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## Sounds doable but here is the rest of the story

- The property has been categorized as critical habitat for an endangered species.
- The project is delayed by red tape, mitigation efforts, and lawsuits.
- The project is ultimately abandoned because of undue delay.

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## WHAT SPECIES WAS SO CRITICALLY IMPORTANT TO TORPEDO THE PROJECT?



WAIT! The ESA does not apply to "species of the Class Insecta [constituting a pest] whose protection would present an overwhelming and overriding risk to man."

But this exclusion is determined by the Secretary of the Interior. There are other disease bearing species that do fall under ESA protection. So just because it is a pesky little mosquito now does not mean it may not receive protection in the future.

This sounds absurd, right?

Good. Now we can talk about the Endangered Species Act.

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## There are two areas within the ESA

### Before Listing

There is some latitude if you are here.

Today, we will focus our discussion in this world after reviewing significant components of the ESA.

### After Listing

If you find yourself here, what can I say...

You are down the rabbit hole of the ESA and you will need to conform with the Act until someone succeeds in getting the species delisted.

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## THE BIG BAD ESA

It's important to understand the burden of working under the ESA to fully appreciate why it

is a worthy endeavor to engage the FWS before a species is listed.

Congress intended the ESA to be a stiff law.

- **TVA v. Hill, U.S. Tenn. 1978, 98 S.Ct. 2279, 437 U.S. 153.** Under this chapter, Congress intended protection of endangered species to be afforded highest priorities.
- **U.S. v. Billie, S.D.Fla. 1987, 667 F.Supp. 1485.** ESA's prohibition against taking of Florida panther did not impose unconstitutional burden on Seminole Indian's free exercise rights, where use of panther parts was not critical or essential to practice of religion.

## Important definitions §1532

(5)

means-- (A) The term "critical habitat" for a threatened or endangered species

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

- (6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.
- (8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.
- (14) The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.
- (15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

- (16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.
- (19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
- (20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

## Cases that help define "critical habitat"

In determining critical habitat, the Court held: 1) all elements essential for conservation of species did not have to be present in same area to designate land as critical habitat; 2) FWS could determine what elements were necessary for conservation without determining exactly when conservation would be complete; 3) requirement for determination of criteria for measuring when species would be conserved applied only to preparation of recovery plan; 4) area designated as "critical habitat" that met requirements for unoccupied habitat also met requirements for occupied habitat; 5) explicit textual exclusion of structures from designation satisfied ESA's requirement that "specific areas" be designated; and 6) economic analysis from outside consultant properly accounted for economic impact of designation.

Home Builders Ass'n of Northern Cal. v. U.S. Fish and Wildlife Service, 616 F.3d 983 (C.A.9 (Cal.), 2010)

As we consider the impact of listing of the Greater sage-grouse, consider the following:

Fish and Wildlife Service (FWS), having determined that land currently unoccupied by endangered owl species was nevertheless essential to owl's conservation, could not reasonably exclude such land when designating owl's critical habitat. *Center For Biological Diversity v. Norton*, D.Ariz.2003, 240 F.Supp.2d 1090, amended in part 2003 WL 22849594

## Case law on determination of endangered species and threatened species §1533

Fish and Wildlife Service's (FWS) reliance on future conservation efforts in deciding to withdraw proposed listing of Graham's penstemon wildflower violated ESA. *Center For Native Ecosystems v. U.S. Fish and Wildlife Service*, D.Colo.2011, 795 F.Supp.2d 1199

In other words, to avoid listing you have to show current implementation of regulations and the regulations need teeth. This is become very apparent with our work on Greater sage-grouse.

## Case law on Incidental Takes and Conservation Plans

Fish and Wildlife Service (FWS), in issuing incidental take permits allowing the trapping and relocation of prairie dogs, did not make a clear error in judgment, based on data available at the time of issuance, when it found that the relocation destination adequately mitigated the loss of golf course and Indian land habitats, despite claim that the FWS failed to establish the relocation destination as a viable habitat, in violation of the Endangered Species Act (ESA); the very purpose of a conservation easement at the destination location was to "protect and enhance forever" the prairie dog habitat at the site, and a state agency had oversight of the easement to ensure its purposes were carried out. *WildEarth Guardians v. U.S. Fish and Wildlife Service*, D.Utah 2009, 622 F.Supp.2d 1155.

Applicant for permit to take an endangered species must submit a comprehensive conservation plan and the Fish and Wildlife Service's must then scrutinize the plan and, after affording opportunity for public comment, find that the proposed taking will be incidental to an otherwise lawful activity, that the applicant will minimize and mitigate the impacts of taking, that there is adequate funding for the conservation plan, and that the taking will not appreciably reduce the likelihood of the survival of the species. *Friends of Endangered Species, Inc. v. Jantzen*, C.A.9 (Cal.) 1985, 760 F.2d 976.

## Case law on Incidental Takes and Conservation Plans

[Under] Section 7(a)(2), an agency's decision whether to take a discretionary action that may jeopardize endangered or threatened species is strictly governed by ESA-mandated inter-agency consultation procedures. The procedural obligation ensures that the agency proposing the action (the "action agency") consults with the FWS to determine the effects of its action on endangered species and their critical habitat. To meet its procedural obligation, the action agency must first determine whether its proposed discretionary action may affect a listed species or a critical habitat. If so, the agency must consult with the FWS. During consultation, the FWS "evaluates the effects of the proposed action on the survival of [the] species and any potential destruction or adverse modification of critical habitat" and, "based on 'the best scientific and commercial data available,' " formulates a biological opinion (also referred to here as "B.O.").

If the biological opinion concludes that jeopardy is not likely and that there will not be adverse modification of critical habitat, or that there is a "reasonable and prudent alternative[ ]" to the agency action that avoids jeopardy and adverse modification and that the incidental taking of endangered or threatened species will not violate section 7(a)(2), the consulting agency can issue an "Incidental Take Statement," ... authorizing the action agency to take the endangered or threatened species so long as it respects the [FWS's] terms and conditions." If an action agency receives a jeopardy opinion, the action agency can comply with its substantive obligation under § 7(a)(2) only if it " terminate[s] the action, implement[s] the proposed alternative, or seek[s] an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e).

*Rio Grande Silvery Minnow v. Bureau of Reclamation*, C.A.10 2010, 601 F.3d 1096, 1105 (internal citations omitted)


## Case law on best available science/data

Under the Administrative Procedure Act (APA), Fish and Wildlife Service (FWS) acted arbitrarily and capriciously by failing to use the "best science" when determining that listing, pursuant to the Endangered Species Act (ESA), of the greater sage-grouse was not warranted; although it consulted with a panel of experts, FWS excluded them from its decision-making process and created no detailed record of their opinions, and it also ignored that portion of their opinions that had been preserved. *Western Watersheds Project v. Fish and Wildlife Service*, D.Idaho 2007, 535 F.Supp.2d 1173.

The best available data requirement set forth in the Endangered Species Act (ESA), which requires an agency to make its determinations solely on the basis of the best scientific and commercial data available to the agency, merely prohibits an agency from disregarding available scientific evidence that is in some way better than the evidence it relies on. *Home Builders Ass'n of Northern Cal. v. U.S. Fish and Wildlife Service*, N.D.Cal.2007, 529 F.Supp.2d 1110, affirmed 321 Fed.Appx. 704, 2009 WL 971479

Listing determinations under the ESA must be based solely on "the best scientific and commercial data available." Fish and Wildlife Service's (FWS) failure to consider available data regarding the potential impact of energy extraction, grazing, and OHV on the Graham's penstemon was arbitrary and capricious. *Center For Native Ecosystems v. U.S. Fish and Wildlife Service*, D.Colo.2011, 795 F.Supp.2d 1199

If you hear the  
ESA train coming  
here are some  
resources and  
pointers



### Resources

- Endangered Species Act of 1973  
16 U.S.C.A. §1531 et seq.  
See materials above
- United States Fish and Wildlife website  
<http://www.fws.gov/endangered/>

### Pointers

- Be engaged
- Form coalitions
- Look in the toolbox

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### U.S. Fish and Wildlife Website

**GOOD STARTING POINT  
TO GATHER  
USEFUL INFORMATION**



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Examples of information on their website



State	State	Resource	State	Link (Other)	Resource Data Sheet	Resource Data Sheet	Resource Data Sheet
Alabama	Alabama	Alabama	Alabama	Alabama	Alabama	Alabama	Alabama
Alaska	Alaska	Alaska	Alaska	Alaska	Alaska	Alaska	Alaska
Arizona	Arizona	Arizona	Arizona	Arizona	Arizona	Arizona	Arizona
Arkansas	Arkansas	Arkansas	Arkansas	Arkansas	Arkansas	Arkansas	Arkansas
California	California	California	California	California	California	California	California
Colorado	Colorado	Colorado	Colorado	Colorado	Colorado	Colorado	Colorado
Connecticut	Connecticut	Connecticut	Connecticut	Connecticut	Connecticut	Connecticut	Connecticut
Delaware	Delaware	Delaware	Delaware	Delaware	Delaware	Delaware	Delaware
Florida	Florida	Florida	Florida	Florida	Florida	Florida	Florida
Georgia	Georgia	Georgia	Georgia	Georgia	Georgia	Georgia	Georgia
Hawaii	Hawaii	Hawaii	Hawaii	Hawaii	Hawaii	Hawaii	Hawaii
Idaho	Idaho	Idaho	Idaho	Idaho	Idaho	Idaho	Idaho
Illinois	Illinois	Illinois	Illinois	Illinois	Illinois	Illinois	Illinois
Indiana	Indiana	Indiana	Indiana	Indiana	Indiana	Indiana	Indiana
Iowa	Iowa	Iowa	Iowa	Iowa	Iowa	Iowa	Iowa
Kansas	Kansas	Kansas	Kansas	Kansas	Kansas	Kansas	Kansas
Kentucky	Kentucky	Kentucky	Kentucky	Kentucky	Kentucky	Kentucky	Kentucky
Louisiana	Louisiana	Louisiana	Louisiana	Louisiana	Louisiana	Louisiana	Louisiana
Maine	Maine	Maine	Maine	Maine	Maine	Maine	Maine
Maryland	Maryland	Maryland	Maryland	Maryland	Maryland	Maryland	Maryland
Massachusetts	Massachusetts	Massachusetts	Massachusetts	Massachusetts	Massachusetts	Massachusetts	Massachusetts
Michigan	Michigan	Michigan	Michigan	Michigan	Michigan	Michigan	Michigan
Minnesota	Minnesota	Minnesota	Minnesota	Minnesota	Minnesota	Minnesota	Minnesota
Mississippi	Mississippi	Mississippi	Mississippi	Mississippi	Mississippi	Mississippi	Mississippi
Missouri	Missouri	Missouri	Missouri	Missouri	Missouri	Missouri	Missouri
Montana	Montana	Montana	Montana	Montana	Montana	Montana	Montana
Nebraska	Nebraska	Nebraska	Nebraska	Nebraska	Nebraska	Nebraska	Nebraska
Nevada	Nevada	Nevada	Nevada	Nevada	Nevada	Nevada	Nevada
New Hampshire	New Hampshire	New Hampshire	New Hampshire	New Hampshire	New Hampshire	New Hampshire	New Hampshire
New Jersey	New Jersey	New Jersey	New Jersey	New Jersey	New Jersey	New Jersey	New Jersey
New Mexico	New Mexico	New Mexico	New Mexico	New Mexico	New Mexico	New Mexico	New Mexico
New York	New York	New York	New York	New York	New York	New York	New York
North Carolina	North Carolina	North Carolina	North Carolina	North Carolina	North Carolina	North Carolina	North Carolina
North Dakota	North Dakota	North Dakota	North Dakota	North Dakota	North Dakota	North Dakota	North Dakota
Oklahoma	Oklahoma	Oklahoma	Oklahoma	Oklahoma	Oklahoma	Oklahoma	Oklahoma
Oregon	Oregon	Oregon	Oregon	Oregon	Oregon	Oregon	Oregon
Pennsylvania	Pennsylvania	Pennsylvania	Pennsylvania	Pennsylvania	Pennsylvania	Pennsylvania	Pennsylvania
Rhode Island	Rhode Island	Rhode Island	Rhode Island	Rhode Island	Rhode Island	Rhode Island	Rhode Island
South Carolina	South Carolina	South Carolina	South Carolina	South Carolina	South Carolina	South Carolina	South Carolina
South Dakota	South Dakota	South Dakota	South Dakota	South Dakota	South Dakota	South Dakota	South Dakota
Tennessee	Tennessee	Tennessee	Tennessee	Tennessee	Tennessee	Tennessee	Tennessee
Texas	Texas	Texas	Texas	Texas	Texas	Texas	Texas
Utah	Utah	Utah	Utah	Utah	Utah	Utah	Utah
Vermont	Vermont	Vermont	Vermont	Vermont	Vermont	Vermont	Vermont
Virginia	Virginia	Virginia	Virginia	Virginia	Virginia	Virginia	Virginia
Washington	Washington	Washington	Washington	Washington	Washington	Washington	Washington
West Virginia	West Virginia	West Virginia	West Virginia	West Virginia	West Virginia	West Virginia	West Virginia
Wisconsin	Wisconsin	Wisconsin	Wisconsin	Wisconsin	Wisconsin	Wisconsin	Wisconsin
Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming

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#### Form Coalitions

1. Collaborate with other state and local entities
2. Engage industry – they may have experts on their staff that can provide scientific expertise.
3. Don't be afraid to engage the BLM or FS. Sometimes they are at odds with FWS and may be able to provide assistance

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#### Look in the toolbox

1. Request extensions
2. Request information through FOIA
3. Help draft and implement Conservation Agreements
4. As stated earlier, the only way to succeed is to fight science with better science. This is why your client must get engaged early on. Time is not on our side.
5. Of course, litigation is always an available tool

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#### Current Projects In Uintah County

GREATER SAGE-GROUSE

GRAHAM'S AND WHITE  
RIVER BEARDTONGUE

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