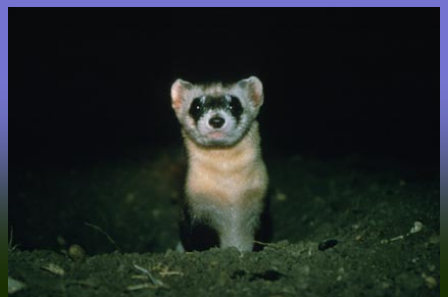
U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

NATIONAL SYSTEM OF PUBLIC LANDS

Endangered Species Act

Section 7 Consultation

Level 1 and 2 Teams



Purpose of the ESA

"It is the policy of Congress that all Federal departments and agencies shall seek to conserve endangered and threatened species and shall use their authorities in furtherance of the purposes of this Act"

(Sect. 2(c)(2))

Endangered Species Act

Endangered species - a species which is in danger of becoming extinct

Threatened species - a species which is in danger of becoming endangered

Endangered Species Act

Candidate - A species for which there is sufficient information to list, but for which listing is precluded by other, higher priority actions (e.g., Sage-grouse)

Critical Habitat - Specific areas which have physical or biological features essential to the conservation of the species

Endangered Species Act

Prohibits take, which is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct

Endangered Species Act

Harm - habitat modification that results in death or injury, or disrupts breeding, foraging, or sheltering behavior

Harass - Actions that will lead to injury to a migratory bird, and disrupt breeding, foraging, or sheltering behavior

Where and When does the ESA apply?

- The ESA applies to a species and its habitat
- The ESA does not differentiate between surface or subsurface ownership

Where and When does ESA apply?

- Private Surface Federal Mineral → If lease issued for mineral, Federal agency has to ensure development of the lease will not harm a listed species
- Federal Surface Private Mineral → If mineral developed, Federal agency has to ensure surface disturbance, or right-of-way does not harm a listed species

Where and When does ESA apply?

- Federal Surface
  Federal Mineral → If lease issued for mineral, Federal agency has to ensure development of the lease will not harm a listed species

- Private Surface
  Private Mineral → ESA still applies, but no Federal nexus. Responsibility of compliance is with developer

Where and When does the ESA apply?

Section 7(a)(2) requires Federal agencies to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize a listed species, or result in destruction or adverse modification of their habitat

Consultation

Informal

Working with agencies, project proponents, and all others affected by the project to minimize potential impacts to listed species to the point where no harm occurs to the species as a result of the project

Consultation

Formal

When impacts to listed species cannot be removed or minimized

- Process has rigid deadlines and requirements
- Results in: Mandatory Conditions
  Incidental Take Permit

Section 7
Facts and Fallacies

ESA
Section 7(a)1

"Federal agencies shall use their authorities to further the purpose of the ESA by carrying out programs for the conservation of endangered and threatened species."

Section 7(a) 2

"Federal agencies will insure that no discretionary action authorized or funded by them will result in jeopardy to the species, or in adverse modification of critical habitat"

Definition

Jeopardy

An action where you could reasonably expect to appreciably reduce the likelihood of both survival & recovery of a listed species in the wild

Reduce:

- reproduction
- numbers
- distribution

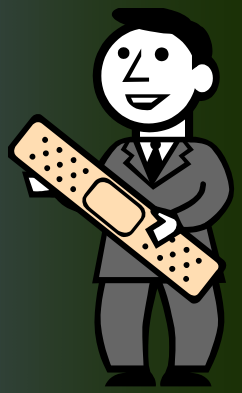
Definition

Adverse modification

Direct or indirect habitat alteration that appreciably diminishes the value of critical habitat for the survival and recovery of a listed species.

Goal of Section 7

To minimize impacts of a proposed project on a listed or proposed species



Process

Action agency analyzes project for effects on listed or proposed species

Yes?

Initiate!

Now

No?

Formal or Informal?

If the project cannot be modified to remove an adverse effect

Formal consultation

If the project can be modified to remove adverse effect

Informal consultation

Fallacy #1 – Effect calls

- The action/funding agency makes the call

  One little exception…..

- Think the entire project through!!

- A call should be based on data & scientific judgment

  NOT on whether the call will create a garment for the rear of the body

Definitions

Discountable

Those effects extremely unlikely to occur

Insignificant

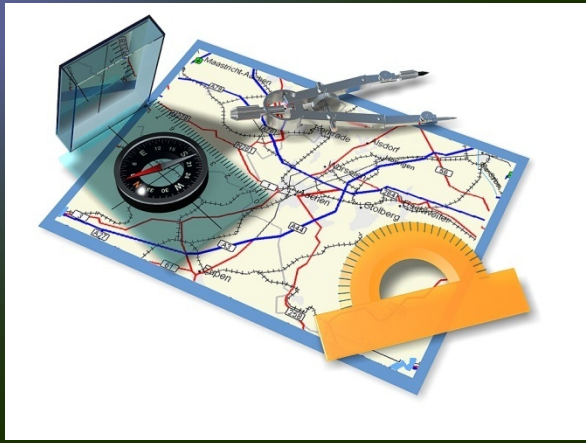
Effects that never reach the scale where take occurs

Fallacy #2
Impact is just where we turn dirt

Action area

All areas to be affected, directly or indirectly by Federal action

Must consider effects over the entire action area



Fallacy #3
Formal Consultation is Evil

Formal consultation does NOT:

- Stop a project
- Make the project impossible
- Represent failure

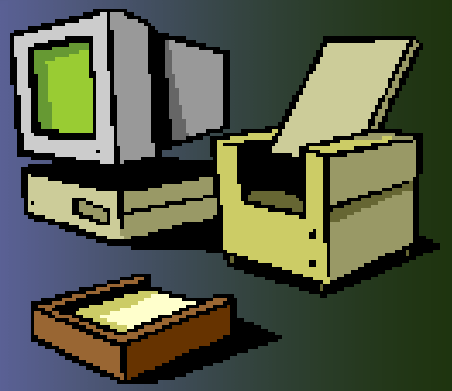
Formal consultation does:

- Take more time
- Usually more effort
- Result in a BO, which may provide for incidental take

Biological Assessments

BA's are extremely useful for formal consultation.

- Provides information
- Provides justification
- No set format



Please don't ask FWS to "just use the NEPA document"

- Greatly increases time
- FWS doesn't consult on all alternatives
- FWS will hate you

Fallacy #4
We should do formal consultation all the time!

Biological opinions usually contain reasonable and prudent measures which must be implemented

Should not be done just to get an ITS that will act as a garment for a rear part of the anatomy

Every effort should be made to remove the adverse effect first.

Fallacy #5
I've got concurrence – I'm done!!

Informal consultation can be very effective in removing adverse effects

Follow-through is essential

Conferencing

For proposed species

Need to determine if the effect will jeopardize the species, not an adverse effect to an individual

Rest of the procedure is same as consultation

Other types of consultation

Emergency

an act of God, a disaster,
or needed immediately
for national defense or security

- Initiation occurs after the emergency is under control
- Needs to notify FWS as soon as possible
- Although after the fact, treated like any other consultation

Other types of consultation

Programmatic

Addresses multiple actions on a program, regional, or other basis

Require lots of up-front work,
but can provide a great framework
for streamlining consultation down the road

Fallacy #6
Programmatic consultations are all we need to do!

Just because the programmatic Consultation is done doesn't mean you are done!

Each individual project must still be evaluated and must follow Terms and Conditions of the Programmatic!!!

Fallacy #7

"Streamlining" using less information

"I'll just send a standard project description and say it may be in habitat

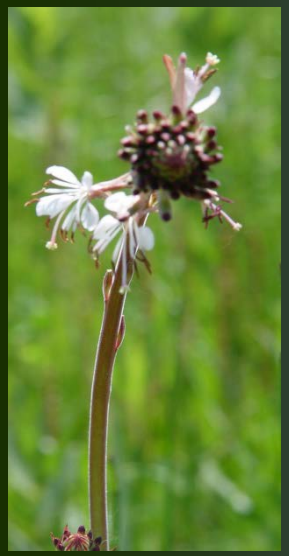
The better the information:

- More accurate response
- The quicker the response
- We will all be happy!!!

Fallacy #8
Consultation done, we are good!!!

- Projects may change, animals may move, plants can be found in new places, etc.
- These type of changes may require re-initiation

When to re-initiate



- If the level of incidental take is exceeded;
- New information reveals effects in a manner or extent not previously considered;
- Action is modified and causes effects not considered;
- New species listed or critical habitat designated that may be affected

Fallacy #9
Lets consult on all species!!

Consultation/conferencing only necessary for listed, proposed species or critical habitat

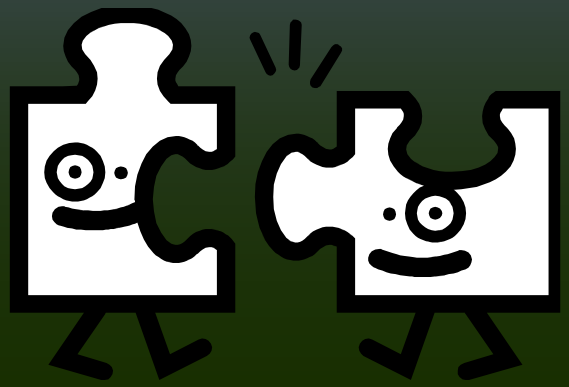
FWS does not consult on non-listed species, but will on candidates on a case by case basis

FWS concurrence is not necessary for no effect determinations

Inter-related and Interdependent

Inter-related – actions that are part of larger action and depends on the larger action for their justification

Interdependent – have no independent utility apart from the action under consideration



Non-Federal representative

Section 7 consultation is between Federal agencies

FWS does not consult with a private entity (e.g. a consultant).

You may designate a private entity to act in your behalf, but FWS needs it

IN WRITING FROM YOU!!

Piecemealing

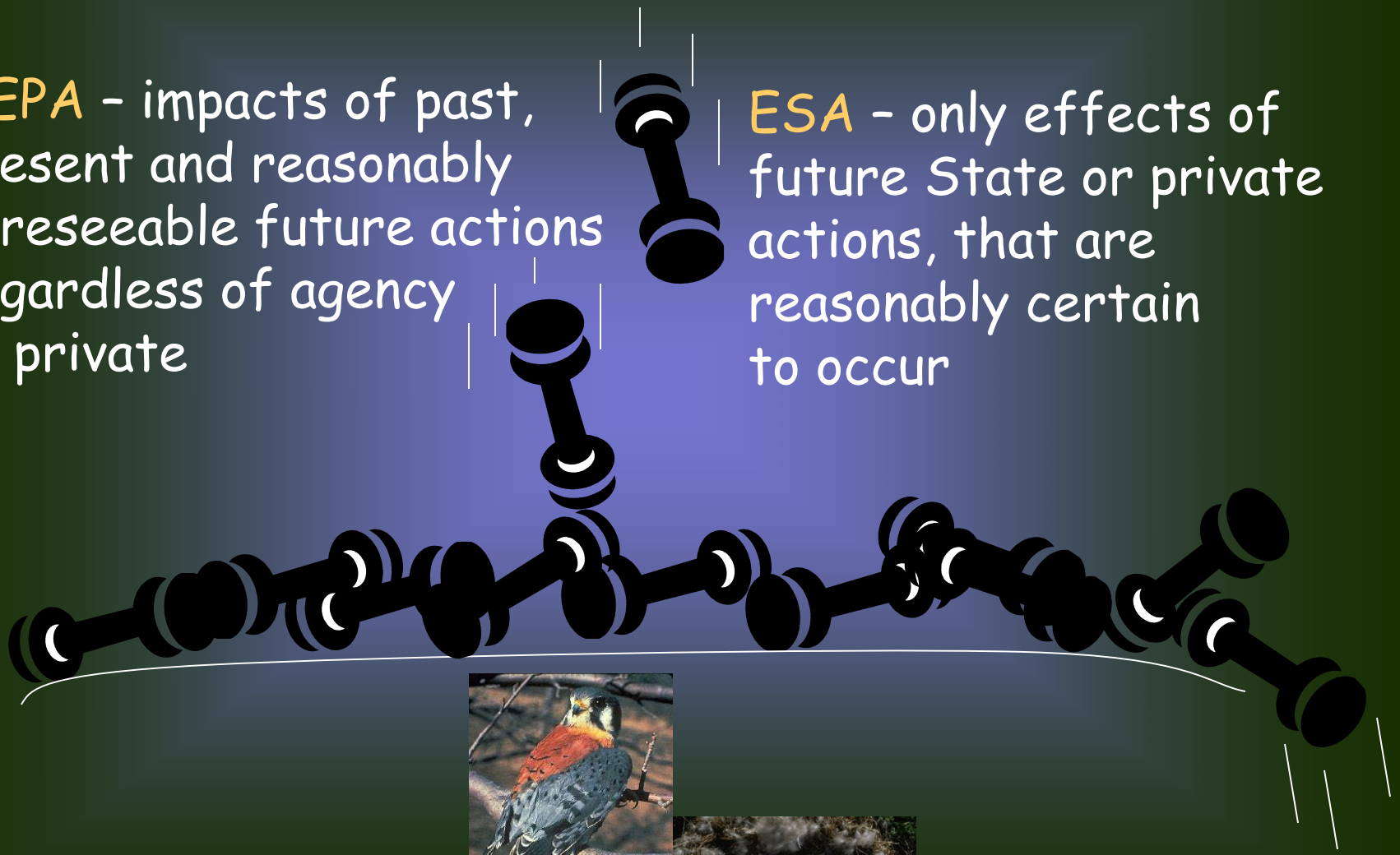
To the extent possible present the entire project at the same time (e.g. not just well by well).

This allows us, and FWS to make the best decisions possible
and will save us time and effort in the long-run

Cumulative Effects

NEPA – impacts of past, present and reasonably foreseeable future actions regardless of agency or private

ESA – only effects of future State or private actions, that are reasonably certain to occur



Streamlined Consultation Procedures for Sec.7 of the ESA

In 2000, BLM, FS, NMFS and FWS developed an MOA to improve efficiency and effectiveness of plan and Programmatic level section 7 consultation and to enhance conservation of imperiled species while providing goods and services provided by lands and resources managed by signatory agencies.

In 2002, three Level 1 teams and one Level 2 team were formed to address this MOA and expand use of stream-lining into Wyoming

Streamlined Consultation Procedures for Sec.7 of the ESA

Intent of Level 1 and 2 teams- Establish a streamlined process for interagency cooperation in the exercise of their responsibilities under ESA

Provide guidelines and procedures for informal and formal consultations, as well as consideration of Candidate species conservation during plan development

Streamlined Consultation Procedures for Sec.7 of the ESA

Level 1 Teams- Field level, District level, or Forest level biologists serving as forum for information exchange & joint evaluation of proposed projects beginning at earliest stages of planning

Level 2 Teams- Agency managers functioning mainly as an issue resolution body when (on rare occasion) Level 1 teams fail to reach consensus on project effects determinations or workload priorities

Streamlined Consultation Procedures for Sec.7 of the ESA

RCTT- In addition to Level 1 and 2 Teams, a Regional Coordination and Technical Team was formed to provide technical assistance, coordination, and promote consistency for Level 1 and 2 Teams in Wyoming and Colorado

Level 1 and Level 2 Teams and Streamlining Consultations

Key to successful streamlining- Early interagency communication and coordination, full participation, and agreement on timelines, information needs, and analyses

Early up-front coordination between the agencies will allow for early ID and resolution of issues prior to actual consultation

Migratory Bird Treaty Act

It is illegal to pursue, hunt, take, capture, kill, any migratory bird, its nest or eggs, or any part thereof (i.e. feathers) or attempt any of these activities.

It is illegal to sell, barter, or transport any migratory bird, its nest or egg, or any part thereof.

What is a Migratory Bird?

- Any bird which migrates across a political boundary during some part of its life cycle

- Includes birds of prey, songbirds, shorebirds, ducks, seabirds, etc.

- Does not include non-migratory game birds such as grouse

Definitions

- Take - harass harm, pursue, hunt, shoot, wound, kill, trap, capture or collect
- Harm - habitat modification that results in death or injury, or disrupts breeding, foraging, or sheltering behavior
- Harass - Actions that will lead to injury to a migratory bird, and disrupt breeding, foraging, or sheltering behavior

What does this mean to BLM?

Any work that may affect a migratory bird, such as work around a nesting bird (drilling, pipeline installation, road construction, etc.), building powerlines that result in a bird being electrocuted, removal of trees or cliffs with nests on them could be a violation of this law!

Solutions

How do we find the birds?

- Use existing information
  - Other projects in area
  - WGFD
  - USFS
  - BLM
  - FWS

- Survey an area before conducting work

Solutions

What if we find a bird?

- Do work outside the nesting period (generally, March through July, but depends on species)
- Do work outside the nesting buffer (1/2 mile for all birds but bald eagles and ferruginous hawks)
- Get a permit

Bald and Golden Eagle Protection Act

Prohibits knowingly taking, or taking with wanton disregard, any bald or golden eagles or their body parts, nests, or eggs. Also prohibits collection, molestation, disturbance, or killing these birds

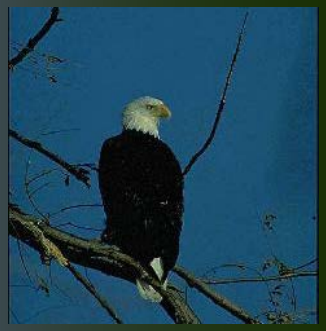
What does this mean to BLM?

Any work that may affect an eagle, such as work around a nesting eagle (drilling, pipeline installation, road construction, etc.), building powerlines that result in an eagle being electrocuted, removal of trees or cliffs with nests on them could be a violation of this law!

Solutions

How do we find the birds?

- Use existing information
  - Other projects in area
  - WGFD
  - BLM
  - USFS
  - FWS



- Survey an area before conducting work

Solutions

What if we find a bird?

- Do work outside the nesting period (generally, February through August)
- Do work outside the nesting buffer or winter roosting buffer (1/2 mile for golden eagles, 1 mile for bald eagles)
- Get a permit

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Overview of Candidate Conservation Agreements

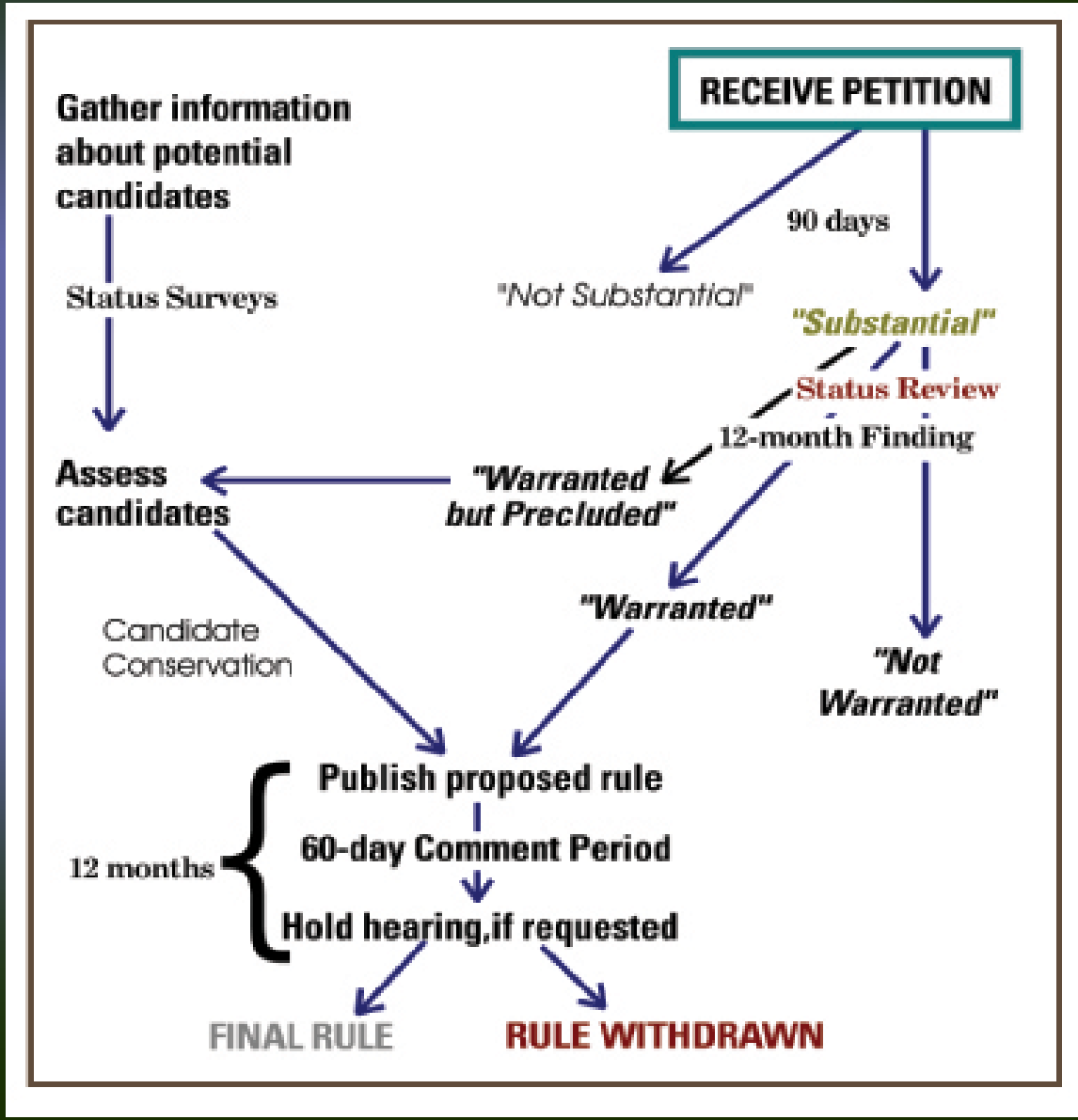
What are Candidates?

Candidate has a specific definition under the ESA, but under the Candidate Conservation Agreement program can also include:

- Species of concern from the State (e.g., Greater sage-grouse)
- Species of concern from the BLM (e.g., precocious milk vetch)
- Species of concern from the Forest Service (e.g., Northern Goshawk)
- Or, it may be a an actual Candidate Species from the U.S. Fish and Wildlife Service (e.g., population of yellow billed cuckoo)

How it all fits together

Proactive conservation



Species at risk can also be included

Listing Factors

A. Present or threatened destruction, modification, or curtailment of habitat or range

B. Overuse for commercial, recreational, scientific or educational purposes

C. Disease or predation

D. Inadequacy of existing regulatory mechanisms

E. Other natural or human factors affecting species continued existence

Candidate Conservation Agreements with Assurances (CCAA)

- Conservation on non-Federal lands critical to biodiversity & meeting the purpose of the Endangered Species Act
- Non-Federal property owners agree to conduct (or not conduct) certain activities that may preclude the need to list

CCAA Purpose

Conserve target species on non-federal lands while allowing for human activities

CCAA Goal

- Cooperative conservation on non-federal land
- Reduce or remove threats to the species

CCAA Standard

If the benefits of the conservation measures in the agreement were implemented on other similar properties, there would be no need to list the species

How do CCAA's work?

- It's simply a conservation agreement
- Landowner agrees to implement actions to conserve species
- FWS provides the regulatory assurance that land-owner will not be "penalized"
- Landowner receives Sec. 10 permit if the species listed

When is a CCAA appropriate?

- Threats/requirements of species known
- Can determine conservation measures to reduce/remove threats
- Have willing partners/landowners

Right Tool?

- Policy allows for flexibility to accommodate circumstances
- Agreement guided by what is needed to meet the standard:

  "The benefits of the conservation measures… would remove the need to list the covered species."
- This may require habitat restoration, increased population size, removal or prevention of threats
- Typically requires landowner action

Section 7, 9 and 10 of the ESA

Section 7 of the ESA outlines activities required of Federal agencies - and provides in many ways, via Incidental Take and Conservation Measures, similar assurances to a CCAA - but through a different vehicle relevant to federal lands.

Section 9 of the ESA outlines “prohibited acts”.

Section 10 of the ESA outlines “exceptions” – Under a CCAA, a Section 10a(1)A permit is issued that permits certain normally prohibited acts (e.g., take of a covered species).

CCA without Assurances

- Can apply to any landowner/manager
  - Does not go through Fed Reg process
  - Does not issue a permit for take
  - Privacy
- No assurances if species is listed, FWS may ask for more CMs
- Federal agencies do not seek assurances
- CCA can be developed to CCAA standard to be seamless across landownership

ITEM	CCAs	CCAAs
Voluntary?	*Yes*	*Yes*
Who/what lands are eligible?	*Federal and non-Federal entities and lands*	*Non-Federal property owners / lands*
Policy? Regulations?	*No policy* *Sec.7 regs*	*CCAA policy* *50 CFR 17.22(d)*
Standard?	*No standard*	*CCAA standard*
Sec. 10(a)(1)(A) permit for take?	*No*	*Yes*
Regulatory Assurances?	*Yes/No (Sec. 7)*	*Yes*

When listing happens:

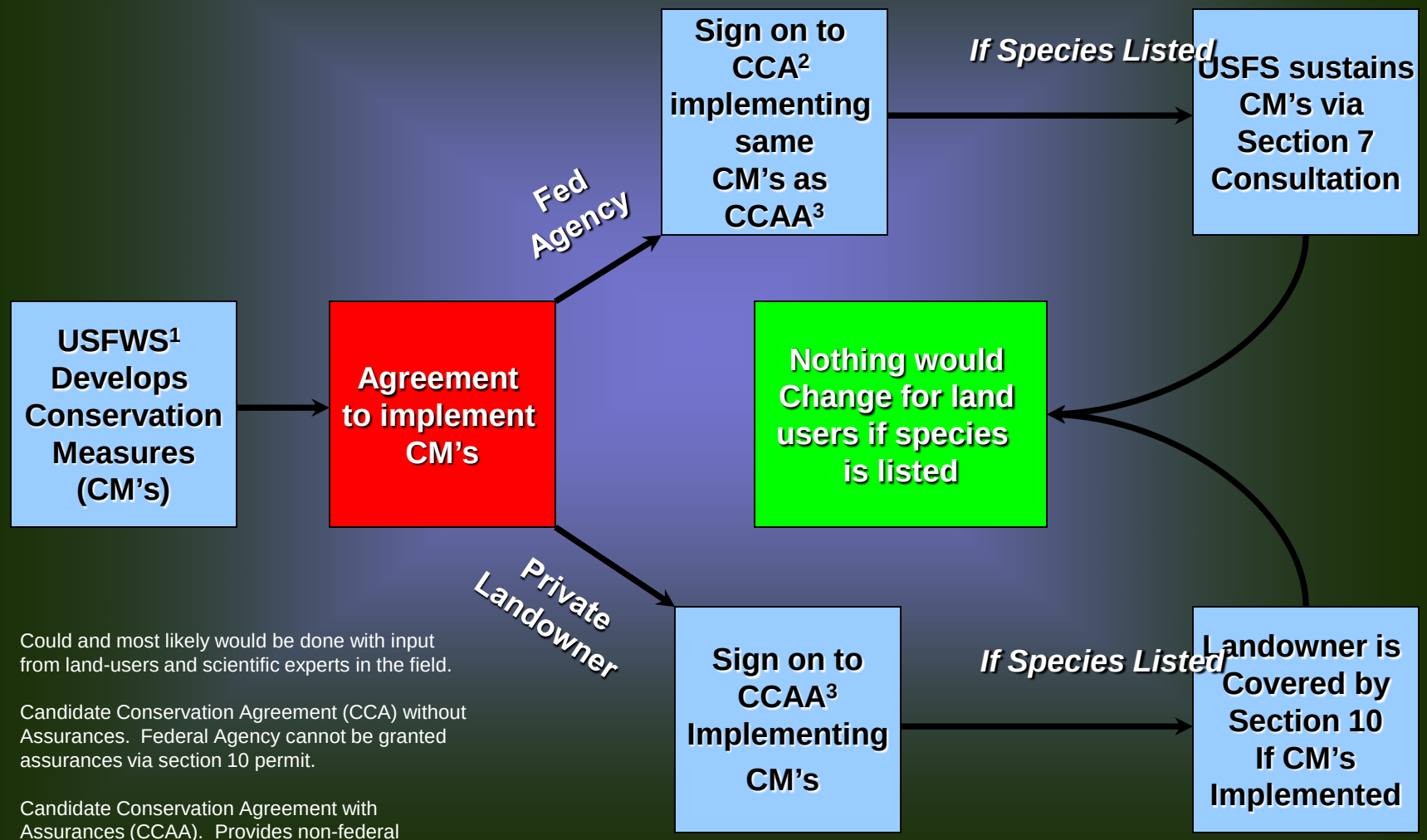
- Federal agencies need to comply with section 7 (a)(2) (protection from adverse effects of Federal activities) Management flexibility reduced (but
- ESA does have provisions for nearly all projects to move forward).
  ESA applies to all lands

Federal Partners - CCAs

Federal agencies have specific responsibilities under ESA and cannot receive assurances

- Federal agencies can develop a CCA to be implemented with CCAA
- If the CCA meets CCAA standard and species is listed, the CCA rolls into section 7 consultation

Conceptual Process for Providing Regulatory Assurances under ESA for Mixed Land-ownership



1) Could and most likely would be done with input from land-users and scientific experts in the field.

2) Candidate Conservation Agreement (CCA) without Assurances. Federal Agency cannot be granted assurances via section 10 permit.

3) Candidate Conservation Agreement with Assurances (CCAA). Provides non-federal landowner with assurances that there will be no requirements beyond the agreed to CM's if the species were eventually listed under ESA.

Grazing CCA Example

Goal: Avoid and minimize impacts to populations and individual sage-grouse present on property

Livestock Management in Important Sage-grouse Habitats

Issue: Birds leave leks or abandon nests (i.e., direct impact to nests and brooding hens).

Conservation Measures

Avoid surface disturbance activities or occupancy (e.g., herding or trailing livestock through leks) within 0.6-mile of the perimeter of occupied leks;

Avoid human activity between 6 p.m. and 8 a.m. from March 1 through May 15 within 0.6-mile of the perimeter of occupied leks;

Conservation Measures

Avoid concentrating (high intensity such as when gathering) livestock in areas identified as nesting habitat (March 15- June 30);

Avoid placing salt and minerals, new watering facilities and corrals in areas identified as nesting habitat.

<u>Benefits</u>: Reduces disruptions to lekking and nesting activity.

Grazing CCA Example

Goal: Avoid and minimize impacts to populations and individual sage-grouse present on property

Placement of Fences and Other Livestock Structures

<u>Issue</u>: Mortality from flying into existing or new fences.

Conservation Measures

Avoid construction of new fences and other livestock facilities (corrals, loading chutes, water tanks, windmills, etc.) within 0.6-mile of occupied leks or within nesting habitats;

Relocate, redesign (such as with white-topped steel fence posts) or mark existing fences (e.g., wire markers) that occur within 0.6-mile of a lek and especially where previous collisions have been observed.

Benefit: Correct existing adverse impacts from problem fences and structures, and avoid new hazards.

Questions or More Information