

# Recent Developments Under the Endangered Species Act

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# ESA Overview

- Purpose of ESA: To conserve threatened and endangered species and the ecosystems on which they depend
- Administered by U.S. Fish and Wildlife Service and NOAA Fisheries



# ESA Overview

## ➤ Section 4 Listing Determinations

- How a species gets ESA protection
- “Endangered” – in danger of extinction within all or a significant portion of its range
- “Threatened” – likely to become endangered in the foreseeable future
- Service directed to designate critical habitat upon listing
- Review can be initiated by the Service or by a listing petition

# ESA Overview

## ➤ Section 4 Listing Criteria

- Present/threatened destruction, modification, or curtailment of habitat or range
- Overutilization
- Disease or predation
- Inadequacy of existing regulatory mechanisms or
- Other natural or manmade factors affecting its continued existence

# ESA Overview

## ➤ Section 9 Take Prohibition

- Broadly prohibits “take” of endangered species by “any person” on federal or non-federal lands
- Take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”
- Take includes significant habitat modification that actually kills or injures a listed species

# ESA Overview

## ➤ Section 7 Consultation

- Federal agencies must consult with Service to ensure agency actions do not cause “jeopardy” to species or “adverse modification” of critical habitat
- If a project is “not likely to adversely affect” a listed species or critical habitat, informal consultation is sufficient
- If a project “may affect” a listed species, formal consultation is required

# ESA Overview

## ➤ Section 7 Consultation

- Formal consultation results in the Service's biological opinion
- “No jeopardy” BOs contain an incidental take statement
  - coverage from take liability
  - reasonable and prudent measures”
- “Jeopardy” opinions contain reasonable and prudent alternatives to the proposed action that would not result in jeopardy

# ESA Overview

## Section 10 Incidental Take Permits

- Applicable when there is no federal nexus
- Authorizes taking otherwise prohibited by Section 9 if such taking is incidental to an otherwise lawful activity
- Must be accompanied by a Habitat Conservation Plan

# Section 4: Recent Listing Developments

- Sage-grouse
- Climate change

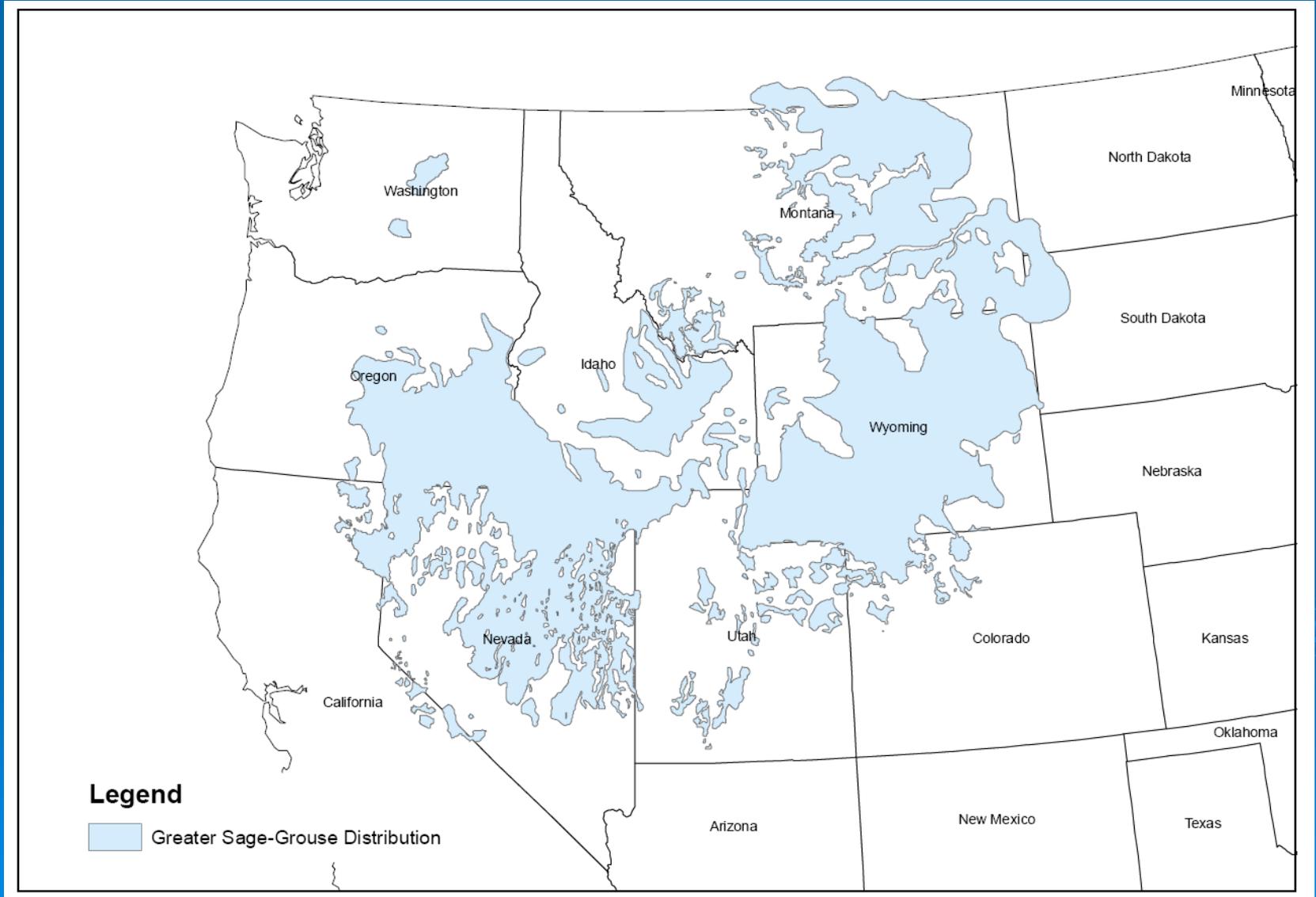


# Sage-Grouse Decision



- Petitioned to list in 2002 and 2003
- The Service determined that listing the sage-grouse was not warranted in 2005
- Decision overturned by federal court in 2007
- On March 5, 2010, the Service determined listing was warranted but precluded by higher priority listings
- Now a candidate species

# Range of the Greater Sage-Grouse



# Candidate Options

- Options for dealing with candidate species, such as sage-grouse, include:
  - Candidate Conservation Agreements (federal land)
  - Candidate Conservation Agreements with Assurances (non-federal land)
  - Informal conservation measures

# Climate Change in Listing Decisions

## Arctic Species

- Polar bear: listed as threatened in 2008 (in litigation)
- Spotted seal: Southern DPS proposed for listing in 2009
- Ribbon seal: listing not warranted in 2008 (in litigation)
- Pacific walrus and two other ice seal species: currently under status review



# Climate Change in Listing Decisions

## Non-Arctic Species

- Two coral species: listed as threatened in 2006; FWS currently reviewing 82 other coral species
- American pika: FWS determined listing was not warranted in 2010
- Grizzly bear (Yellowstone population): court overturned decision to delist due in part to FWS's failure to consider climate change impacts on its food source



# Section 7: Recent Consultation Developments

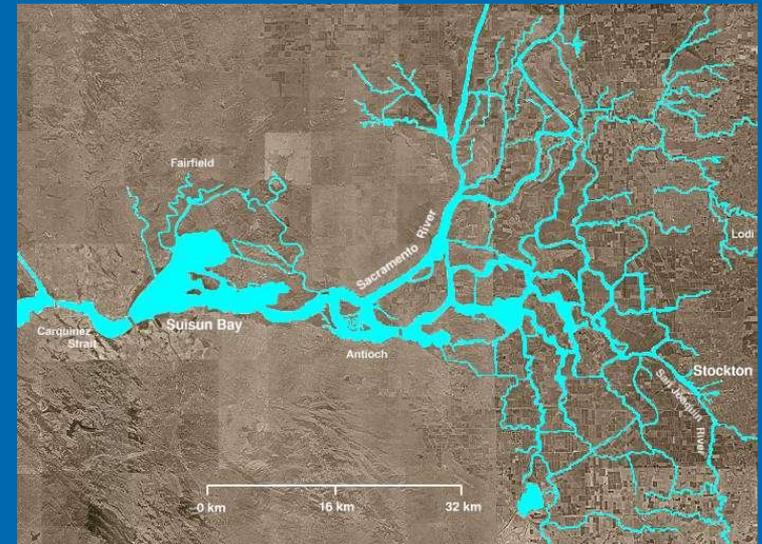
- Climate change
- Regulatory revisions and subsequent withdrawal

# Climate Change in Consultations

- The nature of the issue depends on whether the proposed action emits GHGs
- No GHG emissions – issue is cumulative effects of the project and climate change on listed species
- GHG emissions – issue is whether contribution to climate change has a sufficient “effect” on any listed species to trigger consultation obligations

# Climate Change – Projects with No GHG Emissions (Delta Smelt Case)

- BO for two large-scale water diversion projects in the Sacramento-San Joaquin Delta
- Relied on historical records and assumed neither the climate nor the hydrology of the Delta would change
- Did not address available data regarding potential climate change impacts on the Delta and delta smelt



# Climate Change – Projects with No GHG Emissions (Delta Smelt Case)

- Federal district court overturned the BO
- Failed to use best scientific and commercial data by not addressing effects of climate change on delta smelt
- Court left substantive evaluation of climate change data to agency

# Climate Change – Projects with No GHG Emissions (Delta Smelt Case)

## ➤ Two key facts

- Delta smelt was in the immediate project area (not remotely located)
- Proposed action was a water-diversion project that did not itself contribute to climate change



# Climate Change – Projects with No GHG Emissions

- More recent treatment of climate change in non-emitting project BOs has varied
  - Climate change modeling
  - Summaries of existing climate change research
  - Passing mention of climate change impacts

# Climate Change – Projects with GHG Emissions

- No case has addressed whether consultation is required for projects with GHG emissions based on anticipated contribution to climate change and impacts to remotely located species



# Climate Change – Projects with GHG Emissions

- The issue was addressed in 2008 in a DOI Solicitor's Opinion and a FWS Director policy memorandum
  - A project's GHG emissions and contribution to climate change do not meet the “may affect” threshold for consultation
  - Mere fact of contribution to climate change does not trigger Section 7 consultation requirements (for now)
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# Regulatory Revisions and Withdrawal

- FWS and NMFS issued revised Section 7 consultation regulations in December 2008
  - Revised certain definitions
  - Allowed federal agencies to make a “not likely to adversely affect” determination without Service concurrence (in certain situations)
  - Established timeframes for informal consultation
  - Provided that an individual sources’ GHG emissions and contribution to climate change would not trigger consultation

# Regulatory Revision and Withdrawal

- Congress authorized withdrawal of the revised regulations without normal notice and comment procedures (March 2009)
- The Secretaries withdrew the revised regulations, reinstating the prior regulations (May 2009)
- Withdrawal notice initiated a comprehensive review of the Section 7 regulations, requesting public comment on many aspects of the regulations (no results of this review yet)

# Recent Section 9 Development

- In Dec. 2009, a federal district court enjoined the Beech Ridge wind farm project based on anticipated Section 9 violations
- It found that it was a “virtual certainty” that Indiana bats would be taken by the project in violation of Section 9



# Recent Section 9 Development

- Prohibited the further construction and operation of the Beech Ridge project until the developer obtained a Section 10 Incidental Take Permit
- The developer has since entered into a settlement agreement to forego construction of 24 turbines and obtain an ITP
- This case highlights the need for thorough pre-project ESA compliance efforts

# Questions?

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