
The Western Riverside County Multiple Species Habitat Conservation Plan: Looking Forward After Ten Years

Michelle Ouellette and Charles Landry

The Western Riverside County Multiple Species Habitat Conservation Plan (HCP or Plan) just turned ten years old. In 2004, when the U.S. Fish & Wildlife Service (FWS) issued incidental take permits for a Plan that covers 146 endangered, threatened, and sensitive species, as described in more detail below, the Plan was the largest habitat conservation plan ever approved. In the last decade, the HCP has been very successful, conserving nearly 400,000 acres of habitat while allowing residential, commercial, and infrastructure development to proceed, often more quickly than without the Plan in place. However, some obstacles have arisen to Plan implementation. As described below, these have included uncertainty related to the “No Surprises” policy and rule (and FWS’s views and implementation of the same).

The Western Riverside County Regional Conservation Authority (RCA), the joint powers authority that implements the Plan, has also weathered one of the worst economic downturns in recent history. The recent recession has made funding the Plan more of a challenge. As envisioned by the Plan funding documents, the Plan obtains its needed capital for habitat acquisition from local development mitigation fees. But when the recession began in 2008, funding diminished. Around the same time, the federal government decided that local development mitigation fees could not be used as a match for grant funding, severely limiting the RCA’s ability to obtain grant funding for the program under the federal Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* Although the government has lifted that restriction more recently, grant funding is still difficult to acquire. This article will discuss the benefits of the Plan, some of the impediments to Plan implementation, as well as the RCA’s novel and progressive funding strategies that are currently being pursued.

Located 50 miles east of Los Angeles, Riverside County is California’s fourth-largest county, approximately the size of the state of New Jersey. Historically, California focused its development on the coast, leaving Riverside County mostly undeveloped with acres of open space. Despite its primarily desert environment, Riverside County has diverse topography, including river valleys, low deserts, mountains, foothills, and plains. With such a wide variety of habitats comes a wide

variety of species, some of which moved inland after human development encroached on their coastal habitat areas.

In the late 1980s, the economy in western Riverside County began to rely more on residential and commercial development. At the same time, residential, commercial, and infrastructure development in California was impacted by a small mammal species known as the Stephen’s kangaroo rat (SKR). In 1988, FWS placed the SKR on the endangered species list under the ESA. California already listed the SKR as rare under the California Endangered Species Act (CESA) in 1971 and changed its status under CESA to threatened in 1985. Cal. Code Regs. tit. 14, § 670.5(b)(6)(C) (2014). But the effect of listing under the federal ESA protected the species from any disturbance that would result in “take” of the species. Much of the SKR habitat needed for its survival occurred in western Riverside County and the listing of the SKR brought much development in that part of the county to a standstill as developers struggled to obtain take coverage.

In 1990, Riverside County and eight cities formed the Riverside County Habitat Conservation Agency (RCHCA), a joint powers authority. The RCHCA’s mission was to create and implement a long-term plan, under section 10(a) of the ESA, 16 U.S.C. § 1539, and section 2081 of the CESA, Cal. Code Regs. tit. 14, § 783.4, for legal “take” of the SKR, allowing development in western Riverside County to once again proceed. In 1996, FWS granted the RCHCA an incidental take permit for Riverside County covering 30,000 acres of potential SKR habitat based on the RCHCA’s plan to conserve and protect the species.

In 1999, the county started a regional planning effort to help coordinate its anticipated growth. As development pressures increased, Riverside County recognized that it needed a more comprehensive and regional planning effort to address housing, transportation, economic, and habitat conservation needs of existing and future county residents. This effort, known as the Riverside County Integrated Project, included a habitat conservation plan, under section 10(a) of the ESA, that would cover more than just the SKR. Other endangered, threatened, and rare species existed in Riverside County and addressing just one species at a time was untenable. Comprehensive HCPs were becoming more attractive as the federal agencies started to encourage this type of planning. From that, the HCP was born. In 2003 and 2004, the county and fourteen cities formally adopted the HCP, which covered a landmark 146 endangered, threatened, and sensitive species. In 2004, FWS and California Department of Fish and Game

Ms. Ouellette is a partner in the law firm of Best Best & Krieger LLP in Riverside, California. She may be reached at michelle.ouellette@bbkllaw.com. Mr. Landry is the Executive Director of the Western Riverside County Regional Conservation Authority in Riverside, California. He may be reached at clandry@wrcrca.org.

(now known as California Department of Fish and Wildlife (CDFW)) granted take permits pursuant to the HCP, www.wrc-rca.org/Permit_Docs/mshcp_vol1.html.

In a nutshell, the basic premise of the HCP is that in exchange for take coverage for 146 species, an approximately 500,000-acre conservation area would be set aside and managed for these species. Many of the “covered species” and associated sensitive habitats are located on federal, state, and other publically owned lands. For these reasons, the parties to the HCP designed it so that these public lands would count toward the required 500,000-acre conservation area. In terms of habitat conservation, the HCP started off strong with approximately 347,000 acres in public or quasi-public ownership at the time of approval. This includes U.S. Forest Service lands in the Cleveland and San Bernardino National Forests, land owned by the U.S. Army Corps of Engineers known as the Prado Basin, and land owned or managed by the BLM.

The state of California owns approximately 34,409 acres of land in public ownership, including the Lake Perris Recreation Area, San Jacinto Wildlife Area, Chino Hills State Park, Anza Borrego Desert State Park, Mount San Jacinto Wilderness State Park, Santa Margarita Ecological Reserve, Santa Rosa Plateau Ecological Reserve, Motte Rimrock Reserve, and Box Springs Reserve. The state lands are held by, among other entities, California State Parks, California Department of Parks and Recreation, California State University, and University of California Regents.

Local government entities own the balance of the public or quasi-public lands, totaling 64,330 acres. These participating entities include the county, Riverside County Habitat Conservation Agency, City of Riverside, and Riverside County Flood Control and Water Conservation District. In some instances, the local government entity will continue to manage the land for the HCP. The HCP requires memoranda of understanding (MOUs) for the public and quasi-public lands counted toward conservation to ensure that the agencies in charge manage the lands in concert with the needs of the HCP covered species. The RCA is assembling an additional 153,000 acres of land, called Additional Reserve Lands (ARL), needed to meet the 500,000-acre conservation requirement. ARL comes from various sources, including private land acquisitions through land development and other sellers, donations of fee title or conservation easements, and additional MOUs with public agencies to gain credit for land conservation in the Plan area. Also, several conservation banks exist within the HCP conservation area. The Plan has a procedure to allow developers to purchase credits in these banks to mitigate their project impacts.

As of December 31, 2013, approximately 46,861 acres of ARL has been acquired through the various methods above. Of those 46,861 acres, the federal government has contributed 6,279 acres, in addition to its land held in public or quasi-public ownership. The state government has contributed an additional 11,121 acres toward the HCP conservation goal. Recordation of conservation easements, acquisitions from willing sellers, donations, and acquisition of property from private developers through the development entitlement process has brought in an additional 29,461 acres. The RCA expects approximately another 9,000 acres to be brought in from pending development projects. However, as discussed below, the economic recession has slowed development and many of the areas appropriate for conservation associated with these development projects may not be dedicated to the HCP for some time.

Implementation of the HCP

Habitat conservation plans have typically required an executed implementing agreement (IA) between the permittees and the federal and state wildlife agencies. The IA (www.wrc-rca.org/Permit_Docs/mshcp_vol3.html) for the HCP contains many of the complex requirements and responsibilities of the parties under the Plan. For example, the HCP IA details the conservation strategy, including the unique property owner initiated Habitat Evaluation and Acquisition Negotiation Strategy (HANS), discussed below. The HCP also has multiple management and monitoring requirements. The HCP IA lists these requirements as well as the annual reporting mechanism to ensure that the permittees complete regular management and monitoring of the conservation areas and species.

The HCP IA also describes the cooperative organizational structure of the HCP. As stated in the IA, the HCP requires both a local regional presence, the RCA, as well as regular coordination with the state and federal wildlife agencies to be successful. Under the RCA, the IA identified additional boards and committees including the RCA Board of Directors, which governs the RCA, a reserve management oversight committee, and independent science advisors. The IA also addresses funding of the HCP, permittees’ take authorization and obligations, and the assurances required by both FWS and CDFW. As intended, the IA is an agreement for implementation of the HCP but also a comprehensive reference document detailing the required steps for any proposed changes to the HCP or any conflicts that may arise, including procedures for modifications and amendments to the HCP, termination, withdrawal of permittees, remedies for relief, and enforcement provisions.

Habitat conservation is not the only benefit from implementation of the Plan. HCP permittees with public works projects have benefitted significantly from the take coverage under the HCP.

Development and adoption of the HCP required the coordination of a large number of government agencies and municipalities. Such an approach had been undertaken before. First, as noted above, with the development of the RCHCA, Riverside County and the cities of Corona, Hemet, Lake Elsinore, Moreno Valley, Perris, Riverside, Temecula, and, in 1995, Murrieta joined forces to obtain take coverage for the SKR. In August 1990, the RCHCA developed an interim conservation program to allow development to proceed while the parties worked on a long-term plan. In April 1996, the RCHCA entered into an implementation agreement with FWS and CDFW for a long-term SKR conservation plan.

When Riverside County developed the HCP, the number of players in the process grew significantly. Riverside County

and the cities of Banning, Beaumont, Calimesa, Canyon Lake, Corona, Hemet, Lake Elsinore, Moreno Valley, Murrieta, Norco, Perris, Riverside, San Jacinto, and Temecula all adopted the HCP in 2003 and early 2004. The new cities of Wildomar, Menifee, Eastvale, and Jurupa Valley followed suit after incorporation. The county and cities, which are permittees under the Plan, all have adopted an ordinance imposing a local development impact fee for development within their jurisdictions. It is these local development mitigation fees that help fund the HCP. The HCP IA also requires the county to update its general plan to establish general policies for regional compliance with the HCP.

The HCP also allows the RCA to grant take authorization to nonsignatory public entities and other regional service providers under the Participating Special Entity provision of the HCP.

Habitat conservation is not the only benefit from implementation of the Plan. HCP permittees with public works projects have benefitted significantly from the take coverage under the HCP. These permittees include the county and, now, eighteen cities within western Riverside County, as well as the Riverside County Flood Control and Water Conservation District, Riverside County Transportation Commission, and California Department of Transportation. Given the rapid growth in the county, transportation projects constitute the bulk of the public works projects that have benefitted from the HCP. Examples include the State Route 91 Corridor Improvement Project, Interstate 215 Widening Project, reconstruction of Van Buren Bridge and interchange, widening of Interstate 15 at Clinton Keith Interchange, and State Route 91 high-occupancy vehicle project, just to name a few. Other examples of public works projects under the HCP include landfill improvements, storm drain construction, and water system expansions.

The HCP also allows the RCA to grant take authorization to nonsignatory public entities and other regional service providers under the Participating Special Entity provision of the HCP. The HCP defines a Participating Special Entity as any regional public facility provider, such as a utility company, public district, or other agency that operates or owns land within the HCP. Southern California Edison (SCE) is one of these Participating Special Entities that has taken advantage of the HCP. For example, SCE will be receiving take coverage under the HCP for a major transmission line project consisting of seven electrical transmission towers, associated stub roads, wire pull sites, reel sites, and guard structures.

Residential development also benefits from the HCP in that development of a single-family home or mobile home on an existing legal parcel is a covered activity under the HCP. This

means that this type of residential development benefits from an expedited review process and allows development to proceed much more quickly than it would without the HCP. Large development projects also benefit from the Plan in that there is no longer any need to get take permits directly from the FWS or CDFW for species covered under the Plan; instead, upon Plan compliance, the developer receives take authorization from the approving permittee, such as the county or a city.

Obstacles to Implementation of the HCP: Changes to Habitat Conservation Plan Implementation Policies

In 1994, the Clinton administration developed the “No Surprises” policy, which was an important reason why the use of habitat conservation plans expanded in the mid-1990s. See generally Habitat Conservation Plan Assurances Rule, 63 Fed. Reg. 8,859 (Feb. 23, 1998) (No Surprises Policy). Under this policy, FWS could provide an incidental take permit application with assurances that, once approved, additional requirements or mitigation could not be imposed upon a permittee implementing its habitat conservation plan in good faith, even if unforeseen circumstances arise potentially increasing impacts to listed species. Habitat conservation plans became much more common after the federal government proposed the No Surprises Policy, as it gave permittees greater certainty with regard to their mitigation obligations. FWS adopted the No Surprises Policy as a rule in 1998. *Id.*

In June 2004, right before the federal and state government agencies issued the take permits for the western Riverside County HCP, a court enjoined use of the No Surprises rule in incidental take permits. The court agreed with environmental groups and invalidated the Permit Revocation Rule, which governs when an incidental take permit can be revoked, holding that FWS did not adequately comply with public notice and comment procedures when adopting the Permit Revocation Rule. *Spirit of the Sage Council v. Norton*, No. 98-1873, 2004 U.S. Dist. LEXIS 10789 (D.D.C. June 10, 2004); *Spirit of the Sage Council v. Norton*, 294 F. Supp. 2d 67, 92 (D.D.C. 2003). FWS relied on the Permit Revocation Rule to justify No Surprises, arguing that it could revoke an incidental take permit if unforeseen circumstances resulted in jeopardy to a species. *Spirit of the Sage*, 294 F. Supp. 2d at 91. Because the public did not have an adequate opportunity to comment on the Permit Revocation Rule, the court determined that the Permit Revocation Rule should be reestablished and finalized before the No Surprises rule could go into effect. FWS issued the HCP permit with the No Surprises language regardless of the litigation, expecting that it would honor the No Surprises language if the courts later upheld it, or the No Surprises language would be without authority if eventually invalidated by the court. After three years of uncertainty, the courts finally decided in August 2007 that the No Surprises rule does not violate the ESA or the Administrative Procedure Act. *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 46 (D.D.C. 2007).

Impact of the Recession

The recent recession has also hampered implementation of the HCP. As designed, the Plan receives much of its funding from developer impact fees. The recession has resulted in

less development and thus fewer fees. State and federal funding sources have also decreased. Not only does this reduce potential grant funding sources for the RCA, but the state and federal governments' ability to purchase land for the HCP has greatly diminished. As part of the negotiations for the HCP, state and federal governments agreed to purchase 56,000 acres of the 153,000 acres needed for the ARL. Land acquisition by state and federal governments has slowed as the state and federal agencies fight to keep their basic funding.

One of the main sources for grant funding has been federal section 6 grants, named for section 6 of the ESA, 16 U.S.C. § 1535, which authorizes the funding. Section 6 grants require a minimum 25 percent match of funds from the grant applicant. In 2008, FWS prohibited local development mitigation fees from being used as a match. This severely limited the RCA's eligibility for this funding source. In recent years, the RCA and other HCP parties have negotiated the use of limited section 6 funds with local development mitigation fees as the required match. However, applying for and obtaining these grants continues to be a labor-intensive and competitive process. Due to the economy and the recent popularity of habitat conservation plans, the RCA now competes with more entities for less funding. Therefore, the RCA has developed some novel strategies for funding the HCP's required habitat conservation needs.

HCP Funding Strategies

At this point, the HCP's primary expense is land acquisition, and there are two primary ways that the RCA buys land for the HCP. One way is to simply buy the land from someone who owns land that is suitable for conservation under the Plan. Almost 75 percent of the habitat acquisitions come from sellers who ask the RCA to consider buying their land. If the property is appropriate for conservation under the HCP, the RCA makes an offer to the property owner based on an independent appraisal.

The second way that the RCA acquires property is through the HANS process described in the HCP's IA and Plan. Under this incentive-based program, the RCA, county, and cities have various tools at their disposal to provide compensation to property owners who convey their property to the HCP preserve. What makes the HANS process so unique is the way land is identified for acquisition and potential development incentives. The HANS process is triggered when a landowner wants to develop land. At that point, the local city or county officials review the proposal to determine if it is consistent with the HCP. If the reviewing municipality determines that any of the subject property is necessary for conservation, the RCA negotiates with the landowner for acquisition. The RCA hires an independent appraiser to determine the value of the property and presents an offer to the landowner based on the appraised value. The seller may elect to order a separate appraisal if the seller disagrees with the appraised land value. A third, independent appraiser, mutually selected by the parties, may review any discrepancies between the two appraisals and provide a final opinion of value. The parties then work out

the terms of the sale, which may or may not include incentives such as waiver of development fees, option agreements, fast track project processing, density bonuses, and density transfers for development. The RCA usually funds the purchase of lands for the HCP from local development mitigation fees that developers pay upon obtaining their permits for development within western Riverside County.

Local development mitigation fees have decreased with the recession and housing market crash, and the RCA's ability to purchase land from willing sellers for the HCP has been more limited.

As discussed above, local development mitigation fees have decreased with the recession and housing market crash, and the RCA's ability to purchase land from willing sellers for the HCP has been more limited. To ensure that funding is available when the RCA needs it, the RCA has looked to the U.S. Congress. On June 10, 2014, the president signed into law the Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193, which provides for these needed loans. Under section 5021 of this new law, habitat conservation loans will be offered to public entities with a fully authorized and approved habitat conservation plan. Congress authorized appropriations for this loan program from 2015 through 2019, with funding amounts ranging from \$20,000,000 to \$50,000,000 per year. Although the details regarding rates, terms, and eligible borrowers will be provided in regulations yet to be drafted, given current federal budget constraints, the loans will have strict eligibility requirements ensuring a minimal default rate. The hope is that through these creative solutions and novel funding strategies, the HCP can reach its goal of conserving all of the additional 153,000 acres needed to complete the conservation area and switch its focus to managing and monitoring those lands for the benefit of future generations.

The HCP is a groundbreaking and innovative plan, covering a large area and 146 species. Such an ambitious conservation effort has not been without its challenges. The RCA and the Plan participants are committed to solving these problems with creative solutions so that conservation efforts in Riverside County can continue. The hope is that additional development, combined with new funding sources, will help complete the remaining habitat acquisition for Riverside County residents and visitors to enjoy for many, many years. 🌳