2013

Habitat Conservation Plans: Embracing Landowner Pragmatism and Quieting the Complexity of the Incidental Take Permit Process

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Recommended Citation

Mark F. Maples, *Habitat Conservation Plans: Embracing Landowner Pragmatism and Quieting the Complexity of the Incidental Take Permit Process*, 1 Tex. A&M J. Real Prop. L. 245 (2013).
Available at: <https://doi.org/10.37419/JPL.V1.I2.5>

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HABITAT CONSERVATION PLANS: EMBRACING LANDOWNER PRAGMATISM AND QUIETING THE COMPLEXITY OF THE INCIDENTAL TAKE PERMIT PROCESS

By Mark F. Maples†

I. INTRODUCTION.....	245
II. WHAT ARE HCPs?.....	248
III. ARGUMENTS OF LANDOWNERS	252
IV. JURISPRUDENCE FAVORING LANDOWNERS.....	253
V. ARGUMENTS OF PRESERVATIONISTS AND ENVIRONMENTALISTS	254
VI. JURISPRUDENCE FAVORING PRESERVATIONISTS AND ENVIRONMENTALISTS	255
VII. RECOMMENDATION	256
A. <i>Introduction</i>	256
B. <i>Legal Pragmatism</i>	258
C. <i>Farber's Advantages of Legal Pragmatism</i>	259
D. <i>The Rise of Eco-Pragmatism</i>	260
E. <i>No Verifiable Victory for Either Side</i>	262
F. <i>Quieting the HCP Complexity</i>	264
VIII. CONCLUSION	265

I. INTRODUCTION

The Supreme Court, in *Tennessee Valley Authority v. Hill*, declared the Endangered Species Act of 1973 (“ESA” or “the Act”) the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹ The Court declared that species protection must be achieved at any cost.² This decision, more than any other, set the tone for future interpretations of the Act.³ Depending on one’s worldview, the ESA can be described in vastly different ways, but one description has prevailed: it is “the pit bull of federal environmental statutes.”⁴ It has the power to “alter the behavior of

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1. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

2. *Id.* at 184.

3. Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 4 (1993) (citing Richard Littell, *Endangered and Other Protected Species: Federal Law and Regulation*, 3 (1992)).

4. Address by Donald Barry, Majority Counsel, House of Representatives, Comm. on Merch. Marine and Fisheries, Am. Bar Ass’n Section on Nat. Res., Energy and Env’tl. Law, Workshop on Endangered Species (Apr. 6, 1990) (cited in Robert DOI: <https://doi.org/10.37419/JPL.V1.I2.5>

the largest and most powerful institutions in the nation.”⁵ Section 7 of the Act restricts federal government action that affects endangered species, which was enough to ruffle plenty of feathers in Congress.⁶ However, one section alone causes the most controversy among land-owners and ecologists—section 9. This prohibits actions by any private citizen or municipality that might result in the *take* of an endangered or threatened species.⁷ *Take* is defined in the Act as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁸

Anyone who owns a piece of real property that happens to contain the habitat of a listed species can take no action that may harm that habitat and, in turn, that species.⁹ This, in effect, establishes strict land-use limitations on private landowners. The recent expansion and enforcement of section 9 evinces the “ESA’s inevitable progression from the regulation of federal agency activities to the regulation of private and local governmental actions.”¹⁰ This notion of placing animal protection (no matter how small the species) above the needs of property owners has become increasingly criticized since the Act’s inception.¹¹

After World War II, the United States experienced an unprecedented growth in urbanization and industrialization.¹² The ESA was a reactionary response to a rising conviction that humans were extinguishing plant and animal species at an alarming rate.¹³ For many, the reasons for species conservation were economic.¹⁴ Proponents of the Act felt that there might be a possibility for the future use of species in new medicines and to attract eco-tourists to exotic areas.¹⁵ For most, the reasons were more altruistic—plant and animal species have

Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991)).

5. Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 605–606 (1991).

6. Sugg, *supra* note 3, at 2.

7. Endangered Species Act of 1973, 16 U.S.C.A. § 1538 (West 2012); *see also*, U.S. DEP’T OF THE INTERIOR FISH AND WILDLIFE SERV., HCP HANDBOOK 1–1, *available at* <http://www.fws.gov/endangered/esa-library/pdf/HCPBKTOC.PDF> [hereinafter HCP HANDBOOK].

8. § 1532.

9. *See generally* George C. Coggins & Irmis Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433, 1433–34 (1982).

10. Thornton, *supra* note 5, at 606.

11. Laurence Michael Bogert, *That’s My Story and I’m Stickin’ to It: Is the “Best Available” Science Any Available Science Under the Endangered Species Act?*, 31 IDAHO L. REV. 85, 87 (1994).

12. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 492 (2008).

13. *Id.* at 492–93.

14. *Id.* at 493.

15. *Id.*

intrinsic value, humans cannot *play God*, and a world of variety trumps a world of homogeneity.¹⁶

As high-minded and environmentally conscious as that sentiment may be, landowners can argue that they hold ancient land-use rights that should not be infringed upon because a protected species of insect resides on their property.¹⁷ Are landowners not entitled to use the land they have purchased as they choose? The decision is almost indisputable if the endangered species in question is a bald eagle. On the contrary, when the debate is centered upon a fly or a small fish,¹⁸ opinions can vary widely as to whether the species warrants such a strict limitation on property rights.

Congress addressed these concerns in 1982 by giving landowners recourse to avoid prosecution as section 9 violators—the *incidental take* provision in section 10. This provides landowners with the opportunity to apply for an incidental take permit.¹⁹ If the land in question encompasses the habitat of a listed species, and the landowners would like to make improvements that may result in the destruction of that habitat, they can submit a plan detailing how they will mitigate the damage.²⁰ These plans have come to be known as “habitat conservation plans” (“HCP”).²¹ Even though an incidental take permit is a boon to landowners previously at the mercy of the ESA, HCPs are not universally prized.

For some owners, developing and initiating an HCP is cost prohibitive.²² With margins already thin on many commercial developments, it is easy to see how a landowner would be reluctant to increase expenses by attempting to develop a property while making a solid effort to preserve a species as well. In some cases, under section 10, owners can apply for a hardship exemption from section 9 liability.²³ If an individual enters into a contract affecting a species that is subsequently listed as endangered or threatened, and it will cause him undue economic hardship under the contract, the Secretaries of Commerce or the Interior may exempt him from application of section 9.²⁴ This exemption is of limited scope and is not available to those whose land contains a species that was listed before they entered into the purchase contract.²⁵ The Act gives sole discretion to

16. *Id.*

17. *See generally* Nat'l Ass'n of Home Builders of the U.S. v. Babbitt, 949 F. Supp. 1, 2 (D.D.C. 1996), *aff'd sub nom.* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

18. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

19. 16 U.S.C.A. § 1539 (West 2012).

20. *See id.*

21. HCP HANDBOOK, *supra* note 7, at 1–2.

22. Rufus C. Young, Jr., 2008 Update: How The Federal Endangered Species Act Affects Land Use, SP011 ALI-ABA 531, 536.

23. § 1539(a).

24. § 1539(b).

25. *Id.*

the Secretary as to who qualifies for an exemption.²⁶ Even with these provisions, it stands to reason that many landowners may be reticent to develop a property knowing that they also may have to initiate a restrictive and expensive HCP.

Both sides of the debate have strong reasons for disliking section 10. After a brief discussion of HCPs and their history in Part II, this Comment will evaluate the best arguments from both landowners and preservationists in Parts III and V. Parts IV and VI will discuss case history supporting both sides. Part VII will then discuss the philosophy of eco-pragmatism and recommend that resourceists and landowners should adopt some of its principles regarding adaptive management and HCPs. Within this Section, the Author will argue that the advantages to pragmatism in constitutional law that Daniel Farber submitted in 1988 are perfectly suited to the conflicts presented by modern HCPs, and it is essential for landowners to understand this. Further, the ESA must be revised to make HCPs less complicated and more cost-effective for landowners, so that it will be reasonable for them to develop operative plans. HCPs are really the only viable option we have for addressing the needs of vastly different competing interests. These tools for conservation must be embraced and strengthened, so they can successfully and efficiently preserve species.

II. WHAT ARE HCPs?

The ESA charges the Secretaries of the Interior and Commerce with the development of endangered species lists, which automatically activate protections.²⁷ Ninety percent of the endangered or threatened species that are listed reside on private land, and two-thirds have at least sixty percent of their total habitat on private land.²⁸ Before the amendments of 1982, private parties engaged in otherwise lawful activities that resulted in the taking of an endangered species were subject to section 9 liability and had no legal recourse.²⁹ Up to that point, only conservation actions and scientific research that resulted in takings were authorized under the ESA.³⁰ The purpose of HCPs and incidental take permits is to authorize the incidental take of a listed species—these were not intended to authorize the underlying activities that cause the take in the first place.³¹ Section 10(a)(2)(B) requires the following from an HCP before a permit will be issued:

26. *Id.*

27. Wyman, *supra* note 12, at 493–94.

28. Robert D. Thornton, *Habitat Conservation Plans: Frayed Safety Nets or Creative Partnerships?*, 16 NATURAL RESOURCES & ENV'T 94, 94 (Fall 2001) (citing David Wilcove et al., *Rebuilding the Ark: Toward a More Effective Endangered Species Act for Private Land*, 28 ENVTL. L. REP. (Envtl. L. Inst.) 10, 701 (1998)).

29. HCP HANDBOOK, *supra* note 7, at 1–1.

30. *Id.*

31. *Id.*

- “(i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such 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; and”
- (v) any other measures required by the Secretary must be met.³²

Congress not only intended this process to provide recourse to private parties engaged in otherwise lawful land use, but also to provide a way “to reduce conflicts between listed species and economic development activities, and to provide a framework that would encourage ‘creative partnerships’ between the public and private sectors and state, municipal, and Federal agencies in the interests of endangered and threatened species and habitat conservation.”³³ Congress sought to develop a climate of cooperation and to resolve the inherent conflict that had arisen between species protection and economic activities on private lands.³⁴ With these changes, landowners could undertake development projects with assurances from the federal government that, as long as they continued to follow their approved plan, they would not be prosecuted under section 9.

Surprisingly, in the twelve years following the addition of the HCP provision in 1982, the federal government approved only fourteen HCPs, and most of those were very limited in scope, addressing only a few species.³⁵ In 1994, Bruce Babbitt, Secretary of the Interior under President Clinton, undertook an ambitious administrative reform plan to increase habitat conservation on private lands.³⁶ Babbitt formed a two-part agenda that sought to appease both resourcists and environmentalists, and balance their interests through a reinterpretation of the ESA.³⁷ One part of his agenda focused on ecosystem-level habitat management that would enhance species conservation.³⁸ Secondly, Babbitt’s agenda gave a voice and fair recourse to landowners inadvertently barred from land use by the section 9 *takings* prohibition.³⁹ This agenda directly led to many regulatory innovations.⁴⁰ Babbitt’s reforms included *safe harbor* and candidate conservation agreements, but HCPs and their accompanying assurances (although in existence

32. Endangered Species Act of 1973, 16 U.S.C.A. § 1538(a)(2)(B) (West 2012).

33. HCP HANDBOOK, *supra* note 7, at 1–2 (referring to H.R. Rep. No. 97-835 (1982)).

34. *Id.*

35. Thornton, *supra* note 28, at 95.

36. *Id.* at 94.

37. J.B. Ruhl, *Is the Endangered Species Act Eco-Pragmatic?*, 87 MINN. L. REV. 885, 931 (2003).

38. *Id.* at 886–87; *see generally* DANIEL A. FARBER, *ECO-PRAGMATISM* (1999).

39. Ruhl, *supra* note 37, at 918–919.

40. *Id.* at 937.

before the reforms) were the centerpiece of the program.⁴¹ After these reforms, the use of HCPs rose steeply.⁴² Between 1993 and 1997, two hundred HCPs were approved.⁴³ At their essence, the Babbitt reforms were meant to “encourage landowners voluntarily to commit to the protection and management of endangered species habitat in return for a degree of economic and regulatory certainty regarding the cost of species and habitat protection.”⁴⁴ The Assurances Rule was a driving factor in the growth of HCPs in the 1990s—it provides that, in the case of unforeseen circumstances that require more mitigation to protect the species, the permit holder will suffer no further land-use restrictions nor be required to pay further financial compensation.⁴⁵ The federal government will then cover any further expenses related to mitigation.⁴⁶ These assurances only apply to species covered by the HCP, and only if the plan has been properly implemented.⁴⁷

Since the 1990s, HCP approvals have decreased significantly.⁴⁸ This is largely due to the rising complexity and expense of plans, uncertainty about the future of the Babbitt reforms, and antipathy from the environmental community about the reforms.⁴⁹ To be successful, the process requires those undertaking development to build consensus among the various stakeholders and interests.⁵⁰ This is especially true when the HCP is being developed for a large regional area.⁵¹ The biological issues present are not clear-cut and often require biologists from the U.S. Fish & Wildlife Service (“FWS”) to assist in creating a sufficient plan that will be accepted by the Secretary.⁵² Many landowners and municipalities are reluctant to undertake such huge, expensive plans, especially when a plan covers millions of acres and dozens of species.⁵³

In 1999, to address criticisms raised by the environmental community, the government established the Five-Point Policy.⁵⁴ This addendum to the *HCP Handbook* addresses: “(1) biological goals and objectives; (2) adaptive management; (3) compliance monitoring and effectiveness monitoring; (4) permit duration; and (5) enhanced public

41. Thornton, *supra* note 28, at 94.

42. *Id.* at 95.

43. *Id.*

44. *Id.* at 94–95.

45. *Id.* at 95.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. HCP HANDBOOK, *supra* note 7, at 1–15.

51. *Id.*

52. *Id.*

53. Thornton, *supra* note 28, at 95.

54. *Id.* at 96.

participation.”⁵⁵ This *adaptive management* is defined as a “method for examining alternative strategies for meeting measurable biological goals and objectives, and then, if necessary, adjusting future conservation management actions according to what is learned.”⁵⁶ This approach appeases the preservationists, but it produces a tension with the Assurances Rule.⁵⁷ Adaptive management proposes the notion that HCPs should be adjusted over time and as new information is obtained.⁵⁸ This is in direct contrast with the Assurances-rule notion that once an HCP is approved and an incidental take permit issued, the landowner is assured to not be subject to further mitigation expenses apart from those already established in their HCP.⁵⁹

Another conflict between landowners and preservationists arose when the FWS adopted the Permit Revocation Rule.⁶⁰ This change established that the FWS could revoke an issued incidental take permit if it believes that the approved HCP will, in fact, harm the covered species, even if the permit holder is not responsible for the harm.⁶¹

Landowners could argue that this undermines the Assurances Rule because, previously, in response to unforeseen circumstances harming the species, the FWS could not revoke the permit without the permission of the permittee.⁶² The FWS could now unilaterally revoke an incidental take permit.⁶³ For years, the FWS has allowed local agencies that hold area-wide permits to sell *sub-permits* to third parties to take covered species under the approved HCP.⁶⁴ This process is beneficial because it provides a financial incentive to protect habitat and species, and defers the cost of maintaining the plan for permit holders.⁶⁵

Generally, however, HCP implementation has become a process that landowners would like to streamline.⁶⁶ Developing an HCP can create a large burden “for the small developer and landowner; minorities and residents of depressed communities are unlikely to own sizeable tracts of land or engage in large-scale development” and cannot afford to take advantage of an incidental take permit.⁶⁷

55. *Id.*

56. *Id.* (quoting 65 Fed. Reg. 35, 252 (June 1, 2000)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 97.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 99.

65. *Id.*

66. Young, *supra* note 22, at 558.

67. Craig Anthony Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 36 (1991).

III. ARGUMENTS OF LANDOWNERS

The Takings Clause of the Fifth Amendment bars the federal government from taking private property for public use without just compensation.⁶⁸ Recently, courts have construed certain standards under the law to determine if government regulation or conduct is restricting a landowner's property rights too greatly.⁶⁹ If it is determined that the restrictions are too great, it usually is considered to be a taking and the landowner must be paid just compensation.⁷⁰ A landowner can make a claim that the ESA section 9 prohibition amounts to a regulatory taking without just compensation, which would amount to an unconstitutional taking of private property. He or she has been prevented from developing or utilizing his or her land; this could be seen as the federal government overstepping its authority. Industry groups and property-rights advocates want compensation for landowners if species protection restricts their land use.⁷¹

Also, landowners are seriously concerned that the Permit Revocation Rule is an attempt to undermine the Babbitt reforms.⁷² If these reforms fade, it is unlikely that landowners will be interested in large, long-term HCPs.⁷³ As Robert Thornton explains:

At a minimum, any sophisticated landowner is going to be extremely reluctant to commit to long-term habitat protection and management in advance of the time that the [incidental take permit] is effectively vested through the completion of development. Landowners will likely insist that conveyance of legal interests in habitat to the agencies be phased with the vesting of development rights.⁷⁴

Lastly, as will be discussed below, the HCP process can be very laborious and expensive. These plans are meant to provide landowners with an opportunity to develop their land and receive what amounts to a free pass to lawfully violate the takings prohibition. Even still, formulating and implementing an HCP is so expensive that few would want to undertake the process. Currently, industry groups are calling for the process to become more streamlined.⁷⁵

68. U.S. CONST. amend. V.

69. Srinath Jay Govindan, "Taking" Steps to Protect Private Property and Endangered Species: Constitutional Implications of Habitat Conservation Planning After *Dolan v. Tigard*, 47 EMORY L.J. 311, 312 (1998).

70. *Id.*

71. Young, *supra* note 22, at 558.

72. Thornton, *supra* note 28, at 97.

73. *Id.*

74. *Id.*

75. Young, *supra* note 22, at 558.

IV. JURISPRUDENCE FAVORING LANDOWNERS

Those favoring a limited application of the ESA have successfully achieved a narrowing of the Act's protections in the courts.⁷⁶ Many of the successful challenges have been directed at the processes the FWS uses to come to its listing decisions. In *Endangered Species Committee of the Building Industry Ass'n v. Babbitt*, the plaintiffs sued the Department of the Interior because a bird (coastal California gnatcatcher) had been listed as endangered.⁷⁷ The building association challenged the listing because there was conflicting evidence about the geographical area within which the species resided.⁷⁸ The court held that listing the gnatcatcher as a threatened species violated the Administrative Procedures Act because the Secretary should have made the underlying data, which was the basis of the decision, available to the public.⁷⁹

In another challenge to a listing decision, *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, the FWS issued an incidental take statement that prevented ranchers from allowing their cattle to graze in certain areas because they might potentially modify the habitat of various endangered species, even though the Agency's own reports stated that harm to the habitat was unlikely.⁸⁰ The Ninth Circuit held that such agency action is arbitrary and capricious because there was no evidence that endangered species actually existed on the land in question, and similar actions must be predicated on findings of incidental takings.⁸¹

Courts not only have limited the listing processes, but also struck down challenges when the FWS has chosen not to list a species at all. In *Defenders of Wildlife v. Bernal*, environmental groups brought suit to stop the construction of a school on land that was potentially a habitat for the cactus ferruginous pygmy owl.⁸² The school district had not applied for an incidental take permit.⁸³ First, the court held that the district was not required to apply for a permit because it did not believe that its actions would result in a taking of the owl.⁸⁴ It is not mandatory for a party to seek a permit, but if their actions do result in the taking of a listed species, they could suffer civil and criminal penalties.⁸⁵ Second, the court held that, based on the evidence

76. *Id.* at 538.

77. *Endangered Species Comm. of the Bldg. Indus. Ass'n v. Babbitt*, 852 F. Supp. 32, 33–35 (D.D.C. 1994).

78. *Id.*

79. *Id.* at 38.

80. *Ariz. Cattle Growers' Ass'n. v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1233 (9th Cir. 2001).

81. *Id.*

82. *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000).

83. *Id.* at 922–27.

84. *Id.* at 927.

85. *Id.*

presented, the district court was not erroneous in finding that the construction of the school would not result in the take of the pygmy owl.⁸⁶

V. ARGUMENTS OF PRESERVATIONISTS AND ENVIRONMENTALISTS

From the outset, the environmentalist movement embraced the Babbitt reforms as a way to promote conservation on private lands by way of regulatory incentives.⁸⁷ In recent years though, powerful segments of the movement are turning against the reforms and issuing a full legal assault on HCPs and the assurances they provide.⁸⁸ As one study indicates, endangered species whose habitat is on private land are faring much worse than species located on federal land,⁸⁹ and this is troubling to environmentalists. There is anecdotal evidence that some landowners will actually preemptively destroy habitats in order to avoid application of the land-use restrictions of sections 7 and 9.⁹⁰ This problem has been nicknamed “shoot, shovel, and shut up”; and seriously undermines the efforts to protect endangered species.⁹¹

Environmentalists proffer six complaints about conservation through HCPs:

- HCPs should be required to meet a “recovery” standard—not just mitigate impacts and ensure survival;
- The agencies should be able to impose additional mitigation requirements on HCP applicants in the event of new information or unforeseen circumstances;
- If “no surprises” assurances are provided, the extent of the assurances should vary in relation to the level of conservation provided by the HCP;
- HCPs should commit to specified biological objectives and the plans should be reopened if the biological objectives are not met;
- HCPs should include scientific peer review; and
- The environmental community should have a greater seat at the table in HCP negotiations.⁹²

When arguing against the use of HCPs, environmental groups typically point to a study that supports that HCPs can be scientifically deficient.⁹³ Sponsored by the American Institute of Biological Studies, researchers studied forty-three HCPs across the country to determine the extent to which scientific method and data were used in

86. *Id.*

87. Thornton, *supra* note 28, at 95–96.

88. *Id.*

89. *Id.* at 94.

90. Wyman, *supra* note 12, at 506.

91. *Id.*

92. Thornton, *supra* note 28, at 96.

93. *Id.*

development of the plans.⁹⁴ But the study merely criticized some of the HCPs for not consistently monitoring the effects over a long period of time and for not properly using biological data.⁹⁵ The study focused on older, smaller HCPs and did not look at newer plans that may utilize better methodology.⁹⁶ However, the study itself has been criticized for not using proper methodology.⁹⁷

VI. JURISPRUDENCE FAVORING PRESERVATIONISTS AND ENVIRONMENTALISTS

Where resourcists and landowners have successfully challenged the listing processes and methodologies used to restrict land use, in many cases, environmental groups have successfully sued to enforce the *takings* prohibition of section 9 or won suits brought by developers. In some cases, the challenge has been to the issuance of the incidental take permit even though there was an accepted HCP in place.

In *National Wildlife Federation v. Babbitt*, environmental groups sued to stop a large flood mitigation development in California that had been issued an incidental take permit.⁹⁸ The proposed dam and levees were expected to affect the habitat of migratory waterfowl and the giant garter snake by allowing for urbanization of an area that previously was not suitable for development.⁹⁹ The environmental groups challenged the issuance of the permit because the HCP did not meet all of the requirements established in section 10. The plaintiff's motions for summary judgment were granted on five of its nine causes of action.¹⁰⁰

Some landowners have attempted and failed to challenge the ESA on constitutional grounds. In *Rancho Viejo, L.L.C. v. Norton*, the developer's suit was not challenging the FWS listing processes or administrative methodologies, but the very power of Congress itself to regulate the activity.¹⁰¹ In this case, the FWS decided that a development in California was going to jeopardize the existence of the arroyo southwestern toad.¹⁰² Instead of developing an HCP, the developer sued the government challenging the application of the ESA as unconstitutional under the Commerce Clause.¹⁰³ The court held that even though the development was located in only one state, the activ-

94. *Id.* (see generally P. Kareiva et al., *Using Science in Habitat Conservation Plans* (1999), <http://www.nceas.ucsb.edu/nceas-web/projects/97KAREI2/hcp-1999-01-14.pdf>).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Nat'l Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1277 (E.D. Cal. 2000).

99. *Id.* at 1277-78.

100. *Id.* at 1302.

101. *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003).

102. *Id.*

103. *Id.*

ity was economic in nature, and regulation through the ESA did not violate the Commerce Clause.¹⁰⁴

In *Loggerhead Turtle v. County Council of Volusia County, Florida*, an action was brought on behalf of two species of sea turtle, claiming that cars driving on the beach during nesting season were negatively affecting the turtle population.¹⁰⁵ They claimed that the county's refusal to ban the activity was an unlawful take under the ESA.¹⁰⁶ The county had received an incidental take permit, but takings related to artificial light from the beachfront were not permitted in the issuance.¹⁰⁷ The court held that the county's permit did not authorize the take of the turtles "through purely mitigatory measures associated with artificial beachfront lighting."¹⁰⁸

Cases like *Loggerhead Turtle* serve to highlight the fact that landowners and municipalities are often in the dark about the steps they *must* take to lessen the chance of ESA litigation. It appears that the slightest oversight during the incidental take permit process can open them up to claims under the Act. Further, these cases show that landowners are unlikely to succeed in any constitutional claims that they might bring challenging ESA provisions.

VII. RECOMMENDATION

A. Introduction

The ESA's sole regulatory restriction on private activity is the *taking* prohibition of section 9.¹⁰⁹ Aside from that section, the federal government, through the ESA, does not force landowners into species protection and recovery, and habitat restoration.¹¹⁰ Most people would agree that wholesale species slaughter and habitat destruction should not be permitted. The ESA is in desperate need of update and revision—environmentalists, resourcists, and politicians agree on *that* at a minimum.¹¹¹ The problem does not lie solely with the section 9 *takings* prohibition, which resourcists and landowners view as a case of government overstepping its bounds. Neither does the problem lie with the section 10 incidental take permit, which environmentalists see as an affront to the entire purpose of the *takings* prohibition from the beginning. Barring the enforcement of these provisions, the ESA

104. *Id.* at 1069–70.

105. *Loggerhead Turtle v. Cnty. Council of Volusia Cnty, Fla.*, 148 F.3d 1231, 1234–36 (11th Cir. 1998).

106. *Id.*

107. *Id.* at 1258.

108. *Id.*

109. 16 U.S.C.A. § 1538 (West 2012).

110. Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 288–89 (1998).

111. Young, *supra* note 22, at 558.

does not directly address habitat loss at all.¹¹² Further, the Act fails to address water and air pollution, and exotic species invasion as causes of species loss and does little to promote conservation of biodiversity on a *geographic scale*.¹¹³

The Author submits that the response to these issues can be found when resourcists embrace a philosophy that has been traversing the ranks of environmentalist groups for the last few years—eco-pragmatism. Both sides of the debate must look to this way of thinking and accept the inevitability that neither side will ever claim an outright victory. If resourcists can adopt a pragmatic view of adaptive management they may see, as so many environmentalists have seen, that it is truly the only way to reconcile the current state of ecology and balance property rights with preservation.

In 1988, Daniel Farber outlined distinct advantages that legal pragmatism brings to constitutional law. The Author believes that these advantages are also distinctly relatable to environmental law and efforts to balance stakeholder needs in conflicts over HCPs. Part B of this Section will summarize this philosophy, and Part C will discuss Farber's advantages to legal pragmatism. Analysis of these advantages may help to persuade those seeking resolution to these conflicts to view pragmatism in a new light. There are times when both sides in a conflict are so entrenched that a pragmatic approach is the only feasible solution. Part D of this Section will discuss the rise of eco-pragmatism and how it has come to be viewed in the environmental community. Part E will contend that both sides in this debate have legitimate concerns and neither will ever be able to claim a verifiable victory in this struggle. Therefore, landowners must accept that humanity has a stewardship responsibility to every organism, and both sides must practice a pragmatic approach to the problem.

Further, under current conditions, HCP development is far too cost prohibitive. Landowners that may desire to institute an effective plan are unlikely to finance it when they see how much it will cost them. This can then lead to the *shoot, shovel, and shut up* problem mentioned previously. Also, low-income communities may not be able to afford the cost of HCP implementation. It is in the great interest of all involved for Congress to revise the ESA and streamline the procedures that landowners must undertake to receive an incidental take permit. In Part F of this Section, the Author will recommend that we must quiet the complexity of HCPs so that there will be an incentive for landowners to develop plans that they will actually fulfill, and that will actually be effective.

112. Jim Chen, *Across the Apocalypse on Horseback: Imperfect Legal Responses to Biodiversity Loss*, 17 WASH U. J.L. & POL'Y 12, 26 (2005).

113. *Id.*

B. *Legal Pragmatism*

As detailed by Daniel Farber, legal pragmatism is an intellectual movement that attacks foundationalism.¹¹⁴ Farber posits that the philosophy allows legal problems to be solved “using every tool that comes to hand, including precedent, tradition, legal text, and social policy;” and that the law “needs no grand theoretical foundation.”¹¹⁵ To the pragmatist, experience is always the best test.¹¹⁶ He rejects formulaic solutions to difficult constitutional problems and believes that creativity must be used to arrive at an acceptable solution.¹¹⁷ Regarding constitutional law, in 1988, Farber suggested that the recent prevailing theory on judicial review—foundationalism—actually was built upon no foundation at all.¹¹⁸ Scholars had been focused on finding a unified principle that could be used as a basis for judicial decisions, but Farber believed that the foundation they were looking for probably did not exist and, further, that no such foundation was needed.¹¹⁹ Various terms *intuitionism*, *practical reason*, or *prudence*, Farber was part of a growing movement of scholars who were discontent with foundationalism and increasingly embraced a new philosophy of law.¹²⁰ Preferring the term *pragmatism*, Farber saw that, even though many proponents of the philosophy emphasized different positions, there was common ground to be found in the very important tenets of foundationalism rejection, and the emphasis of context, community, and judgment in judicial review.¹²¹ This view was part of a broad intellectual movement and was being accepted outside of legal circles, as well.¹²² Some scientists were rejecting “the notion of a unitary scientific method in favor of nonfoundationalist views of the scientific enterprise.”¹²³ Philosophers from many disciplines were beginning to realize that for far too long they had been building philosophical towers one brick at a time, and when the foundational brick collapsed, so did the tower.¹²⁴ But when the philosophy is supported by “an interlocking web of belief, in which each belief is supported by many others rather than by a single foundational ‘brick,’ [it] is inherently far sturdier than a tower.”¹²⁵

114. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332–35 (1988).

115. *Id.* at 1332.

116. *Id.* at 1341.

117. *Id.* at 1342.

118. *Id.* at 1334.

119. *Id.*

120. *Id.* at 1334–35.

121. *Id.* at 1335.

122. *Id.* at 1335–37.

123. *Id.* at 1335.

124. *Id.* at 1336.

125. *Id.*

To Farber, at the heart of pragmatist thought lies the view that experience is always the ultimate test.¹²⁶ This view fits well with the legal mind because “lawyers are trained to be highly suspicious of glittering generalities and abstract theories.”¹²⁷ Paraphrasing Oliver Wendell Holmes, Farber stated that the lawyer’s creed is summarized in the adage that experience, rather than logic, is the life of law.¹²⁸ This concept is verified by the case method of teaching law students; where they are expected to contemplate specific cases rather than general rules.¹²⁹

C. *Farber’s Advantages of Legal Pragmatism*

Farber showed that legal pragmatism has several distinct advantages over other philosophies. First, the philosophy “responds to our sense that some constitutional problems are simply *hard* and unresponsive to any present formula; it may take all of our intelligence and creativity to devise an acceptable solution.”¹³⁰ Foundationalists aspire to make law easy by providing a single *recipe* for all problems confronted, and this recipe will never require calibration to account for societal change.¹³¹ Whereas foundationalists believe that most genuine case conflicts will dissolve in the light of analysis, pragmatists acknowledge that conflicts must be squarely confronted, and cannot be finessed.¹³²

Second, the pragmatic approach to law is *politically healthier* than foundationalism.¹³³ “By encouraging incremental decision making rather than global remedies, pragmatism reduces the risk of unjustified radical intrusions into social institutions, and increases the possibility of dialogue between the Court and other segments of society.”¹³⁴ Rather than being restricted to a single source for normative support, legal pragmatism allows judges to appeal to a broad range of values and they will be better able to build consensus.¹³⁵

Third, legal pragmatism prompts a requisite concern about the impact of law on society.¹³⁶ In Farber’s view, judges are far too often unconcerned about the societal effects of their constitutional rules and should give more thought to whether decisions “actually further societal goals such as freedom, equality, and democracy.”¹³⁷ Contrary to

126. *Id.* at 1341.

127. *Id.* at 1342.

128. *Id.*

129. *Id.*

130. *Id.* (emphasis in original).

131. *Id.*

132. *Id.*

133. *Id.* at 1342–43.

134. *Id.* at 1343.

135. *Id.*

136. *Id.*

137. *Id.*

what some critics have charged, the pragmatist does not view the past as a *dead hand*.¹³⁸ To the pragmatist, “existing law is not primarily a collection of texts that requires a struggle to interpret, but rather a way of thought that a judge has internalized.”¹³⁹ Instead of being constrained by law, they are empowered by legal tradition.¹⁴⁰ For pragmatists, “the question of the advisability of judicial review turns on its usefulness for promoting a flourishing democratic society—democratic not just in the sense of ballot casting but also in the sense that citizens are in charge of the intelligent development of their lives.”¹⁴¹

D. *The Rise of Eco-Pragmatism*

Farber applied legal pragmatism principles to environmental law in what he called *eco-pragmatism*.¹⁴² This new agenda seeks to reshape environmental policy dialogue and discard the “the bipolar extremism that has saddled the development of environmental law and policy for decades.”¹⁴³ J.B. Ruhl has molded this philosophy to specifically address many of the issues in conflict surrounding the ESA and sought to refine eco-pragmatism to make it directly applicable to species preservation.¹⁴⁴ Ruhl presents rigorous, pragmatic questions that must be asked: “Is no expense on behalf of endangered species too great? Are human rights suspended in order to protect the rights of other species? Are all species entitled to this drastic remedial care? Might helping one species limit our options to help others?”¹⁴⁵ To find solutions to these questions, we must use balanced, practical, pragmatic approaches.¹⁴⁶ Application of pragmatism to environmental law requires that several fundamental challenges be addressed:

First, all decisions in environmental law involve some trade-off between costs and benefits in terms of resource allocation and social welfare. How do we know when the costs are too much to bear relative to the benefits? Second, most decisions in environmental law address issues to which some degree of scientific uncertainty attaches. How do we know what to do when we do not know what will happen? Third, even if our policy is based purely on economic factors, we need to establish some minimum level of environmental protection in order to sustain the economy. What is that minimum level of protection? Fourth, all environmental law decisions have consequences in the present and in the future. How should we

138. *Id.* at 1346.

139. *Id.*

140. *Id.*

141. *Id.* at 1347–48.

142. Ruhl, *supra* note 37, at 886–87; see generally DANIEL A. FARBER, *ECO-PRAGMATISM* (1999).

143. Ruhl, *supra* note 37, at 887.

144. *Id.* at 887–88.

145. *Id.* at 888.

146. *Id.*

structure our decision process today so as to fulfill whatever goals we have for the future? Finally, the environment, as a constantly evolving system, will not wait for us to be perfectly happy with our answers to all the preceding questions. How do we know when to promulgate a decision versus when to wait for more information, input, and deliberation before deciding?¹⁴⁷

To address these fundamental challenges and to define the school of thought, Ruhl presents five pillars of eco-pragmatism.¹⁴⁸ He establishes the first three as a system of core decision-making instruments: drawing the environmental baseline, institutionalizing the precautionary principle, and integrating impact assessment.¹⁴⁹ This system is put into action using Ruhl's final two pillars of eco-pragmatism: empiricism and adaptive management.¹⁵⁰

One of the guiding principles of classical pragmatism is moral pluralism.¹⁵¹ This tenet, applied to ecology, is a challenge to conventional environmental policy discourse.¹⁵² The main thrust of the eco-pragmatist approach is the "willingness to test and discard theory where it does not fit the experience, rather than try to shape outcomes to fit the theory."¹⁵³ Empiricism is, therefore, "the glue that holds together the moral and instrumental components of eco-pragmatism."¹⁵⁴

As important as empiricism is to eco-pragmatism, the Author's intended focus here is Ruhl's final pillar: adaptive management. Nature is "a complex system and human relations to it [are] therefore equally as rich and varied."¹⁵⁵ Environmental law must be more dynamic, and policies that are implemented must take new information into account and allow for adaptation.¹⁵⁶ At the core of adaptive management, are the principles that ecosystems are inherently unpredictable and can "exhibit multi-equilibrium states between which the system may move for unpredictable reasons, in unpredictable manners, and at unpredictable times."¹⁵⁷ Also, because these systems are not static, quality is not achieved by completely eliminating all change within the system.¹⁵⁸ The unexpected can, and often does, happen and this makes predicting outcomes exceedingly difficult.¹⁵⁹ "[C]ollecting information, establishing measurements of success, monitoring outcomes, [and] using new information to adjust existing approaches" becomes

147. *Id.* at 893.

148. *Id.* at 888, 893.

149. *Id.* at 894–903.

150. *Id.* at 903.

151. *Id.*

152. *Id.* at 904.

153. *Id.*

154. *Id.*

155. *Id.* at 905.

156. *Id.*

157. *Id.* at 906.

158. *Id.*

159. *Id.*

an important part of combatting this unpredictability.¹⁶⁰ Management policy must possess a willingness to change.¹⁶¹ Currently, there is broad consensus among scholars and resource managers that ecosystem management policy implementation is best achieved through adaptive management.¹⁶² Both resourcists and environmentalists seek policy with fixed rules and hope to preserve any ground they have gained in their fight, but adaptive management frameworks are more experimental, “relying on iterative cycles of goal determination, performance standard setting, outcome monitoring, and standard recalibration.”¹⁶³

E. *No Verifiable Victory for Either Side*

Generally, the Author wholly rejects the notion of moral pluralism—the idea that there are no absolutes in knowledge or morality. Life is not a gray-scale field, devoid of commitment to any truth. There exists a transcending moral truth. There *are* “black-and-white” conflicts to confront, and they require absolute answers. Pluralism, coupled with moral pragmatism, is a scourge on society. The Author is not advocating a level of pragmatism that gropes to define some measure of higher moral truth. However, when attempting to confront the conflicts between resourcists and preservationists the Author believes a modicum of pragmatism is a necessary approach. It is “moral” to desire the protection of species from extinction at the hands of mankind. It is “moral” to desire to develop land that you rightfully own. These two perspectives are equally valid, yet they can be diametrically opposed. Logically, both sides must be flexible so that a conclusion acceptable to all parties can be achieved.

There is a place in the law for foundationalist thought as well as pragmatism; these philosophies are not necessarily mutually exclusive. In fact, is it not the essence of pragmatism for one to believe that there is *not* one clear philosophy or perspective on the law? On the contrary, it is the height of pragmatism to understand that, based on the given facts, a foundationalist approach may, at times, be necessary.

Of course, a discussion of foundationalism versus pragmatism is not the aim of this Section. Here, the Author seeks to elucidate the application of eco-pragmatism to the battle over the takings provision of section 9. This application is of utmost importance if there is to be any resolution between resourcists and preservationists. The environmental movement already has begun to view the issues in an eco-pragmatic light. It is now time for resourcists, landowners, and developers to understand that the issue is too complicated to view solely from a

160. *Id.*

161. *Id.*

162. *Id.* at 907.

163. *Id.* at 906–07.

property-rights perspective. We must inject realism into the thought-processes, and all sides must come to the same understanding: There are varied interests involved and a sustainable solution will require more than a one-size-fits-all approach to the problem. Preservationists must accept the facts that humans have thoroughly populated the planet and are probably not going away any time soon.

There will be times when we *will* encroach upon a habitat of an endangered species. We will do our absolute best to avoid taking said species, but not all can be saved. This process is inevitable. If the preservationist can accept this, he or she can then focus on taking the necessary steps that will mitigate the damage as much as possible. The pragmatic approach insists that not every animal can be saved, and preservationists must pick their battles.

The same pragmatic approach *can* be embraced by resourcists and landowners. They must accept the fact that animals are stakeholders in this process, and as the species on the highest tier of dominion over this planet, humans hold a grave responsibility to mitigate the taking of animals and their habitats, even if it means that sometimes we will not be able to use our land exactly as we would like. Property rights are important. If someone purchases a piece of land, he should be able to do whatever he wants with it, generally speaking. In fact, it is essential to our economy that landowners are allowed to develop their land. This is an individualistic country that values property rights. When the government attempts to control the use of private land, some may see it as an affront to civil rights.

Government land regulation confronts us on a daily basis. Local zoning ordinances tell landowners *what* they can build on their land and *how* to build it, yet, even though some may say this is government overstepping its bounds, most of us accept it for what it is: government attempting to prevent the chaos that would ensue if anyone was allowed to build anything they want, anywhere that they want. After all, few ranchers would embrace the concept of a new toxic waste dump adjacent to their land. The rancher is a stakeholder in the surrounding countryside. What happens to the land around his ranch affects his ranch. This is analogous to the habitat of endangered species. The species that inhabit that land are stakeholders in the land and the surrounding area. Just like the rancher, it matters what happens to the environment. In the case of the rancher, land-use restrictions merely lessen the value of his property or affect his livelihood. But for the endangered species, encroachment of their habitat can destroy the species itself.

Landowners and resourcists must take the pragmatic view. There is a strong environmental movement in this country that is trying to protect these species; proponents of change are not going to go away and leave developers to their own devices. Just as it is readily accepted by the public that the government is going to dictate land use through

zoning ordinances, it must be accepted that the government is not likely to allow the wholesale destruction of habitats that contain listed species. It behooves both resourcists and preservationists to meet the other side half way in this fight. They must understand that neither will ever win outright and that it is best for both sides to concede that they will not get everything they want; experience tells us this. Preservationists must accept that they cannot save every single species of snail that might be on the brink of extinction, and that people have a right to develop their land within reason. Landowners must accept that we, as humans, have a responsibility to do whatever we can to mitigate the damage to species that our development causes. Both sides must accept that HCPs are arguably the most viable vehicles for achieving the most objectives for both sides of the debate.

F. *Quieting the HCP Complexity*

As discussed above, the process for designing and implementing an HCP is so complicated and slow that only large developers can attempt to develop land that contains endangered species.¹⁶⁴ Low-income communities are essentially priced out of the opportunity to develop their own properties.¹⁶⁵ The environmentalist focus on the federalization of land-use controls has adversely affected these important stakeholders, who merely wish to improve their circumstances.¹⁶⁶ Again, the high expense of HCPs could lead landowners to destroy habitats preemptively and take species without attempting to mitigate the damage.¹⁶⁷

On paper, the system makes logical sense. The only way for the ESA to meet the challenge of protecting endangered species without trampling fundamental, constitutional property rights is with the incidental take permit option provided in section 10 of the Act. When issuing these permits, the viable way to avoid the wholesale destruction of endangered species is to require that those responsible for the taking must develop a plan to mitigate the destruction. This all appears to flow in a logical direction, to a place where both sides are at least partially satisfied. Landowners have the opportunity to use land that harbors endangered species, and preservationists can take solace in the fact that there is a plan in place to mitigate damage to the species. The HCP truly is the best solution to the problem. It is essential that the system work correctly in order for HCPs to fulfill their intended purpose. The implementation of these plans has to be cost-effective so that landowners can consider them. It is requisite that the process of obtaining a permit through an HCP be time-sensitive. Few communities or landowners possess the resources to wait on the FWS

164. Arnold, *supra* note 67, at 35–36.

165. *Id.* at 36.

166. *Id.*

167. Wyman, *supra* note 12, at 506.

to conduct study after study to assess the impact of development. Industry groups are currently seeking a provision known as *self-consultation*.¹⁶⁸ This would allow federal agencies other than the FWS and the National Marine Fisheries Service to assess the impact.¹⁶⁹ Agencies like the Forest Service could do assessments in areas that fall under their purview.¹⁷⁰ Implementation of ideas like self-consultation, would allow the entire process to be more efficient, and landowners would not avoid HCP development out of fear of an interminable delay due to the federal bureaucratic machinery, which could definitely be seen as a danger to the “landowner species.”

An efficient, cost-effective process furthers the causes of all involved. This Comment does not seek to delve into the depths of detailing exactly how Congress can accomplish a reasonable solution, it seeks only to emphasize that a reasonable solution is critical. To prevent unconstitutional land-use restriction, incidental take permits and the HCPs that accompany them are essential. To ensure that landowners will mitigate damage to endangered species there must be solid processes in place: federal agencies should follow up on the approved HCPs to ensure that the landowners are actually fulfilling the practices detailed in the plan. All of this must be cost-effective and rapid enough to encourage landowner compliance. These are tall orders for Congress to address, but without some change to the status quo we will be left with a system that holds much promise, but is languishing in futility.

VII. CONCLUSION

When confronted with two absolutist factions who view their opposition with enmity, it stands to reason that compromise is the only recourse. The road to this compromise is paved with a pragmatic perspective. Preservationists already are conceding that perhaps the subsistence of some species will come at far too great an economic and civic cost. Now, landowners need to deliberate in a similar pragmatic way: perhaps they can consistently consider their stewardship roles when developing their lands and fully embrace adaptive management. To date, HCPs have been the best solution developed to address the concerns of both sides, but if Congress does not find a way to drastically streamline the process and make it less expensive, owners will cease to apply. This will either hinder economic development or cause the preemptive destruction of listed species. The ESA will then cease to perform its intended function and be relegated to exist as the *pit bull* statute¹⁷¹ that has no teeth.

168. Young, *supra* note 22, at 558.

169. *Id.*

170. *Id.*

171. Barry, *supra* note 4.