



September 2012

## Inside this Brief

- **Federal Endangered Species Act**
- **ESA: Key Sections**
- **How is the Risk of Extinction Determined?**
- **What Does a Listing Mean?**
- **Oregon Endangered Species Act**
- **Sage Grouse and the Gray Wolf**
- **Oregon Authorities**
- **Staff and Agency Contacts**

Legislative Committee Services  
State Capitol Building  
Salem, Oregon 97301  
(503) 986-1813

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 recorded and 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., ecological services, nutrient cycles, food and medicines).

Under the federal Endangered Species Act (**ESA**) (1973, as amended), 599 animals (including invertebrates) and 794 plants are listed currently as threatened or endangered nationwide. A total of 1,138 listed species have approved recovery plans in place. In Oregon, [52 animals](#) and [59 plants](#) are listed under the state and/or federal Endangered Species Acts. The U.S. Fish and Wildlife Service also lists fish and wildlife species as federal candidate species (taxa for which the Fish and Wildlife Service has sufficient biological information 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 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. The USFWS has the same jurisdiction with respect to freshwater species, and terrestrial plants and animals. 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” any threatened or endangered species (see 16 U.S.C. 1532(19)).

### **ESA: Key Sections of the Act**

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 on the basis of 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 Section 9 take prohibition with respect to threatened species for specified activities. 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, 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. At present, Oregon Parks and Recreation Department, City of The Dalles and Benton County have approved habitat conservation plans and associated incidental take permits issued by the U.S. Fish and Wildlife Service. Currently there are three approved HCPs on private lands in Oregon.

### **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 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?

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.

### **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 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 Services 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**

In 1987, the Oregon Legislative Assembly 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 in 1995. 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 the 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 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 [Oregon ESA] 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) are prohibited (ORS 498.026).

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.

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 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, Aleutian Canada goose, American peregrine falcon, arctic peregrine falcon, bald eagle, stalk-leaved monkey flower, colonial luina, and Ertter’s senecio.

In February 2012, the Oregon Legislative Assembly amended the Oregon ESA through House Bill 4006. The bill requires the Fish and Wildlife 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.

### **Sage-Grouse and the Gray 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 the 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 which was adopted by the Fish and wildlife Commission in April 2011 with the intent of ensuring that sage-grouse and sagebrush habitats are maintained or enhanced into the future.

The Gray Wolf is currently listed as an endangered species statewide under the Oregon ESA and west of Highways 395/78/95 under the federal ESA. Wolves were federally de-listed on May 5, 2011 east of those highways; the Oregon Wolf Conservation and Management Plan adopted in 2005 and revised in 2010 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. In 2011, the Oregon Court of Appeals issued an order preventing ODFW from killing wolves under the department's chronic depredation rules. In November 2011, the Court extended the stay which has resulted in further lethal control being on hold pending the Court's decision.

### **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 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) and Steller sea lion; there are 17 fish species or distinct population segments.

The Oregon Fish and Wildlife Commission make 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 Natural Heritage Program at Oregon State University. The Oregon Biodiversity Information Center 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.

### **Staff and Agency Contacts**

Beth Patrino  
[Legislative Committee Services](#)  
503-986-1751

Ron Anglin  
[Oregon Department of Fish and Wildlife](#)  
503-947-6312

Lisa Hanson  
[Oregon Department of Agriculture](#)  
503-986-4556

Jimmy Kagan  
Oregon Biodiversity Information Center,  
Institute for Natural Resources  
503-725-9955

*The Department of Fish and Wildlife assisted with the development of this document.*

*Committee Services provides centralized, non-partisan research and issue analysis for the Legislative Branch. Committee Services does not provide legal advice. Background Briefs are intended to give the reader a general understanding of a subject, and are based on information which is current as of the date of publication. Legislative, executive, and judicial actions subsequent to publication may affect the timeliness of the information.*