



BENTON COUNTY
PRAIRIE SPECIES
HABITAT CONSERVATION PLAN

DECEMBER 2010



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Benton County's Prairie Species Habitat Conservation Plan: Signposts for the future of species-based land-use regulation?

A presentation to the Oregon chapter
of The Wildlife Society
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Overview:

- **Argument:** Benton County's HCP offers some evidence that conservation policy is moving toward improving the survival species by recognizing and addressing regulatory risk to maintenance-dependent species on private land.
- **Context:** My thesis (in progress): Risk to maintenance-dependent species from orthodoxy in species-based land-use regulation.
- **Benton County HCP:** A case study of orthodoxy but also some hope to improve the survival of species through policy efficiencies?
- **Concluding thoughts:** Words from Aldo Leopold.
- **Your comments and questions.**
- Thanks to USFWS for supporting work contributing to this research (LIP 005-4279S-WILDLIFE). **All views solely mine.**



Overview:

- Some definitions:
 - **Species-based land-use regulation:** Governmental land-use prohibitions or exactions based on the presence of species or associated habitat (e.g., mitigation fees under US ESA).
 - **Habitat Conservation Plans (HCPs):** An exception program under the US ESA allowing fees or other exactions in return for limited immunity from liability under the ESA (ESA §10(a)(1)(b)).
 - **Maintenance-dependent species:** Species whose survival depends on human action (e.g., to control exotic species or reintroduce disturbance) (Wilcove and Chen 1998; Scott et al 2010). (LEFT.)

— Oregon white oak killed by conifer invasion, in absence of active management



Context:

- **Personal history:** My conservation efforts took me on a **walkabout** through conservation policy.
 - **Discovery:** Some policies inadvertently tend to make it self-defeating for individuals to conserve or maintain habitat for declining species.
 - **Concern:** Losing joy of stewardship = losing species.
 - **My question:** Could the survival of a species ever depend on allowing individuals to conserve or maintain habitat on private land without selectively incurring adverse consequences from regulation intended to save it?
 - **Orthodox responses:** No choice; Landowner responsibility; We've dispelled regulation; etc.
 - **My response:** Took question to graduate school.



Context:

- **Thesis (preliminary finding):** Humans inadvertently risk exacerbating the loss of maintenance-dependent species by using species-based land-use regulation to seek other benefits (e.g., scenery, mitigation fees, administrative stability).
 - **Scientific benefit:** Helps explain persistent incoherence in conservation policy and discourse.
 - **Implication:** With constraints on funding, humans might help some species by openly refraining from land-use regulation based on their presence.
 - **Implication:** Political and economic forces make this alternative difficult to consider or implement. (But some signs of hope from Benton County HCP?)



Context:

- My questions for today:
 1. Does the Benton County HCP offer evidence that regulatory policy is moving further to recognize and address regulatory risk to species?
(As I'll explain, USFWS rules have already moved in this direction.)
 2. Does the HCP suggest how to further realize and implement such policy efficiencies?

Case study: Benton County HCP

- History of species-based land-use regulation in US:

- 1973: US ESA – First instance in federal law; set strict prohibitions; US Legislature apparently didn't anticipate its effect on private land (Lueck 2000; Doremus 2010).
- 1982: HCPs – ESA amendment recognized maintenance dependence; allowed exactions in return for limited immunity; established present USFWS policy to fund maintenance of species by taxing landowners who have them; modeled after an agreement with a wealthy developer; goal is to “minimize and mitigate impacts”, not ensure survival of species; apparently never considered whether exactions might be counterproductive (US House 1982; ESA §10a(1)).
- 1999: SHAs, CCAAs – USFWS rules recognized risk to species from regulatory disincentives; expanded opportunities for immunity, but still limited and still require exactions, per 1982 amendment (USFWS 1999).
- 2001-2006: Average of \$370 mil/y in species-based mitigation fees (Bean et al 2008: 57).
- - 2006: USFWS again recognized risk from disincentives, but said regulation is “required by law” (USFWS 2006: 63896-63897).

“There is mounting evidence that some regulatory actions ... while well intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on private lands... [T]his negative outcome is greatly amplified ... where active management ... [is] necessary for species conservation...”

(USFWS 2006: 63896-63897)

Case study: Benton County HCP

Field observations from public meetings on Benton County HCP:

"I lose my steam." (Landowner and advisor to HCP and ODFW, on risk of regulatory consequences for maintaining oak and prairie habitat, 2009.01.22)

"I think a lot of damage has been done." (Watershed council representative, on county letter advising landowners of potential liability, 2009.04.09)

"I kind of agree." (USFWS biologist, responding to above comment by watershed council, 2009.04.09)

- History of Benton County's HCP:

- **2000:** USFWS lists Fender's blue butterfly as endangered; recognizes it is maintenance dependent; estimates \$1.3 to \$11.3 mil loss in market value of land across 195+ small private ownerships in OR and WA (NEA 2006: 31-32).
- **2005(?) :** USFWS notifies Benton County it is liable for permitting development; helps pay to develop an HCP for seven prairie species (Barrett 2006).
- **2006 – 2010:** Open meetings; concern for risk to species from regulatory disincentives (Benton County 2009).
- **2011:** USFWS approves the HCP (USFWS 2011a). For private lands, county agrees in part to acquire 50-60 ac through grants and maintain mitigation populations for 6 years.

Case study: Benton County HCP

1. Evidence of further movement to recognize and address regulatory risk to species? Apparently YES; to reduce regulatory risk to species:

- Benton County offers to pay mitigation fees for private landowners, though only for covered species, existing lots, and uses requiring permits (USFWS 2010: 13). (New recognition?)

- USFWS promises prosecutorial discretion for new populations, though only in light of other exactions (ibid: 9-11, F1-F3). (Marginally new discretion?)

- The HCP calls for identifying and modifying regulations that hinder conservation (including SHAs, CCAAs), though doesn't assign resources or responsibilities to do so (ibid: E61). (New recognition?)

I suggest these features, however limited, represent further movement toward recognizing and addressing regulatory risk. For example:

• In contrast, for new populations, SHAs require landowners to provide a "net conservation benefit", and CCAAs require landowners to proportionately preclude listing (USFWS 1999: 32713).

• In contrast, the USFWS-approved Oregon conservation strategy calls for addressing regulatory disincentives (ODFW 2006: 24, 31) but "will not challenge [or] change ... existing regulations" (ibid: 4).

Case study: Benton County HCP

- But evidence of remaining risk and orthodoxy:
 - Landowners outside Benton County remain at risk under the ESA if their local governments are unable or unwilling to pay mitigation fees.
 - Landowners in Benton County remain at risk if other species are listed, or if the county can't find sufficient funding (Benton County 2010: 129-130, 132, 137, 145).
 - Landowners everywhere remain at risk under state and local law (e.g., Goal 5, Thurston County Critical Areas Ordinance).
 - The HCP implies it provides a test of “voluntary” conservation, inadvertently obscuring remaining regulatory risk (Benton County 2010: 6, 9).
 - USFWS did not recognize public comment asking USFWS to consider the scope of need and authority for discretion (Novick 2010; USFWS 2011a; 2011b).

USFWS apparently never considered whether any liability for exactions might be counterproductive to the survival of species (thereby inadvertently entrenching policy that tends to make it self-defeating for individuals to conserve or maintain declining species on private land).



Case study: Benton County HCP

2. Does the HCP reveal how to further recognize and address regulatory risk to species? MAYBE; I find it suggests:

- Local governments are potential allies for change.
- When preparing HCPs, consideration might come more easily from hiring consultants who do not stand to receive mitigation fees or associated funding.
- Individuals can have some effect, however marginal, through public comment in regulatory proceedings.
- Those who seek transformational change must find some satisfaction from incremental change.



Concluding thoughts

- Aldo Leopold, on conservation policy:

“The [6] successive stages of progress [in ‘game management’] are:

1. Policing the remnants of the virgin game crop. ...
6. Starting to encourage private management. Regulating private management in the public interest.

... The kind of laws ... and the degree of discretionary authority suitable for the first function is of course entirely unsuitable for the last.” — Aldo Leopold, *Game Management* (1933: 407)

- What might lead USFWS to consider scope of need and authority to address regulatory risk to species?

- Maybe the Legislature’s directive for USFWS to maximize creativity under ESA §10?

“To the maximum extent possible, the Secretary should utilize this authority ... to encourage creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation.” (HR 1982: 30)

- Maybe the ESA’s directive for all agencies to “utilize their authorities in furtherance of the purposes of this Act” (ESA §2(c))?



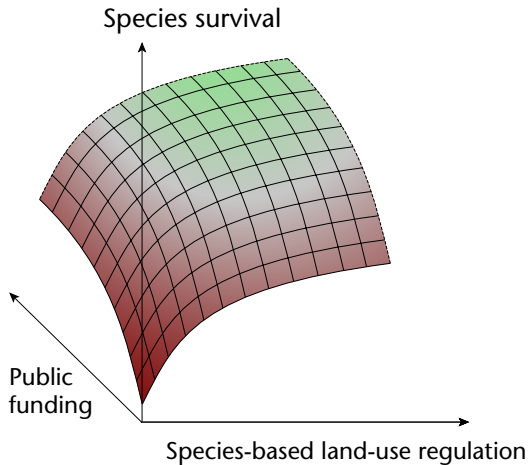
Thanks... Questions?

- Potential threads:
 - What might lead USFWS to consider the scope of need and scope of authority to address regulatory risk to species?
 - Does the ESA give USFWS any responsibility to do so?

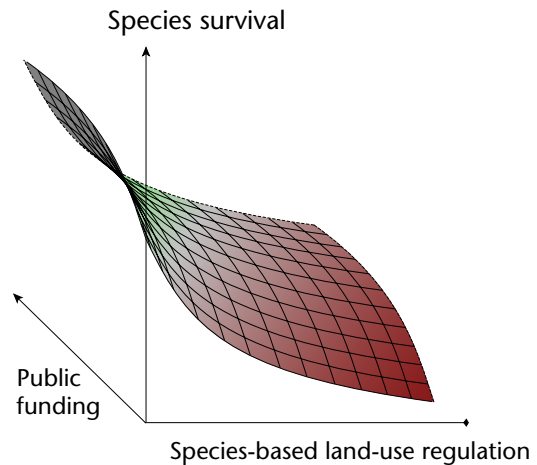
Appendix 1: Supply-curve models of policy decision space

These two idealized models illustrate contrasting expectations for the effect of public funding and species-based land-use regulation on the survival of maintenance-dependent species on private land.

Carrot and stick (conventional model):



Gas and brakes (more accurate?):



Appendix 2: Game theoretic model of risk to maintenance-dependent species from orthodoxy in species-based land-use regulation on private land

Actions and payoffs for regulatory community¹ from species-based land-use regulation for a species²

	Openly refrain from regulating incidental harm to the species ³	Seek exactions (e.g., fees): Ask little ↔ Ask much	Strictly prohibit incidental harm to the species
Benefit to the species			
– Harm to the species			
= Net benefit or harm to the species			
Other perceived benefits (scenery, funds, etc.) ⁴	Lower	Higher	

¹ I.e., regulators and others who facilitate or advocate species-based land-use regulation.

² For simplicity, I omit the Landowner's available actions and payoffs. Such actions include *Actively destroy*, *Passively destroy*, and *Maintain habitat*.

³ Under some statutes (e.g., US ESA), regulators might perceive this action (accurately or not) as statutorily impermissible.

⁴ Examples include funding from mitigation fees, HCP-associated grants from USFWS under ESA §6, and administrative stability.

Crosshatching = disregard



Acknowledgments

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Change log

- 2011.02.10: Presented at OR-TWS 2011, Bend OR, on 10 Feb 2011.
2011.03.04: Added cite to Barrett (2006); minor edits.