

GETTING TO 'WIN-WIN' UNDER THE ENDANGERED SPECIES ACT

Presented to the Western States Land Commissioners Association

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Major points:

- Requirements When a Species is Listed
 - Section 7
 - Section 9
- Statutory Exceptions
 - Special Rules
 - Experimental Populations
- Policy Exceptions
- Incentives vs. Disincentives



ESA Section 7:

- 7(a)(1): “...in furtherance of the purposes of the Act.”
- 7(a)(2):
 - Applies only to Federal actions
 - Prohibits jeopardizing listed species
 - Prohibits destroying/adversely modifying designated critical habitat

ESA Section 7:

- “May affect”: Agencies consult with FWS
- “Not likely to adversely affect” (insignificant, discountable, beneficial)
- “Likely to adversely affect”



ESA Section 7:

- Biological opinion
- **Incidental take statement**
- Non J/Ad mod: Reasonable and prudent measures
- J/Ad mod: Reasonable and prudent alternatives



ESA Section 9:

- Prohibits “take”
- Applies to all persons, including Feds
- Critical habitat not a factor



What is Take?

- “Take”: Wound, shoot, kill, injure, trap...harm or harass
- “Harm” and “harassment” can involve habitat effects
- “Incidental take”: Unintentional
- S.7 ITS for Feds; S.10 for non-Feds

ESA-AUTHORIZED EXCEPTIONS

- 4(D) Special rules
- Experimental Populations



LANDOWNER TOOLS

Section 10 permits:

> For non-Feds



> 10(a)(1)(A) permits for *intentional* take

> 10(a)(1)(B) permits for *incidental* take

LANDOWNER TOOLS

- Safe Harbor Agreements
- Candidate Conservation Agreements
- Habitat Conservation Plans
- Research and Recovery Permits
- Conservation Banks
- Prelisting Conservation Proposal



CANDIDATE CONSERVATION AGREEMENTS (WITH ASSURANCES)

- For candidates or other unlisted species
- Management to prevent listing
- Monitoring required
- Issued 10(a)(1) “Enhancement of Survival” permit

CANDIDATE CONSERVATION AGREEMENTS (WITH ASSURANCES)

- If listed, no additional requirements
- No “assurances” for Feds
- Can combine CCA and CCAA
- “A deal is a deal”



SAFE HARBOR AGREEMENTS

Establish baseline:

- # of critters
- # of acres
- Stream miles
- Etc.



SAFE HARBOR AGREEMENTS

Agree on:

- Conservation measures
- Monitoring requirements
- Length of agreement
- Provisions for cancelling
- Notice requirements



SAFE HARBOR AGREEMENTS

Once signed:

- Issued a 10(a)(1)(A) permit (net conservation benefit)
- Certificate of inclusion (programmatic SHA)
- Neighbor provisions
- “A deal is a deal.”



Prelisting Conservation Proposal

- Encourage and reward voluntary conservation actions
- Anyone, including Feds, can accrue credits
- Several differences from CCAs (Feds can accrue credits; no assurances; no specific magnitude of benefit required)
- Credits may be used by proponent or traded/sold on open market

WHAT'S THE 'INCENTIVE'?

- > “Orange-colored sticks”
- > Regulatory relief
- > Improving species' conservation outlook
- > Doing the 'right thing'
- > Take advantage of conservation programs

PROBLEM



SOLUTION?



SOLUTION!

