure of the MSHCP process gave participants time to establish "common ground." He also mentioned that, in the WR MSHCP in particular, the county was seeking political consensus from the AC, which was possible because members had come to understand what other members were seeking from the process and why. Indeed, Silver's theory was that "your goal is to build consensus. And it is with consensus that you gain leverage. If you approach the Board of Supervisors and say there has been consensus on the AC on something, you have a much higher chance of getting what you want. You have to be practical. We established relationships that still exist today. We had known each other for years by the time the WR MSHCP negotiations were completed."²⁵²

The acknowledgment that trust was developed during the MSHCP process was all the more impressive because participants came from such varied backgrounds and points-of-view. As mentioned in chapter three, the Laguna Greenbelt Director said she came to believe that one of the fundamental differences among MSHCP participants was the way in which each viewed the land. Gail Wansczuk-Barton for instance, who succeeded her

brother as chair of the WR MSHCP, said that Dan Silver's view of land use was that people don't need much land, they can live in inner-urban areas in small apartments.²⁵³ Barton said that she came to admire that about Silver, "but I couldn't do that," she admitted, "I know where my soul is. My family has lived and made a living on this land for 100 years and I don't want to lose it. But the world changes around you and what can you do?"²⁵⁴ Former County Supervisor Mullen noted as well that "you can go down the lists of people whose families were raised out here on the land and who have been here for over 100 years, they are not the exception; they are the rule. And when they first sat down to negotiate they told us that we couldn't tell them what the hell to do with their land."²⁵⁵ Even this visceral feeling about the land softened as participants began to develop the social capital that fostered a willingness to listen to one another's ideas, respect each other's goals, and learn from the knowledge each brought to the table.

Barton, for instance, noted her annoyance with the Dominigoni family's association with the Farm Bureau (FB), which was known for its strong stance on property rights. Initially Barton felt as if the family was using the FB disingenuously because they were seeking to keep their land not for farming, but for future housing development. "But as Cindy [Dominigoni] discussed the land in the AC," said Barton, "I realized that they didn't want to develop their land, but development surrounded them and then farming does not remain a viable choice."²⁵⁶ A similar transformation was apparent to the Laguna Greenbelt Director, who had fought with the county and the Irvine Company for years over the location and design of Orange County's transportation corridors. She contended that the NCCP process led to Irvine Company owner Donald Bren "starting to think about

his legacy, about what he was going to leave behind. I watched the change as he started to think that what he left as open space in conservation was as important as what he had built.”²⁵⁷ (Indeed, five years after the Orange County NCCP was permitted, Bren continued to gift land, deeding another 11,000 acres of land for conservation and open space to the county.)

Relationships with Leaders

Relationships between the participants and those who were in positions of leadership were also deemed important by those interviewed. Effective leaders and the direction they provided the process were perceived as essential to making the plans work. In fact, several participants offered such phrases as, “it was if the stars were aligned and the right people just seemed to be there at the right time,”²⁵⁸ and “all the right people were there to go to bat for us, or we never could have accomplished so much.”²⁵⁹ Invariably the participants were referring to the influence of those who held leadership roles. In the Orange County NCCP, the leadership was at the state and federal level of government. Interior Department Secretary Bruce Babbitt had connections with the Irvine Company and was instrumental in gaining support for the plans in Washington, D.C., while Governor Pete Wilson used his influence at the state level to do the same.

But foremost in the effort to get the Orange County NCCP permitted was Monica Florian, with the Irvine Company, and California Natural Resources Secretary Doug Wheeler. Of these, only Wheeler actually took part in NCCP negotiations. Wheeler established rapport with the negotiators, as he took the time from his schedule in Sacramento and got to know the negotiators by attending meetings whenever possible. He began by listing five precepts needed for NCCP success: “conservation science, a large scale reserve, stakeholder involvement/buy in with the right people at the table (which he defined as those who were committed to the process and were willing to compromise), behind the scenes political will, good timing with demonstrable strong positive results, soon, thrown in for good measure.”²⁶⁰ Wheeler himself drove the “behind the scenes political will” and provided support for the NCCP at the level of state government.

The WR MSHCP AC members benefitted from strong leadership at the county level and also from within the group. At the county level, Tom Mullen was one of the early instigators of the plan and he drove it until his tenure on the Board of Supervisors ended. He later became the Executive Director of the Riverside Conservation Authority (RCA). There was unanimous agreement among AC members that Mullen’s leadership was imperative to initiating the process and keeping it moving. There was never any question among the AC that Mullen’s goal was twofold, to mitigate for infrastructure and at the same time to protect the county against litigation. According to the Farm Bureau’s Cindy Dominigoni, “Mullen was the catalyst that made the MSHCP possible – for good or bad.”²⁶¹ Another participant said that Mullen’s leadership was “huge, he took the heat

when there was conflict among the AC and between the AC and the Steering Committee. He kept us focused on the goal; Tom [Mullen] is an individual of high character and integrity. Any less credible person at the top and we would have had a very different end product. He taught us not to get too caught up in our individual positions and then fail to look at the overall goal of the process.”²⁶²

But if Mullen was the architect of the WR MSHCP, the county’s Richard Lashbrook was the builder. Perhaps more than any leader in all three case studies, Lashbrook’s leadership was praised by his fellow participants (although there were complaints that he was not a Riverside County resident). He came to know the AC members and acted as their principal negotiator. When Lashbrook retired close to the end of the process, his loss was felt heavily by the AC. It was a personal loss for the AC but also “a drain of institutional knowledge; his absence left a void.”²⁶³ The departure of leadership in the midst of negotiations meant that it was impossible to retrieve reliable information regarding who had made verbal promises and commitments to whom. Following Lashbrook’s retirement, the AC was also left not knowing which issues had been verbally agreed upon or decided against, and which if any decisions had been communicated to the Steering Committee and which had not. These losses were magnified for the AC because their chairman, Gary Wanczuk, had died unexpectedly earlier in the process. AC members expressed shock and sorrow over Wanczuk’s untimely death. The Wanczuk family was pleased when the vast large majority of WR MSHCP participants at all levels attended his funeral.²⁶⁴ Barton took her brother’s place as chairman, which she thought would not have been possible had the AC not come to

trust and respect one another. She admitted that her brother was not as flexible as she was as chairman and wondered whether, had he lived and remained chairman, negotiations would have gone as smoothly. Interviewed AC members agreed that when negotiations “got stuck” or when one member, or group of members, insisted on getting their way, mutual trust made it easier to “agree to modifications that made reaching a consensus possible.”²⁶⁵

The Orange County NCCP and the WR MSHCP negotiation phases each lasted approximately six years and participants met on average about three times a month. In contrast, the RMV SCORE process lasted just under a year and met less often, which did not allow for long-term relationships to develop. As discussed in the previous chapter, the SCORE process was not established to empower participants to influence the design of the preserve. According to RMV executives, SCORE was an information imparting process that provided a vehicle for the RMV, through Supervisor Wilson, to discover what the surrounding community and the interested environmental groups thought of the Ranch Plan.²⁶⁶ Although RMV contended that SCORE was a “distinctive process that stood on its own and not one of those collaborative things,”²⁶⁷ SCORE participants accepted the invitation to take part assuming that at least a portion of their input would be incorporated into the NCCP.²⁶⁸ SCORE had no leaders; it was a process in which each member expressed his or her individual preferences or the preferences of respective groups he or she represented. As one member put it, “we talked past each other, not to each other, and there was certainly no deliberation, per se.”²⁶⁹ Without the political backing for the Ranch Plan a collaborative negotiating structure may have fostered, RMV

found itself faced with a protracted battle with the community and law suits brought by the city of Mission Viejo and by the Endangered Habitat League (EHL).

Dan Silver, although a SCORE member, approached RMV regarding their NCCP prior to and following the SCORE process. Once the NCCP had been abandoned, RMV's Vice President of Entitlements noted that Silver came to RMV offices, and without acrimony let them know that the EHL was planning on filing a law suit. The EHL's complaint was against the Ranch Plan's development approval by the county, citing an inadequate EIR under the California Environmental Quality Act. The executive added that when interviewed by local reporters about the pending law suit, Silver was very complimentary about RMV's family owned operation, despite their differences of opinion about halting the NCCP. Silver's skill at establishing relationships and his willingness to understand that "there are legitimate interests: housing, property *and* the environment..." meant that even though not an Orange County or Riverside County resident, his participation was considered legitimate by his fellow participants and by the Irvine Company, RMV and Riverside County's land use officials. Indeed, the social capital that developed as a result of interaction among a large network of MSHCP participants, led to Silver being sought by local officials to participate in the plans, including the RMV NCCP. But in RMV's case it didn't keep Silver from filing a law suit when he thought it necessary. RMV saw the law suit as part of the cost of doing business and settled with the EHL and the city of Mission Viejo quickly.²⁷⁰

Litigation Avoided and Unavoidable Litigation

Orange County NCCP/HCP – the Irvine Company

As mentioned in chapter three, the Irvine Company executive interviewed said that the NCCP was entered into not with the goal of avoiding law suits, but in order to avoid the regulatory hammer of the ESA and to comply with state and federal environmental rules. He declined to discuss whether law suits were filed against the NCCP. However, he estimated that the Irvine Company's approximately 20 million dollar investment in the NCCP negotiation phase was millions below what the cost would have been without the benefit of agreements reached under the plan. Had the agreements determining which areas of the Irvine Company's land would be preserved and which would be developed not been settled prior to construction, he estimated that each project would very likely be litigated separately and at tremendously high cost. He also added that the relationships and open communication between the Irvine Company and the environmental community established during NCCP planning, "built a new basis of knowledge on which to guide future negotiations."²⁷¹

Western Riverside MSHCP

The impetus for the WR MSHCP was the county's attempt to preempt lawsuits that would slow its proposed transportation infrastructure, adding to its cost and protracting its completion. Mullen claimed that he presented the idea of the MSHCP to the Board of

Supervisors by arguing that “if we have everyone at the table and we could come to an agreement, we could avoid going to court.”²⁷² (The need to plan growth was secondary but an important goal of the MSHCP as well.) The county intended to mitigate under the MSHCP permit agreements for the impact of upgrades to existing infrastructure and for four proposed large transportation projects. Indeed, the MSHCP was instrumental in smoothing the way for infrastructure as planned, although one of the transportation projects between Riverside and Orange Counties was shelved.

But the SKR HCP experience in which private property owners threatened to sue the county for regulatory takings and inverse condemnation damages haunted the WR MSHCP. What constitutes a regulatory taken is not settled law. The Supreme Court’s ruling in *Penn Station Transportation Company vs. New York City* (1978) left the decision of what constitutes a regulatory taking up to the courts on an *ad hoc* basis; the court also ruled that a taking has not occurred when partial use of the property remains. During the SKR HCP, land owners found themselves unable to sell their property if it was deemed part of the Study Area for the SKR reserve. The property owners argued that placing the property under the SKR Study Area encumbered the land for an indeterminate time, thus devaluing the land. Property owners, such as farmers who worked the land, argued that there was loss of economic use of the land as well. The county countered that the SKR HCP and the WR MSHCP differ because the SKR HCP was a “hard line” plan, meaning that its boundaries were fixed. Under fixed boundaries, if the property was deemed necessary for the reserve, there was no question that its use would be restricted.

In the WR MSHCP, the flexible criteria cells, theoretically at least, diminished the probability of the county being sued.

The flexible criteria cells meant that the reserve areas were undetermined until such time as the county was able to compensate the owner by partially or wholly purchasing the property. With this arrangement, there would be less chance of a class action suit filed against the county by all the property owners within a determined boundary or hardline plan. This arrangement worked well for developers; they could mitigate for development outside of the Criteria Area by purchasing property within the Criteria Area and deeding it to the county. But it did not work well for landowners who had intended to develop their property and were prohibited from doing so, especially when the county did not have the funds to purchase their property. A major portion of the anticipated funding was to come through developer fees, making the process dependent on the housing market and on the region's economy. Property owners contended that in the event of a recession that slowed the housing market, the insufficient funding would be tantamount to recreating the same regulatory takings scenario as in the SKR HCP.

Even if funding became available, owners who wanted to develop the property or sell it were required to go through the HANS process. And, as Farm Bureau and AC member Cindy Dominigoni noted, "it is not a comfortable process and there are fees associated with it."²⁷³ The Dominigonis themselves filed a law suit against the county, seeking an addition to the MSHCP that allowed for species take on farm land: "Our position was that farming doesn't impact endangered species, in fact, we have been

providing habitat, food and water to SKRs for years. What we were doing on the land must not have been a problem because they have co-existed with us and we are doing the same things we have always done, so we seem able to adapt to one another.”²⁷⁴ The Dominigonis had requested, but had been turned down during MSCHP negotiations, a guarantee that if land had been farmed in the preceding five years a certificate of inclusion could be submitted to the county and the farming activity could continue. Dominigoni said that the law suit they filed earned them the audience with the FWS and CDFG she sought as an AC member; county officials, who knew her and her husband through the SKR and MSHCP process, “did get us back to the table and we did settle, quickly.”²⁷⁵ The certificate of inclusion process was added to the MSHCP along with several additional procedural clarifications that were requested “to make sure that people in decision-making roles 20 years from now know what we had in mind and there will be no issues at that point.”²⁷⁶

Rancho Mission Viejo

RMV was seeking to avoid litigation by keeping the community and environmental interest groups apprised of the Ranch Plan progress. RMV’s public relations outreach to the community, such as the windshield tours, the retired Marine Colonel who acted as an ambassador of sorts to surrounding communities, private meetings held with community leaders, and the SCORE process were similarly focused efforts aimed at avoiding law suits. But according to the county’s Planning Director, RMV decided not to adopt a collaborative negotiation structure for the proposed NCCP because they felt that they

could not participate in open dialogue with environmental and no-growth groups. RMV reasoned that in order to protect themselves from law suits they would necessarily have to reserve information that might open them up to future litigation.²⁷⁷ Durant (2004) contends that trust building through transparent, deliberative processes is vital when it comes to restoring confidence in proposed projects with environmentally sensitive issues at stake. The lack of trust between RMV and its adversaries did little to gain public confidence in the Ranch Plan that RMV had sought through its public relations policies. It is impossible to determine for certain whether following through with a NCCP/HCP would have meant avoiding the law suit filed by the city of Mission Viejo. But had the EHL and other interested environmental groups had more input in the Ranch Plan design through a collaborative process, the EHL likely would not have brought their law suit against the county for granting development agreements without adequate environmental consideration.

The establishment of a collaborative negotiation process may have been worth the initial risk that RMV feared. Had RMV followed the Irvine Company's or Riverside County's collaborative negotiation model, the relationships and trust that were likely to have resulted might have led to the political consensus observed in those plans. It was the CDFG's concern that without the strong support for RMV's NCCP from environmental groups, they were risking being sued over granting NCCP/HCP permits. As it was, the EHL, the Sierra Club, the NRDC and the Audubon Society did file a law suit, but waived their ability to file suit in the future in exchange for an additional 1,800 acres in conserved land and some minor changes to development location. However, the Ranch

Plan is being developed incrementally over a 20 year period and NCCP/HCPs are typically established to last from 25 to 75 years. Therefore a NCCP/HCP would provide litigation protection past the life span and memory span of many of the participants.

But if RMV balked at establishing a collaborative process, they nonetheless followed NCCP procedural requirements prior to abandoning the plan. Without a NCCP agreement in place, to avoid future law suits RMV needed to show that the Ranch Plan was going to be developed in a manner that would do the least harm to the natural landscape. The county's Planning Director noted that "[RMV] had biologists study each watershed – the stream composition, water quality, soils, etc. and they created a hydro-geomorphic model of the land's natural erosion over time. They had to determine the recharge of aquifers; they need to know the entire picture of the land, including what is below the land's surface."²⁷⁸ The biological survey in preparation for the NCCP gave RMV the confidence that their knowledge of the property was comprehensive and "it would help them to avoid any future law suits because it was clear that their project's design was based on scientifically-collected information."²⁷⁹ RMV decided that the biological survey data had given them enough information to avoid disturbing the property's biologically sensitive areas while also clarifying the location of endangered species and critical habitat. Therefore they could develop the land without a NCCP/HCP and remain in compliance with both federal and state environmental laws and protect themselves from law suits.

Property Rights, Species Protection, and Land Acquisition

In all three case studies, property rights, whether specifically addressed or implied, were at the center of negotiations. As the Director of the Laguna Greenbelt quoted in chapter 3 said, “[developers] just have a different view of the land.”²⁸⁰ Perhaps her claim would apply to MSHCP negotiations in particular had she said that property owners’ *perception* of their property rights differs from that of biologists and environmentalists. Laguna Greenbelt was a coalition of environmental groups that had many years of experience advocating for environmental issues in Orange County. Among those with whom the Director had negotiated was the Irvine Company. She had acted as one of the principal negotiators during the conflict over selling land in Laguna Canyon for the county’s transportation corridor and modifying the alignment of Laguna Canyon Road, which bisects the canyon. She said at that time (the mid to late 1980s) the Irvine Company told her: “If you don’t like what we are doing, buy the land.”²⁸¹ She noted that for years in negotiations with the Irvine Company, “when there was something they were building that we didn’t like,” negotiations meant “talking about densities, traffic, etc. and it goes on forever. But with the NCCP, since you have to provide for the habitat, the species and the development issues hold equal weight during negotiations.”²⁸² When NCCP negotiations were initiated, the Irvine Company had wanted the “the prime land for golf courses and the hill tops developed for the views and they wanted to do anything they damn well please. [The environmental coalition members] were looking at where the

wildlife were, where the connectivity is and we wanted the water sheds to be left alone.”²⁸³

The NCCP process acted as an education of sorts for the company’s executives. Over six years of negotiations and presentations by a number of biologists and conservation scientists, the Irvine Company’s stance regarding their property rights began to soften and a more nuanced, integrated understanding of the land began to take its place. The county itself learned from the process as well. The county’s Planning and Development Services Department and the Board of Supervisors were accustomed to the Irvine Company getting its way when it came to development. “After all,” argued the Planning Director, “we figured it was *their* land.”²⁸⁴ But accumulating biological data overtime and learning about the process of adaptive management of the land with the goal of protecting species changed their perspective. “[The county] began to recognize that stewardship of the land was more than just putting a conservation easement over the land.”²⁸⁵ The Irvine Company came to a similar conclusion, which has led to their establishment of the non-profit Irvine Ranch Conservancy and Bren’s donation of thousands of acres of wildlands for conservation purposes.

Ironically, the wildlife agency staff also resisted the Orange County NCCP/HCP model at the onset, although their view of property rights fundamentally differed from that of the Irvine Company. Agents reasoned that the ESA superseded property rights and provided the authority for the CDFG and the FWS to stop development in its tracks. Therefore NCCPs constituted an unwarranted compromise that allowed development,

which amounted to a failure in their goal of protecting the land and the wildlife. The agents saw themselves as being “in the unenviable position of trying to work between the developers and the ‘enviros’ and it’s easier for us to see things from the enviro side because of our training.”²⁸⁶ But when the wildlife agency staff found that rather than dealing with the typical project by project patchwork of preserves, they would be looking at broad, landscape level conservation, their attitudes about the NCCP changed. They began to see the NCCPs as a means of species protection that gave them more discretion when it came to which lands would be conserved and the certainty that the agreements would be fulfilled as planned.

The WR MSHCP had the most complex property rights issues of the three case studies. In both Orange County plans the major landowners in each case mitigated for development with their own land and benefitted from the mitigation. In the WR MSHCP there were thousands of landowners. The landowners needed to establish a reserve to mitigate for infrastructure and development had to be either purchased outright, or the property owners had to be made whole through alternative forms of compensation, i.e., density bonuses. The property rights conflict surrounding the plans is a reflection of the historic American debate between individual rights and the public good that James Madison addressed in the Federalist Papers over 200 years ago. Madison argued that the balance between the two would be supplied by the plurality of interests an enlarged republic would provide. Indeed there were a myriad of interests involved in the WR MSHCP, but the process did not so much lead to a balance of interests as it lead to an integration of interests.

For private property owners, the conflict came down to economics – if the county wanted the land for the reserve, the county should purchase the land. However, a means of funding the purchase of the land had not been arranged. Former Supervisor Tom Mullen said that the county had to trust that the funding would be worked out as the plans were developed. According to Mullen, the county began the MSHCP process assuming that the funding would be divided between the state, the federal government and developer exactions, one third each. “If we have an environmental fund set up, it makes no difference what we borrow out of it as long as we can guarantee that we will pay it back as we would any bond on Wall Street. It doesn’t make any difference whether you pay it back in 20 years or over the life of the MSHCP, which is 75 years.”²⁸⁷ Private property owners were not willing to wait that long for payment.

For individual property owners, developing 10 acres of a 40 acre parcel meant mitigating for the 10 acres by agreeing to sell the remaining 30 acres to the county at fair market value for the reserve. Without funds to purchase the land however, the plan to acquire the land would not be viable. Commercial land owners dealt with a similar dilemma; they formed a coalition of commercial property owners and appealed to the Transportation and Land Management Agency for intervention on their behalf with the county. They argued that “[e]ven if the County has the funds to purchase Core area property, landowners may not receive fair market value due to the time lag between when the property is valued [for its biological importance] and when it is purchased, depriving landowners of land appreciation.”²⁸⁸ The county’s answer to the lack of funds for land acquisition came in the form of a local development mitigation fee (LDMF) unanimously

adopted by the Riverside County Board of Supervisors in July of 2003. The LDMF would add \$1,651 to the cost of each new single family home (fees were incrementally lower for higher dwelling densities per acre) and add \$5,620 to the cost per acre of commercial, industrial, or agricultural and in unincorporated areas of Western Riverside County.²⁸⁹ However, the county estimated that these fees would only generate enough revenue to purchase less than half of the land needed to complete the reserve.

The wildlife agency personnel saw the issue of payment for reserve land from a different perspective. The FWS representative on the AC commented that “land owners felt that if the county wanted their land for the MSHCP, they should be paid for it and paid now...they think it’s I, me, mine and no consideration for the public good. They see the dollar value of the land and they don’t see it as a societal value. They saw the limitations on their land [from the MSHCP] as a takings issue and they didn’t see the limits on development as a societal good.”²⁹⁰ This same FWS agent added however, that she had come to “enjoy several of the people on the AC,” but her fellow committee members were shocked that someone they were personally comfortable with, “shared recipes with, and who they figured thought rationally,” didn’t share their point-of-view about the land. During her tenure on the AC, she learned that the reaction to the MSHCP she observed “was not a lack of ability to see the bigger picture.” Rather, it was that there were many affected landowners whose families had been on the land since the late 1800s and early 1900s who “wanted to do things the way they always had. But things have changed, there is more population now and plans have to be made to accommodate the growth and protect the county’s amazing biodiversity.”²⁹¹ Despite her philosophical

differences with the majority of her fellow AC members, she grew to understand why they felt as they did and was able to accept their differences. When negotiations became frustrating and the group came to a seemingly intractable impasse, the social capital they had developed allowed the AC to adopt a “get over it and keep working on the solution” attitude.²⁹²

The Property Owners Association (POA) of Riverside County raised concerns later in the process, complaining in the association’s newsletter that the fiscal impacts of the plans had to be addressed: “[L]ands in the MSHCP reserve would remove vast areas from Riverside County’s tax roll. The \$38 million in Measure A funds to Lake Elsinore for local road improvements, which are contingent upon City participation in the MSHCP, fail to offset the \$230 million loss of potential revenues over a 30 year period, as a result of losing 13,043 housing units to reserve land.”²⁹³ The scenario described in the newsletter, however, was hypothetical. The POA representative on the AC who wrote the newsletter was a paid lobbyist from Newport Beach whose “big issue” was “property rights: making sure that regulated land was fairly compensated.”²⁹⁴ He noted that he had come to the process standing on principles. But the process, he admitted,

...was a really interesting mixed bag. The best thing about it was that it got us all to sit down and talk to each other when we wouldn’t have otherwise trusted one another. But now we had to; it was a wonderful chance to build relationships with people you wouldn’t normally have a chance to talk to. We had to work together to accomplish a common goal on common ground, so we established working

principles to accomplish that goal. So then we start talking and it doesn't help holding anything in or to be secretive or guarded, we just lay it out on the table and discuss it. And you find that you want to tell them, not to give offense, but to lay out your concerns so they will be addressed. We established some of the best working relationships I have ever had. We still communicate with one another and respect one another as people.²⁹⁵

The POA representative maintained his claim that the economic issues associated with the plans needed to be addressed. He and his counterparts on the AC were virtually unanimous in their agreement that the local funding sources would not suffice and that not having allocated funding from state and federal sources for land acquisition weakened the probable success of the MSHCP's implementation.

Although living within a constitutional framework assumes that some individual liberties are relinquished in order to ensure the overall good of the community, the government has a perverse incentive to relegate the costs of environmental protection for the community to the fewest individuals possible. One AC member argued that "the ESA benefits everybody and everybody should pay for it. If the county is going to have a [MSHCP] that benefits the county and the nation, everyone should contribute."²⁹⁶

Addressing this debate, the Supreme Court directed that a determination be made that there is an "essential nexus" that exists between the public objective advanced by a regulation and the "condition imposed by application of the regulation to a specific piece

of property” (*Nolan v. California Coastal Commission*, 483 U.S. 825, 1987). Furthermore, “[t]he court will assess the degree to which the application of the regulation on the specific property ‘substantially advances’ the asserted public purpose and will weigh that assessment against the burden on the property owner.” This does not mean that a regulation that simply diminishes the value of property constitutes a taking worthy of compensation. The Court ruled that the diminution in value must rise to a certain level for the regulation to be compensable, although it did not provide a formula for arriving at that determination (Wise 2003). This ambiguity led to later rulings (e.g. *First English Evangelical Lutheran Church v. County of Los Angeles* 1987) which resulted in the enactment of compensation-related legislation aimed at protecting property rights with regard to partial takings. Wise argues that the difficulty in balancing competing values in the takings calculus expands the liability of regulators faced with determining what constitutes a taking, does little toward introducing collaborative approaches, and runs the risk of “putting environmental governance on a continuing litigious treadmill that is decidedly ill-suited to the building of common purpose.”²⁹⁷

Participation and Negotiation

A common observation among participants in all three case studies was that “the right people” had to be in positions of leadership and on committees at the negotiating table for the plans to reach the permit stage. As noted in previous chapters, participants who

refused to compromise and/or were adverse to a consensus-based process, tended to eliminate themselves from their respective committees and leave negotiations of their own accord. However, there were those who considered themselves unnecessarily marginalized, such as Ileene Anderson of the Center for Biological Diversity, who requested to be part of the WR MHCP's AC. She admittedly entered the process too late to be a formal AC member from the beginning of negotiations. And when an AC member dropped out and Anderson was voted on the committee by the AC, the Board of Supervisors stepped in and overrode the decision in reaction to her organization's reputation for filing law suits in environmentally-based controversies. Aside from the Board's legal concerns however, Anderson herself was averse to compromise. Anderson noted that the EHL's Dan Silver, "as an AC member, had access to the process, but we felt he gave in too much to compromise when it came to species coverage and land acquisition. If the county can't acquire the land, they shouldn't allow development while they are seeking the funds; to [allow development] is not in the spirit of HCPs."²⁹⁸

The Borel family's representative was similarly excused from participation in the WR MSHCP AC; Spirit of the Sage Director Leona Klippstein chose to exit the process herself. The benefit of eliminating those who desired to participate but refused to compromise was that the process could proceed with the least amount of impasse. But the drawback of eliminating recalcitrant members was that their ideas were also eliminated from the final agreements. Borel's participation was personal; she sought committee membership to protect her family's land. Klippstein's AC inclusion was not practical; she was philosophically opposed to HCPs, period. Dan Silver's inclusion was based on

philosophical goals as well; however, he was pragmatic and held to the old saw that he was not going to “allow the perfect get in the way of the good.” Despite their historically polarized ideologies, both environmental groups and property rights groups held Silver in high regard. And, although he didn’t see himself as someone who held formal political power, his participation was deemed valuable by the majority of his fellow stakeholders and officials in both counties. Silver in fact held significant political clout primarily *because* of the esteem in which he was held by his fellow participants. As the Starr Audubon Ranch Director commented as he swept his hand across the preserve’s wilderness, “without [Silver], none of this would have happened. His style is respectful and caring; he doesn’t waste anyone’s time.”²⁹⁹ The social capital that developed among the network of local, state and federal land use and wildlife officials, environmental groups, and landowners, while working on MSHCPs in both Riverside and Orange counties, resulted in the tacit understanding that Silver would be included in these and any future MSHCP processes in which he chose to participate.

In Orange County’s NCCP, the Starr Ranch Director and the Laguna Greenbelt Director, both scientists, were adamant that limited participation was imperative if negotiations were to be fruitful. Both Directors were criticized by what the Starr Ranch Director called “the hard liners.” He noted that there was infighting among the conservation coalition that he had thought would support his participation in NCCP/HCP negotiations. “The hard liners accused those of us willing to compromise as traitors, and here we’d worked so hard to get the agreements. I didn’t like that; getting different perspectives out on the table was important but they wanted all development to cease.

You can't just stand on principle, though; that gets nothing accomplished. You could end up with a lawsuit, which could easily be lost, and then you've gotten nowhere."³⁰⁰ The resistance to compromise that the scientists experienced is not unusual when environmentally-based conflicts are negotiated. The underlying causes of discord when environmental decisions are in the mix emerges largely from differing value systems (O'Leary et al, 2004). Identities and self-images are nearly inseparable from strongly held views and shared ideologies, a factor which also emerges as playing a large part in the intensity of environmental conflict. Gray (2003) describes identification in this manner as "framing," which she defines as a perspective from which one shapes, focuses and organizes the world, reflecting interpretations of how one sees one's self and others in relation to particular circumstances. Framing in environmental disputes plays a significant role in establishing a "common cause, mission, or vision among participants, and a common perception of the enemy."³⁰¹ As a result, some members of environmental groups are less amenable to negotiation, which is seen as a means of compromising their basic values (Burgess and Burgess 1995), even if being inflexible means affecting their community's economic development (Seidenfeld 2000).

Participants in the Irvine Company's NCCP and in the WR MSHCP seemed to have set aside their identity frames during the negotiation processes. That is not to say that participants changed "teams" and abandoned their basic perspectives. On the contrary, although those interviewed admitted to the process facilitating a better understanding of fellow participant's concerns and objectives, none had rejected his or her basic principles. The relationships and trust developed during the process, and a common goal that rose

above the individual concerns and perspectives of each participant, made deliberation and debate possible without generating animosity. But problems arose when outside forces interfered with the relationships participants had established. At various points within the negotiating phase of both Orange County plans, outside mediators were hired to facilitate negotiation.

The Irvine Company hired a facilitator³⁰² whom participants did not trust. According to the Laguna Greenbelt Director, “We did not trust him; he was working on the plan as a consultant. There were clear conflict of interest issues with him acting as facilitator. He was a process guy, a bureaucratic type and he acted as if he was a lawyer giving us advice.”³⁰³ When participants balked at the consultant’s mediation style, the Irvine Company asked a conservation biologist with experience planning HCPs in Florida as a Nature Conservancy representative³⁰⁴ to mediate negotiations. Researchers have found mixed attitudes toward mediation in alternative resolution processes. While several environmentalists argue that the scientific complexity of some environmental disputes are well suited to mediated collaborative negotiation, others are hesitant due to the expense of hiring a professional mediator, and still others think that some cases (i.e. those involving legal ruling on the listing or failure to list endangered species under the ESA) were not appropriate (Kloppenber, 2003). Mediation proponents insist that mediated processes are essential to collaborative problem solving, arguing that weaker stakeholders are empowered by a moderator acting to “even the playing field” (Birkoff and Lowry 2003).

Douglas Amy (1987) gives a scathing critique of mediation, equating its perceived benefits as a form of seduction. He cites research by Jane Mansbridge (1983) who found that in face-to-face negotiations, participants are not on an equal power footing and are therefore often easily coerced into feigning consensus where none existed in order to avoid public criticism. Amy suggests that a solution would be to explore whether informal processes and the “conciliatory efforts” of a mediator create a seductive atmosphere in which participants tend to make “excessive concessions” that are not in his or her interest. The caveat here is the same as that of litigation – there are circumstances under which alternative methods would not be preferable, such as when one party’s power to influence an outcome is indomitable (Gray 1989). As far as the two scientists participating in the Irvine Company’s negotiations were concerned, the replacement facilitator was able to mediate “the best facilitated session we had in the four previous years of negotiations.”³⁰⁵

Wondolleck and Yaffe (2000) argue that a skillful consensus facilitator can foster interaction between difficult personalities and keep participants on topic and get past deliberative gridlock. Environmental mediation assumes that a neutral party facilitates consensus between participants who are the best qualified to understand and voice their own interests (Mangerich and Luton 1995); it also assumes that the mediator is fair, competent, and assertive (Baird et al 1995). RMV hired the mediator the Irvine Company replaced to mediate the SCORE process. SCORE participants did not perceive his facilitation to be balanced and fair since it was in his best interest if negotiations dragged on.

Conclusion

In this chapter I have examined the role that relationships among MSHCP participants and between participants and those in leadership positions played in the MSHCP processes in Orange and Riverside counties. The long-term nature of the MSHCP negotiations process and the frequency of meetings made it possible for relationships and trust to develop among people with opposing perspectives who would otherwise not have had reason, opportunity, or desire to interact and work together toward a common goal. However, while the ostensible common goal of the process was negotiating the design of a reserve to protect species, it was also the case that avoiding litigation, pursuing litigation, protecting property rights and redefining property rights were among the dichotomous goals participants pursued. The challenge of reaching agreement, or at a minimum reaching a consensus, was overcome in part by eliminating or ostracizing those who refused to compromise and instead stood their ground. As mentioned above, eliminating inflexible participants meant eliminating their input as well. (In one such case, essential advice from a landowner was left out of the WR MSHCP process. She had intended to warn the AC that hard, sandy areas at the edges of creeks were necessary for cattle to utilize when calving and should be granted to livestock ranchers rather than included in the reserve.)

Avoiding litigation shaped the plans. In both counties avoiding litigation was the impetus for seeking a MSHCP permit. In the Irvine Company and WR MSHCP plans, the social capital that developed among participants, in particular the trust that is an aspect of

social capital, acted to smooth negotiations. Litigation was in some cases unavoidable. But in all three case studies, the negotiation process diminished or eliminated the threat of litigation. RMV, however, decided against a collaborative approach, the result of which will be addressed in the concluding chapter.

Chapter 7: Implications for Collaborative Negotiations

I began my research expecting that the collaborative negotiation model inherent in the MSHCP process was the key to the plan's ability to bring disparate stakeholders to consensus. As I interviewed the stakeholders who participated in four MSHCPs, I discovered that the combined effect of the process structure and the relationships established during negotiations fostered social capital that acted as a catalyst, drawing participants with opposing goals toward reaching an acceptable compromise. As is reflected in the preceding chapters, there was an abundance of evidence indicating that the relationships established during the negotiations phase of plan development, and reinforced by years of repeated interactions, served to facilitate mutual trust. Once participants came to understand and trust one another, negotiations among participants whose goals were often sharply at odds were possible, as long as each accepted that the final outcome was a product of compromise. I also hypothesized that the structure of the process would lead to consensus because participants were assured that their "voices" would be heard. Generally, this was the case; however, participants did not always feel they had been heard, particularly when it came to reserve design.

Circumscribing who was and who was not a participant influenced the discussion agenda in negotiations. And, while some participants self-eliminated, the power of the majority, or simply those with the most decision-making power, shaped the membership of negotiating groups. As several respondents noted, had those who refused to

compromise remained within the negotiating groups, the plans would have taken far longer to complete or may have not been completed at all. Although elimination of those who refused to compromise meant that some voices were not heard at all, the loss of the inflexible participants was itself a compromise of sorts.

Another insight gained was that participants wanted a significant role in the design of the land conserved, not simply to be included in negotiations over which species would be protected. The accuracy of this supposition was evidenced in all three case studies. For example, in the initial Orange County NCCP/HCP, participants praised the Irvine Company's attitude about the land and rather than thinking exclusively in economic terms, considering its importance for species protection. The Laguna Greenbelt Director for example, complained, "During negotiations we [conservation scientists] were never asked where we wanted the reserve areas, or how we wanted the reserve to look. The negotiations phase was just over the suite of species we wanted to protect, not how the reserve would look."³⁰⁶ The Audubon Starr Ranch Director echoed her complaint, saying that "knowledge of this Mediterranean ecosystem is important; does the builder place development here, or there? With the knowledge our expertise brought to the process, the least sensitive areas could be protected and development can take place where it won't impact the area as much. We would say build here, in bubble 68, or there, in bubble 55, but we didn't have a say in that part of negotiations."³⁰⁷

In each of the three case studies, the participants expressing irritation at being excluded from reserve design (in particular those in the WR MSHCP who were land

owners) were those who were not signatories to the plans. EHL Director Dan Silver, who participated in all three case studies, speaking about the Irvine Company's NCCP said, "it's really a back door thing; they listened to us about which species would be covered, but all the decisions about which land would be conserved was decided by the county's politicians, the politicians who rubber stamp development, that's Orange County."³⁰⁸

Participants acknowledged that the need to consider biological data associated with reserve design was important, but felt that in many instances they knew which portions of the land locals prized more than others. For example, a constant refrain from respondents was that they did not want to see hill tops developed and in the RMV NCCP, San Juan Capistrano residents expressed the desire to leave the rural character of the area intact, at least along the Ortega Highway which was visible, in order to protect the draw for tourists.

Respondents indicated that they felt empowered when those who would be making final decisions regarding plan agreements acknowledged and considered their input. Every participant interviewed was asked whether they felt that their input was held as important by those with decision making authority (i.e., those who were signatories to the plans); each was also asked which person or entity participating did appear to hold the most power in the planning process. No respondents admitted to holding the most powerful position within the process relative to other participants. Participants who were not signatories to the plans in particular tended to feel as if they had limited persuasive power, which was unequivocally denied by those who were the decision- makers at local, state and federal government levels. Those who worked for, were elected to, or were

members of the group of signatories, deferred to their supervisors as having authority over their ability to make autonomous decisions regarding participant input and did not see him or herself as having more power than his or her counterparts in the process. When asked who did wield the most power during negotiations, with the exception of the Irvine Company's NCCP participants, the majority of respondents answered, "the services," that is to say, the CDFG and the FWS. In the Irvine Company's NCCP, participants said that the Irvine Company itself held the most power during negotiations, although the Laguna Greenbelt Director added that the quasi-government agencies (e.g. Southern California Edison and The Toll Roads Agency) that took part in negotiations also held some of the decision-making authority with regard to who did and did not participate.

The only individual or entity that admitted to wielding power was the Field Supervisor for the FWS, who noted that "I was in meetings that ran from 9:00 AM until 6:00PM for the WR MSHCP. I *had* to be or they couldn't have a meeting. When I got stuck in traffic they would have to stall the meeting and wait for me. Without me, they didn't have a meeting."³⁰⁹ He admitted that the WR MSHCP AC members interviewed were correct in their responses that the FWS did not listen to them: "the county was, I am sure, very influenced by what the AC had to say. My sense was that the actual agreements that were struck came from the [Steering Committee] meetings. Whatever the AC had to say had to be broached with the wildlife agencies at some point but we did not speak to them directly. But if the county based their plan on what the AC had to say, we would have said, well, this doesn't make it. We would have said that this plan doesn't

meet our criteria.”³¹⁰ The Field Supervisor saw the process in hierarchical terms in which the FWS did not answer to the AC but to county officials. The Field Supervisor said that the FWS would reject the AC’s input because “the county was the primary spokesman, the driving force behind the plan.”³¹¹ However, the FWS had a lower level representative on the AC who said that she regularly reported the content of AC discussions to the Field Supervisor.³¹²

Two plans were formed under a single political structure, the County of Orange: the NCCP/HCP initiated by the Irvine Company and RMV’s abandoned NCCP/HCP. Since both plans were proposed under the same jurisdiction, I reasoned that juxtaposing the two would shed light on the influence the county’s political structure and culture had on the plans. Both plans were proposed on lands that were former Spanish land grants, consisted of large swaths of open space and privately held in development corporations, and each under the control of a strong owner-executive. And yet the approach to negotiating the plans differed tremendously, due in part to timing, since the Irvine Company’s NCCP was the first of its size and set a precedent for its successors. The Irvine Company wields considerable political and business power in the county and that allowed for tremendous influence in the public policy arena; the company acted as a policy entrepreneur with its NCCP in that regard.

The Irvine Company has thrived under this power scenario; therefore, it was in the company’s interests not to relinquish its power over local government (which holds the bulk of land use decision making power) to provisions of the ESA or to those at the state

and federal level who enforced its regulations. According to the Irvine Company executive who was instrumental in introducing the plan, “NCCPs are important in terms of retaining local land use control. Before, cities and counties began to feel as if their power was being usurped by state and federal officials, who were calling [ESA enforcement] environmental protection but which amounted to land use planning, thus taking it out of local hands, ostensibly to protect species.”³¹³ She added that the NCCP provided two important benefits: “First, certainty; we could get on with the law suits up front and get them over with. Second, negotiations with *all* government entities involved would be taken care of all at one time instead of the state saying yes, the feds saying no, then the county saying yes, etc. We discussed ideas as well with only the serious environmentalists and included government officials regarding coordinating layers of government into negotiations.”³¹⁴ The Irvine Company also understood that no-growth groups could not be included in negotiations because their goal was to halt growth and the NCCP allowed for growth. Those who were participants in the initial NCCP had to fight for a voice in the design of the plans, but the Irvine Company did not deny them the opportunity to do so. As one of the environmental biologists noted: “In the north [portion of the land] it was all blank, theoretically you’d think it was easier to begin with nothing, but with all of that open space there was more contention because we were all jockeying to have different uses of the same blocks of land. When development surrounds potential conservation areas, there is nowhere to move and the development determines the shape of the reserve.”³¹⁵

RMV's relationship with County officials is not as visible as that of the Irvine Company, due in part to the well-known fact that the long-time patriarch of the family, Richard O'Neill, was a Democrat in a predominantly Republican county.³¹⁶ RMV nonetheless has strong political allies in Orange County government and their development has helped transform the County into the urban center it is today. The RMV NCCP plan was initiated under an atmosphere of contentious public sentiment regarding development of a large and contiguous open space. Environmental groups framed the argument against the county granting development agreements for the proposed Ranch Plan by characterizing the land as a rare "environmental hot spot" that should be left untouched for the sake of the County's posterity. This was an ironic juxtaposition given that the landowning family argued that they wanted to develop the land over a twenty year period in order to provide a financial legacy for their own posterity. RMV's land use application to the County and its NCCP/HCP were begun on separate but parallel tracks. Their primary goal had been to negotiate entitlements with the County and set aside a portion of the land for open space as mitigation under CEQA; however, when endangered species were discovered on the land, RMV management initiated the NCCP process to meet compliance under the ESA. According to RMV's Vice President of Entitlements, there was "lots of internal debate" within the RMV management and the family about initiating a NCCP/HCP: "We had lots of discussion about whether we really wanted to do this because we'd been successful at staying under the radar. But you make yourself into a pretty big target, a giant bull's eye, when you attempt to develop 23,000

acres in a whack.”³¹⁷ RMV had this and several other reasons for not wanting to include the public in making decisions about the family’s vast property.

A portion of RMV land had already been designated as mitigation for nearby development and RMV did not want to be left without potential open space areas to mitigate for their own proposed development. RMV’s management argued, “If you are trying to avoid lawsuits and give people a stake in your property, people who don’t really have a stake, and you call them stakeholders, they don’t always have the ability to come to agreement. Then if you don’t let everyone who wants to come to the table in, one of their brothers comes along and later sues you. But you don’t have anything left to give, nothing with which to negotiate and that’s not where we wanted to be.”³¹⁸ Here he is referring to the people who had been demonstrating at the County’s land use decision-making meetings and to the members of local environmental interest groups. This same RMV executive noted that they had met with the EHL’s Dan Silver, the Audubon Starr Ranch Director and the Laguna Greenbelt Director well before choosing to initiate a NCCP. He called the meetings productive because it opened communications and established relationships between RMV and the three Directors, who made it clear that they were opposed to the County’s proposed extension of the Toll Road through RMV land but willing to negotiate for a reserve under the NCCP. RMV chose not to open up the NCCP process either to the agitated interest groups or the three Directors and supported the SCORE process instead. Their decision not to include those who thought of themselves as stakeholders (an assumption held in part because of the negative externalities the Ranch Plan was expected to generate) was understandable given the

considerable impassioned contention the interest groups exhibited at the Ranch Plan's CEQA required public meetings. Regardless, even though the County Planning Commission meeting fulfilling the required public meeting and the subsequent Board of Supervisors meeting both made it clear there was strong opposition to the project, the Board voted unanimously to approve the Ranch Plan. The County's pro-development leanings were therefore evident in both Orange County NCCP proposals. The major difference in the two plans was the attitude of the developer toward including stakeholders, not in the County's political structure or political culture.

My research suggests that RMV may have had a very different response from environmental groups had they included representatives from the groups in their planning. Had the RMV management carefully selected representatives from a small sample of interest group members to take part in planning the proposed project, their plan may have been met with far less contention and in fact may have been more likely to be supported by the community. The process certainly would have taken longer because of the time required for relationships among participants and between participants and RMV management to become established and the end result may have looked somewhat different than the final Ranch Plan does today. When participants trust one another and understand that they have been empowered to aid in designing the development and the conserved lands in a project, they are less likely to fight the proposed development, in or out of court. As it is, the Ranch Plan was stalled by the 2007 recession and is only moving into production in 2012.

The RMV executive quoted above noted that although RMV management paid close attention to the WR MSHCP, comparing their own negotiations to WR's was untenable because of the disparate landownership in Riverside. The Riverside County plan was negotiated over land that was a mixture of public, quasi-public, and private land. The WR MSHCP stretched across more than a dozen municipal jurisdictions, and across a mosaic of farm land and smaller parcels of owner-occupied homes; the plan affected thousands of private property owners. The WR MSHCP was initiated and driven by the County of Riverside and not by the land owners as was the case in Orange County. The elected county and municipal officials and even the appointed land use decision makers, who worked for the county, were dependent on local voters for maintaining their positions, if in some cases indirectly. Therefore, eliciting political consensus for the WR MSHCP was as vital to their careers as it was to the possibility that the plans would be permitted at all. And to achieve political consensus for the plan, the effected land owners had to be given a place at the negotiating table; their input was essential if the county was going to be able to avoid a flood of law suits that would delay building necessary infrastructure. The WR MSHCP also included 14 municipalities, not all of which were supportive of the MSHCP, causing friction between county and city governments. The Orange County plans had no such obstacle because the proposed NCCPs were to be on lands that were located in unincorporated portions of the county.

That the WR MSHCP, with all of its complexities and complications, was brought to fruition at all is a testament to the political capital that resulted from its protracted planning stage, the broad participation of local stakeholders, and the participant's

commitment to the project. In the WR MSHCP, interviews for this research were conducted beginning approximately three years after the final agreements were signed. Many of those interviewed had not been in touch with former fellow participants during the time since the signing. Invariably, participants asked about the welfare of fellow participants who had also been interviewed. Each could summarize where his or her counterparts was “coming from” when it came to points-of-view regarding the plan. While not always in agreement, participants had clearly come to respect, and in some cases, feel sincere admiration and even affection for one another. In all three case studies participants expressed pride in his or her respective plan’s completion and the considerable accomplishment of taking part in protecting species and conserving critical habitat that may otherwise have been the subject of regulatory conflict. Those taking part in the Irvine Company’s NCCP negotiations celebrated the completion of their plan with a “retreat” to the Nature Conservancy’s Santa Cruz Island. The Director of the Irvine Ranch Conservancy had a photograph on his office wall of the Channel Islands gathering that included a mix of people that would not have been freely associating had it not been for taking part in negotiating the NCCP. WR MSHCP AC members exhibited a similar sentiment as each noted sadness and even grief over the death of AC chairman Gary Wanczuk. Virtually every person interviewed mentioned that “the right mix of people” was integral to reaching an acceptable agreement leading to a signed plan. When asked whether the respondent would have thought during the first week of negotiations that the “right mix of people” was at the table, the answer was no. The MSHCP and NCCP negotiating processes had a transformative effect on its participants that was lacking in

the RMV NCCP SCORE process. Examining the differences between processes in which the voices of participants are heard and incorporated into the process and those that do not offers a rich opportunity for further research.

Perhaps the most challenging aspect of generalizing the MSHCP negotiation process is the considerable time it takes to develop social capital. Although there were no formal time tables to completion of a plan, each of the three case studies examined here ran approximately six years (coincidentally the length of a single term in the U.S. Senate.). Participants seem unfazed by the long-term commitment required to complete a plan. Remarkably, the majority of participants were not paid to take part in the process. WR MSHCP AC member Gail Wanczuk, for example, admitted that although her participation began as a means to protect her family's land interests, her efforts were beneficial to hundreds of landowners in her area. She did not complain when she confessed that the only form of compensation she received was reimbursement for her parking. I was surprised to discover dedication to the MSHCP such as Wanczuk's from those interviewed in all three case studies. In fact, when there was complaint about the process it came from those who were not included; not a single participant complained about the commitment of time and effort to his or her respective plan.

The interviews conducted for this dissertation provide strong support for continuing and further developing long-term negotiation processes in MSHCP development. As suggested with the reference to senatorial terms, a similar negotiation process in which relationships are established and which lead to the development of social capital, this

model may hold hope for legislative bodies as well. My research suggests that the key to applying collaborative negotiations processes similar to those examined in these three case studies is to assemble a broadly representative number of participants who are willing to commit to a long-term goal and do not object to the notion of compromise. The lesson to be learned from the long term process is the length of time it takes to build social capital, which might bear upon the issue of term limits for legislators, who barely have time to get to know one another due to the obligation to raise campaign dollars.

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¹⁸⁴ Allen, Michael, et al, Center for Biology, University of California Riverside, “Review for the County of Riverside of: Approach to Evaluation of Reserve Alternatives, Western Riverside County Multiple Species Habitat Conservation Plan, December 13, 1999.

¹⁸⁵ This was in fact the “Achilles’ heel” of the HCP process generally and likely would have meant the demise of the plans had the No Surprises law suit been decided in favor of Leeona Klipstein’s *Spirit of the Sage Counsel v. Norton*.

¹⁸⁶ Borre Winkle, Personal Interview, 2007.

¹⁸⁷ T.A. Scott, Personal Communication, 2011.

¹⁸⁸ The Riverside Conservation Authority lists 146 as the number of covered species. http://www.wrc-rca.org/Permit_Docs/MSHCP_Docs/volume3/Vol3-Exhibit_C.pdf

¹⁸⁹ Ibid.

¹⁹⁰ Tom Mullen, Personal Interview, 2007.

¹⁹¹ Olson, Todd G., “Biodiversity and Private Property: Conflict or Opportunity?” in William J. Shape, *Biodiversity and the Law*, Island Press, Washington, D.C., 1996, pg. 69.

¹⁹² Ibid., pg. 71.

¹⁹³ Olson, Todd G., 2000, pg.7.

¹⁹⁴ Ibid, pg. 10.

¹⁹⁵ The proposed HTM process is so vague, complex and illogical that I found it nearly impossible to summarize.

¹⁹⁶ Winkle, Borre, "Memorandum to the MSHCP Project, Subject: HTM Comments," July 17, 2000.

¹⁹⁷ Ibid.

¹⁹⁸ Ed Sauls, Personal Interview, 2007.

¹⁹⁹ Dan Silver, Personal Communication, January 5, 2012.

²⁰⁰ Ibid.

²⁰¹ Available from combining the local, state and federal funds the county hoped would be committed for the MSHCP.

²⁰² Brian Beck, Personal Communication, February 9, 2012.

²⁰³ Carey, Gabriele Gonder. *From Hinterland to Metropolis: Land Use Planning in Orange County, California, 1925-1950*, Doctoral Dissertation, University of California, Riverside, 1997, p.8.

²⁰⁴ Enrollment of RMV property in the NCCP marks the first time since its creation that an NCCP had been entirely privately funded. Had RMV not funded the project, the county's budget constraints would have made enrollment virtually impossible.

²⁰⁵ Murphy, D. D., Ph.D., Biological Resources Research Center, University of Nevada, Reno, November 29, 2004, Personal Interview.

²⁰⁶ RMV's V.P. of Entitlements noted that they paid less attention to the WRMSHCP than to the Irvine Ranch NCCP. They did so because of the Riverside's vast number of landowners that added to the complexity of the process, whereas with a single entity owning the land, theirs was similar to the Irvine Ranch process.

²⁰⁷ California Fish and Game Code, Section 2801 (i).

²⁰⁸ Adaptive Management is a method of managing natural resources by iterative assessment of a conservation program's progress. Given the complexity of natural

systems, repeated monitoring of landscape systems, for example, allow for adjustments in actions that have not demonstrated improvement of the natural resource or for continuation of those that have.

²⁰⁹ Thornton, Robert D., "Habitat Conservation Plans: Frayed Safety Nets or Creative Conservation Partnerships?" *Natural Resources & Environment*, Fall 2001, p.2.

²¹⁰ D.D. Murphy, Interview, January 5, 2005.

²¹¹ California Fish and Game Code, Section 2815.

²¹² Orange County SCORE Program, "Land Use and Urban Runoff Task Force Phase One Report," October 2002, p.1.

²¹³ Orange County SCORE Program, p.1.

²¹⁴ Ibid, p. 1.

²¹⁵ Silver, Dan, Personal Interview, January 21, 2005.

²¹⁶ Public Invitation to NCCP/SAMP Workshop, California Department of Fish and Wildlife, April 28,2003.

²¹⁷ Dan Silver, Personal Interview, 2005.

²¹⁸ Ibid.

²¹⁹ Jerry Collamier, Orange County Planning Commission Meeting Minutes, Public Hearing, December 5, 2001.

²²⁰ Paul Carlton, Sierra Sage, San Clemente Chapter, Sierra Club, November 25, 2004, Interview.

²²¹ Ibid.

²²² Public Scoping Session, County of Orange, December 2, 2002, San Juan Capistrano, California.

²²³ Ibid.

²²⁴ Dan Silver, Director, The Endangered Habitat League, "Action Alert! Rancho Mission Viejo Disaster Goes to Planning Commission, Your Help Urgently Needed!" Member email, November, 1, 2004.

²²⁵ Richard K. Goacher, November 24, Interview.

²²⁶ Agenda Staff Report, County of Orange, California, ASR Control 04-002548, Resources and Development Management Department, "Ranch Plan GPA/ZC/EIR/DA/SCRIP Program," November 8, 2004.

²²⁷ Grindle, Shirley, "Open Space, Open Questions," Orange County Commentary, The Los Angeles Times, December 9, 2001.

²²⁸ The minutes of eight Planning Commission hearings and the final Board of Supervisors hearing in which the GPA/ZC was approved record no testimony in favor of the Ranch Plan referring to the NCCP.

²²⁹ Broming, Richard, Personal Interview, 2007.

²³⁰ Ibid.

²³¹ Interview, Anonymous Employee of the California Department of Fish and Game, February 12, 2005.

²³² Chuck Raybrook, Regional Manager, California Department of Fish and Game Office, Encinitas, California, Personal Communication, January 27, 2005.

²³³ Dan Kelly, V.P. of Government Relations, Rancho Mission Viejo Company, Testimony before the Orange County Planning Commission, October, 10, 2004.

²³⁴ Broming, Richard, Personal Interview, June 23, 2007.

²³⁵ Yi, Daniel. "Environmental Coalition Sues to Block 14,000-Home Development." *The Los Angeles Times* 9, Decemeber, 2004.

²³⁶ Ibid.

²³⁷ Eng, Larry, California Department of Fish and Game Regional Manager, Letter to Laura Coley Eisenberg and Richard Broming, Rancho Mission Viejo, LLC, "Assurances for Development and Conservation Under the Southern Orange County NCCP, November 30, 2006.

²³⁸ Tony Moiso, CEO, Rancho Mission Viejo, Orange County Planning Commission Public Hearing, October 12, 2004.

²³⁹ Broming, Richard, Personal Interview, 2007.

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- ²⁴⁰ Environment News Service, “Coalition Works to Save Rancho Mission Viejo,” October 8, 2002.
- ²⁴¹ Broming, Richard, Personal Interview, 2007.
- ²⁴² D.D. Murphy, November 29, 2004, Interview.
- ²⁴³ Dan Kelly, Vice President of Governmental Relations, Rancho Mission Viejo Company, February 11, 2005, Interview.
- ²⁴⁴ Richard K. Goacher, Orange County Planning Commission Chairman, November 24, 2004, Interview.
- ²⁴⁵ Thomas, C.W., “Habitat Conservation Planning: Certainly Empowered, Somewhat Deliberative, Questionably Democratic,” *Politics & Society*, Vol. 29, No.1, March, 2001, p.119.
- ²⁴⁶ Susskind, Lawrence, et al. Negotiating Environmental Agreements, How to Avoid Escalating Confrontation, Needless Costs, and Unnecessary Litigation, (Island Press: Washington, D.C., 2000) p. 25.
- ²⁴⁷ Winkle, Borre, Personal Interview, August 12, 2007.
- ²⁴⁸ Winkle, Borre, Personal Interview, August 12, 2007.
- ²⁴⁹ O’Connell, Mike, Personal Interview, June 10, 2010.
- ²⁵⁰ Brown, Elizabeth, Personal Interview, April 15, 2007.
- ²⁵¹ Ibid.
- ²⁵² Silver, Dan, Personal Interview, January 21, 2005.
- ²⁵³ In fact, Dr. Silver confirmed this position when interviewed in down town Hollywood, across from his apartment complex.
- ²⁵⁴ Wanczuk-Barton, Gail, Personal Interview, July 18, 2007.
- ²⁵⁵ Mullen, Tom, Personal Interview, July 22, 2007.
- ²⁵⁶ Wancuk-Barton, July 18, 2007.

²⁵⁷ Brown, Elizabeth, April 15, 2007.

²⁵⁸ Ibid.

²⁵⁹ Barton, Gail, July 18, 2007.

²⁶⁰ Brown, Elizabeth, notes taken at Orange County NCCP/HCP meeting, date unavailable.

²⁶¹ Dominigoni, Cindy, 2007.

²⁶² Sauls, Ed, Personal Interview, July 23, 2007.

²⁶³ Wikle, Borre, 2007.

²⁶⁴ AC member Tom Scott of the Science Advisory Board gave a eulogy for Mr. Wancsuk.

²⁶⁵ Barton, Gail, 2007.

²⁶⁶ Kelly, Dan, Vice President of Government Relations, RMV, Personal Interview, February 11, 2005.

²⁶⁷ Ibid.

²⁶⁸ Carlton, Paul, Personal Interview, February 22, 2007.

²⁶⁹ Ibid.

²⁷⁰ Broming, Richard, Personal Interview, November 30, 2007.

²⁷¹ Tamaribuchi, Sat, Personal Interview, April 30, 2007.

²⁷² Mullen, Tom, 2007.

²⁷³ Dominigoni, Cindy, Personal Interview, 2007.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Neely, Tim, Personal Interview, June 6, 2007.

²⁷⁸ Neely, Tim, 2007.

²⁷⁹ Ibid.

²⁸⁰ Brown, Elizabeth, Personal Interview, April 15, 2007.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Neeley, Tim, Personal Interview, 2007.

²⁸⁵ Ibid.

²⁸⁶ Bartel, Jim, August 12, 2007.

²⁸⁷ Ibid.

²⁸⁸ Condas, John C., Jackson, DeMarco & Peckenpaugh, A Law Corporation. Letter to Ms. Kristi Lovelady, County of Riverside, Transportation and Land Management Agency, September 4, 2001.

²⁸⁹ Riverside County, California Ordinance 801.2, Section 7.

²⁹⁰ Cleary-Rose, Karin, Phone Interview, November 14, 2011.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Property Owners Association of Riverside County, "*Overview of Proposed Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)*," September 25, 2003.

²⁹⁴ Colbert, Bruce, Personal Interview, June 8, 2007.

²⁹⁵ Ibid.

²⁹⁶ Dominigoni, Cindy, 2007.

²⁹⁷ Wise, Charles, p.311.

²⁹⁸ Anderson, Ileene, 2007.

²⁹⁹ DiSimone, Pete, 2007.

³⁰⁰ Ibid.

³⁰¹ Gray, Barbara, "Framing of Environmental Disputes," in Roy J. Lewicki et al, eds., *Making Sense of Intractable Environmental Conflicts, Concepts and Cases*, 2003, p. 17.

³⁰² The consultant, R.J. Meade, acted as facilitator on both the Orange County plans and as a conservation consultant for the Irvine Company and Rancho Mission Viejo.

³⁰³ Brown, Elizabeth, 2007.

³⁰⁴ The new facilitator was Mike O'Connell of the Nature Conservancy, whose interview is quoted in Chapter 3. After the NCCP was permitted, O'Connell became the Executive Director of the Irvine Ranch Conservancy.

³⁰⁵ Brown, Elizabeth, 2007, confirmed by Pete DiSimone, 2007.

³⁰⁶ Brown, Elizabeth, 2007.

³⁰⁷ Di Simone, Pete, 2007.

³⁰⁸ Silver, Dan, 2005.

³⁰⁹ Bartel, Jim, 2007.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Cleary-Rose, Karin, 2011.

³¹³ Florian, Monica, Phone Interview, 2005.

³¹⁴ Ibid.

³¹⁵ Brown, Elizabeth, 2007.

³¹⁶ Richard O’Neill held the position of the California Democratic Party Chairman from 1979 to 1981. He died in 2009. His nephew, Antonio “Tony” Moiso, has served as the President and CEO of RMV throughout the NCCP/HCP process, and as of this writing, still holds that position.

³¹⁷ Broming, Richard, 2007.

³¹⁸ Ibid.

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