



# The Endangered Species Act of 1973

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UNIVERSITY



# The Endangered Species Act: An Overview of Listing & Protections

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# Today's Agenda



*Bushy bluestem (e)*

- A very brief history
- The ESA
  - Purpose, key definitions (Sec. 2-3)
  - Listing, critical habitat (Sec. 4)
  - Prohibitions (Sec. 9)
- Has the Act succeeded?
- A recent controversy
- What do Americans think?



An aerial photograph showing a vast expanse of white, puffy clouds. The clouds are densely packed and appear to be illuminated from above, creating bright highlights on their tops and darker, bluish-grey shadows in the recesses between them. The overall effect is a textured, undulating surface of white against a deep blue background.

The view from 10K feet



# Brief History

## **1966 -- *Endangered Species Preservation Act***

- Listing of native animal species (77 species) as endangered, provided means for protection
- Authorized land acquisition

## **1969 -- *Endangered Species Conservation Act***

- Expanded conservation to international level for species in danger of worldwide extinction
- Allowed for listing of invertebrate species

## **1973 -- *Endangered Species Act* (PL 93-205)**

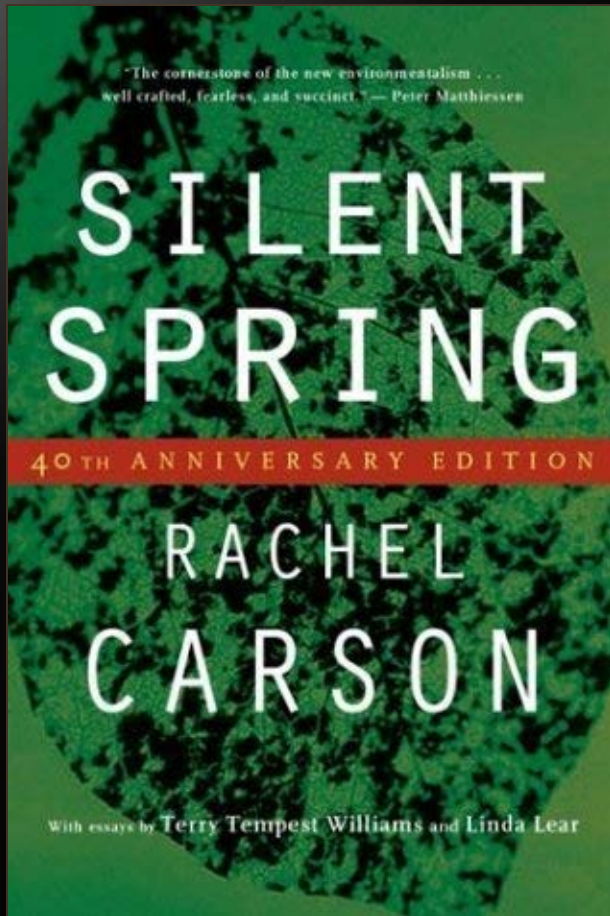
- Biological/ecological focus – on all species
- Protection of species *AND* habitats
- House: 355-4, Senate: 92-0







# 1962 – Silent Spring



- In *Silent Spring* Rachel Carson challenged the practices of agricultural scientists and government agencies, calling for a changes in the way humankind viewed and managed the natural world.





# ESA in Brief



- Instructs FWS and NMFS to compile a list of T&E species
- Instructs these agencies to develop recovery plans
- Protects listed species by:
  - Prohibiting “take”;
  - designating & protecting critical habitats;
  - reducing markets for T&E species by banning sale/trade of parts;
  - Banning federally-linked projects that jeopardize endangered species;



# Findings, Purpose & Key Definitions

# Endangered Species Act

Section 2: Findings and Purposes

Section 3: Definitions

Section 4: Listing, Critical Habitat Designation,  
Recovery, Monitoring

Section 5: Land Acquisition

Section 6: Cooperation with the States

Section 7: Interagency Cooperation (Federal)

Section 8: International Cooperation

Section 9: Prohibited Acts

Section 10: Exceptions (Permits, experimental  
populations)

Section 11: Penalties and Enforcement

Sections 12-18: Misc





## Sec. 2 – Findings, Purposes, & Policy

- FINDINGS.—The Congress finds and declares that—
- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;



## Sec. 2 – Findings, Purposes, & Policy

- PURPOSES.—The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...
- to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.



# Wolf Recovery in Yellowstone: Park Visitor Attitudes, Expenditures, and Economic Impacts

*John W. Duffield, Chris J. Neher, and David A. Patterson*

## Introduction

IN 1995, THE U.S. FISH AND WILDLIFE SERVICE BEGAN Greater Yellowstone ecosystem and to the Central Idaho endangered gray wolf to the Rocky Mountains. The rest National Park has become one of the most successful wild history of endangered species conservation. Yellowstone i places in the world to watch wild wolves. Visibility of the v interest in wolves and wolf-based education programs, have far exceeded initial expectations.

During the preparation of the environmental impact statement (EIS; US Fish and Wildlife Service 1994) that was completed by the National Park Service (NPS) prior to wolf restoration, more than 170,000 public comments were reviewed to determine the public's key concerns. One of the main issues identified during this process was the concern about the possible economic effects of wolf restoration. Among the concerns of opponents were the expenditure of

regional net economic impacts caused by the presence of wolves.

Prior to reintroduction of wolves into the Yellowstone ecosystem, an EIS analysis presented predictions of a wide spectrum of impacts, including economic impacts, that would result from wolf recovery (U.S. Fish and Wildlife Service 1994). This study provides an *ex post facto* (after the fact) analysis of wolf-related social and economic impacts for comparison with the EIS predictions.

**\$24-49  
Million**



# Sec. 3 – Definitions

**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.

- Joint DPS policy (1996) sets criteria for deciding if a population is a DPS



# Sec. 3 – Definitions

- “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...
- “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.



# Sec 3—Definitions

- Conservation *is the Purpose*
  - **Conservation** is defined as using “*all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this act or no longer necessary*”
- The term “**Recovery**” is used as a synonym for **Conservation**

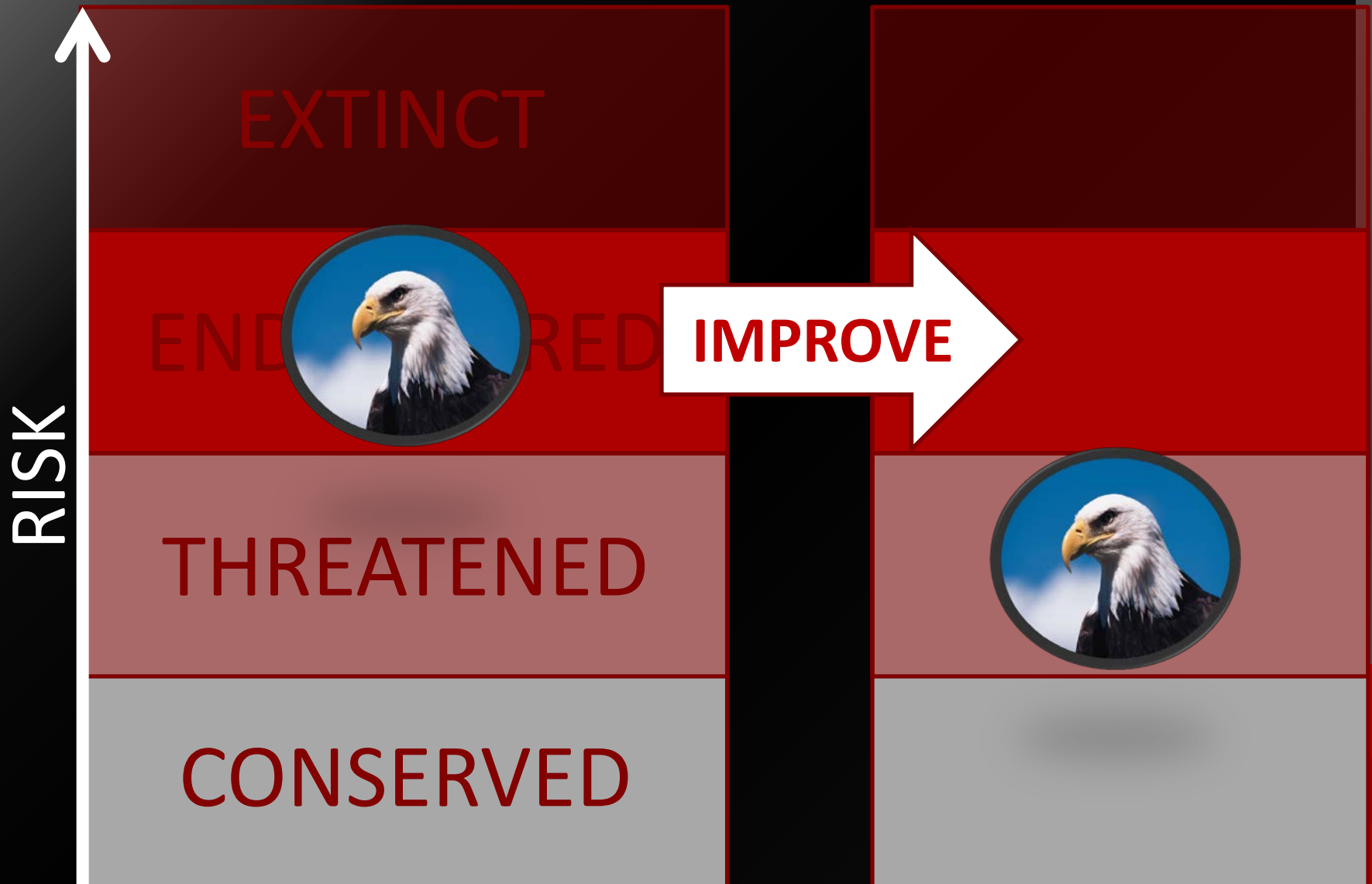




# What is the Goal?



# What is the Goal?



# The Listing Process

# Sec 4—Listing Species

- Sec. 4 (a)(1) “The Secretary shall ...determine whether any species is an endangered species or a threatened species because of any of the following factors:
  - (A) the present or threatened **destruction, modification, or curtailment of its habitat** or range;
  - (B) **overutilization** for commercial, recreational, scientific, or educational purposes;
  - (C) **disease or predation**;
  - (D) the **inadequacy of existing regulatory mechanisms**; (E) **other natural or manmade factors** affecting its continued existence.”



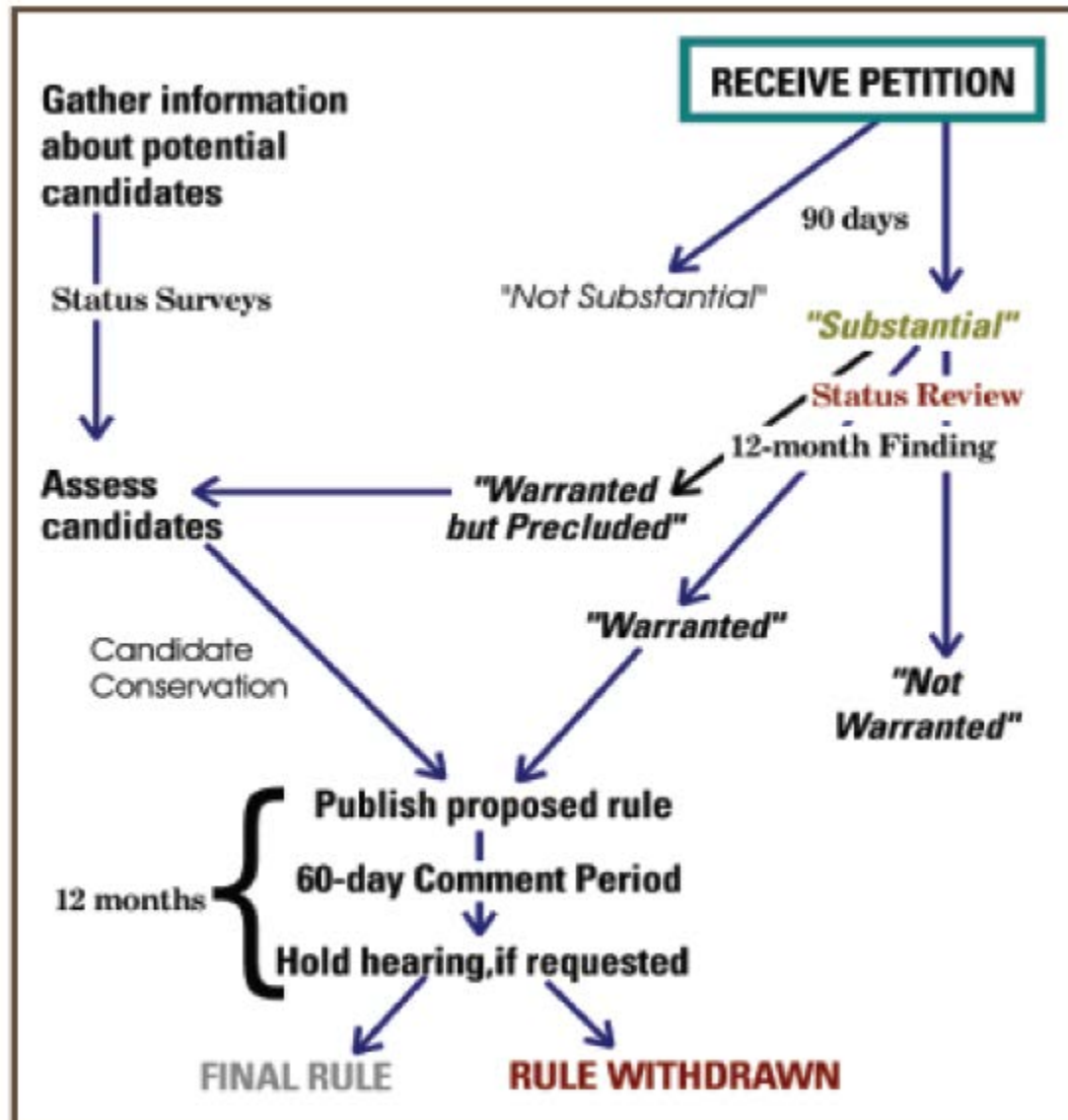


# Sec 4—Basis for Determinations

- Sec. 4(b)(1)(A) “The Secretary shall make determinations ...**solely on the basis of the best scientific and commercial data available to him** after conducting a review of the status of the species...”
  - Commonly known as the “best available science mandate”
- Mandate is problematic— Species status determinations require two types of judgments:
  - A scientific **assessment of the risk** of extinction
  - A normative assessment as to whether that risk is **acceptable**



# Listing Process





**U.S. Fish & Wildlife Service**

# **Listing a Species as Threatened or Endangered**

*Section 4 of the Endangered Species Act*

The Endangered Species Act of 1973, as amended, is one of the most far-reaching wildlife conservation laws ever enacted by any nation. Congress, on behalf of the American people, passed the ESA to prevent extinctions facing many species of fish, wildlife and plants. The purpose of the ESA is to conserve endangered and threatened species and the ecosystems on which they depend as key components of America's heritage. To implement the ESA, the U.S. Fish and Wildlife Service works in cooperation with the National Marine Fisheries Service



Susanne Miller, USFWS

# Sec. 4 – Critical Habitat

**Critical habitat** “the specific areas within the geographical area occupied by the species ...on which are found those physical or biological features essential to the conservation of the species”

- Critical habitat can include areas outside current range
- Unlike listing, non-biological factors, including economics, are to be used in determining critical habitat
- Critical habitat designation – among most controversial parts of the ESA

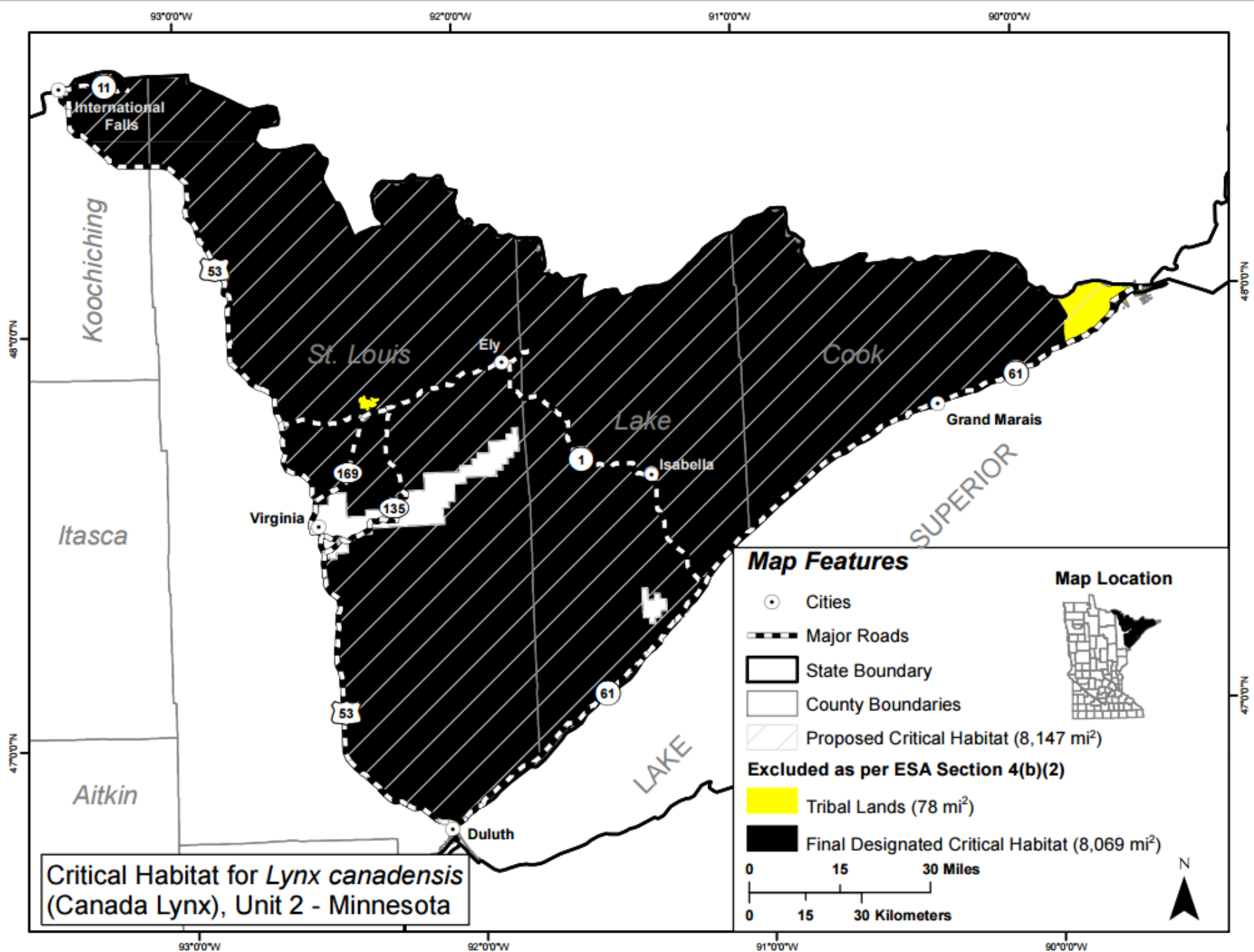




# Why is Critical Habitat so Controversial?

- Critical habitat can be designated on **private lands**
- Critical habitat can include areas **outside** a species' current geographic range
- Agencies have the power to **block actions** that would adversely modify the critical habitat of an endangered species
- Can effectively **block development and extractive uses of resources**





# Prohibitions

# Sec. 9 – Prohibitions

- Sec. 9 (a)(1) – “it is unlawful for any person...to—

1. **Import/Export**
2. **Take/harm**
3. **Posses/transport**
4. **Sell/deliver**
5. **Violate regulations**

- (A) import ..or export any such species...
- (B) take any such species within the United States or the territorial sea of the United States;
- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever...
- (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce...
- (F) sell or offer for sale in interstate or foreign commerce any such species; or
- (G) violate any regulation pertaining to such species or to any threatened species





# Sec. 9 – Prohibitions

- **Take** – “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.”
  - **Harm** → “an act which actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.” (Agency Policy)
- **Jeopardize** – “to engage in an action that reasonably may be expected, directly or indirectly, to reduce the reproduction, numbers, or distribution of the species.”



# Historical Context: Pressure to Curtail Listings



- 1992 – FWS designates critical habitat for the northern spotted owl
- 1994 – FWS establishes nonessential experimental population of gray wolves in YNP
- 1995 – Supreme Court rules that modification of an endangered species' habitat could constitute “harm” and affirmed the power of the Secretary to regulate such activities



# Pressure to Curtail Listings

- 1995 – Congress enacted Public Law 104-6, an emergency appropriations for the DOD
- The bill also rescinded \$1.5 million from FWS  
“...from the amounts available for making determinations whether a species is a threatened or endangered species and whether habitat is critical under the Endangered Species Act of 1973.”
- Under intense pressure from Congress to reform the ESA, Interior Secretary Babbitt institutes a series of incentive-based administrative reforms (Goble et al. 2006)



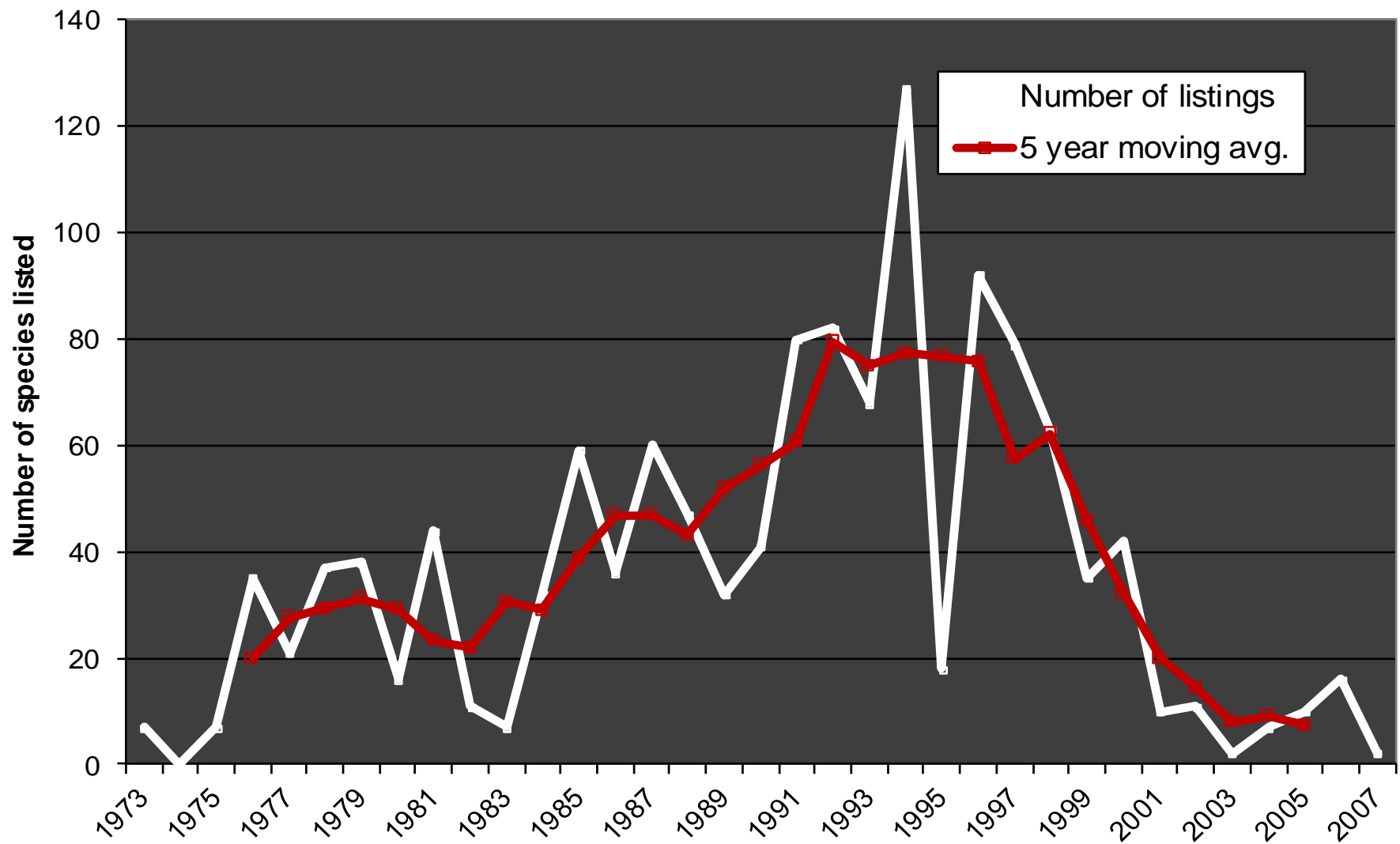
# Lack of species listings

- Sidle (1998:249) argued that FWS employees were “*under intense pressure to curtail listings*” and protect species through some means other than the ESA.
- 1997 - “...this agency is no longer adequately supporting the function for which I was hired, the classification and protection of wildlife... and indeed, often is working against this function. I have become particularly concerned about the agency’s seemingly unrestrained use of public funds to carry on litigation and other actions to thwart or delay appropriate classification and regulation of species...”





# Species Listings: 1973-2008



## Section 4(g) Monitoring (1988 Amendments)

(1) The Secretary shall implement a system in cooperation with the States **to monitor effectively for not less than five years the status of all species** which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section . . .



74 Fed. Reg. 48595 (September 23, 2009)

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered and Threatened Wildlife  
and Plants; Draft Post-Delisting  
Monitoring Plan for the Concho Water  
Snake

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability of draft post-delisting monitoring plan.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of our Post-Delisting Monitoring Plan for the Concho water snake (*Nerodia paucimaculata*). The draft post-delisting monitoring (PDM) plan describes the methods we propose to monitor the status of the snake and its habitat, in cooperation with the State of Texas and other conservation partners, for a 15-year period if we remove this species from the Federal list of endangered and threatened wildlife under another pending action. The draft PDM plan also provides a strategy for identifying and responding to any future population declines or habitat alterations.



# By the Numbers: Judging the ESA

# Judging Success of the ESA

## 2,218 Listed Species

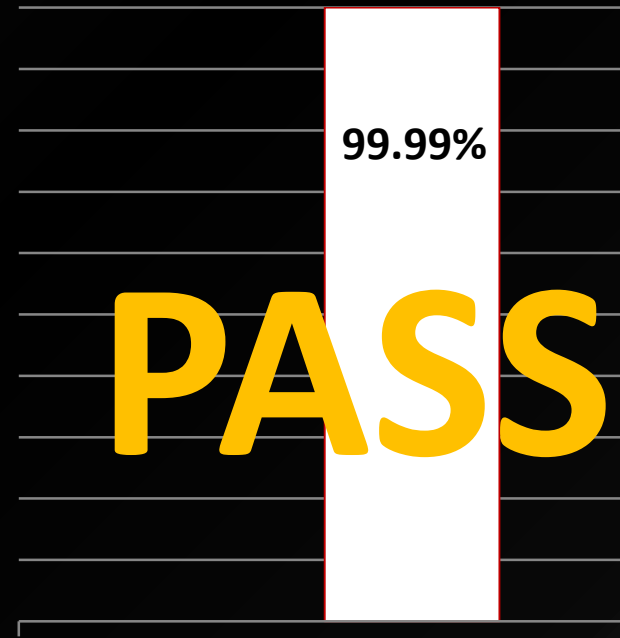
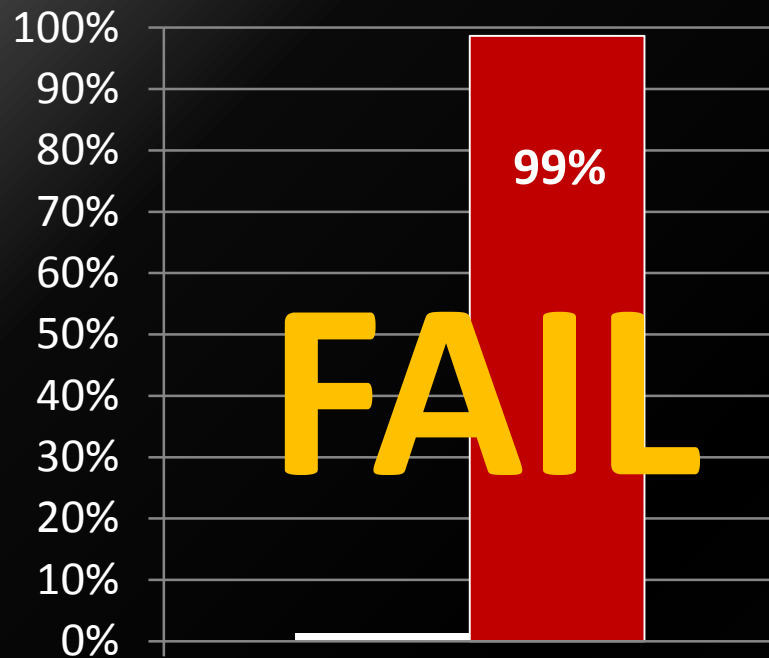
- Endangered (1780)
- Threatened (438)
- Candidate species (145)
- Warranted but precluded by ongoing conservation efforts (64)
- Extinct while on list (10)
- Recovered (30)
- 1,155 species listed in US – 676 (59%) have active Recovery Plans





# Judging Success of the ESA

- Of the 2,218 species listed...



# A Significant Controversy (And Why it Matters)

# The Controversy

- Under the ESA, “...endangered species means any species which is in danger of extinction throughout all or a significant portion of its range...” (USC 16 § 1532).
- Phrase is ambiguous
  - What constitutes a “significant” portion?
  - How should “range” be defined?
- Interpretation determines what it means to be “endangered” and also “recovered” (i.e. not endangered)
  - Which species will be listed?
  - Where will they be recovered?



# Case Studies: Flat-Tailed Horned Lizard



- 1993 – Proposed rule to list the FTHL as threatened (loss of historical habitat cited as primary reason)
- 1997 – In July, the Secretary **withdrew the proposed rule**, arguing that while continued losses were expected on *private lands*, protective measures (i.e. conservation agreement) on *public lands* were adequate for preserving the species
- Defenders of Wildlife (DOW) sued, arguing that the Secretary did not adequately consider whether the FTHL was in danger **in a significant portion of its range**





- In her brief, the Secretary indicated she interpreted the SPR phrase to mean a species was eligible for ESA protections only if it *“face[d] threats in enough key portions of its range that the entire species [wa]s in danger of extinction, or [would] be within the foreseeable future.”*
- The Court rejected this approach, and held that a species could be in danger of extinction in a SPR *“if there are major geographical areas in which it is no longer viable but once was.”*
- **The Ninth Circuit established a precedent that has been upheld in several subsequent cases**





# Canada Lynx



- 2000 – Final Rule listing lynx as threatened throughout US
- FWS concluded that, “collectively the Northeast, Great Lakes and Southern Rockies [regions] do not constitute a significant portion of the [lynx’s] range...” (refused to designate critical habitat)
- 2002 – The court disagreed with FWS, noting the Ninth Circuit’s decision (i.e. major geographical areas), and ordered FWS to explain



# Gray Wolf



- 2003 – FWS issued final rule on wolves establishing three DPSs and proposing down-listing wolf (to threatened)
- FWS argued “... when an endangered species has recovered to the point where it is no longer in danger of extinction throughout all or a significant portion of its **current range**, it is appropriate to downlist...”
- Conservation groups filed suit pointing to the 9<sup>th</sup> Circuit’s opinion, and arguing **wolves remained absent from the vast majority of their historic range**



# Gray Wolf



- 2004 – The courts (Vermont & Oregon both sided with plaintiffs, noting that FWS's determination was based on the threats faced by existing wolf populations within relatively small “core” areas in these DPSs
- The court noted that the boundaries of the DPS appeared to have been designed to downlist as quickly as possible; **court concluded that it appeared the intent of the FWS wasn't conservation, but rather downlisting**



# Solicitor's Opinion

- March 16, 2007 - Memorandum of Solicitor's legal opinion on meaning of SPR phrase
- Two conclusions with respect to the SPR phrase:
  - The word “range” refers only to the **current range of species** (not its historic range).
  - The Secretary has broad discretion in determining what is “significant” – in essence, **the Secretary does not need to consider the size of the species range that is lost.**



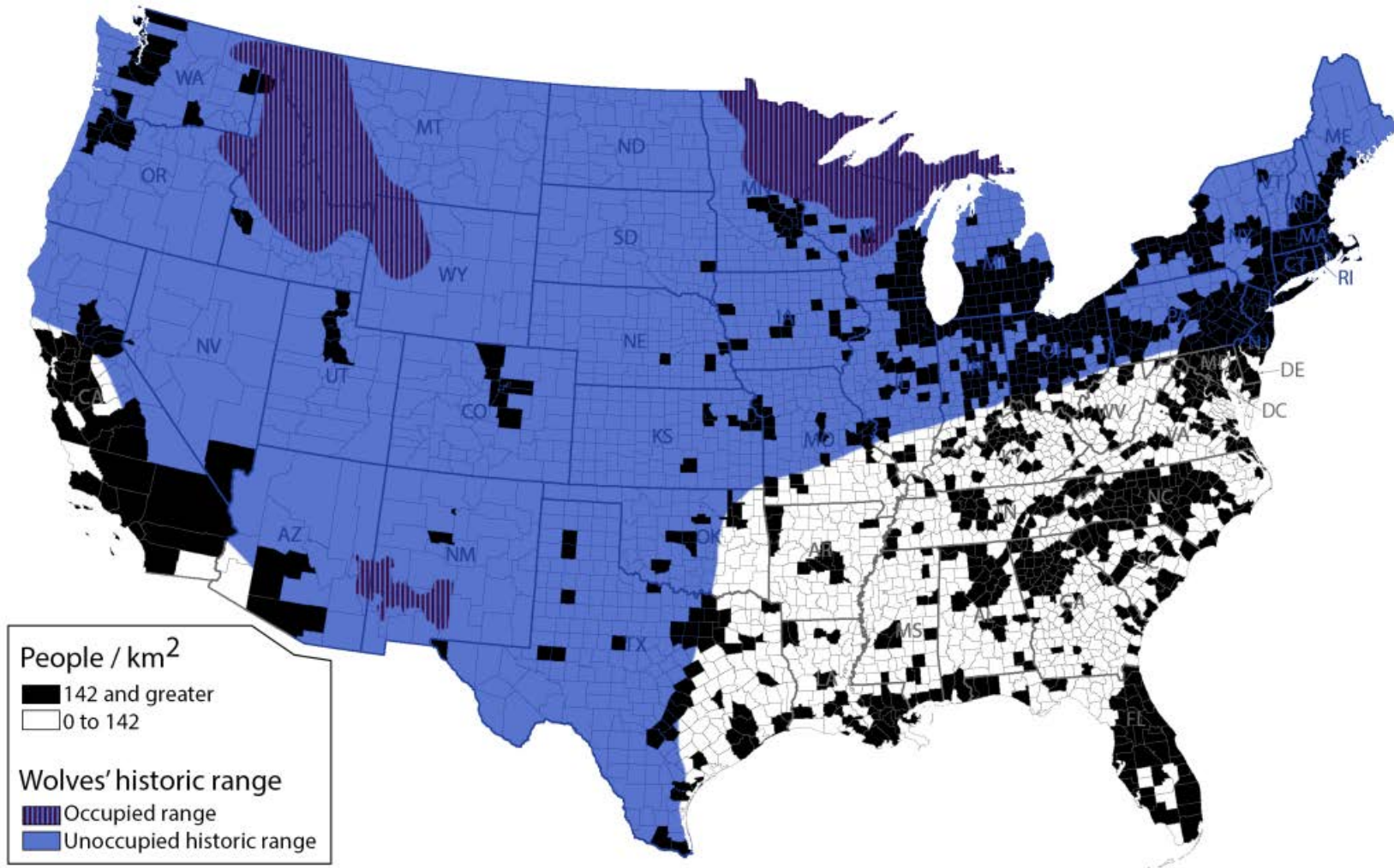
# The Saga Continues

- In 2011, the Solicitor's Memorandum Opinion was withdrawn and replaced by formal policy—
- “..the **range** of a species is defined as the general geographical area within which that species can be found at the time either FWS or NOAA-Fisheries makes a status determination...”
- “**Lost historical range cannot constitute a significant portion of a species' range**”
- This interpretation was again rejected by the D.C. court in December of 2014





# Why should I care?



Bruskotter, J. T., Vucetich, J. A.,ENZler, S., Treves, A., & Nelson, M. P. (2013). Removing protections for wolves and the future of the US Endangered Species Act (1973). *Conservation Letters*.



# Dealing with the Controversies—A Partnership in Conservation

# Policy Reformation

- **Safe Harbor Agreements** – Voluntary agreement between private landowner & FWS where landowner agrees to alter property to benefit species in exchange for assurances that FWS will permit future “take”
- **Candidate Conservation Agreements** – Similar to Safe Harbor Agreements, but CCA’s are meant to protect unlisted species (if future listing, landowner not required to do more than they’ve already done)





## THE ENDANGERED SPECIES ACT (ESA)

### AFBF Policy:

We believe that endangered and threatened species protection can be more effectively achieved by providing incentives to private landowners and public land users rather than by imposing land use restrictions and penalties.

The ESA should not be reauthorized in its current form. The current federal ESA must be amended and updated to accommodate the needs of both endangered and threatened species and humans with complete respect for private property rights within the framework of the United States Constitution.

Human need for food, fiber, shelter, and energy shall have priority over the protection of endangered and threatened species.

species, it can restrict a wide range of human activity in areas where species exist or may possibly exist. Furthermore, it allows private special interest groups to sue anyone who they allege to be in violation of the Act.

The ESA is a litigation-driven model that rewards those who use the courtroom at the expense of those who practice positive conservation efforts. Currently, sue-and-settle tactics currently employed by radical environmental groups have required the government to make listing decisions on hundreds of new species. These plaintiffs have been rewarded for their efforts by taxpayer funded reimbursements for their legal bills as a result.



## WILDLIFE

# Obama's preemptive strike to reform Endangered Species Act

*The administration's proposal is aimed at warding off a GOP overhaul of the law.*

Elizabeth Shogren | May 20, 2015 | Web Exclusive



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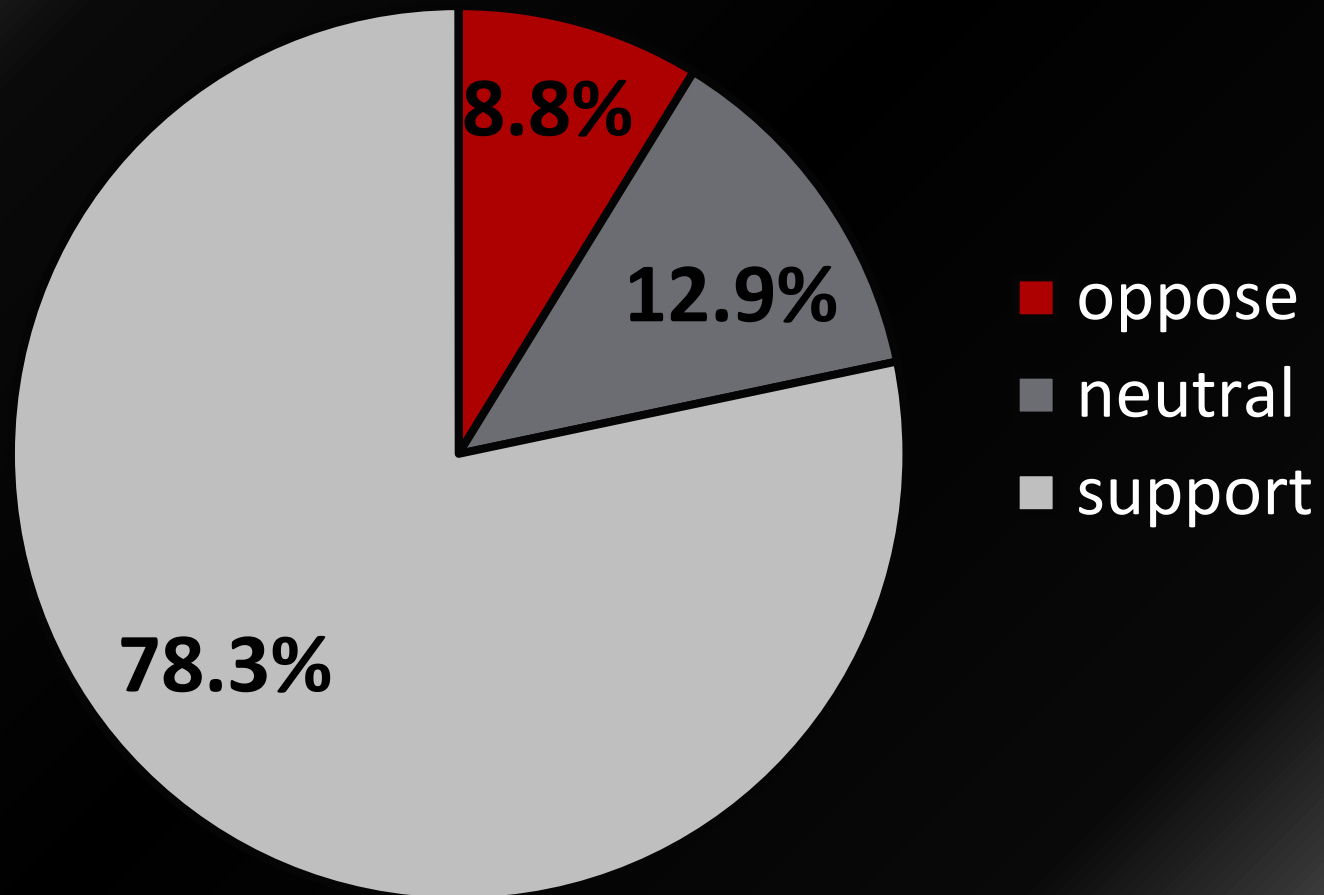
The Obama administration this week proposed increasing the role states play in decisions about whether to list animals and plants as threatened or endangered.

The announcement comes as congressional Republicans have vowed to overhaul the [Endangered Species Act](#) and have been pushing legislation to reduce protections for individual species, including the greater sage grouse and lesser prairie chicken.

The [proposed rule](#) by the Interior Department and National Oceanic and Atmospheric Administration would require people who want to petition the federal government to list a species to first send petitions to whatever state agencies manage the species in question. If the state responds within 30 days with



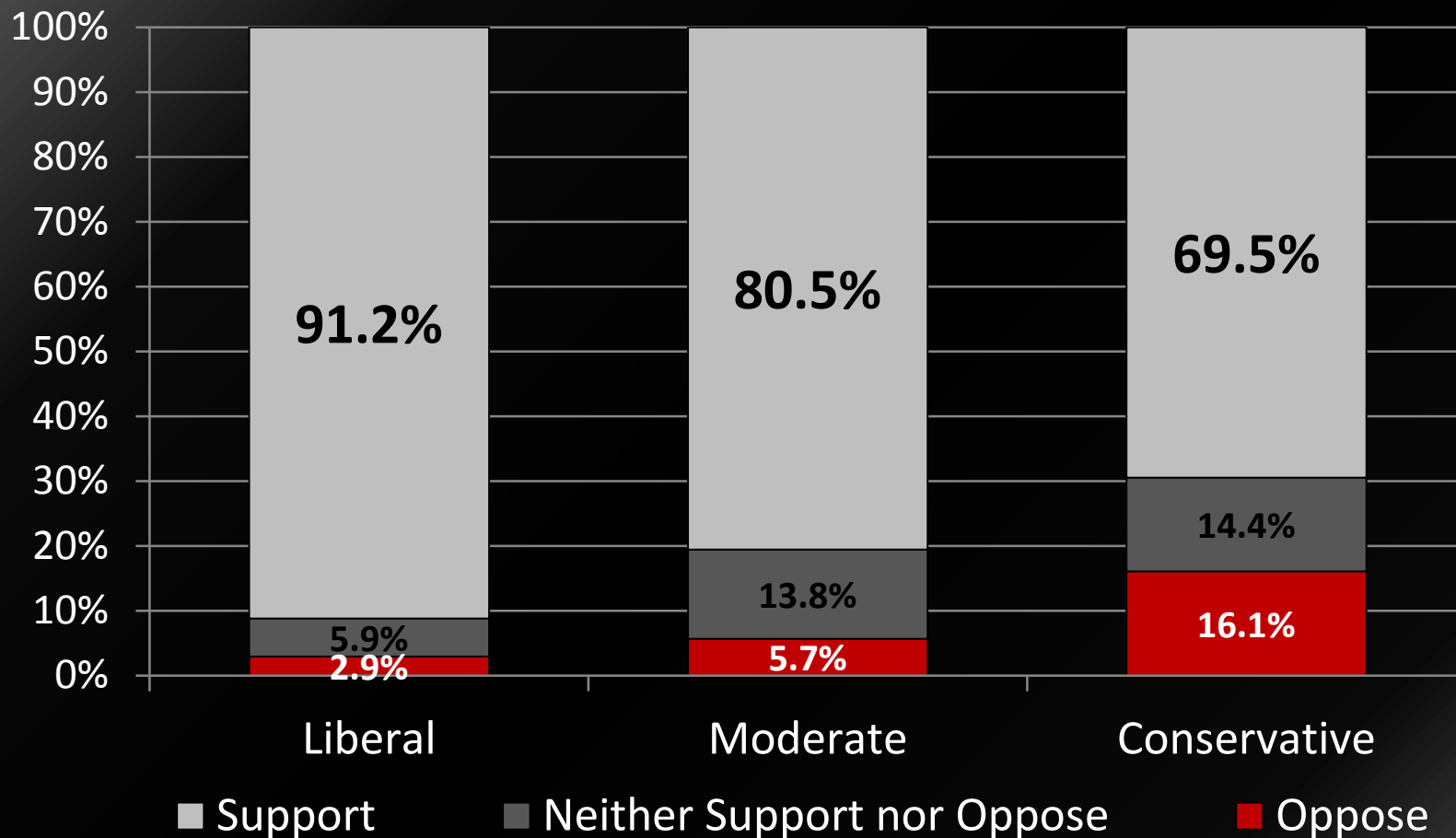
“...would you say that you support or oppose the **Endangered Species Act?**”



National sample (2014): 1,254 respondents | 95% Confidence, +/- 3 points.



# “...would you say that you support or oppose the **Endangered Species Act**?”



National sample (2014): 1,254 respondents | 95% Confidence, +/- 3 points.



Thank You!

