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Fred Bosselman as Participant-Observer Lawyer: The Case of Habitat Conservation Planning

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FRED BOSSELMAN AS PARTICIPANT-OBSERVER LAWYER: THE CASE OF HABITAT CONSERVATION PLANNING

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I. INTRODUCTION: THE PARTICIPANT-OBSERVER

One of the many pleasures and benefits of my academic career has been my professional relationship and friendship with Fred Bosselman. I first encountered Fred during his early land use scholarship. Along with his mentor, the late Richard Babcock, Fred was one of a small group of land use lawyers who fused practical experience with a deep understanding of land use law to produce works of major scholarship widely accepted and used in the academic community. Fred's subsequent books, including *The Quiet Revolution in Land Use Control* and *The Taking Issue*, still stand as major works of land use scholarship and helped those of us in the field understand the potential consequences of the rapid transition of land use controls from a tool of suburban politics to an important and still underappreciated component of environmental protection. Later, I met Fred socially when I discovered that we both lived in

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the same Chicago suburb. This led to my professional association with him.

In 1991, my former colleague Dean Stuart Deutsch, now dean of Rutgers, Newark, and I were able to lure Fred from a successful practice into teaching once we assured him that he could continue his normal diet of a minimum of one round trip per week from O'Hare International Airport. His wife Kay has probably never forgiven us for enabling his travel addiction. Fred's arrival at Chicago-Kent anchored our expanding program in Land Use and Energy Law and began a long period of fruitful and exciting learning and collaboration for me. Like all successful collaborations where genuine learning occurs, there was always an element of fear present.

Fred is a lawyer's lawyer and can best be described as an optimistic pragmatist. His work demonstrates an abiding faith in the ability of law to achieve fair social and environmental progress. He is equally a model of graciousness and understatement, but his razor-sharp mind and encyclopedic legal and nonlegal research have taught me to think very carefully about what I say and to understand better the depth and accuracy of the research necessary to address an issue. Many times I have stopped by his office to confirm my understanding of a legal principle only to have him gently tell me to consult a recently decided case he caught electronically or to refer to an old case that I forgot about or probably never found in the first place. Several times, I had the hubris to suggest a topic that seemed to merit a law review article. After acknowledging and complimenting my suggestion, Fred would often pull out a 50- to 100-page manuscript from a neat stack of papers on his credenza and ask if I had the time to look at a very rough (translation, fully developed and exhaustively researched) draft of an article on the same suggested topic. Alternatively, Fred would point to a tall stack of books that he was reading in preparation for the draft.

In the 1960s, the term "participant-observer" became popular in sociology to describe academic fieldwork by those studying and participating in the anti-Vietnam War movement.[1] The term is a charged one in sociology because of the dangers that the dual role poses for objective research and for the betrayal of subject confidentiality. However, the term is an apt description of Fred's unique contributions to lawyering and legal scholarship and carries none of the baggage of sociology. Through his involvement in many

1. *See* Barrie Thorne, *Political Activist as Participant Observer: Conflicts of Commitment in a Study of the Draft Resistance Movement in the 1960s, in* CONTEMPORARY FIELD RESEARCH: A COLLECTION OF READINGS 216 (Robert M. Emerson ed., 1983).

cutting-edge land use and environmental situations, he has developed into the ultimate legal participant-observer.

Fred's greatest contribution to land use and environmental innovation has been his ability to function both as an on-the-ground expert, bringing his vast knowledge of the law to solve immediate on-the-ground problems, and then to use this experience to serve as a bridge to the scholarly world. He has used his first-hand experience and vast legal and interdisciplinary knowledge to make two specific contributions. First, he has helped to legitimate innovative environmental protection experiments. Second, he has helped to provide creative and well-justified answers to tough legal questions that these experiments pose. Fred's role in the creation of two large-scale multi-species habitat conservation reserves in Southern California illustrates these two contributions at work.

II. BRIEF HISTORY OF HABITAT CONSERVATION PLANS

A. Balancing Development and Conservation

The story of habitat conservation plans begins in the 1970s when a desire to balance land development with the creation of species reserves led to a 1982 amendment to the Endangered Species Act (ESA).[2] Section 10(a) permits the Secretary of the Interior to issue incidental take permits for the activities that threaten to destroy listed species if there is an approved habitat conservation plan (HCP) in place.[3]

HCPs lay dormant until the late 1980s, when the potential impact of the ESA on private as well as public land development became clear. As a result, intense landowner opposition threatened to undermine this core federal biodiversity conservation program. The ESA created a process to list endangered or threatened species and prohibit federal agencies from jeopardizing their continued existence.[4]

B. Takings Implications and Exceptions

The ESA was originally perceived as an Act that limited federally permitted activities, primarily on public lands. However, section 9 prohibits private parties from "taking" listed species.[5] The prohibition against taking in section 9 applies both to the federal

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2. *See* MICHAEL J. BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE 52-65 (1991), for a history of the first plan at San Brunno Mountain west of San Francisco International Airport.

3. 16 U.S.C. § 1539(a)(2) (1994).

4. *Id.* at § 1536(a)(2).

5. *Id.* at § 1538.

government and to private landowners. In short, any land development risks taking a listed species because "take" is defined as "to harass, harm, pursue . . . wound, . . . [or] kill."[6]

In 1975, the Secretary of the Interior promulgated a rule defining "harm" to include "significant habitat modification where it actually kills or injures wildlife."[7] Despite efforts to modify it, amended versions of this rule stood for nearly two decades and were upheld, expanded, and enforced by the Fifth and Ninth Circuits in two influential decisions[8] that were ultimately upheld by the Supreme Court.[9]

The extension of takings to any habitat modification exposed local governments and landowners to uncertain liability risks for both direct development activities and regulatory decisions that allowed the development.[10] HCPs were the primary safety value because they constituted a potential variance process to allow limited "takes."

However, the price for a variance is high because HCPs generally require the creation and maintenance of a habitat reserve administered by local governments and financed by public expenditures and developer exactions. The broad definition of "take" is the primary legal glue that holds these programs together and creates the enforcement threat necessary to induce their creation. As this new liability risk to development became known, states in biodiversity hot spots[11] such as California, Florida, and Texas began to seek ways to avoid the enforcement of the ESA in a manner that prohibited all land development. The United States Department of the Interior became a supporter of these efforts after the Republicans captured Congress in 1994 and began a frontal assault on the ESA.

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6. *Id.* at § 1532(19).

7. Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 690 (1995).

8. Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991); Palila v. Hawaii Dep't of Land & Natural Res., 639 F.2d 495 (9th Cir. 1981).

9. *See Sweet Home*, 515 U.S. 687; Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 NAT. RESOURCES & ENV'T 65 (2001).

10. J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RESOURCES & ENV'T 70, 74 (2001); J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37 (1998).

11. The term was coined by Norman Myers in 1988 and further popularized in EDWARD O. WILSON, THE DIVERSITY OF LIFE 261 (1992). The California floristic reserve is the only United States site among the fifteen listed by Wilson. *Id.* at 262-263.

III. CALIFORNIA'S RESPONSE

A. Natural Community Conservation Plans

One of the first chances to find creative ways to balance species conservation and continued development arose in California. To avoid the state listing of a small songbird, California devised a soft planning process to promote multi-species reserves. At the urging of Governor Wilson, the California legislature passed the Natural Community Conservation Act in its 1991 session. The Act created a voluntary program through which local governments and private landowners may cooperate in the preparation of plans (hereinafter "Natural Community Conservation Plans" or "NCCPs") for the protection of those natural areas that provide habitat for a variety of rare birds and other species.[12] The NCCP was a vague formulation of an idea on a slim statutory basis[13] with a high potential for ineffectiveness. Many environmentalists immediately rejected the idea as an ESA avoidance scheme, but the state had the vision that NCCPs could become large scale, multi-species equivalents of the Habitat Conservation Plans ("HCPs") authorized under the federal Endangered Species Act ("ESA"), which addressed species conservation plans proactively rather than reactively.[14]

B. Coastal Sage Scrub NCCP

To test the NCCP program, the Resources Agency in 1991 selected as a pilot project the "coastal sage scrub" terrain of Southern California, a region that had already experienced conflicts under the existing endangered species legislation. The state wildlife agencies (the Department of Fish and Game and its parent agency, the California Resources Agency) began working closely with the United States Fish and Wildlife Service (the "Service") to implement the new statute in three counties of Southern California, putting aside years of distrust and rivalry. As a reward for the good faith

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12. CAL. FISH & GAME CODE §§ 2800-2840 (West 1998 & Supp. 2001). The statute authorizes any person or governmental agency to prepare a Natural Community Conservation Plan (NCCP) pursuant to an agreement with, and guidelines written by, the Department of Fish and Game. *Id.* at §§, 2810, 2815, 2820. Each such plan is to promote "protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth." *Id.* at § 2805. Once the Department of Fish and Game approves an NCCP, the department may authorize developments that might otherwise be found to have an adverse impact on listed or candidate species if those developments are consistent with the NCCP. *Id.* at §§ 2081, 2825(c) and 2835.

13. The metaphor is borrowed from Justice Holmes's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920).

14. 16 U.S.C. § 1539(a) (1994).

but then untested efforts of the State, the Secretary of the Interior designated the California gnatcatcher as a threatened species rather than an endangered species. More importantly, he concurrently proposed to list the songbird under a section § 4(d) rule, therefore exempting those activities that are approved as part of the NCCP process from the prohibition of taking the species.[15] In effect, the Department of the Interior de facto delegated considerable authority to the state to set allowable yearly takes. Although this action changed the voluntary nature of the NCCP program substantially, it set in motion an opportunity to test cooperative habitat planning at the national level.

The federal government listed the gnatcatcher by a 4(d) special rule as threatened rather than endangered because it provided a legal basis for the Fish and Wildlife Service not to designate its critical habitat. Thus, identification of its habitat might precipitate quick clearing to eliminate the threat to development. The Endangered Species Act gives the Fish and Wildlife Service considerable discretion not to list habitat when designation would actually jeopardize the continued existence of the species.[16]

The basic idea of the coastal sage scrub NCCP was to promote federal, state, and local agency cooperation plans to be developed into multi-species conservation plans for the protection of rare habitat. Conservation plans are more effective and efficient than the process outlined in the ESA of listing, designating critical habitat, and strictly enforcing the Act against all violators.[17] At a

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15. Endangered and Threatened Wildlife and Plants, 58 Fed. Reg. 16,742, 16,758 (Mar. 30, 1993) (to be codified at 50 C.F.R. pt. 17).

16. Early cases challenging the failure to designate habitat held that the failure to designate would not be an abuse of discretion. Some courts have accepted as a justification for the Secretary's refusal to designate critical habitat the likelihood that designation will encourage species destruction. *See, e.g.*, Fund for Animals v. Babbitt, 903 F. Supp. 96 (D.D.C. 1995), *amended*, 967 F. Supp. 6 (D.D.C. 1997). But many of the more recent cases suggest that it will be difficult to justify a refusal to designate. *E.g.*, Sierra Club v. U.S. Fish and Wildlife Serv., 245 F.3d 434 (5th Cir. 2001); Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999); Natural Res. Def. Council v. U.S. Dep't of Interior, 113 F.3d 1121 (9th Cir. 1997). Nondesignation does not excuse noncompliance with the Act. Jeopardy can still be found if there is no designation. United States v. Glenn Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992). However, the failure to designate makes it somewhat easier to find no jeopardy. *E.g.*, Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy, 898 F.2d 1410 (9th Cir. 1990); Enos v. Marsh, 769 F.2d 1363 (9th Cir. 1985).

17. *See Secretary Babbitt Outlines Support for Endangered Species Act*, U.S. NEWSWIRE, May 6, 1993, *available at* LEXIS, News Library, WIRES File. The Service had been taking a similar position under the previous administration as well, as reflected by the settlement of litigation in the 1990-92 period, as part of which the Department of Interior and the Service "made an explicit commitment to pursue a 'multi-species, ecosystem approach' to its listing responsibilities." *See* Eric R. Glitzenstein, *On the USFWS Settlement Regarding Federal Listing of Endangered Species*, ENDANGERED SPECIES UPDATE, Mar. 1993, at 1-3. The arguments in favor of the broader approach are summarized in Christopher A. Cole, *Species*

minimum, many strong supporters of species conservation saw the process as the best alternative to counter efforts to roll back species protection on the theory that the ESA blocked almost all development, small and large. More grandly, the NCCP process provided an opportunity to cure the central defect of the ESA: the ESA is a biodiversity conservation strategy, but it only indirectly addresses the primary cause of biodiversity loss, which is habitat destruction. And it only comes into play at the eleventh hour when the species' survival is in doubt. It does not therefore promote the conservation of the ecosystems and the geographic scale necessary to promote biodiversity generally, not just for species on death's door.

Some mainstream nongovernmental organizations (NGOs) agreed, but others saw the process as an end run around the one substantive environmental law with real teeth and opposed the process. They preferred a strategy of listing, designating critical habitat, and enforcing all takes. The risks in large-scale multi-species HCPs are substantial, but risks of ineffectiveness from the ESA strategy are equally high. The debate continues to this day, although it seems to have shifted from the merits of the basic idea of the HCP to how to improve the HCP process.[18]

IV. TRIBUTE TO FRED BOSSELMAN: APPRECIATING HIS ROLE IN THE NCCP EFFORT

Fred was hired by the California Resources Agency as special counsel to assist the state in creating the coastal sage and other NCCPs based on his work in establishing similar smaller scale innovative land conservation programs in Florida and elsewhere. As he so often does with issues just below the profession's radar screen, Fred wrote the first article on the NCCP program.[19] His article defended what was then a bold but untested experiment in inducing all three levels of government to cooperate with private stakeholders to eliminate both existing and future obstacles to an acceptable level of land development while conserving both existing and future threatened and endangered species on a large geographic scale.[20]

Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws, 72 B.U. L. REV. 343, 350-54 (1992).

18. *See* John Kostyack, *Reshaping Habitat Conservation Plans for Species Recovery: An Introduction to a Series of Articles on Habitat Conservation Plans*, 27 ENVTL. L. 755 (1997).

19. Fred Bosselman, *Planning to Prevent Species Endangerment*, LAND USE L. & ZONING DIG., Mar. 1992, at 3.

20. There is now a great deal of literature on habitat conservation and ecosystem conservation. *See* Cymie Payne, *The Ecosystem Approach: New Departures for Land and*

He saw the process as a creative way to apply a new area of science, conservation biology, to help all levels of government take a more proactive role in biodiversity conservation and to carry forward the idea of "bio-regionalism," the use of a region's biodiversity resources to delineate an area and ultimately to structure development. As demonstrated by his recent lecture delivered at the Florida State University College of Law,[21] Fred's interest in conservation biology's application to land use and environmental law has deepened and matured.

A. Stakeholder Collaboration: A Move Away From Rule of Law Litigation

HCP experiments represent a potentially important turning point in environmental law. Not only was the geographical scale of the reserve unprecedented, but also it was one of the first major uses of stakeholder collaboration to try to move away from the use of rule of law litigation to drive the resolution of environmental problems. In brief, environmental lawyers have relied heavily on lawsuits to bring conflicts to the surface and force their favorable resolution.

Environmental law is an unplanned byproduct of the unique politics of environmentalism in the late 1960s and early 1970s. Environmental law began as a legal guerilla movement led by ad hoc groups of citizens that tapped into a growing frustration with development and the idea that all technological application is progress.[22] The objective was often to stop a local public works project or a federally- or state-licensed activity that allowed the development of scenic "natural" areas.[23] In the seminal case of

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Water, Foreword, 24 ECOLOGY L. Q. 619 (1997); Kostyack, *supra* note 18. Marc J. Ebbin, *Is the Southern California Approach to Conservation Succeeding*, 24 ECOLOGY L.Q. 695 (1997), is an especially useful introduction to the coastal sage program by the Special Assistant to the Secretary of Interior who was the principal DOE-state liaison.

21. Fred P. Bosselman, *What Lawmakers Can Learn from Large-Scale Ecology*, 17 J. LAND USE & ENVTL. L. (forthcoming 2002).

22. Former Secretary of the Interior Stewart Udall describes Victor Yannacone, the first lawyer to try and stop the use of DDT, as follows:

> Yannacone was a brilliant tactician, but from the beginning he had no illusions that litigation would produce resounding legal victories. His maverick motto was "Sue the Bastards," and he envisioned his lawsuits as show trials to dramatize environmental truths that would ultimately compel members of the legislative and executive branches of government to act. He was willing to lose court decisions if his cause prevailed in the court of public opinion.

STEWART L. UDALL, THE QUIET CRISIS AND THE NEXT GENERATION 224 (1988).

23. In his history of the modern environmental movement, Samuel P. Hays stresses the grass roots, bottoms-up nature of the movement compared to the top-down elite scientific conservation movement. SAMUEL P. HAYS, BEAUTY, HEALTH AND PERMANENCE:

Scenic Hudson Preservation Conference v. Federal Power Commission, the petitioners convinced the court of appeals to read a broad regulatory statute, which at best conferred discretion on the agency to consider aesthetic values (a then much contested idea), to impose mandatory duties on an agency to consider environmental values and to justify more fully decisions not to protect environmental values.[24] *Scenic Hudson* was a stunning achievement, but it produced two lasting legacies for the environmental movement that blocked its progress. Environmental preservation was cast as a negative rather than an affirmative objective, and the primary policy instrument became a rule of law litigation strategy.

This strategy worked well at the beginning of the environmental movement when there was little legal basis for the recognition of environmental values or when agencies did not take the new mandates seriously. The value of rule of law litigation has declined over time because many new second-generation problems require much more complex, long-range, and experimental solutions. Biodiversity conservation is a prime example of a second-generation problem. Environmental protection needs to be carried out on larger landscape scales; thus, the ability of rules to structure this process (except in its ability to provide the necessary legal framework) is diminishing. We can set objectives and even performance targets, but we can never be sure that the objectives will be achieved.

This uncertainty means that environmental protection is increasingly an exercise in risk-sharing among stakeholders rather than the strict enforcement of statutory mandates. In legal terms, discretion must be exercised for long periods of time, and thus it becomes more difficult to determine when an action is arbitrary. In addition, in consensus-decentralized processes, participants must adapt statutory mandates that were not written with the problem being addressed in mind, so a rule of law suit to declare an action ultra vires may be counter-productive. Often, the best that we can do is to apply adaptive management to ecosystem management. In short, the new environmental law, as many have pointed out, is a law of deals.[25]

ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985 (Donald Worster & Alfred Crosby eds., 1987).

24. 354 F.2d 608 (2d Cir. 1965). The plaintiffs were aided by the fact that a decade earlier the Commission had successfully defended its authority to deny a license to protect a free-flowing river. *See* Nanekagon Hydro Co. v. F.P.C., 216 F.2d 509 (7th Cir. 1954); *see also* A. Dan Tarlock et al., *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502, 514-523 (1972).

25. *E.g.*, Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis*

Many environmental NGOs recoil at the characterization of these new processes because the "deals" that have been struck have the potential to displace federal standards for which many have fought hard, to push all the hard management and effectiveness questions to the future, and to shift the responsibility for all risks to the federal government. The price for participation is often immunity from responsibility for changed conditions in the future. The Department of the Interior has responded to this concern by issuing its "No Surprises" rule over NGO protest.[26] The rule effectively shifts the responsibility for future protection measures to the federal government once a Habitat Conservation Plan is approved.

These solutions present a rich target of opportunity for rule of law litigation because deals raise both vires and constitutional issues. The case against these deals is that natural resources management is not place driven, but centralized. The great conservation battles of this century have been fought to eliminate or minimize place-based, or local and low, standards by subjecting them to the discipline of scientifically rational standards, and this lesson was carried forward into environmental protection legislation.

B. Creation of the Orange County Reserve

Fred's faith in the NCCP process bore fruit, thanks in no small measure to Fred's contributions. In 1996, state and local governments, private landowners, and other stakeholders entered into an agreement to create a multi-species habitat reserve to preserve a remnant of the coastal sage scrub ecosystem in Orange County in Southern California.[27] San Diego began a parallel process to create an even larger and more complex reserve system. It took a great deal of creative lawyering and risk-taking on all sides, much of it structured by Fred to produce the Orange County reserve. Fred's role in risk reduction is a classic example of the creative lawyering process.

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for Flexible Regulation, 41 WM. & MARY L. REV. 411 (2000).

26. The rule was initially adopted as policy statement, but the Department ultimately issued it as a federal regulation after the policy was challenged on procedural and substantive grounds. The final rule and comments can be found at 63 Fed. Reg. 8859-8873 (Feb. 23, 1998) and 50 C.F.R. pt. 17 (2000).

27. *See* Ebbin, *supra* note 20.

1. Risk Reduction through the No Surprises Policy

The debate over the allocation of responsibility for changed conditions and management failures illustrates the challenges for law and lawyers in a deal-making environment. For these deals to work, private parties must forego the enjoyment of their full development entitlements in return for public approval of ecosystem protection and related mandates. To encourage this cooperation, acceptable ways must be found to limit the risk exposure of the participants over time. The federal government, and ultimately NGOs, must walk a thin line between offering less than full enforcement of a statute as an incentive for a superior solution[28] and maintaining a credible threat of a more drastic alternative to cooperation.[29] Otherwise, landscape-scale experiments will not go forward, and biodiversity protection will not work.

The Department of the Interior took a bold risk-reduction step to induce landowner cooperation and land donation. It issued a "No Surprises" policy.[30] The policy shifted the financial responsibility for remedying unforeseen species to the federal government. No surprises is the linchpin of large HCPs, and it raises major legal problems. Orthodox constitutional doctrine, premised on sovereign immunity, teaches that the state can bargain away its police powers because there is no estoppel against the federal government.

2. Fred Bosselman's Defense of the No Surprises Policy

In 1997, Fred wrote an elegant and powerful theoretical defense of the doctrine and its crucial role in biodiversity conservation.[31] In brief, he defended the policy because it both created the certainty necessary to induce landowners to afford innovative biodiversity conservation measures and encouraged the design of the most scientifically credible and geographically extensive reserves possible under existing scientific knowledge and land realistically available

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28. In his pioneering exploration of under-enforcement of environment law, Daniel Farber concludes that under-enforcement both has the potential to encourage innovation and "also has an inevitable cost in terms of damage to our concept of the rule of law." Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance In Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 325 (1999).

29. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Professor Dan-Cohen suggests that there are two types of criminal rules; conduct rules that are designed to produce uniform citizen behavior, and decision rules that are more flexible for the police. The latter are more flexible and do not always require full compliance.

30. *Supra* note 26.

31. *See* Fred P. Bosselman, *The Statutory and Constitutional Mandate for a No Surprises Policy*, 24 ECOLOGY L.Q. 707 (1997).

for inclusion. He addressed the troubling ultra vires issue by arguing that the 1982 Amendments to the ESA creating HCPs shifted the focus of the Act from species-by-species protection. This shift permitted the Department of the Interior to administer the Act in a manner that would minimize the taking of listed species and to negotiate creative private-public partnerships. Thus, the Department can (and should) negotiate assurance agreements when "they can provide the maximum benefit to the species in comparison with other available means."[32]

Fred Bosselman's article also tackled the constitutionality of the no surprises rule in a way that combines Fred's characteristic pragmatism with a close reading of Supreme Court precedents and the no surprises policy. He did not address the abstract question of whether the no surprises policy bargained away the federal government's power to act in the future. Instead, he framed the issue more narrowly: Can the federal government constitutionally assume the costs of financing future modifications in the HCP? This legitimately finessed the more difficult constitutional issues because the no surprises policy reflected a contemplation of revisions of the HCP in response to changed conditions but placed the financial burden for paying for these changes over the life of the project on the federal government.

He found support for a positive answer in the Supreme Court's *Windstar* decision.[33] *Windstar* held that Congress could not legislatively abolish a favorable accounting rule contained in Federal Home Bank Board- savings and loan contracts negotiated as part of the industry bailout in the 1980s and early 1990s.[34] The Court agreed that Congress could not promise not to change the rule in the future but could promise to indemnify the industry for the losses incurred as a result of the change.[35] The distinction between a promise not to exercise the police power and a risk-shifting promise described exactly what the Department of the Interior had done in the no surprises policy.

V. CONCLUSION

Fred's legal work and resulting scholarship in the creation of the Orange County multi-species reserve is only one in a long series of examples of how Fred both shaped the legal structure of innovation and participated in the careful lawyering to implement the

32. *Id.* at 723.
33. United States v. Windstar Corp., 518 U.S. 839 (1996).
34. *Id.* at 909-10.
35. *Id.*

structure. He has shown us how to work within existing legal frameworks to accomplish creative results and the deeper legal and cross-disciplinary dimensions of the structures that he has helped create. This is the stuff of a great and distinguished legal career.