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Background Brief on ...

# Endangered Species

Plant and animal species evolve and become extinct as part of the natural life process over very long periods of time. From fossil records, scientists have calculated the long-term rate of extinction for many species. The protection of endangered species initially arose from evidence that the extinction rate has significantly accelerated in the most recent period of earth's history. The underlying concerns are that gene pools will lose important diversity necessary for adaptation and that we will lose the benefits these species may provide us (i.e., medicine, nutrient cycles, and food).

Under the federal Endangered Species Act (**ESA**) (1973), 575 animals (including invertebrates) and 746 plants are listed currently as threatened or endangered. A total of 1,135 listed species have approved recovery plans in place. In Oregon, [52](#) animals and [60](#) plants are listed under the state and/or federal Endangered Species Acts.

## Federal Endangered Species Act

The ESA protects species whose survival is recognized (listed) as endangered or threatened. Before a plant or animal species (subspecies or distinct population segment) can receive protection under the ESA, it must first be placed on the Federal list of endangered and threatened wildlife and plants. The ESA listing program follows a strict legal process to determine whether to list a species, depending on the degree of threat it faces. An "endangered" species is one that is in danger of extinction throughout all or a significant portion of its range. A "threatened" species is one that is likely to become endangered in the foreseeable future. The National Oceanic and Atmospheric Administration (**NOAA**), Fisheries Division (formerly **NMFS**) and the U.S. Fish and Wildlife Service (**USFWS**) share responsibility for implementing ESA requirements. NOAA Fisheries has jurisdiction to implement ESA requirements for anadromous (salmonid) species that migrate from the ocean to freshwater for spawning

and rearing, as well as marine mammals and sea turtles. The USFWS has the same jurisdiction with respect to freshwater species, plants, and animals. Authority under the ESA includes listing decisions, designating “critical habitat”, developing recovery plans, and regulating “take” of a listed species. A “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” (see 16 U.S.C. 1532(19)).

### **ESA: Key Sections**

Section 4 concerns the listing and delisting process and criteria (adding or removing species’ protection under the ESA); determinations of either threatened or endangered status, periodic status reviews and recovery planning. Section 4(d) provides for special rules which may be issued by the Interior or Commerce Secretaries. 4(d) rules allow for exceptions to the Section 9 take prohibition, with respect to threatened species, for particular activities specified in rule. Programs and activities identified in a 4(d) rule have been determined to adequately protect species from the named activities and are not subject to federal enforcement action. Section 4 further provides for accepted state recovery plans to be the designated recovery path instead of federal regulation. Oregon was the first state to attempt this route with the Oregon Plan for Salmon and Watersheds (see *Oregon Plan for Salmon and Watersheds* Background Brief). There are no Section 4 exceptions for endangered species.

Section 6 allows NOAA and USFWS to cooperate to the extent practicable with states in carrying out conservation programs authorized under the ESA. Cooperative agreements between NOAA and USFWS and states, under Section 6, are the means by which the federal government determines if states have established and are maintaining adequate and active programs for the conservation of listed species. Oregon has three such agreements, covering vertebrate wildlife and fish, plants, and invertebrate species. The associated grant program established under Section 6 (Cooperative Endangered Species Conservation Fund) provides funds to state agencies to help maintain and recover listed

species and to monitor the status of other species of concern. Section 6 funds may also be used to acquire habitat for protected species and develop habitat conservation plans.

Section 7 requires federal agencies to ensure that any action they undertake will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat that has been designated for a listed species. Federal agencies comply with this directive by formally consulting with the appropriate Service (NOAA Fisheries or USFWS). The consultation process results in a biological opinion that describes the probable impact on a listed species and may include measures to reduce adverse impacts.

Section 9 makes it unlawful for any person to take a threatened or endangered fish or animal without authorization. Remedies for violations include injunctions, civil fines up to \$25,000 per violation, criminal penalties of up to \$50,000, and/or one year imprisonment per violation. To date, no one has been prosecuted for a violation in Oregon; however, NMFS did file previously for a court injunction to stop operation of the Savage Rapids project. While there are no take provisions for plants under the federal ESA, there are penalties for destroying listed plant species. Section 9 also prohibits importation, exportation and sale of listed species.

Section 10 allows for exceptions to the Act through various permits- e.g. Section 10 (a)(1)(A) authorizes NOAA Fisheries and USFWS to issue an incidental take permit to authorize prohibited actions “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” To obtain a permit, an applicant must develop a habitat conservation plan (**HCP**) demonstrating the activity will not appreciably reduce the likelihood of the survival and recovery of a listed species in the wild. At present, the Oregon Department of Forestry, Oregon Parks and Recreation Department, and Benton County have or are developing habitat conservation plans.

## How is the Risk of Extinction Determined?

Available scientific information is used to investigate the following types of questions:

- What was the historic geographic range of the species?
- What is the current geographic range of the species?
- Does the species inhabit the full range of its habitat?
- What is the condition for each year class (generation) in the maturation cycle of the species?
- What threat does the species face within the range of its habitat?

Many factors contribute to survival or extinction of any particular species. A risk of extinction is calculated by looking at both the natural population status (numbers) and the present factors of decline such as habitat degradation, exotic species competition, or water quality conditions. A listing agency is not required to have complete science on which to base its decision, but it is required to use the best available science. An agency may decline to make a listing decision if scientific data are considered inadequate. In a 12-month petition finding USFWS or NOAA Fisheries may also determine that listing is “warranted but precluded” because the resources necessary to do so are being devoted to other higher priority actions.

## What Does a Listing Mean?

Endangered status means the identified species is in danger of extinction throughout all or a significant portion of its range. An endangered listing automatically prohibits any action(s) that would result in a take of a listed species.

Threatened status means that the species is likely to become endangered in the foreseeable future. A threatened listing allows the development of a 4(d) rule that may authorize certain activities to be exempt from the take prohibition.

Candidate status means that either the species does not face imminent extinction or additional

information is necessary to determine whether it may qualify as threatened or endangered.

Proposed listings initiate a one-year timeframe for federal agencies to determine the risk of extinction and make a final listing decision. The decision will either be one of the above three categories or a “not warranted” decision that removes the species from ESA regulation.

## Oregon Endangered Species Act

In 1987, the Oregon Legislative Assembly enacted the Oregon Endangered Species Act (**OESA**) (ORS 496.171 to 496.192, 498.026, and 564.100 to 564.135); it was amended in 1995. Oregon’s endangered species list includes all native species listed under the federal ESA as of May 15, 1987, plus any additional native species determined by the appropriate state agency (or commission) to be in danger of extinction throughout any significant portion of its range within the state. Threatened species are those animals that could become endangered within the foreseeable future within all or a significant part of its range. The OESA goal is similar to the federal goal; that is, conservation of threatened or endangered species through “the use of methods and procedures necessary to bring a species to the point at which [protective] measures are no longer necessary” (ORS 496.171(1)).

The reach of OESA is different than that of the federal ESA. The species-recovery mechanism under the OESA (survival guidelines described below) is limited to state-owned land, state-leased land, and land over which the state has a recorded easement. In addition, endangered species management planning is limited to state agencies. Although OESA broadly prohibits take of listed species, the definition of take (“to kill or obtain possession or control”) is narrower than under federal law. Moreover, OESA also provides that “nothing in [OESA] is intended by itself to require an owner of any commercial forest land or other private land to take action to protect a threatened or endangered species or to impose additional requirements or restrictions on the use of private land” (ORS 496.192(1)). Transactions in threatened and endangered

species (import, export, transport, purchase or sell) is prohibited (ORS 498.026).

Another significant difference is that invertebrates (e.g., insects and butterflies) are not protected under OESA. Federal ESA protections do apply and the Oregon Natural Heritage Information Center (Institute of Natural Resources) consults with USFWS regarding invertebrate conservation and undertakes monitoring and research.

Any person may petition to add, remove, or reclassify a species on the state list. State listing criteria are similar to federal criteria. A state listing decision is based on, among other things, biological information, assessments of threats to the species and its habitat, and the adequacy of programs and plans to protect the species or its habitat.

Upon listing a wildlife species, the state develops survival guidelines to ensure survival of individuals of the species. Endangered species management plans identify the role that state land plays in the conservation of the species. During implementation, state policy is to minimize duplication between the state and federal ESA requirements. The status of each threatened or endangered species on the state list is reviewed at least once every five years. Species that have been removed from the state list include the Columbia white-tail deer, Stalk-leaved monkey flower, Colonial luina, Ertter's senecio, Aleutian Canada goose, and American and arctic peregrine falcons.

### **Sage-Grouse and the Grey Wolf**

In March 2010, USFWS determined that protection of the greater sage-grouse under the federal ESA was warranted. However, listing the greater sage-grouse was precluded at that time by the need to address other listings facing greater risk of extinction. Currently the sage-grouse is listed as a candidate species. Because Oregon Department of Fish and Wildlife (ODFW) has the legal authority and responsibility for Oregon wildlife, they have taken a lead role in crafting a Greater Sage-Grouse Conservation Assessment and Strategy with the intent of ensuring that sage-grouse and

sagebrush habitats be maintained or enhanced into the future.

The Gray Wolf is currently listed as an endangered species under OESA and ESA west of Highways 395-78-95. Wolves east of that boundary are managed by ODFW through its Wolf Conservation and Management Plan. The goal of Oregon's wolf plan is to ensure the conservation of gray wolves as required by Oregon law while protecting the social and economic interests of all Oregonians.

### **Oregon Authorities**

Federal agencies have ultimate jurisdiction with respect to species on the federal list and Oregon actively participates in federal decision-making processes and recovery planning. The protections of the ESA trump any less protective provisions of state law. Five species are listed under OESA but not under the ESA: bald eagle, gray whale, kit fox, wolverine, and Washington ground squirrel. Wildlife species protected by the ESA but not state-listed include: Canada lynx, and Steller sea lion.

The Fish and Wildlife Commission makes policy decisions under OESA regarding animal and fish species. The Department of Agriculture makes plant species determinations (ORS 564.100). Insects and butterflies are monitored by the Natural Heritage Program at Oregon State University. The [Natural Heritage Information Center](#) is a repository for locational data for all sensitive, threatened, and endangered species in Oregon. Scientific data supporting listing decisions and recovery status of threatened and endangered plants is gathered and maintained by the Department of Agriculture.

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