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The Endangered Species Act: A Federal Update on an Evolving Statute

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October 20, 2014

IPAA

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IOGCC Public Lands Subcommittee

* Background of Act
* "Mega Settlement"
* Congressional Action
* IPAA Goals

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ESA Background

- Signed into law by President Nixon in 1973 to protect plant and animal species at risk of extinction due to habitat changes or loss.
- Amendments were made in 1978, 1982, and 1988, while keeping the overall framework of the 1973 Act essentially unchanged.
- The funding levels in the present Act were authorized through Fiscal Year 1992. Congress has annually appropriated funds since that time.
- 2005 Comprehensive ESA reform legislation passes House; not considered by the Senate.
- NEVER intended to be litigation tool.

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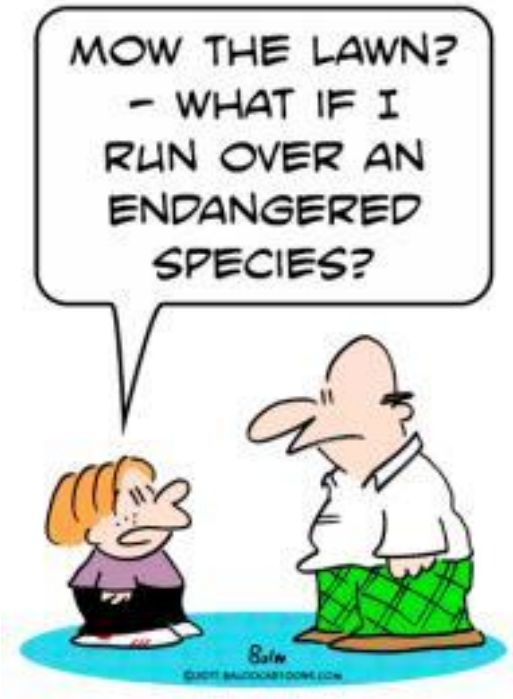
The ESA Report Card

* 2,196 species listed as endangered or threatened (as of October 19, 2014).
* Less than 2% of species "recovered."
* BILLIONS of dollars spent on ESA Compliance: actual amount unknown.



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The Settlement Agreement

* September 17, 2011: Federal Court approves U.S. Fish and Wildlife Service settlement agreement with WildEarth Guardians and the Center for Biological Diversity.
* Over 250 candidate species must be reviewed for final listing as either threatened or endangered under the ESA by 2016.
* 2011 and 2012 FWS Work Plan adopted that covers action on listing, critical habitat petitions and other actions for over 1,000 species.

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Federal Candidate Species for Listing Under Mega-Settlement Agreements

Implications of Mega Settlement

* More compliance costs.
* More litigation.
* More rulemakings.
* More uncertainty for oil and gas producers.

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ESA Collides with Oil and Gas

1) When a federal permit is needed to do something in an area inhabited by a "listed" species. In that situation, the ESA requires the agency from which you are seeking the permit to insure that your proposed activities will not put the survival of the "listed" species in jeopardy, or destroy or adversely modify the species' critical habitat. As part of that process, the permitting agency is required to "consult" with FWS(or NMFS) if it determines that your proposed activities "may affect" a "listed" species. Once the duty to consult has been triggered, the Service is then required to prepare a Biological Opinion (BiOp) on whether your proposed activities will put the survival of the "listed" species in jeopardy. If the BiOp finds that your activities are likely to place a "listed" species in jeopardy, you will have three choices:

   A) you can withdraw your permit application;

   B) you can adopt the "reasonably prudent alternatives" ("RPAs") to your activities that are suggested by FWS (or NMFS);

   C) you can seek an exemption from the requirements of the ESA. You should note, however, that such an exemption is almost impossible to obtain.

2) The second situation is when you are planning to conduct, or are conducting, activities in an area inhabited by a "listed" species, but you do not need a federal permit to conduct your activities. This situation typically occurs when you are conducting your activities on state or private land. In that situation, the ESA makes it illegal to "take" or "harm" the "listed" species or its habitat, unless you have obtained an Incidental Take Permit ("ITA") from FWS (or NMFS).

Congressional Actions

* **House:** Natural Resources Committee form working group to examine the ESA and develop strategies on how to improve it. The work product of this group, was a series of bills rolled into H.R. 4315, the **21st Century Endangered Species Transparency Act.** H.R. 4315 *passed the House on July 29, 2014 with a bipartisan vote of 233-190. Awaits consideration by the Senate.*
* **Senate:** Partisan pressures have thwarted legislative efforts. Species-specific concerns replace talk of comprehensive reform.

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Legal Update – Some Good News

- Lesser Prairie Chicken: Two weeks ago, the D.C. District Court has granted our motion to intervene in the environmentalists' challenge to the 4(d) Rule. This order was not unexpected, but still was welcome news. The Court also officially "filed" the Motion to Transfer the D.C. action to the Northern District of Oklahoma that we submitted with the Motion to Intervene.

- Dunes Sagebrush Lizard: After a few months of silence from the D.C. District Court following the culmination of briefing in the DSL action, the court has upheld the Service's decision to withdraw its proposed listing of the DSL under the Endangered Species Act (ESA).

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Recent Administrative Proposals

* Critical Habitat
* Adverse Modification
* Exclusion
* Pre-Listing Voluntary Conservation Credits

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IPAA ESA Strategy

* Member company driven Task Force
* National Endangered Species Act Reform Coalition (NESARC)
* Created esawatch.org to educate with the toolkit and provide up to date information about ESA
* Daily communications on ESA news and weekly summary newsletter

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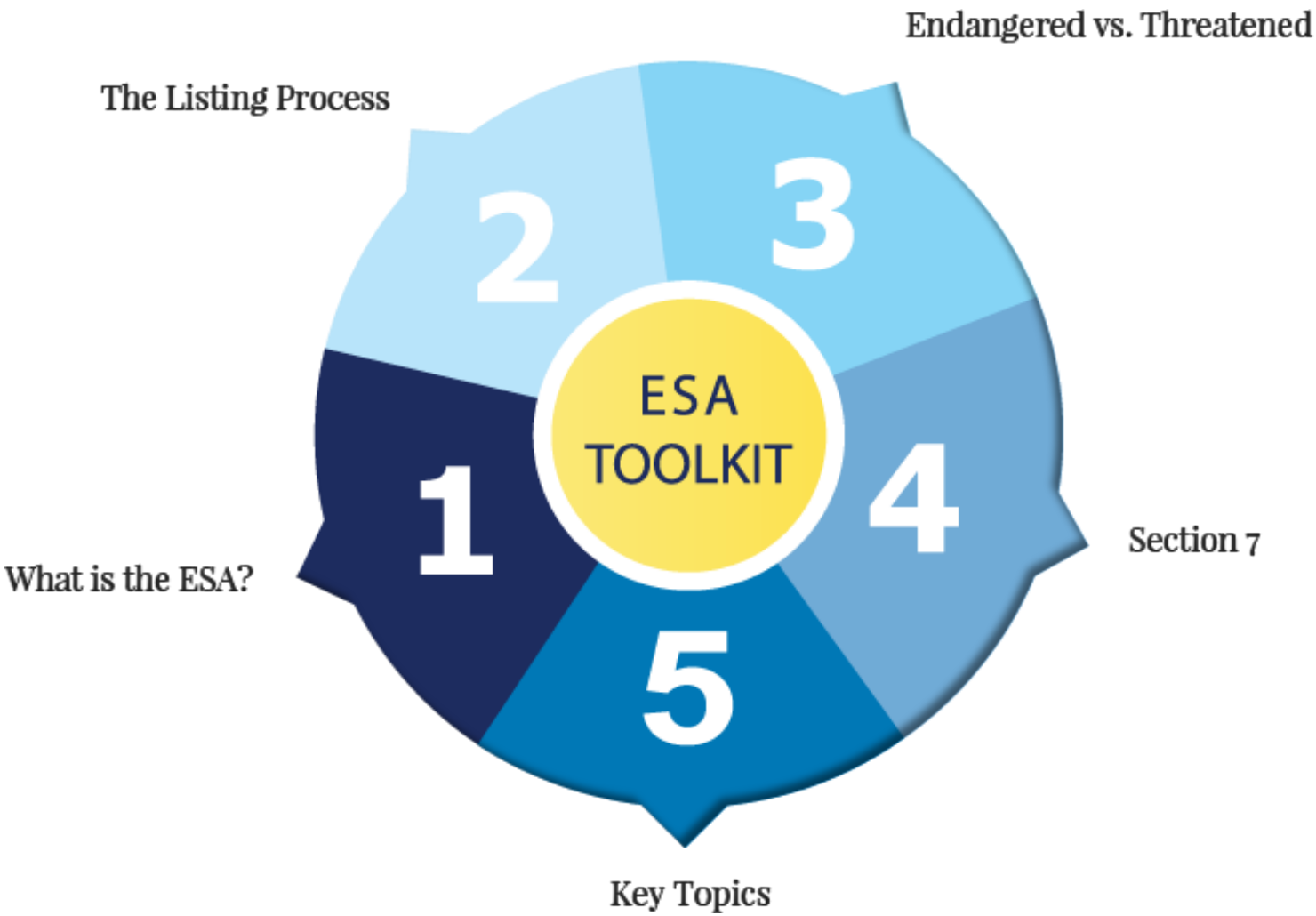
The ESA Toolkit



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QUESTIONS?

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