REAL PROPERTY & FINANCIAL SERVICES SECTION/HAWAII STATE BAR ASSOCIATION

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"The News"

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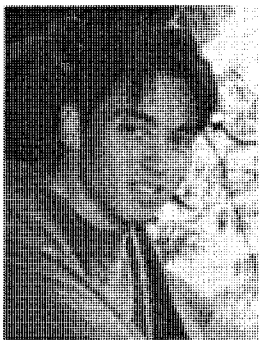
message FROM THE CHAIR



by Darcy H. Kishida

The Dragon has certainly inspired us this year. With his forceful spirit, the Real Property and Financial Services Section has had a very productive year.

Earlier this year, our Section's seminar featuring UCLA Professor Susan F. French, Reporter for the *Restatement of Law Third, Property, Servitudes,* and members' articles in the *Ka Nu Hou*, explored the practical effects of the Hawaii Supreme Court's recent decisions concerning the interpretation and enforcement of real covenants. In July, Past Chairs Deborah Macer Chun and Randy Brooks continued their ongoing contribution to the Section by presenting our Annual Legislative Update. The remainder of the year will be similarly filled with educational opportunities for our membership.

On November 1, 2000, Past Chair Bill Deeley will be chairing our Annual Litigation Update, which will feature a discussion of the Hawaii Supreme Court's recent land use decisions including Waiahole Ditch by panelists David Callies, Carl Christiansen and Gary Slovin. In addition, our Section will also be sponsoring two substantive seminars at the Annual HSBA Bar Convention on December 1, 2000. During the morning session, Past Chair Mark Hazlett will be chairing a discussion on the newly revised Article 9 of the Uniform Commercial Code, and during the afternoon session, our RPFSS Opinion Letter Committee will present the "Hawaii 2000 Addendum Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions".

Through the dedication and efforts of Chair-Elect Trudy Burns Stone, our newsletter has undergone a major overhaul this past year, soliciting members' articles on important issues and including new features, such as *"The Web Mistress Speaks . . . "* by Past Chair Nancy Grekin. We all owe a debt of gratitude to Nancy, who has been the driving force in incorporating the use of technology in our Section's services to its members with her work on our website *(http://www.hsba.org/sections/rpfs)*, and our new discussion group.

Finally, I would like to thank all of the members of the Board of the Directors, as well as our Past Chairs, without whose energy and commitment we would not have been able to achieve these accomplishments. I would especially like to thank my Executive Committee, Secretary Rick Kiefer, Treasurer Gail Ayabe and particularly, Vice Chair Trudy Burns Stone, who I am confident will be a great leader as your Chair next year. Thank you for the opportunity to serve the Section this year.

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INTRODUCTION

The Endangered Species Act ("ESA")[1] has been called "the pit bull of environmental laws."[2] The analogy is an apt one for environmentalists, many of whom consider the ESA the "crown jewel"[3] of environmental protection because of its often uncompromising restrictions on private land development. In addition to offering protection to

endangered species on private land,[4] the ESA forbids government agencies from significantly harming both the species itself and its critical habitat.[5] Though some environmentalists contend it does not go far enough, the ESA has, at the very least, staved off extinction for the majority of its listed species.[6] In fact, the ESA has been so successful in some cases that several species' populations were deemed healthy enough to be delisted.[7]

Like the jaws of the infamous pit bull, however, the ESA can sometimes act as a vice grip, completely prohibiting landowners from developing their property.[8] Spotted Owls, Kangaroo Rats, and Red-Cockaded Woodpeckers have all been blamed for causing economic hardship in areas ranging from the Pacific Northeast to the Eastern Seaboard.[9] This has brought fierce criticism from private landowners, who complained that it was unfair to subject them to liability for harming a listed species while engaging in activity that was otherwise legal.[10] In an attempt to assuage disgruntled landowners,[11] Congress amended the ESA in 1982 to be more flexible.[12] Landowners can now be granted a conditional "incidental take permit," which allows the holder to "take"[13] endangered species subject to certain mitigation requirements.[14]

One of these measures is the "Safe Harbor" concept.[15] First developed in 1995, Safe Harbors are agreements between the government and private property owners in which the landowners voluntarily engage in activities beneficial to endangered species.[16] In return, the government promises not to impose further restrictions on the land, even if the population of the species covered by the agreement grows.[17] Under the Safe Harbor program,[18] landowners have agreed to do such things as maintain trees that endangered species depend on, actively restore prairies, or even reintroduce endangered species into areas the animals once inhabited.[19]

Hawai'i is on the verge of entering into its first Safe Harbor agreement[20] to reintroduce its state bird, the Nene Goose, on Moloka'i.[21] Because Safe Harbor agreements often concede too much to landowners,[22] Hawai'i should approach them with caution. This article looks at the Safe Harbor program nationwide and concludes that, like a potent drug, they are beneficial when taken in small doses but can be dangerous if misused. Part I gives an overview of the ESA and Safe Harbor agreements. Part II evaluates three of the earliest Safe Harbor agreements to determine the effectiveness of the Safe Harbor concept, not only from the endangered species' point of view, but also from the sides of the government and the landowners. Part III assesses the value of the Safe Harbor concept in Hawai'i as applied to the endangered Nene goose. Although its conclusion is that the Nene would benefit from the proposed Safe Harbor agreement, this article argues that Hawai'i's unique geography and the particular needs of the Nene require Safe Harbor agreements in Hawai'i to ask more of landowners than has been done in previous Safe Harbor agreements.

I. AN OVERVIEW OF THE ESA AND SAFE HARBOR AGREEMENTS

A. The Endangered Species Act

1. Overview

Congress passed the ESA in 1973, largely in response to concern over the dwindling numbers of such high profile animals as bald eagles, polar bears, whales, and whooping cranes.[23] It was a revolutionary piece of legislation that for the first time provided true protection for species threatened with extinction.[24] Section 7[25] and section 9[26] give the ESA much of its bite. Section 7 compels all federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[27] This rather stoic language "absolutely prohibit[s] certain harmful federal agency actions."[28] The power of §7 was illustrated in the famous Supreme Court case *Tennessee Valley Authority v. Hiram Hill*.[29] The case involved a small, endangered fish, the snail darter, whose habitat was in jeopardy by the impending completion of a $100,000,000 dam.[30] In ordering construction of the dam stopped, the Court held the language of §7 was clear: no federal agency action can directly harm an endangered species or adversely affect its habitat.[31] This was true even when, as here, the federal agencies had already spent considerable amounts of money on a project.[32]

Predictably in a case this controversial, the opinion was not unanimous. Justice Powell dissented arguing that "Congress could [not] have intended [the ESA] to produce the 'absurd result' . . . of this case."[33] His view was echoed by many, including members of Congress and those within the agencies.[34]

In contrast to §7's exclusive application to federal agencies, §9's prohibition on the "taking" of endangered species affects both private landowners and federal agencies.[35] Section 9 is significant because "take" has been interpreted broadly, including prohibiting habitat changes that harm listed species.[36] Thus, if an endangered bird were found on an undeveloped piece of privately owned land, the owner of that land would be banned from doing anything that degraded its habitat enough to kill or injure the bird.

This clash between market forces and conservation was plainly evident in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[37] In *Sweet Home*, the Court reversed the lower court's holding that allowed logging in the habitat of the Red-Cockaded Woodpecker and the Northern Spotted Owl.[38] The Court did so despite the dissent's assertion that "preserv[ing] habitat on private lands imposes unfairness to the point of financial ruin — not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."[39] The majority recognized that the ESA "encompasses a vast range of economic and social enterprises and endeavors"[40] but concluded that species extinction must be stopped "whatever the cost."[41]

This hard-line interpretation of the ESA could not last in the face of political reality.[42] By 1982, the ESA's strict prohibitions had upset enough private property owners that Congress was pushed to soften the ESA to include incidental take permits.[43] This permit essentially carves out an exception to §9, allowing private property owners to take listed species if the taking is not the purpose of the harmful activity and the owner "minimize[s] and mitigate[s]" his impacts.[44] This new §10, however, did little to reduce the controversy surrounding the ESA.

2. The Endangered Species Act under fire

Section 9's restrictive effects on private development is by far the most controversial aspect of the ESA.[45] Predictably, environmentalists have embraced the ESA, "fervently supporting [its] mission of preventing the extinction of our country's fish, wildlife, and plants."[46] Private landowners, on the other hand, bristle at the prospect of the government telling them what they can do with their land.[47] The anxiety of these landowners has resulted in a plethora of horror stories, with opponents recounting the plight of hapless ESA victims.[48] Among these are the homeowners who were barred from saving their property from a wildfire because of brush clearing restrictions, the farmers whose farm equipment was taken away by overzealous federal agents, and businesses going bankrupt because of endangered species.[49]

While other environmental laws also interfere with private land development, the ESA often finds itself up against more than its share of criticism.[50] As one commentator put it:

> *Only the ESA is still regularly subjected to plenary denunciations on the floor of Congress; only the ESA faces serious non-reauthorization initiatives; only the ESA was hit by a sweeping one-year listing moratorium; . . . it is the ESA that has sustained amendments undermining its fundamental goal, species recovery . . . .*[51]

The ESA is so vilified because the utilitarian benefits of other environmental laws are much more apparent than those of the ESA.[52] The Clean Air Act[53] and the Clean Water Act[54], for example, provide tangible benefits to society. Few would argue that the air we breathe and the water we drink are not important resources deserving our protection.[55] It is a much harder sell, however, to convince the general public and private landowners that the O'ahu Tree Snail[56] or the Hawaiian bluegrass[57] should be saved at the expense of job-creating commercial development projects. "The societal rationale for endangered species conservation . . . is generally characterized is terms of philosophy, emotions, and aesthetics - often regarded as heartfelt but not so substantially significant when weighed against the 'practical' world of production, payrolls, and profits."[58]

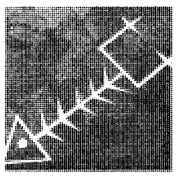
3. Perverse incentives for landowners harming endangered species

A commonly voiced flaw of the ESA are some of the perverse incentives it has created for some land-

owners to engage in activities harmful to listed species to avoid being subject to ESA restrictions.[59] An example of this is a practice known as "midnight bulldozing,"which occurs when a landowner learns of a species' imminent listing and destroys that species' potential habitat *before* its listing.[60] Landowners who commit midnight bulldozing do not presently have any of the proposed listed species on their property; they simply have habitat for that species. These landowners fear this habitat will attract the soon-to-be listed species to their property and trigger ESA land restrictions. Landowners have also engaged in the similar practice of killing the species itself before the species' listing under the ESA for the same reasons.[61]

Landowners have also blatantly violated the ESA by killing already listed species to conceal the existence of the species from the Fish and Wildlife Service ("FWS"), the primary agency responsible for implementing the ESA.[62] Macabrely termed "shoot, shovel, and shut up,"[63] landowners kill listed species for several reasons. Some are fully aware of the endangered status of the species that live on their land, but kill them in violation of the law. These landowners rightfully believe that the FWS lacks the resources to properly enforce the ESA.[64] Others have no listed species on their land and are therefore unaffected by ESA restrictions. To prevent themselves from being bound by what they see as an ESA straightjacket, these landowners simply kill any endangered species that happen to come onto their land, fearful that the government will discover the animal.[65] Thus, ESA critics contend, the ESA's unbending and sometimes harsh prohibitions can ironically lead to more, not fewer, threats to endangered species, a charge some commentators have characterized as exaggerated.[66]

All of this has made the FWS paranoid of the precariousness of the ESA's existence and fearful of what anti-ESA landowners might do to listed species.[67] To placate the public and Congress, both of which the FWS perceived as being hostile towards the ESA, the FWS decided it needed to be more flexible.[68] Out of this climate came the Safe Harbor concept.



B. Safe Harbor Agreements

1. Overview

Safe Harbor Agreements are the FWS's answer to ESA critics who argue the ESA unfairly penalizes private landowners. Under the Safe Harbor concept, landowners voluntarily use their property to benefit listed species.[69] In return, the FWS provides the landowners with a "safe harbor," guaranteeing that no additional conservation measures will be required and no additional land, water, or resource use restrictions will be imposed if the number of listed species grows as a result of the landowner's actions.[70] Thus, landowners who fulfill their Safe Harbor obligations can "take" covered species, without violating §9 of the ESA, until reaching the "baseline", i.e., the number of covered species on the landowner's property at the time the agreement is made.[71]

The FWS, along with the Environmental Defense Fund and other agencies, organizations, and state foresters, developed the first Safe Harbor agreement in North Carolina in 1995 to protect the red cockaded woodpecker.[72] Although the Safe Harbor concept is a relatively recent one, its origins go back to 1982, when Congress amended the ESA by creating a new §10[73] to "shield certain private property owners from the §9 roadblock."[74] Section 10 was designed to add flexibility to the ESA, allowing certain exceptions to the take prohibitions where previously there had been none.[75] The first manifestation of this new policy was the Habitat Conservation Plan ("HCP").[76] Also known as "incidental take permits," HCPs allow the government to "permit . . . any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to and not the purpose of, the carrying out of an otherwise lawful activity."[77] HCPs are authorized by §10(a)(2)(A), which provides, in part, that "[n]o [incidental take] permit may be issued by the Secretary . . . unless the applicant therefore submits . . . a conservation plan that specifies . . . the impact which will likely result from such taking . . . [and] . . . what steps the applicant will take to minimize and mitigate such impacts."[78] In short, a landowner may take a listed species under an HCP as long as the taking is only incidental to an activity that is otherwise legal.[79]

HCPs are especially important for landowners who wish to develop their property now but are prohibited from doing so by ESA §9 restrictions. Landowners can apply for an incidental take permit to allow them to "take" a specified number

of endangered species.[80] The landowner must demonstrate that the activity does not significantly reduce the chances of survival and recovery of species in the wild[81] and "minimize and mitigate" the adverse impacts their activities have on the covered species.[82] Although landowners are theoretically free to engage in a variety of mitigation practices, the FWS has made it clear that "first and foremost, mitigation strategies should compensate for habitat lost . . . by establishing suitable habitat for the species that will be held in perpetuity, if possible."[83] For HCPs that have a negligible effect on habitat, for example, the mitigation requirement could be to restore or enhance existing habitat so that it better meets the species' requirements.[84]

The Safe Harbor concept, although at first glance strikingly similar to HCPs because each represents a compromise on the part of both landowners and the government,[85] was developed under a different §10 provision. Safe Harbor agreements implement §10(a)(1)(A), which states that "[t]he Secretary may permit . . . any act otherwise prohibited by section 9 for scientific purposes *or to enhance the propagation or survival of the affected species* . . . ."[86] Where HCP landowners are involved in the process by the necessity of having to obtain an incidental take permit, Safe Harbor participants are involved by choice. Therefore, Safe Harbor agreements seek to proactively benefit covered species.

The environmental goals of the Safe Harbor program mesh well with those of the ESA. The ESA seeks to bring endangered species to the point where they no longer need protection and can be delisted.[87] Reflecting this policy, Safe Harbor agreements aim for "the conservation *and recovery* of species."[88] To achieve this, the FWS will only enter into an agreement if the agreement provides a "net conservation benefit" to all covered species.[89] Net conservation benefits must directly or indirectly contribute to the recovery of covered species,[90] and include, but are not limited to:

> [R]eduction of habitat fragmentation rates; the maintenance, restoration, or enhancement of habitats; increase in habitat connectivity; maintenance or increase of population numbers or distribution; reduction of the effects of catastrophic events; establishment of buffers for protected areas; and establishment of areas to test and develop new and innovative conservation strategies.[91]

Safe Harbor agreements must last long enough to achieve the hoped-for net conservation benefit for the covered species.[92] The length of time landowners are obligated to perform net conservation benefits can vary greatly depending on the covered species, the type of habitat it requires, and the planned improvements to its habitat.[93] Based on these variables, Safe Harbor agreements can last a single season to restore certain types of wetlands, 15 years for some prescribed burning of habitat, or, if the situation requires, much longer.[94]

Similarly, the land area Safe Harbor agreements cover can also differ. Safe Harbor agreements have been used for properties as small as 2.5 acres and have gone much higher, making them appropriate for both small landowners and large corporations.[95] The average Safe Harbor agreement covers about 1,000 acres.[96]

Safe Harbor agreements come in two forms.[97] One arrangement is between individual landowners and the federal agency charged with protecting the species, usually the FWS.[98] The other type of Safe Harbor is called an "umbrella" agreement.[99] Under umbrella agreements, an intermediary such as the FWS or a private conservation organization[100] develops a Safe Harbor program for a certain area.[101] The covered area can be a county or a group of counties.[102]

Besides its environmental goals, the Safe Harbor program's other major challenge was to placate worried landowners who feared government restrictions on their property.[103] The FWS's answer was to give landowners Safe Harbor assurances that guarantee their good deeds in protecting endangered species would not be punished by added restrictions on their land.[104] These assurances allow participants to take the number of covered species their voluntary conservation measures have produced, as long as their take does not fall below the baseline.[105] For example, a landowner may enter into a Safe Harbor agreement and restore native Hawaiian forest on her land that presently contains two 'Alala crows. Because of the reforestation, five additional 'Alala have come onto her land. After her obligations under the Safe Harbor agreement are complete, the FWS assures her that she can take five 'Alala if

she chooses, but at least two must stay, since this is the number she started with. This "you scratch my back, I'll scratch yours"-type arrangement was central to the program's success from the very beginning.[106]

Safe Harbor assurances, however, only apply to covered species specified in the agreement.[107] Therefore, if a non-covered species is found on the property, two scenarios are possible. First, if the FWS concludes that the non-covered species is on the property as a direct result of the landowner's conservation activities, the FWS can either amend the agreement at the request of the property owner or review and revise the permit.[108] Second, if the non-covered species' presence cannot be directly attributable to the landowner's activities or the participating landowner specifically requested that the non-covered species be excluded, the Safe Harbor assurances do not apply.[109] In this case, a separate Safe Harbor agreement would need to be negotiated using a baseline determined when the new agreement is signed.[110] This baseline can be the same as when the landowner entered into the original agreement; it can also be higher (if, for example, the landowner's Safe Harbor activities under the first agreement indirectly result in an increased population or a small population where there was none before) or lower (the endangered species is naturally declining).[111] Hence, landowners roll the dice by excluding species from coverage.[112]

II. ANALYSIS OF THREE SAFE HARBOR AGREEMENTS

Perhaps because Safe Harbors are still in their infancy, the analysis up to now has been more theoretical than practical. That is, most commentators have limited their inquiry to Safe Harbors as a concept instead of evaluating actual agreements already in force. Indeed, focusing on individual Safe Harbor agreements and how well they have achieved their twin goals of species preservation and improved relations between the government and private landowners arguably produces the most constructive critique of the program.

The Safe Harbor agreements analyzed here were chosen because they were the first three developed, the longer time frame hopefully painting a more accurate picture of their effectiveness. The North Carolina Sandhills Safe Harbor agreement for protecting the Red-cockaded Woodpecker and the Texas Coastal Prairie agreement for the Attwater Prairie Chicken were both developed in 1995.[113] The Texas Northern Aplomado Falcon Reintroduction Safe Harbor agreement was approved in 1996.[114]

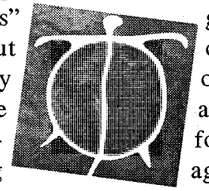
Although the covered species are all birds, the differences between the three make analysis of their Safe Harbor agreements meaningful. For example, the Red-Cockaded Woodpecker is nonmigratory[115] while the Aplomado Falcon travels long distances when it is not mating.[116] Fewer than fifty Attwater Prairie Chickens[117] are left in the wild compared to more than 10,000 Red-Cockaded Woodpeckers.[118] The Aplomado Falcon and Attwater Prairie Chicken Safe Harbor agreements seek to reintroduce the species to their traditional habitat.[119] The Red-Cockaded Woodpecker, by contrast, has had its habitat severely reduced but has always been on what little habitat remains.[120]

Each agreement will be evaluated based on the following criteria: (1) the improvement in the population of the covered species, if any (to gauge whether the agreement has achieved its fundamental goal of improving the species' population); (2) participants' satisfaction with the process (to ascertain if the agreement is reaching its other goal of reducing fear and distrust of the government and the ESA); and (3) the incidence of endangered species not on Safe Harbor land at the time the agreement is made but attracted to the land as a direct result of the landowner's Safe Harbor activities and whether landowners have yet opted to exercise their right to "take" covered species back to the baseline (these two criteria being useful in determining the validity of criticism that says Safe Harbor benefits are transitory).

A. The North Carolina Sandhills Safe Harbor Agreement for the Red-Cockaded Woodpecker

The North Carolina Sandhills Safe Harbor agreement was the first ever Safe Harbor agreement.[121] It was developed in 1995 primarily by the FWS and the Environmental Defense Fund, with assistance from other agencies, organizations, and state foresters.[122] It is an umbrella agreement, covering over 20,000 acres in seven counties.[123] The overarching agreement lasts 99 years and is not scheduled to expire until December 31, 2094.[124]

The FWS chose the North Carolina Sandhills for a Safe Harbor program in large part because a "significant portion" of the Red-Cockaded Woodpecker ("RCW") groups in the area are on privately-owned land.[125] In fact, out of the fifteen RCW populations across the country that the FWS considers essential for the recovery of the species, only the one in the North Carolina Sandhills has such a high percentage of RCW "groups" on private land (about 30%).[126] Groups are family units consisting of up to nine birds.[127] The FWS has determined that participating landowners have a combined baseline population of about fifty groups on their property.[128] Because of the large proportion of Sandhills RCWs on private land, "the recovery of the RCW in [the area] is likely to be influenced significantly by the land management decisions of private landowners."[129]



Participants may opt out of the program at any time but, depending on when they opt out, may lose the privilege of returning to the baseline as determined at the time that particular landowner entered into the Safe Harbor agreement.[130] For example, imagine a landowner whose land is inhabited by 20 RCW groups and is not yet enrolled in a Safe Harbor agreement. This landowner can neither take any birds under §9 of the ESA, nor does she have an affirmative duty to maintain the RCW habitat. In other words, §9 allows landowners to sit back and do nothing.[131] If this landowner decides to participate in a Safe Harbor agreement, her baseline will be 20 groups. If she opts out before she has completed *any* of her Safe Harbor obligations, the landowner gains no benefit from the agreement and is subject to §9 take prohibitions as if she had never been involved in the program.[132] If the landowner opts out after fulfilling her Safe Harbor obligations *up to the point at which she opts out*, however, and the number of RCW groups increases to 25 because of her Safe Harbor activities, she will be able to take up to five groups.[133] As for the 20 original groups, the landowner is now obligated to actively manage her habitat for the remainder of the agreement, something the landowner was not required to do before her involvement in the Safe Harbor program.[134] Thus, covered species benefit even when landowners prematurely end their involvement in the program.[135] Landowners who stay with the program will continue to enjoy the lower baseline of 20 groups if they do not opt out, even if it is until the agreement's expiration date in 2094.[136] To date, no landowner has opted out.[137]

The covered species is the Red-Cockaded Woodpecker, a seven to eight-inch bird of the Picidae family.[138] RCWs live in cavities in longleaf pines; they avoid dense hardwood strands.[139] RCW's historic range stretched from East Texas and Oklahoma, to Florida, and north to New Jersey.[140] Now, only "isolated, island populations" remain.[141] Loss of pine forest with trees older than eighty years is primarily blamed for the species' decline.[142] Another cause is fire suppression.[143] To complicate matters, RCWs require trees infected with a fungus that produces a condition known as red-heart disease.[144] Trees with red-heart disease are easier for RCWs to excavate cavities in.[145]

Forty landowners have enrolled in the North Carolina Sandhills RCW Safe Harbor program since its inception, with three more in negotiations at the time of this writing.[146] According to the FWS, the program is so popular among eligible landowners that "demand is outstripping supply (i.e., economic and personnel resources)."[147] Landowners participating in the program have agreed to do such things as prescribed burns, artificial nest cavity drilling, hardwood undergrowth removal, and forest rotation lengthening.[148] In addition, some landowners have begun to reforest their pastureland with longleaf pine.[149] The reforestation serves two important purposes. First, the new growth provides important foraging ground for RCWs.[150] Secondly, the reforested areas can be used by the RCWs as a roosting area after about eighty years, when cavities can be excavated in the trees.[151]

1. Red-Cockaded Woodpecker population increases

Using the first evaluative criteria, whether the North Carolina Sandhills RCW Safe Harbor program has helped to increase the population of the species it is supposed to benefit,[152] the answer seems to be a cautious "yes," at least for the short term.

Before the development of the North Carolina Sandhills RCW Safe Harbor program, the RCW population on private land was falling 9% annually.[153] Since then, the decline has been reversed,[154] the latest count showing an estimated increase of three new groups, which may be equivalent to as many as twenty-seven birds.[155] Despite the improve-

ment, the population is increasing at a rate slower than the FWS had initially hoped for. The FWS estimated in 1996 that the RCW population in the covered areas "could as much as double in eight to 15 years," which could total as many as 100 groups.[156] Since the baseline was determined to be fifty groups in 1995, it is unlikely the current recovery rate will improve enough to allow the RCW population to reach 100 groups anytime soon.

2. Landowners satisfied with their participation in the Safe Harbor program

The second criterion looks at the response of landowners whose land is enrolled in the North Carolina Sandhills RCW Safe Harbor program. Though no surveys of the twenty or so participating landowners have been done, the available evidence suggests they are generally pleased with the newfound flexibility of the FWS and the deals they have negotiated for themselves. A good example is Dougald S. McCormick, whose family owns about 5,000 acres of forestland.[157] His license plate once read, "I EAT RCWS."[158] Now, after enrolling his land in the Sandhills, North Carolina Safe Harbor program, McCormick says he "want[s] to see this [Safe Harbor agreement] succeed."[159]

Another participant, Jerry Holder, is president of the North Carolina Pine Needle Producer Association.[160] He harvests pine needles for a living on his 100-acre longleaf pine forest.[161] Because fallen leaves from hardwood trees interfere with his raking of the straw, Holder clears out scrub oaks and other trees to keep the area free of leaves.[162] The problem, of course, is that by clearing the forest, Holder is attracting RCWs.[163] He said that before the Safe Harbor program, the presence of RCWs on his property was "a definite threat to my livelihood and security."[164] Now, by contrast, "[W]e can live in harmony," Holder said.[165] "It is a great thing for the landowner and the birds."[166] In addition to helping RCWs, Safe Harbor activities have actually resulted in *increased* financial returns for landowners, Holder said.[167] With the hardwoods cleared away, the quantity of pine straw has significantly increased.[168] And because the pine straw is much cleaner without debris from other tree species, it has a higher value.[169]

This anecdotal evidence, along the program's apparent popularity and the fact that no landowners have yet opted out of the program, strongly suggests Safe Harbors are good for landowners. Furthermore, only two landowners have so far chosen not to participate.[170] One of them is a conservation group whose activities are more beneficial to the RCW than those of the North Carolina Sandhills Safe Harbor program.[171] The other landowner had planned on entering into the Safe Harbor agreement, but later decided against it.[172] Despite choosing not to participate, the landowner still plans to use his land on behalf of the RCW.[173]

3. No other endangered species attracted to the RCW Safe Harbor land

The FWS's procedures for determining whether non-covered endangered species are on Safe Harbor land depend greatly on the specific habitat involved.[174] The more likely the habitat is to attract such species, the greater the need for thorough monitoring.[175] Since the habitat covered by this particular Safe Harbor agreement is all but inhospitable to any listed species besides the RCW, the FWS feels there is little chance of habitation by other species and only minimal monitoring is necessary.[176] To date, the FWS has not observed any non-covered species on land currently under the RCW Safe Harbor program in the Sandhills region of North Carolina.[177] At least for this Safe Harbor program, the danger of non-covered species coming onto Safe Harbor land appears negligible.

Judging from the modest increase of RCW groups, the positive landowner response to the program, and the exceedingly small chance of habitation by a non-covered species, this Safe Harbor agreement appears to be fulfilling its goals. Despite the apparent success of the North Carolina RCW program, however, it is still to early to know how lasting these achievements will be.

B. The Texas Coastal Prairie Safe Harbor Agreement for the Attwater Prairie Chicken

The Attwater Prairie Chicken ("APC") is one of the most endangered species in the United States, with an estimated population of fifty as of April 2000.[178] Although the APC population once totaled over a million birds, the loss of 97% of its suitable habitat has brought the APC to the brink of extinction.[179] Other reasons for the APC's decline are predation, disease, genetic problems, and abnormal weather conditions over the last ten years.[180]

The APC, a member of the grouse family, is about the size of a domestic chicken.[181] A little over a hundred years ago, the APC roamed across approximately 6 million acres of coastal prairies in Texas and southwestern Louisiana.[182] Now, less than 200,000 acres of available habitat remain.[183] APCs live an average of two to three years.[184] They nest once a year, producing an average of about twelve eggs.[185] APCs need open prairie with very tall grass for roosting and nesting,[186] as well as patches of bare ground or very short grass for performing their pre-nuptial display.[187]

APCs live on two refuges.[188] One is the government-run Attwater Prairie Chicken National Wildlife Refuge with twenty APCs.[189] The other is the Nature Conservancy's Galveston Bay Prairie Refuge with thirty.[190] Interestingly, the Nature Conservancy refuge is among the parcels of land enrolled in the Safe Harbor program.[191]

The Safe Harbor agreement for the APC, established in 1995, is an umbrella agreement involving fourteen landowners and covering over 60,000 acres of native prairie hospitable to the species.[192] Of the fourteen, only the Nature Conservancy's refuge contains APCs.[193] The other Safe Harbor participants maintain the APC habitat on their land for the day when APCs recover to the point where the two refuges reach their carrying capacity and extra habitat is needed.[194] All APC Safe Harbor agreements also cover the Houston Toad and Texas Prairie Dawnflower, two endangered species which utilize the same habitat as the APC.[195] Participants are expected to maintain pastures or prairies, restore native plant species to the area, and conduct controlled burnings.[196] Landowners are held to ten-year commitments,[197] though the FWS expects the benefits of their range improvements to continue for a longer period.[198] In addition to restoring and preserving habitat for APCs already on the land, the APC Safe Harbor agreement provides for reintroduction of the species through captive breeding programs.[199] In 1999, 100 birds were released onto the two refuges.[200] Unfortunately, the survival rate for reintroduction has been a poor 36%.[201] Despite the discouraging success rate, the FWS views the captive breeding program as essential for maintaining the existing wild population on the refuges.[202]

The extremely small number of APCs, along with the fact that 98% of their habitat is in private ownership, makes the cooperation of private landowners especially critical.[203] According to Terry Rossignol, the APC Refuge Manager, "Without the help of private landowners, the bird is doomed to extinction."[204]

1. Attwater Prairie Chicken population drops

Looking at the raw numbers, it is easy to conclude that the APC Safe Harbor agreement is a failure. The bird's population in the wild dropped from an estimated sixty-eight in 1995[205] to only fifty in 2000.[206] Though discouraging, the figures are not totally unexpected given the wild fluctuations in the APC population in years past. For example, the number of APCs nose dived from sixty-eight in 1995 to forty-two in 1996.[207] Two years later, in 1998, the population rebounded to fifty-seven.[208] The drop in population to fifty birds in 2000, therefore, is a significantly smaller loss than the 1996 decline and may not be as alarming a setback as it first appears.

Given that many other factors could be the cause of the decline, it is difficult to assess what impact the Safe Harbor agreement has had on APCs. One could conclude that the numbers speak for themselves and that the Safe Harbor program fails this criterion. On the other hand, the FWS itself warned in 1995 that unless something was done, APCs could be extinct by the year 2000.[209] That APCs still survive in the wild may be interpreted to mean this particular Safe Harbor agreement has been successful. In any case, no one can dispute that the APC is just as close to extinction, if not more so, than before the start of the Safe Harbor program.

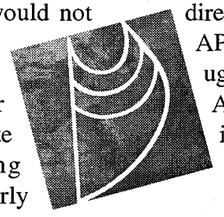
2. Whether participants satisfied with the Safe Harbor program unclear

According to Rossignol, "you couldn't say 'ESA' and 'private landowner' in the same sentence" prior to Safe Harbors.[210] Rossignol, who works closely with Safe Harbor participants, has seen "a 180° turn" from the pre-Safe Harbor years.[211] Landowners' minds have been so changed, in fact, that some participants are actually asking the FWS to reintroduce the APC on their land.[212]

John Elick, whose ranch covers 1,800 acres of prairie along the Gulf of Mexico, participates in the APC Safe Harbor program.[213] Unlike oft-

stereotyped landowners who supposedly kill listed animals before they are discovered on their land, Elick is partial to endangered species.[214] In an article in the *Weekly Alibi*, Elick explained he wanted to do something positive for wildlife because "what is good for the ecology of the land is good for me and my ranch."[215] Before the Safe Harbor program, Elick had been concerned that the federal government would infringe on his property rights if listed species were found on his land.[216] When he heard about the Safe Harbor program, Elick took it upon himself to contact the FWS and get involved.[217] Elick has no regrets, explaining that "[b]oth the government and private landowner benefit without any negative drawback to either party."[218]

Unfortunately, the Southwest Field Office in charge of the APC Safe Harbor program would not release the identities of other participating landowners when the author asked for them. Alternate methods of contacting landowners were similarly unsuccessful.[219] Besides Rossignol's comments and Mr. Elick's experience, the only other indication of landowner satisfaction is that no one has yet opted out of the program.[220] Additionally, the fact that four more Safe Harbor agreements are being negotiated as of this writing[221] can be inferred to mean that the current participants are pleased with their involvement and have generated strong word-of-mouth praise. This is not too outlandish when one considers the very small area of land the FWS has given priority to for enrollment in the Safe Harbor program.[222]



3. No other endangered species attracted to APC Safe Harbor land

Since there are no other endangered species in the area, the FWS is confident the three species included in this Safe Harbor agreement adequately provide for the possibility of a non-covered endangered species being attracted to Safe Harbor land.[223] Because of this, the FWS conducts only informal, cursory "inspections" for other endangered species.[224] These surveys are done only incidentally as part of the FWS's regular visits to Safe Harbor property.[225] The FWS has not observed any non-covered endangered species on APC Safe Harbor land.[226]

With the wild APC population down from the start of the program, it is hard to claim the APC is benefiting from this Safe Harbor agreement. The situation is even more dire in light of the fact that all APCs are currently on two refuges managed exclusively for APC recovery. If the species is struggling under these ideal conditions, it will fare even worse if reintroduced onto Safe Harbor land not specially dedicated to APCs. On the other hand, landowners seem extremely satisfied with their participation in the program. However, any Safe Harbor agreement that falls short of its species recovery goals, no matter how successfully it meets its other goals, is simply not fulfilling its overall purpose. In light of this, until the APC population improves, one can only conclude that the Texas Coastal Prairie Safe Harbor agreement for the Attwater Prairie Chicken is a disappointment.

C. The Texas Northern Aplomado Falcon Reintroduction Safe Harbor Agreement

Out of the three species this article highlights, the Texas Northern Aplomado Falcon ("AF") is perhaps the most dramatic, both in terms of aesthetics and its heroic rebound from the brink of extinction. As the rarest falcon in North America,[227] AFs are "mediagenic" creatures,[228] having been described as "a beautiful and important part of a rich wildlife community" of the American Southwest.[229] Once fairly common throughout the grasslands of the southwestern United States and Mexico, by 1930 it had "all but disappeared" from the United States.[230] The AF's sharp decline was blamed primarily on the loss and degradation of coastal and desert grasslands in its habitat.[231] Like RCWs, AFs suffered as a result of fire suppression.[232]

AFs grow to about eighteen inches long with wingspans of up to a yard.[233] They chiefly feed on small-to-medium sized birds, but can also eat insects, small snakes, lizards and rodents.[234] AFs favor open terrain with widely scattered trees and low growing vegetation.[235] Current populations of AFs generally prefer cattle ranch land because the grazed pastures allow for easier access to prey.[236]

The AF Safe Harbor program was established in 1996 and is unusual in that it is jointly administered by the FWS and the Peregrine Fund,[237] a nonprofit organization "working to conserve wild populations of birds of prey."[238] The arrangement was necessitated in large part by the landowners' strong distrust of the federal government.[239] The situation is highly charged and the only contact landowners have with anyone connected with the Safe Harbor program is with Peregrine Fund employees.[240] The level of suspicion is so high, in fact, that FWS employees are barred from entering participant's landowners' property.[241] Currently, six landowners, all ranchers, are participating in the program.[242] Collectively, their property encompasses 1.24 million acres.[243] Like participants in the RCW Safe Harbor program, landowners here have a ninety-nine year commitment but can opt out at any time.[244]

In a predicament similar to the one faced by the APC, ninety-seven percent of suitable habitat for the AF is on privately-owned land.[245] Since landowners in Texas were distrusting from the start, "future hopes of cooperation [were] dim."[246] The FWS believed the only way to gain landowner support was to establish a Safe Harbor program.[247]

Landowners who choose to enter into this Safe Harbor agreement have few obligations compared with those in the RCW and the APC programs. In fact, all the participants need to do is allow Peregrine Fund employees to enter upon their property for the release of falcons or for monitoring purposes.[248] Affirmative acts such as reforestation or brush clearing are not required.[249]

1. Aplomado Falcon population makes extraordinary turnaround

Of the the three species analyzed in this article, the AF has benefited the most from its Safe Harbor program. From a baseline of zero in 1996, the AF population now totals nineteen nesting pairs,[250] which is almost a third of the way to the sixty pairs needed for downlisting from "endangered" to "threatened."[251] Part of this success story undoubtedly lies with the high survival rate for reintroduced AFs, which was a healthy 83% in 1996.[252] Moreover, the AF's mobility[253] arguably puts it in a better position than either the RCW or APC to adapt to the loss of Safe Harbor habitat should landowners decide to take it back to the baseline. Another advantage the AF has over other species is its gregariousness: AFs do not need "their own space" as much as other falcons do, especially the Peregrine.[254] Because of this, more birds can be released into a smaller area at one time.[255] This is advantageous in two ways: it reduces cost and increases the likelihood of establishing an adult pair.[256]

2. The Safe Harbor program has transformed attitudes among landowners

Depending on whom you ask, the Safe Harbor program for the AF either seems to have made more than a few converts among Texas landowners,[257] or has failed to dispel the suspicions of a sizable group of eligible participants.[258] "[W]ith millions of acres of private lands being enrolled in the plan and birds having been released on major private properties," David Bidwell, Research Associate at the National Center for Environmental Decision-Making Research asserts that the goal of landowner cooperation certainly seems to have been achieved.[259] According to Bidwell, since the agreement went into effect, disputes between landowners on one hand and the government and endangered species on the other have gone down.[260] As with participants enrolled in the other Safe Harbor agreements in this article, none has yet opted out.[261]

A less rosy picture is painted by Pete Jenny, Vice President of the Peregrine Fund, who maintains the program is working, but not as well as it could be.[262] Jenny says "a real mistrust" of the federal government persists among landowners in Texas, and that getting them involved in the Safe Harbor program is sometimes like "fighting an uphill battle."[263] Jenny blames the lingering ill-will on poor implementation of the ESA by the FWS.[264] It is perhaps unsurprising that this rather pessimistic assessment of landowner satisfaction comes from someone other than a FWS employee.

Regardless, at least one landowner is happy.[265] Frank Yturria, owner of the large Yturria Ranch in south Texas,[266] is one of this Safe Harbor's major participants.[267] Yturria, who lists his occupation as both rancher and banker, is descended from a long line of Texas Yturrias going back to the 1800s.[268] According to Cathleen Hoover, Yturria's long-time office manager, Yturria is "very satisfied" with his involvement in the Safe Harbor program and feels "very positively" about endangered species in general.[269] As further evidence of the Safe Harbor program's success, Yturria feels "fairly positively" about the ESA.[270]

As with John Elick, the landowner participating the APC Safe Harbor agreement, Yturria seems to have a great deal of appreciation for nature. Yturria reportedly enjoys watching the AFs living on his land.[271] Moreover, much in the same way he allows the Peregrine Fund onto his land, Yturria lets the Cesar

Kleberg Wildlife Foundation study the endangered Ocelot Cat on his ranch.[272] The Ocelot Cat, however, is not covered by a Safe Harbor agreement. Just as he agreed to allow a private conservation group onto his land to monitor the ESA-protected Ocelot without any Safe Harbor assurances, he may very well have agreed to the Peregrine Fund's request to release and monitor the AF without Safe Harbor. In this way, Safe Harbors may be "preaching to the converted," at least with regards to landowners like Elick and Yturria.

3. No reports of non-covered listed species on Aplomado Falcon Safe Harbor land

Because the FWS is barred from entering onto any AF Safe Harbor land, only Peregrine Fund employees are in a position to know if any non-covered species have been attracted to Safe Harbor land. So far, they have not detected any,[273] a fact which makes sense considering the landowners are not engaged in any restoration or maintenance activities but are simply allowing the Peregrine Fund to release and monitor AFs. This finding must be taken with a grain of salt since Peregrine Fund biologists, aware of the sensitive relationship between landowners and the government, would keep any information about newly discovered endangered species under their hats.[274]

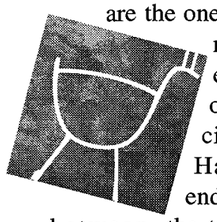
The three agreements evaluated in this article offer but a glimpse of the whole Safe Harbor picture. Like the proverbial blind men touching the different parts of the elephant, each coming away with a different understanding of the animal, observers' opinions are shaped by what aspect of the Safe Harbor program they focus on. Nevertheless, some tentative conclusions can be drawn.

Safe Harbors can help increase a covered species' population, at least in the short term. In some circumstances, the improvement can be quite dramatic, as the AF Safe Harbor program has shown. In other contexts, the gain is modest, as in the North Carolina Sandhills RCW Safe Harbor agreement. By contrast, the failure of the APC program in benefiting its covered species is largely irrelevant to this analysis. In that agreement, the only participating Safe Harbor landowner with APCs on its property is an conservation group which does not need Safe Harbor assurances to engage in activities beneficial to the APC. The unknown variable, of course, is how lasting these benefits are likely to be. The good news is that in none of the three Safe Harbor agreements have any landowners exercised their legal right to take species. Five years, however, is not a very long time, considering these agreements can last nearly a century.

Safe Harbor advocates will likely seize upon the achievements of the AF Safe Harbor agreement and deploy them as ammunition in their campaign to gain widespread acceptance for the program. While the biological accomplishments of the AF Safe Harbor program are certainly encouraging, a few caveats must be noted. A large part of the success of this particular program lies with the AF itself. The high survival rate of reintroduced birds, the excellent mobility of AFs, and the relatively low acreage requirements per individual bird perhaps represent a rare convergence of qualities, ones which most other endangered species do not possess. If so, this is probably an unusual success story, unlikely to reoccur with other endangered species.

Perhaps more than its biological objectives, the Safe Harbor goal of converting landowners from ESA-hating outlaws into born-again conservationists seems to have been achieved. But here too, conclusions must be drawn with caution. For all the Jerry Holders and Dougald S. McCormicks who were strongly anti-ESA before the Safe Harbor program was established, there are the John Elicks and Frank Yturrias who were predisposed to helping out endangered species. These conservation-minded landowners may not need the generous Safe Harbor assurances that other, more recalcitrant ones may. Safe Harbor's "one-size-fits-all" assurances may, in fact, be an example of the criticism that Safe Harbors too often grant overly generous concessions to landowners.

On the other hand, perhaps it is precisely these landowners the Safe Harbor program should be targeting. Recall that a major criticism of Safe Harbors is that covered species will suffer in the long run should participants choose to return to the baseline. Consider also that two distinct types of landowners can enroll their property in a Safe Harbor agreement: (1) those who wish to help out endangered species but want Safe Harbor assurances just in case they elect to develop their property in the future; and (2) those who care little about species conservation and participate with the full intention of taking the covered species back to the baseline as soon as their Safe Harbor obligations are fulfilled. Promoting Safe Harbors to these "Type 2" participants is obviously a risky venture, possibly resulting in harm to the species or financial burden to the FWS or both. Yet, it is these landowners the FWS is aiming to recruit. A much better strategy would be to focus on species-friendly landowners since they are the ones most inclined to manage their property for the benefit of endangered species after the Safe Harbor agreement ends. Differentiating between the two types of landowners could be done by looking at the past conservation activities of prospective participants. Those like Frank Yturria, with a demonstable record of environmentalism, would be given preference with an expedited "fast-track" negotiation process. Conversely, landowners who are likely to return to the baseline would find it more difficult, if not impossible, to gain Safe Harbor approval from the FWS. Those who did would have to settle for less generous assurances. Thus, landowners would see Safe Harbor participation as a privilege worth striving for.



The ideal Safe Harbor agreement, therefore, would cover a species like the AF that is easily reintroduced, fairly mobile, and able to thrive with a limited amount of space. Additionally, prudent Safe Harbor agreements would target landowners with an inclination towards conservation. Fortunately, both the Nene Goose and the prospective Safe Harbor participant appear to possess the qualities that make for a successful Safe Harbor program.

III. THE PROPOSED SAFE HARBOR AGREEMENT FOR THE NENE GOOSE REINTRODUCTION PROGRAM ON MOLOKA'I

A. Background

1. The Nene

The Nene Goose is Hawai'i's state bird.[275] A close relative of the Canadian Goose,[276] the Nene measures between twenty-two and twenty-six inches long and has adapted to its environment by losing much of the webbing on its feet to better navigate its mostly rocky habitat.[277] Besides the rugged lava fields on the Big Island,[278] the Nene can also inhabit scrublands, grasslands, sparsely vegetated slopes, and open lowland country.[279] Some have even been found on golf courses.[280] Though it can wander around quite a bit foraging for food,[281] the Nene is incapable of migrating[282] due to its modified wing structure, which has evolved to better enable shorter flights.[283] The Nene is generally a social bird, joining in flocks in the winter, though it turns territorial during nesting season.[284]

Historically found on all main Hawaiian Islands, the Nene now inhabits only the Big Island (the island of Hawai'i), Maui, and Kaua'i,[285] the latter two populations being products of reintroduction programs.[286] The Nene is believed to have numbered about 25,000 birds on the Big Island in pre-contact times.[287] Their decline is blamed on predation from introduced animals such as rats, dogs, cats, mongooses, and pigs.[288] This was possibly exacerbated by alien plants which crowded out the native ones and provided a less nutritious diet for the Nene.[289] After reaching a low of thirty birds in 1951,[290] the Nene population has since rebounded to a combined wild population of about 1,000.[291] This dramatic increase was a result of captive breeding and reintroduction efforts by both public and private organizations such as the State of Hawai'i, the National Park Service, the Wildfowl Trust in England, and the Peregrine Fund.[292] Biologists have also attributed the Nene's population improvement to its adaptability to a variety of terrain[293] and its good sociability, which allow the Nene to be released on a wider range of habitat, both in terms of type and size, than it otherwise would be.[294]

2. The agreement

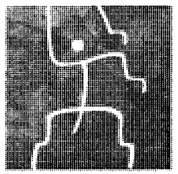
The reintroduction of Nene to Moloka'i is a joint endeavor among the State of Hawai'i, the FWS, and Pu'u O Hoku Ranch ("POHR"),[295] a privately-owned enterprise whose owner approached the state offering her land for Nene reintroduction.[296] As with its counterparts on the mainland, POHR does not want added restrictions on its land as a result of its good deeds. Thus, POHR indicated that before any Nene reintroduction program be implemented, the state would need to provide Safe Harbor protection.[297] The goal is to eventually have seventy-five Nene on Pu'u O Hoku Ranch and 200 for the whole of Moloka'i.[298]

The POHR agreement, if approved, would be the first application of a 1997 state law authorizing Safe Harbors.[299] Largely identical to the federal Safe Harbor program, the state law nevertheless contains some important differences which could make it a much harder sell to pro-

spective participants. Unlike the agreements profiled in Part III of this article, which do not involve their respective state governments, Hawai'i's Safe Harbor agreements require state approval.[300] For approval to be granted, the state must hold a public hearing on the island affected by the proposed Safe Harbor agreement and the state's Board of Land and Natural Resources must vote to approve any agreement by a two-thirds majority.[301] Some other major differences include, but are not limited to, requirements that incidental takes be based on the "best scientific and other reliable data"[302] (not specified for federal Safe Harbor program) and that: (1) any habitat creation, restoration, maintenance, or improvement continue for at least five years[303] (federal policy only requires "sufficient duration");[304] (2) any incidental take occur only in the habitat created, restored, maintained, or improved[305] (federal policy only mandates that the baseline be maintained);[306] and (3) the state may "suspend or rescind"[307] any Safe Harbor agreement if the state runs out of funds[308] (no such right for the government under federal law). The role of the FWS in the POHR Safe Harbor negotiations is to review the state agreement to ensure consistency with federal policy.[309]

While the extra hoops the state makes applicants jump through may initially seem prudent, especially in endangered-species rich Hawai'i, their benefits to covered species are probably negligible. It probably makes little difference to the recovery of a covered species whether it is the old or new habitat that is destroyed. It really does not matter much that Safe Harbor obligations in Hawai'i must last for at least five years when landowners on the mainland routinely sign ninety-nine year agreements. The effect of these added conditions will likely be needlessly scared off landowners who would otherwise have entered into a Safe Harbor agreement.

Under the proposed agreement, POHR is obligated for seven years to (1) maintain open, short grass habitat; (2) allow and aid in the release of Nene by assisting the Department of Land and Natural Resources ("DLNR") in establishing and maintaining Nene release sites; and (3) assist DLNR in controlling predators around breeding and release sites[310] on its 14,000 acre ranch.[311]



B. Analysis of Pu'u O Hoku Safe Harbor Agreement

Based on the three agreements considered in this article, one can conclude that Safe Harbor agreements may be particularly worthwhile for species with traits like the Aplomado Falcon, i.e., those with high survival rates when reintroduced into the wild, good mobility, and a level of gregariousness such that it can thrive with others of its species nearby. In addition to a suitable species, a sensible Safe Harbor agreement with long-term conservation goals requires a participating landowner that does not see Safe Harbor participation simply as a way to evade ESA constraints.

Applying these lessons to Hawai'i and the Nene Goose produces guarded optimism. Like the AF, the Nene survives well when reintroduced into the wild.[312] This has repeatedly been the case, as the successful reintroductions on Maui and Kaua'i have shown. As with the AF, the Nene's receptiveness to being in close proximity to others of its species is good, creating territory in breeding season but joining in flocks in the winter. Mobility is the biggest stumbling block. Nene geese do not migrate nor do they have anywhere to go should their future Safe Harbor habitat be destroyed.

Likewise, POHR appears to be the type of landowner best suited to the Safe Harbor program. It has volunteered its land for Nene reintroduction for conservation, not self-serving reasons.[313] Additionally, POHR has stated it does not intend to return the Nene population to the baseline after its seven-year obligations end.[314]

Looked at as a whole, the Safe Harbor agreement for the Nene on Moloka'i should proceed, but with fewer assurances to the landowner than we have seen nationally. One idea would be for the state to set a baseline above zero. This would allow POHR to develop the land, but not to the point where it will result in a total take of the Nene or an expensive relocation effort by the state. The draft Safe Harbor agreement attempts to address this potential problem by indicating a take back to the baseline is not expected to occur.[315] This seems more like wishful thinking than good Safe Harbor policy. If POHR ends up being the only Safe Harbor participant on Moloka'i and it decides to exercise its take option, the state could claim it lacks the funds to relocate the Nene and rescind the agreement under H.R.S. §195D-22(c)(2). This would only cause trauma for the Nene, embarrassment for the state, and resentment among landowners.

Another possibility would be for the state to insist that while POHR can be developed in the future, it can only be done on a parcel by parcel basis. This would allow the Nene to move or be moved to the area of the ranch not slated for development. This solution is a feasible one since the Nene are fairly adaptable to various terrain when not nesting. In any case, it is clear state should not be hasty and simply jump on the Safe Harbor bandwagon. Rather, Hawai'i should approach the Safe Harbor concept cautiously and implement each agreement on a case-by-case basis, taking into account the covered species' needs, landowner motives, and Hawai'i's unique geography.

IV. CONCLUSION

The ESA is the United States' premier law for species protection. Although it does a reasonably good job of preventing the extinction of threatened and endangered species, critics condemn the ESA for unfairly burdening property owners with its inflexible restrictions on private land. True or not, the ESA's vocal opposition has convinced the government that the ESA needed to be more flexible. The government's answer was the Safe Harbor agreement.

The goal of the Safe Harbor program is to appease two seemingly disparate masters - endangered species and private landowners. It attempts to do so by exempting landowners from additional ESA restrictions should they engage in activities beneficial to endangered species. Environmentalists worry that Safe Harbor agreements short-change endangered species in the long run because they allow participating landowners to "take" the additional species their activities create. With the Safe Harbor program only five years old, conclusions are hard to draw. This article looked at three of the first Safe Harbor agreements to assess the merits of the program and apply the lessons learned to Hawai'i's first Safe Harbor agreement for the endangered Nene Goose on Moloka'i.

Safe Harbor programs should not be used simply to gain the assent of landowners or as a way of quelling a perceived hostility in Congress towards the ESA. Nor should they be employed after a landowner has already taken endangered species under a HCP incidental take permit. This would invite purposeful lowering of the baseline prior to participating in a Safe Harbor program.

Safe Harbor agreements can, however, be beneficial in narrowly defined situations. The covered species should have good mobility and adaptability in case it needs to move or be relocated to another area because a participating landowner has opted to return the land to baseline conditions. Covered species in reintroduction programs should have high survival rates when reintroduced into the wild. They should also be able to live in relatively close proximity to others of its species. This allows for more frequent releases in smaller areas. In addition, participating landowners should not be taking advantage of Safe Harbors to thwart the ESA's conservation goals.

The Nene possesses enough of these qualities to make it an encouraging Safe Harbor candidate. Its lacks the mobility to fly interisland, but does well in reintroduction programs and is generally a social bird. Likewise, the landowner seems predisposed to conservation measures and is on record as saying it has no plans to return to the baseline. In light of these factors, Hawai'i's first Safe Harbor agreement should go forward, but with additional safeguards from the landowner to account for the limited available habitat on Moloka'i and the Nene's particular needs.

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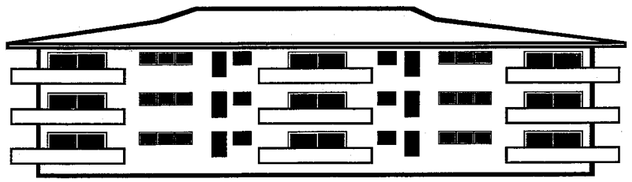
Copies of all referenced footnotes have been omitted due to lack of space availability; however, they are available directly from the author upon request. You may e-mail Darcy at speed3@hawaii.rr.com.

BILL INTRODUCED IN CONGRESS TO EASE CONVERSIONS OF COOPERATIVES INTO CONDOMINIUMS

by Richard J. Kiefer, Esq. and James H. Case, Esq.



On September 5, 2000, U.S. Senator Daniel Inouye, in response to a request from a Honolulu cooperative, introduced S. 3004 in the U.S. Senate. The bill would amend the Internal Revenue Code of 1986 to remove one of the principal impediments to converting cooperatives, or "co-ops", into condominiums. U.S. Senator Daniel K. Akaka co-sponsored the bill. On September 12, 2000, U.S. Representative Patsy T. Mink introduced a companion bill in the House of Representatives (H.R. 5159). Representative Neil Abercrombie co-sponsored the bill.

Hawaii has a number of co-ops, which were generally established in the late 1950s or early 1960s, prior to Hawaii's enactment of a condominium property law. A co-op is a cooperative form of ownership, in which a corporation owns the building and the lease or fee interest in the underlying land. A co-op apartment owner does not own an apartment directly; rather, each owner receives one or more shares in the co-op, which are accompanied by a "proprietary lease" that gives the owner the right to occupy a specific apartment in the co-op. Because of this unusual structure, it is generally more difficult and expensive to secure mortgage financing on co-op units and the value of co-op units has also probably been somewhat depressed compared to condominium apartments.

In order to convert from the cooperative to the condominium form of ownership, the co-op would first submit the property to a Declaration of Condominium Property Regime which would make each unit in the co-op a legally separate "Apartment" under H.R.S. Chapter 514A. Each owner in the co-op would then surrender his or her shares in the co-op and proprietary lease and, in exchange, the co-op would issue the owner an apartment deed for the owner's unit (or a condominium conveyance document in the case of a leasehold project).

Currently, the Internal Revenue Service interprets the Code as treating the conversion from the cooperative to the condominium form of ownership as a liquidation of the cooperative that results in a taxable event at the corporation level and another tax at the owner level unless a tax at either level is specifically exempted by some section of the Code.

According to IRS definitions, there are three types of owners of a cooperative: (1) owners who are "owner-occupants" based on a Code definition, namely, an owner who has maintained his or her principal residence at the co-op for two of the previous five years; (2) owners who occupy the co-op, but not as their principal place of residence (usually, owners who use the co-op as a vacation home for themselves, their family, and friends); and (3) owners who are "investors"; in other words, they rent out the unit as a business.

In a conversion, an investor owner receives a postponement of tax through a transfer of basis from the co-op unit to the condominium unit pursuant to Section 1031 of the Code. However, the IRS contends that there is a tax at the corporate level based upon the value of the condominium apartment being transferred to the owner of the co-op less the basis on the corporation's books. Since almost all co-ops in Hawaii were built between 1959-1963, this basis is extremely low. The IRS might argue that the value of the condominium unit at the time of the exchange would be equal to the value of the co-op. Co-ops have taken the position that the value of the condominium unit just before the exchange is essentially zero because the unit is encumbered by the proprietary lease. The potentially large tax at the corporate level, if the IRS prevailed in court, has persuaded many co-ops not to take the risk of conversion.

The issue is more complicated if an owner-occupant converts. Prior to 1988, the IRS contended that there was a tax at the corporate level, just as in the case of an investor. Fortunately for the owner-occupant, Section 1034 of the Code provided for a transfer of basis from the co-op unit to the condominium unit. However, the possibility of a tax at the corporate level largely prevented conversions.

The U.S. Congress recognized the problem in part in 1988 and amended the Code to provide that there would be no tax at the corporate level if a co-op unit owned by an owner-occupant was exchanged for a condominium unit This amendment still did not result in conversions because there still existed the possibility of a corporate tax at the corporate level for transactions involving investors. The situation worsened in 1997 through what appears to have been inadvertence. Congress amended the Code by repealing Section 1034 which eliminated the transfer of basis provision for an owner-occupant. To replace Section 1034, Section 121 of the Code was amended and provided that an owner who sold a residence was entitled to an exclusion of $500,000 in gain from the sale, but would pay a capital gains tax on any gains over $500,000. There was no mention of "transfer of basis". The IRS has taken the position during informal discussions that it could not issue a ruling providing for a transfer of basis because the Code says nothing about it.

Due to these changes in the Code, there exists the possibility that the IRS might claim that the conversion from a co-op to a condominium would not result in a transfer of basis, but instead would result in a tax to the owner-occupant based upon Section 121 of the Code. This would result in a tax on the owner-occupant based upon the value of the condominium unit received less the value of the co-op unit given up. The owner-occupant would acquire new basis equal to the value of the condo unit received. Thus, the 1997 amendment created a situation where the owner-occupant is worse off than before, when the Congress in 1988 was attempting to make it easier for an owner-occupant to convert.

The situation with respect to the owner who is neither an "occupant" nor an investor is even worse. The corporate tax might apply just as with the investor. However, since this owner is neither an investor nor an owner-occupant, such an owner would not receive the benefits of Section 1031 or Section 121, and the entire amount of any gain might be taxed.

The bills that Senator Inouye and Representative Mink have introduced would address these impediments to co-op conversions by amending the Code to provide that no gain or loss shall be recognized by a cooperative or its apartment owners as a result of the conversion of a co-op into a condominium. The bill also amends the Code to provide that the basis of a condominium apartment received by an owner in a conversion shall be the same as the owner's basis in the co-op stock that was surrendered, decreased by the amount of money, if any, that the owner received in the exchange. This bill, if enacted, would greatly ease the conversion of co-ops into condominiums.

Rick Kiefer is a partner at Carlsmith Ball LLP where he concentrates in the areas of resort, condominium and commercial real estate development. Jim Case is a partner at Carlsmith Ball LLP where he concentrates in the areas of corporate law.

WHAT HAS YOUR BOARD BEEN UP TO?

The Board of Directors of the Real Property and Financial Services Section of the Hawaii State Bar Association holds its monthly meetings at the HSBA offices on the third Friday of each month. The HSBA offices are now located at 1132 Bishop Street, Suite 906, in the old First Hawaiian Building next door to its former offices in the Union Mall building. Members of the Section are welcome to attend all Board meetings. The following is a brief summary of the minutes of the July, August and September regularly scheduled Board meetings.

JULY 21, 2000 BOARD MEETING

1. **COMMITTEES**.
   A. Seminars. Mark Hazlett reported that Lani Ewart and Karen Gebbia would be speakers at the 1/2 day seminar at the December Bar Convention on the new UCC Article 9. Mark indicated that they would like to be able to offer the Annotated Uniform Article 9 to seminar participants, and the Board discussed various ways that the Board could facilitate the sale of those books at a discounted price, such as guaranteeing a minimum number of sales.

   Kari Wheeling of HSBA reported that the Conveyancing Seminar is set for Wednesday, September 27. She also said that Coralie Matayoshi asked the Board to consider offering seminars in 2001 on specific topics covered by the Hawaii Real Estate Law Manual in hopes of generating additional sales of the updated conveyance manual.
   B. Legislation. Gina Watumull reported that, following the enactment of the Chapter 514A recodification bill this year, the Real Estate Branch of the DCCA is in the process of hiring an attorney to draft a proposed recodification. Gina also reported that the recodification is a standing item on the agenda of the Real Estate Commission's Condominium Review Committee's mid-month meetings, and encouraged Section members to participate in the recodification process.
   C. Ad Hoc Treasury Surplus. Discussion of the Committee's proposals for uses of the Section's current budget surplus was passed for discussion at the next Board meeting.
2. **WEBSITE**. Nancy Grekin reported that the website now has links to all of the 2000 Acts that pertain to real property or financial services. Nancy encouraged Section members to submit content for the Website.
3. **TREASURER'S REPORT**. The June Treasurer's Report was approved.

AUGUST 17, 2000 BOARD MEETING

1. **COMMITTEES**. Seminars. Mark Hazlett reported that he is working on getting co-sponsors for the 1/2 day seminar at the Bar Convention on the new UCC Article 9.
2. **NEWSLETTER**. Jon Pang reported that the Section's annual scholarships for papers published in the RPFSS quarterly Newsletter have been awarded to U.H. Law Students Allison Mizuo and Darcy Kishida.
3. **TREASURER'S REPORT**. The July Treasurer's Report was approved.
4. **OLD BUSINESS**.
   A. Servitudes Seminar. The Board concluded that there was no feasible way to salvage the videotape of Professor Susan French's seminar on the new *Restatement of the Law of Property Third - Servitudes* and thus decided not to pursue the matter further.
   B. Condominium Law Recodification. Mark Hazlett reported that Charlie Pear and Joyce Neeley have expressed interest in reviving the Section's condominium subcommittee in order to have a vehicle for providing Section input on the pending effort to recodify H.R.S. Chapter 514A. The Board voted to reconstitute the condominium subcommittee and directed Rick Kiefer to work with Charlie Pear, Joyce Neeley and any other interested Section members in organizing the subcommittee. Rick, Charlie & Joyce were asked to come to the Board's September meeting to report on their ideas and proposals for the subcommittee's structure and role.
5. **NEW BUSINESS**.
   A. New RECO Staff. Cynthia Yee introduced Lorene Arata, who has joined the staff of the Real Estate Commission and will initially be handling condominium association and condominium hotel registrations.
   B. Updated Condominium Public Report Form. Cynthia Yee also reported that RECO is in the process of developing an updated form of Condominium Public Report to reflect recent amendments to the owner-occupant provisions of Chapter 514A.

SEPTEMBER 15, 2000 BOARD MEETING

1. **NEW BUSINESS: PRESENTATION TO BOARD**.
   Calvin Kimura, Executive Director of the Real Estate Commission, reported on the proposed condominium law recodification, and stated that his department is in the process of hiring an attorney to handle the process of recodifying H.R.S. Chapter 514A, which is expected to be a 3-year process culminating in the submission of recodification legislation in 2003. The recodification process is not expected to get underway until after that position is filled. Calvin indicated that their first goal in the process is to clean-up the many unorganized, inconsistent and obsolete provisions currently in Chapter 514A. He indicated that other changes to the condominium law may also be considered as part of the process. Changes to be considered could include, among other things, replacing Chapter 514A with the Uniform Common Interest Ownership Act.
2. **COMMITTEES**.
   A. Seminars. Paulette Suwa reported that the Conveyancing Seminar would need to be rescheduled and proposed holding it on November 20. After discussion, the Board agreed that if the seminar had to be postponed, it should be put off until early 2001 to maximize attendance.

   Bill Deeley reported that the annual Litigation Update seminar is set for November 1, 2000 and will focus on the Supreme Court's recent land use decisions including Waiahole Ditch. The speakers will be David Callies, Carl Christiansen and Gary Slovin.
   B. Annual Meeting. Jon Pang reported that the Section's Annual Meeting is set for December 7, 2000 at the Plaza Club. The Board discussed possible speakers for the Meeting and directed Jon Pang, Trudy Stone and Rick Kiefer to finalize the selection of a speaker.
   C. Nominations. Jon Pang reported that the Board's Nominating Committee (current Chair, Jon Pang, Chair-elect Trudy Stone and immediate past-Chair Randy Brooks) proposed the following slate of officers for 2001: Trudy Stone, Chair (election automatic); Rick Kiefer, Chair-Elect; Gail Ayabe, Treasurer; and Lorrin Hirano, Secretary. The Board unanimously approved the Committee's nominations and directed that they be placed on the ballot.

   The Board discussed possible nominees to fill the seats of current Board members whose terms expire this year. The Nominating Committee will select names in time for the upcoming ballot, which will be mailed out with the October newsletter.
3. **NEWSLETTER**. Trudy Stone reported that she has checked with a number of different publishers and it appears that it is unlikely that any of them could print the Section's Newsletter in its current format for less than the current cost. Alternative ways of publishing the Newsletter were discussed.
4. **TREASURER'S REPORT**. The August Treasurer's Report was approved, showing an ending balance as of August 31, 2000 of $7,320.09.

Real Property and Financial Services Section
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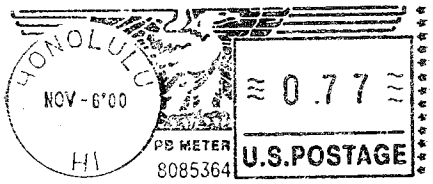

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COMMENTS?

Please send them to the newsletter chair by e-mail:
tstone@ckdbw.com

And check our website:
http://www.hsba.org/sections/rpfs

CALENDAR OF EVENTS

Nov 1
RPFSS Annual Litigation Update
HEI Training Center
1001 Bishop Street
Pacific Tower, 8th Floor
8:00 a.m. to 10:00 a.m.
(*registration/coffee at 7:30 a.m.*)

Nov 17
Board of Directors' Meeting
1132 Bishop Street, #906
12:00 Noon

Dec 1
RPFSS Seminars at HSBA Annual Convention
AM Session - Article 9 UCC
PM Session - Hawaii Addendum Regarding Opinion Letters

Dec 7
RPFSS Annual Membership Meeting at the Plaza Club
12:00 noon