



LPRO: LEGISLATIVE POLICY AND RESEARCH OFFICE

# ENDANGERED SPECIES

## BACKGROUND BRIEF

From fossil records, scientists have recorded and calculated the long-term rate of extinction for many species. The protection of endangered species initially arose from evidence that extinction rates have 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., ecological services, nutrient cycles, food and medicines).

The State of Oregon and the federal government maintain separate lists of threatened and endangered species. Under the federal Endangered Species Act (ESA) (1973, as amended), approximately [2,344 species](#) worldwide have been listed as threatened or endangered, of which 1,661 occur in the United States. Oregon is home to 57 species considered threatened or endangered under the federal ESA – 38 animal and 19 plant species. [Thirty animal species](#) and [60 plant species](#) are listed as threatened or endangered under Oregon's Endangered Species Act. The U.S. Fish and Wildlife Service (**USFWS**) and the National Oceanic and Atmospheric Administration (**NOAA**) also list fish and wildlife species as federal candidate species (taxa?? for which sufficient biological information exists to support a proposal to list as endangered or threatened).

### FEDERAL ENDANGERED SPECIES ACT

The ESA protects species, and the habitats on which they depend, as either endangered or threatened with the primary objective of recovering species so that they no longer need protection under the ESA. The ESA requires federal agencies to ensure that any action they authorize, fund, or carry out will not likely jeopardize the continued existence of any listed species, or destroy or adversely modify any critical habitat for those species. Before a plant or animal species (subspecies or distinct population segment) can receive protection under the ESA, it must first be placed, by regulation, on the federal list of endangered and threatened wildfire and plants.

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An ESA listing results from 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 USFWS and the NOAA Fisheries Division (formerly the National Marine Fisheries Service) share responsibility for implementing ESA requirements. The USFWS has jurisdiction with respect to freshwater species and terrestrial plants and animals. NOAA Fisheries has jurisdiction to implement ESA requirements for marine species, as well as anadromous (salmonid) species that migrate from the ocean to freshwater for spawning and rearing. Authority under the ESA includes listing decisions, designating “critical habitat,” developing recovery plans, and regulating “take” of a listed species. “Take” under the ESA 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 OF THE ACT**

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**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. Listing decisions are based solely the species’ biological status and threats to their existence. Section 4(d) provides for special rules which may be issued by the Interior or Commerce Secretaries that allow for exceptions to the *take* prohibition with respect to threatened species for specified activities (Section 9). 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. The [Oregon Plan](#) was established in 1997 to respond to potential ESA listings of coho and other salmon species. 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 how the federal government determines if states have established and are maintaining adequate and active programs for the conservation of listed threatened and endangered 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, including permitting actions, 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. Federal agencies, such as the Corps of Engineers under Section 404 of the federal Clean Water Act, often issue regulatory permits that conform to the conditions of a biological opinion.

**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. 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 ESA through various permits. For example, Section 10 (a)(1)(A) authorizes NOAA Fisheries and USFWS to issue an incidental *take* permit to allow 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. There are currently seven approved habitat conservation plans in Oregon (Oregon Department of Transportation, Oregon Parks and Recreation Department, City of The Dalles, Benton County, Yamhill County, Port of Portland and Weyerhaeuser) and associated incidental *take* permits issued by the U.S. Fish and Wildlife Service. Several of the HCPs include private lands. There are also four HCPs in progress including the Deschutes River Basin, Port Blakely, Elliott State Forest, and northwest Oregon state forests.

## **How is the Risk of Extinction Determined?**

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, competition by nonnative invasive species, 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 by USFWS or NOAA Fisheries, it may also determine that listing is “warranted but precluded” because the resources necessary to do so are being devoted to other higher priority actions.

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 suitable habitat?
- What is the condition for each year class (generation) in the maturation cycle of the species?
- What threats does the species face within its range?

## WHAT DOES A LISTING MEAN?

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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 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 qualifies as threatened or endangered.

Proposed listings start a 90-day finding on a petition to list and a 12-month status review and finding. The USFWS or NOAA Fisheries have one additional year to 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

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In 1987, the legislature enacted the Oregon Endangered Species Act (**Oregon ESA**) (ORS 496.171 to 496.192, 498.026 and 564.100 to 564.135); it was amended most recently in 2012.

Oregon’s threatened and endangered species lists include 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 threatened or endangered. Endangered wildlife species are those determined 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 within the state. The Oregon ESA 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 the Oregon ESA is different than that of the federal ESA. The species recovery mechanism under state law (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 the Oregon ESA broadly prohibits the *take* of a listed species, the definition of *take* (“to kill or obtain possession or control”) is narrower than under federal law. Moreover, the Oregon ESA also provides that “nothing in [the Oregon ESA] is intended by itself to require an owner of any commercial forestland 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)).

Another significant difference is that invertebrates (e.g., insects and butterflies) are not protected under the state law. Federal ESA protections do apply and the Oregon

Biodiversity Information Center (Institute for 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.

The criteria for listing, reclassifying and delisting a species are found in [OAR 635-100-0105](#). In listing a species, it must be found that the species is native to the state of Oregon and its natural reproductive potential is in danger of failure due to limited population numbers, disease, predation or other factors affecting its continued existence in the state. In removing a species, the opposite finding must be made, that the natural reproductive potential of the species is not in danger of failure and therefore it no longer qualifies for listing. Decisions must be based on documented and verifiable scientific information related to the species' biological status. Verifiable under the Oregon ESA means "scientific information reviewed by a scientific peer review panel of outside experts who do not otherwise have a vested interest in the process" (ORS 496.171(4)). This can include information published in peer-reviewed journals, information developed by state and federal agencies and peer-reviewed by outside experts, and peer-reviewed data gathered by Oregon Department of Fish and Wildlife (**ODFW**) or others using standard methodologies.

Upon listing a wildlife species, the state develops 'survival guidelines' to ensure survival of individuals of the listed species. Endangered species management plans identify the role that state land plays in the conservation of endangered species. During implementation, state policy is to minimize duplication between the Oregon 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 (delisted) from the state list include the Columbia white-tail deer, Aleutian Canada goose, American peregrine falcon, arctic peregrine falcon, bald eagle, stalk-leaved monkey flower, colonial luina, Erter's senecio and gray wolf.

In February 2012, the legislature amended the Oregon ESA through House Bill 4006. The bill requires the Oregon Fish and Wildlife Commission (Commission) to consult with private landowners and affected cities, counties, and local service districts before it makes a listing decision. The legislation also requires ODFW to work with the same entities to mitigate adverse impacts on local economies when species are listed as threatened or endangered.

## **TRANSACTIONS OF PROTECTED SPECIES**

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Transactions in state-listed threatened and endangered species (importation, exportation, transportation, purchase or sale) is prohibited under the Oregon ESA (ORS 498.026). In November 2016, Oregon voters passed Ballot Measure 100, which, with certain exceptions, prohibits the purchase, sale, or possession with intent to sell parts or products from elephant, rhinoceros, whale, tiger, lion, leopard, cheetah, jaguar, pangolin, sea turtle, shark, or ray, subject to civil penalties.

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

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In March 2010, USFWS determined that protection of the **greater sage-grouse** under the ESA was warranted. However, listing was precluded at the time because other candidate species were determined to face greater risk of extinction. The ODFW took a lead role in crafting a Greater Sage-Grouse Conservation Assessment and Strategy, which was adopted by the Commission in April 2011 to ensure that sage-grouse and sagebrush habitats are maintained or enhanced into the future. In September 2012, Oregon Solutions convened the [Sage Grouse Conservation Partnership](#) (SageCon). SageCon partners coordinate federal, state and local efforts to pull together an “all lands, all threats” approach to sage-grouse conservation to both address USFWS’s sage-grouse listing decision and support community sustainability in central and eastern Oregon into the future. By addressing identified threats to sagebrush habitat, the SageCon Partnership helps ensure species protection for sage-grouse while also working with traditional ranching and farming communities as well as emerging industries such as mining and renewable energy. Habitat protection focuses heavily on priority areas for conservation, also known as Core Areas in the state of Oregon. These areas cover about one-third of Oregon’s sage-grouse habitat and support more than 90 percent of the bird’s population in the state. The Oregon Sage-Grouse Action Plan was adopted through Governor Kate Brown’s Executive Order (EO 15-18), in preparation for the federal ESA listing determination in September 2015.

On September 22, 2015, USFWS announced that a status review found that Greater sage-grouse remain relatively abundant and well distributed across the species’ range and do not face the risk of extinction. The USFWS determined that protection for Greater sage-grouse under the ESA is no longer warranted and the species would be withdrawn from the candidate species list.

**Gray wolves** (*Canis lupus*) were reintroduced in the continental U.S. in the mid-1990s with the capture of wolves in Canada and their release in central Idaho and Yellowstone National Park. Since that time, wolves have migrated into northeastern Oregon, as well as Jackson, Klamath and Lake counties. The first documented wolf pups born in Oregon occurred in 2008. The 2017 minimum Oregon population (wolves verified by ODFW staff through direct evidence) was 124 wolves, which included 25 known packs/areas and more than a dozen lone or miscellaneous wolves.

The gray wolf is currently listed as an endangered species under the federal ESA west of Highways 395/78/95, and any *take* of wolves in this area is regulated by the USFWS. Wolves were federally delisted on May 5, 2011 in areas east of those highways.

Today, wolves in Oregon are managed under the [Oregon Wolf Conservation and Management Plan](#) (Wolf Plan). The Wolf Plan was adopted in 2005 and revised in 2010 and is being implemented in the delisted area. 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.

The Wolf Plan uses a three-phased approach to address conservation and management needs as the wolf population increases. Phase 1 is the conservation phase in which actions are directed toward achieving the conservation population

objective of four breeding pairs of wolves for three consecutive years. That objective was reached in January of 2015 in eastern Oregon and the east wolf management zone entered Phase 2 of the Wolf Plan. This phase called for the evaluation of state criteria to delist wolves from the Oregon ESA. On November 10, 2015, the Commission voted 4-2 to delist. Wolves in eastern Oregon are currently managed under Phase 2 of the state's Wolf Plan. Wolves in western Oregon are managed under Phase 1 rules which provide ESA-like protections until this area of the state has four breeding pairs of wolves for three consecutive years.

During the 2016 Legislative Session, the legislature passed House Bill 4040 which ratified and approved the decision by the Commission to remove gray wolves from the state's list of threatened or endangered species.

## OREGON AUTHORITIES

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Federal agencies have 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 the Oregon ESA but not under the federal ESA: brown pelican, gray whale, kit fox, wolverine and Washington ground squirrel. Wildlife species protected by the ESA but not state-listed include: Canada lynx, Columbian white-tailed deer (Lower Columbia River population), streaked-horned lark and Steller sea lion.

The Commission makes policy decisions under the Oregon ESA regarding animal and fish species. The Oregon Department of Agriculture (**ODA**) makes plant species determinations (ORS 564.100 - 564.135). Insects and butterflies are monitored by the Oregon Biodiversity Information Center (**ORBIC**), Institute for Natural Resources, Portland State University. The ORBIC is a repository for occurrence 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 ODA.

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