

Large Scale Solutions for Resolving Endangered Species Act Conflicts

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When we last left our hero...



Legal Settlement Agreement



Legal Settlement Agreement between USFWS and Two Environmental Organizations (Center for Biological Diversity and Earth Guardians)

- Lawsuits filed to force USFWS to process the listing of 757 species to determine if each at risk species could be considered endangered or threatened under Section 4 of the ESA
- USFWS established a schedule to review the status of species petitioned for listing
- Over 100 species have received protection under the ESA as endangered or threatened since the Settlement Agreement was signed

757 Species Details



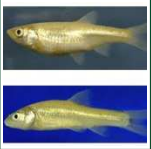
Many of the species currently under review by USFWS are very rare and have geographically small or isolated ranges

- Georgetown and Jollyville Plateau salamanders in central Texas

Other species may occupy large areas within a state or even in a county or counties with multiple uses exist or are planned:

- New Mexico meadow jumping mouse
- Jemez Mountain salamander in New Mexico

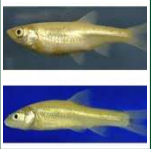
Multi-State Species



Many other species have large multi-state ranges that have existing or traditional uses that are in direct conflict with potential protection and conservation strategies.

- Greater sage grouse (11 states and 2 provinces)
- Lesser prairie chicken (5 states)
- American wolverine (7 states)

Multi-State Species



- Where species exist over a wider range
- there are multiple uses and stakeholders,
 - there seems to be a tendency for the government to promote broad-based solutions as the best way to resolve ESA conflicts.

Virtues of Regional Planning



- The virtues of regional planning solutions are obvious:
- **Large scale ecosystem protection** that promotes the conservation and recovery goals of the ESA
 - **Large scale financing** that spreads the costs to all affected parties so one party does not have pay an inordinate amount of money to protect a species that allegedly benefits all of the public
 - **More flexibility** in establishing protection strategies for the species
 - **More certainty** in establishing planning guidance
 - **Fair market value for lands** set aside as preserve mitigation

Forms of Regional Planning



- Regional Habitat Conservation Plans (ESA--Section 10(a)(1)(B) Incidental Take Permit)
- Candidate Conservation Agreements with Assurances (ESA—Section 10(a)(1)(A) Incidental Take Permit)
- Federal—State Cooperation (ESA--Section 6 and Section 4(d))

Section 10- Habitat Conservation Planning



Habitat Conservation Plans were established in 1982 to resolve conflicts between affected private parties (landowners, developers, resource extractors, etc.) and the federal government

Based on whether “take” of endangered or threatened species has occurred, jeopardy has been avoided, and sufficient mitigation has been provided for the “take” that has been assessed

"Take"



Take is defined as actions that may result in death or injury to the species such as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.

Harm is the key term within the take definition.

"Harm"



Harm would include actions which actually kills or injures wildlife through significant modifications or degradations of occupied habitat.

This is the key element in the ESA and it is the most misinterpreted element in the ESA.

Take/Mitigation Ratios



Individual permittees usually assessed the take/mitigation ratio in terms of occupied habitat based on the harm definition.

- Destruction or modification of habitat plays a role but take of a species and the ability to mitigate for take of the species should be first thought of in terms of the affect to that species not the size of the vegetative patch or rock formation or the pool of water that the species may occupy unless it can be shown that much is essential to the species

Regional Habitat Conservation Plans



Regional Habitat Conservation Planning was born outside of Palo Alto, California

- San Bruno Mountain Regional HCP

Second RHCP in Palm Springs/ Desert

- Coachella Valley RHCP

San Bruno Mountain RHCP



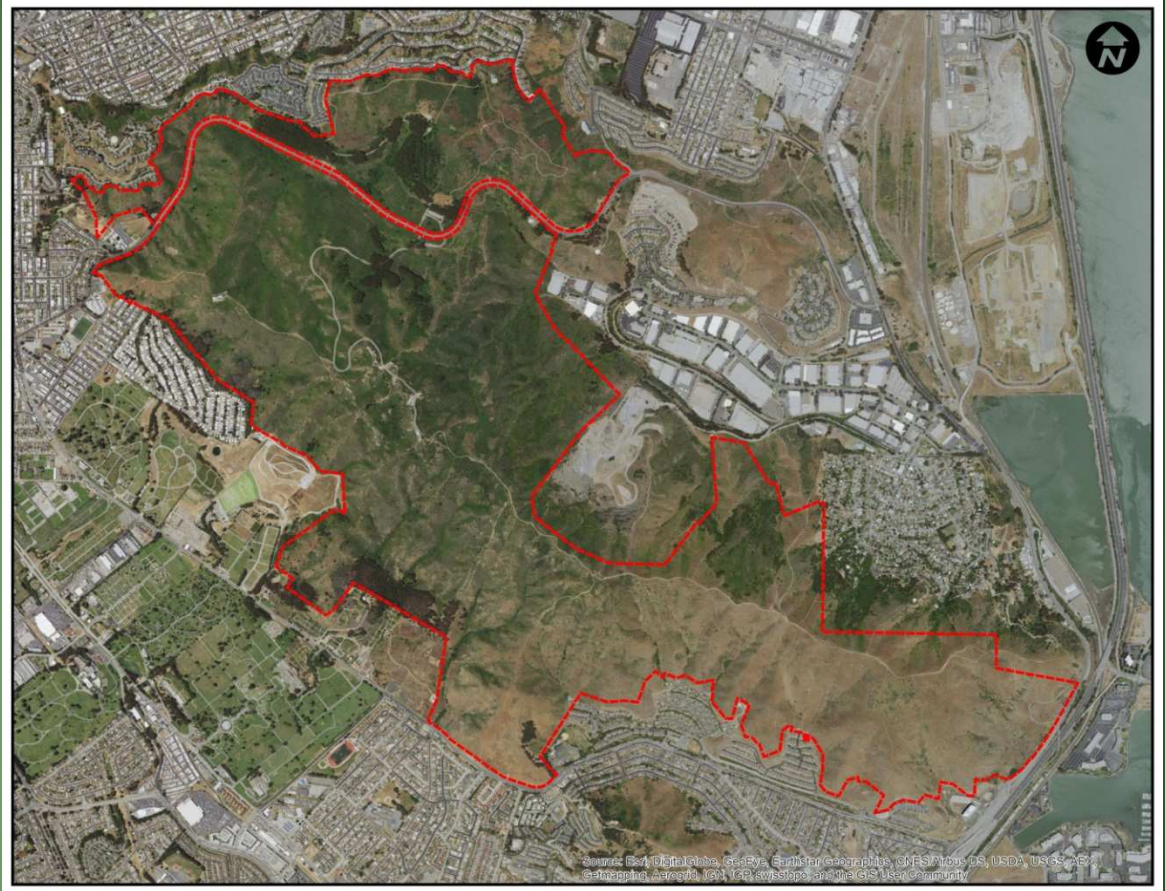
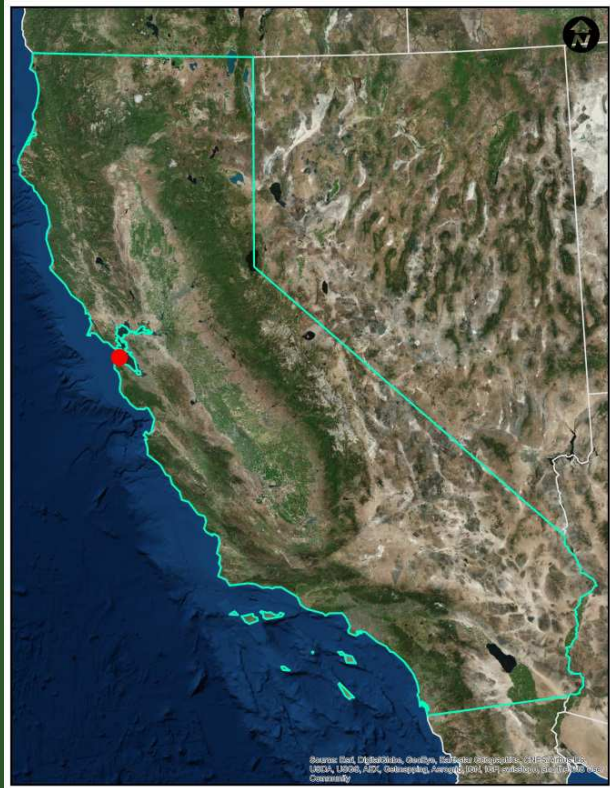
- A number of stakeholders had been in negotiations as to how the area would be developed for (more or less) a decade
- A plan was drawn up, natural areas set aside, and limited (and primarily) residential development determined
- Some environmentalists did not like the outcome and petitioned for two butterflies to be listed in an attempt to further limit development

San Bruno Mountain RHCP



- The USFWS reviewed the plan following the listing of the two butterflies and concluded that the plan provided adequate protection
- However, the problem was that there was not a section in the ESA to allow entities other than the federal government to resolve their conflicts with the prohibitions of the ESA
- Thus, Section 10(a)(1)(B) incidental take permits were born

San Bruno Mountain



San Bruno Elfin Butterfly



Mission Blue Butterfly

Coachella Valley RHCP

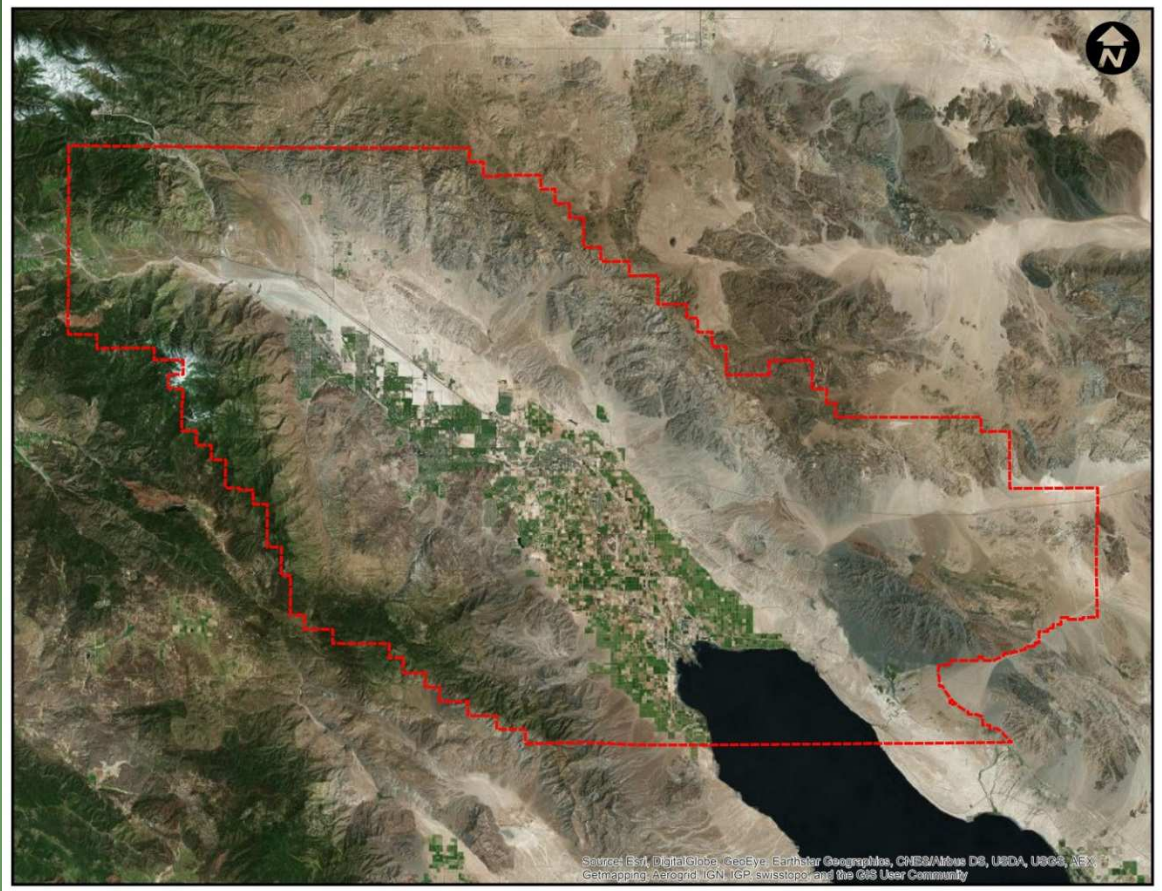
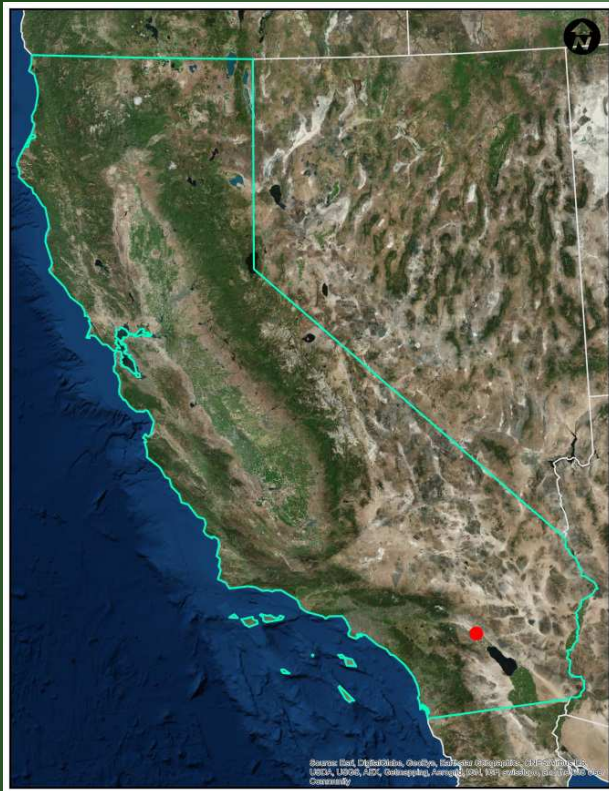


The second Regional Habitat Conservation Plan was in Coachella Valley (Palm Springs/Desert) in the late 1980s

- Coachella Valley Fringe-toed Lizard
- Defined range for the species
- Developers controlled the plan

Mitigation fee was low for developers

Coachella Valley



Fringe-toed Lizard

Photo credit: USFWS

Two Plans = Two Success Stories



The Nature Conservancy even made a video on how successful the Coachella Valley HCP

One problem—there were only 11 HCPs authorized at the time and there was a very unclear path to seeking any Section 10 authorizations let alone how to understand the success of these two regional plans

Why the Success?



San Bruno Mountain RHCP was the result of a decade of negotiations with all landowners (generally) in favor of the outcome given the restrictive laws of California and the localities involved

Coachella Valley was controlled by the affected parties and protection of the lizard and land development were both given serious consideration

- The science as to how large the preserves should be has been recently challenged

How the Successful Concept Changed



Palila v. Hawaii Dep. of Land and Natural Resource II

Sheep and a bird near Mauna Kea and Mauna Loa on the Big Island (Saddle Road)

Critical Habitat Destruction

- Decision upheld the concept that critical habitat could be protected regardless if the species occupied the area on a regular basis.
- Concept of preventing critical habitat destruction soon morphed into the idea that all “habitat” (regardless of if it was critical or occupied) should be protected

Palila v. Hawaii Dep. of Land and Natural Resource II



Created a misconception on take/mitigation strategies especially in Regional Habitat Conservation Planning

Ecosystem Protection became the goal regardless of whether or not it adhered to the tenets of endangered species law

HCPs Solving ESA Conflicts



At the very time that HCPs were in their infancy for solving ESA conflicts:

- Over 100 species were required to be processed as endangered or threatened by a settlement between environmental groups and the Interior
- Regional HCPs changed from a mechanism to resolve ESA conflicts to protecting ecosystems
- Environmental Groups became very involved in any RHCP planning process making decision-making based more on political science
- ESA Section 6 grant money for research was being funneled to scientists who began to make speculative generalizations about species not supported by their research
- Environmentalist attorneys began using the threat of legal action

The Result...



The result was complete breakdown of scientific and regulatory integrity of regional habitat conservation planning

- Less money, less time, more certainty

The Other Success Stories



You have probably heard about the other “success” stories, BUT...

- Without \$2 billion dollars in bonds for the southern California regional HCPs, or...
- Hundreds of millions of dollars earmarked from Congress to prop up some of the central Texas plans, or...
- Dramatic cutbacks to the early expansive goals of other regional plans

Most Regional HCPs



What you do not hear is that...

Most Regional HCPs are languishing, unless...

- More deference is given to the legal language of the ESA and the science that supports planning concepts.
- That will not be happening soon

Candidate Conservation Agreements with Assurances



Section 10(a)(1)(A) Incidental Take Permit

CCAAs were promoted by Secretary of Interior Bruce Babbitt in the middle nineties as a way to assure landowners, large developers, and major resource extractors that they could preclude the listing of an at-risk species in the future if the affected parties could establish certain planning guidance that provide conservation to that at-risk species.

CCAAs, Part of a Trio



Part of a trio of rules (others being Safe Harbors and No Surprises) by Secretary Babbitt

Reason:

- ESA had created significant economic uncertainty and Secretary Babbitt saw this as one of the remedies to ease affected party frustration and backlash

Preclude Listing



If authorized, a CCAAs could preclude the listing of a species because sufficient conservation measures were in place to halt the decline and promote the recovery of a species

Very foggy implementation in the nineties as it was deemed, along with Babbitt's other proposals, more political than substantive

CCAA Case Study: Barton Springs Salamander



Inhabited a man-made swimming pool that was spring fed by a large aquifer in Austin, Texas

“Documented” to be the most endangered species in North America

- Only seven (7) individuals remained in the pool with upwards of 1,500 daily swimmers in the summer

Barton Springs Salamander



The species was petitioned to be listed that deemed the salamander safe from the 1,500 swimmers but imperiled by development upstream in the aquifer's recharge zone

Since then the non-point pollution rules in the aquifer's recharge zone were deemed to be some of the most stringent in the nation,

- Governor George W. Bush protested the petition to list the salamander

Barton Springs CCAA



Secretary Babbitt agreed and a CCAA incorporating those non-point pollution rules was authorized

Environmental groups sued...won...the salamander was listed but USFWS incorporated the same non-point pollution rules as protection strategies for the listing

Endangered Barton Springs Salamander



I was very involved in those discussions and wanted to point out one irony:

- The major cause of death or injury was from the cleaning activities of the pool

Change in pool cleaning activities resulted in a population rise of 1,500 individuals (not 7 as a UT professor claimed) and the number has remained consistent with thousands more residing in the aquifer

Recent CCAAs



Review of the recent CCAAs for species required to be processed as part of the Settlement Agreement reveals a Mixed Bag:

- Dune sagebrush lizard
- Greater sage grouse
- Lesser prairie chicken

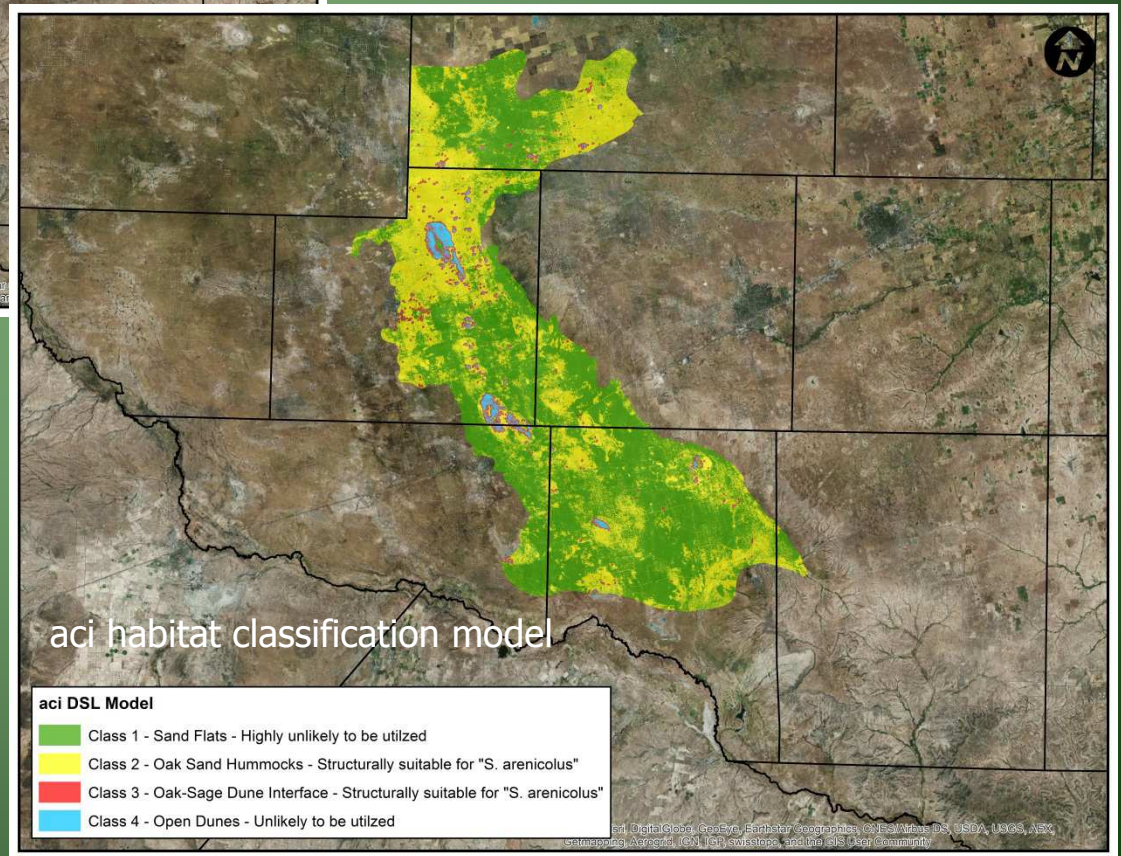
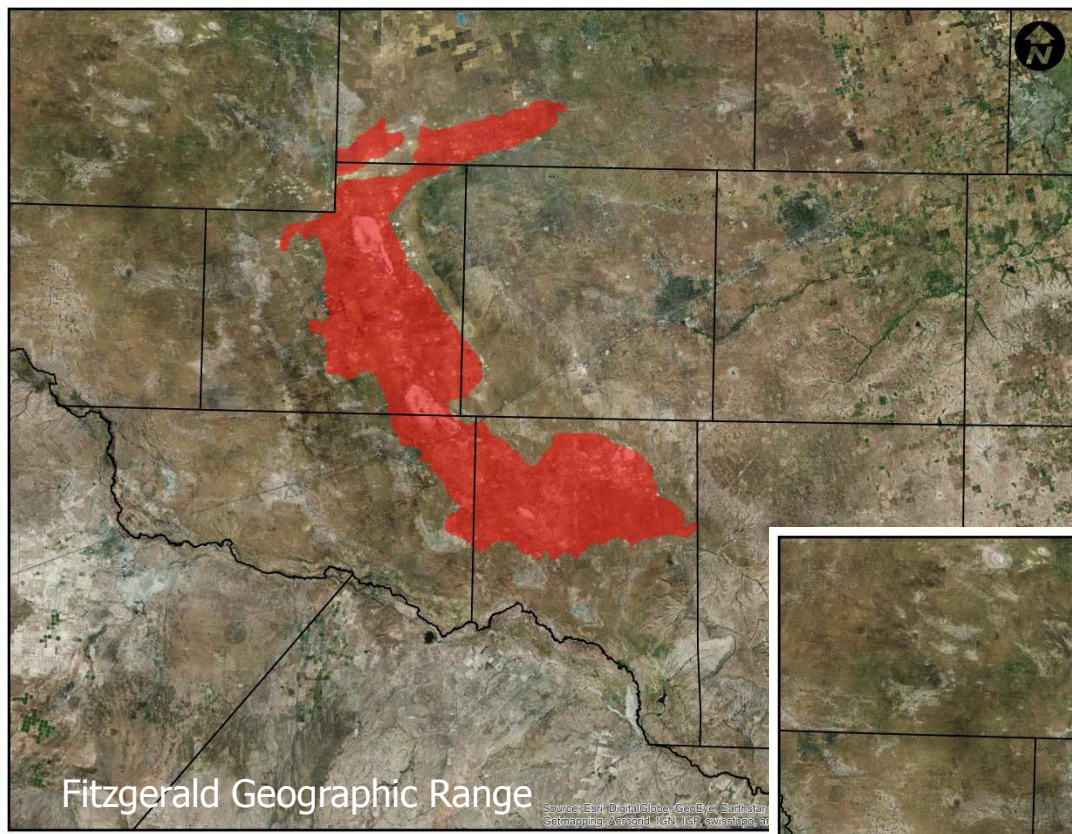
Dune Sagebrush Lizard



In Texas (not New Mexico)---Political deal

- No real effort to protect the DSL except a revegetation plan for disturbances resulting from oil and gas activities
- You cannot revegetate an arid land unless you significantly raise the disturbance acreage price
 - Growing crops in the desert
- Should have used an avoidance strategy and minimization strategy utilizing horizontal drilling

Dunes Sagebrush Lizard (Texas)



Greater Sage Grouse



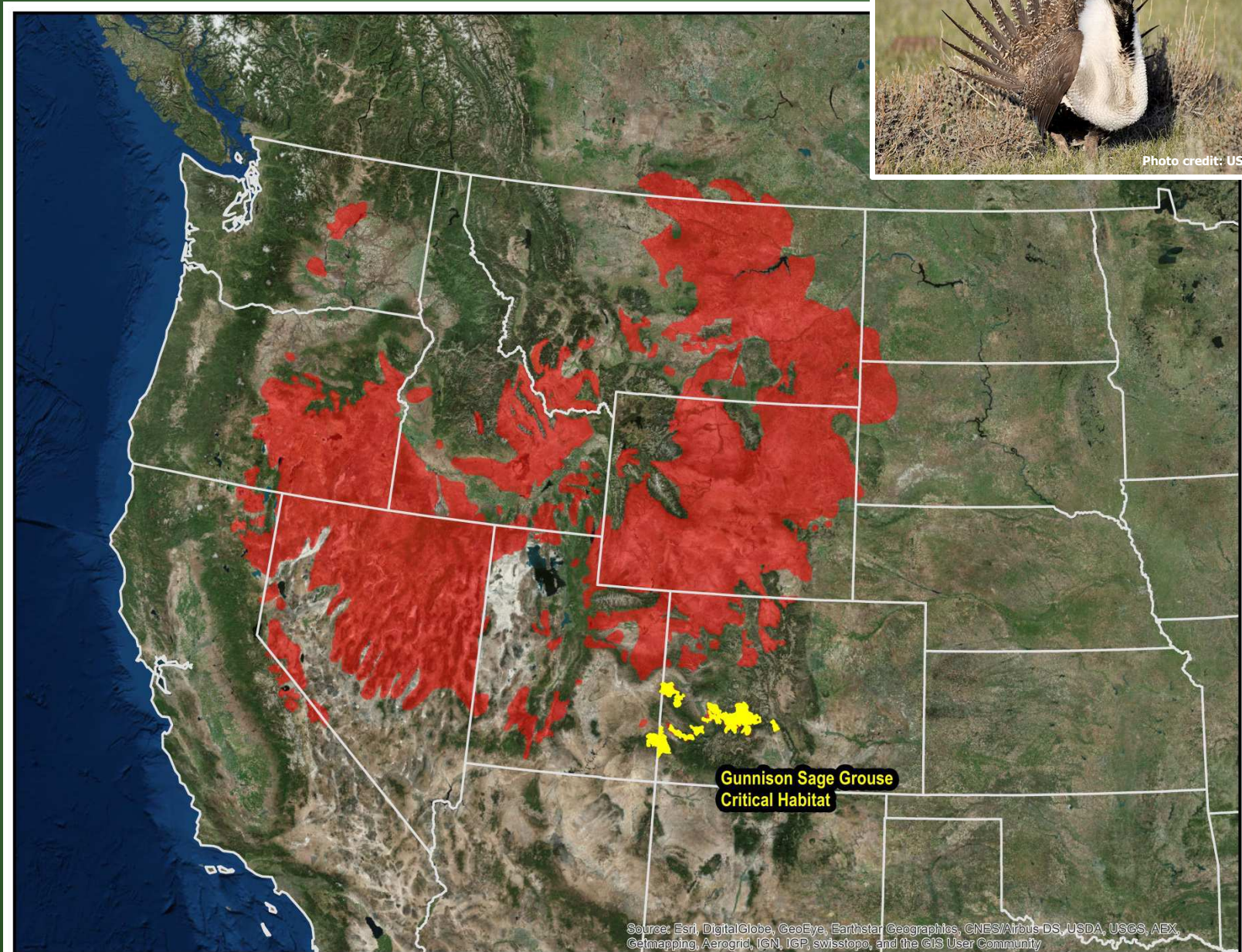
The CCAA set up a process for conserving species that allowed USFWS to preclude listing

If this is a success—why is everybody suing?

- 200,000 individuals

For me, the federal government accomplished their main goal which was to preclude and minimize traditional, private activity on BLM lands

Sage Grouse Current Range



Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community

Lesser Prairie Chicken

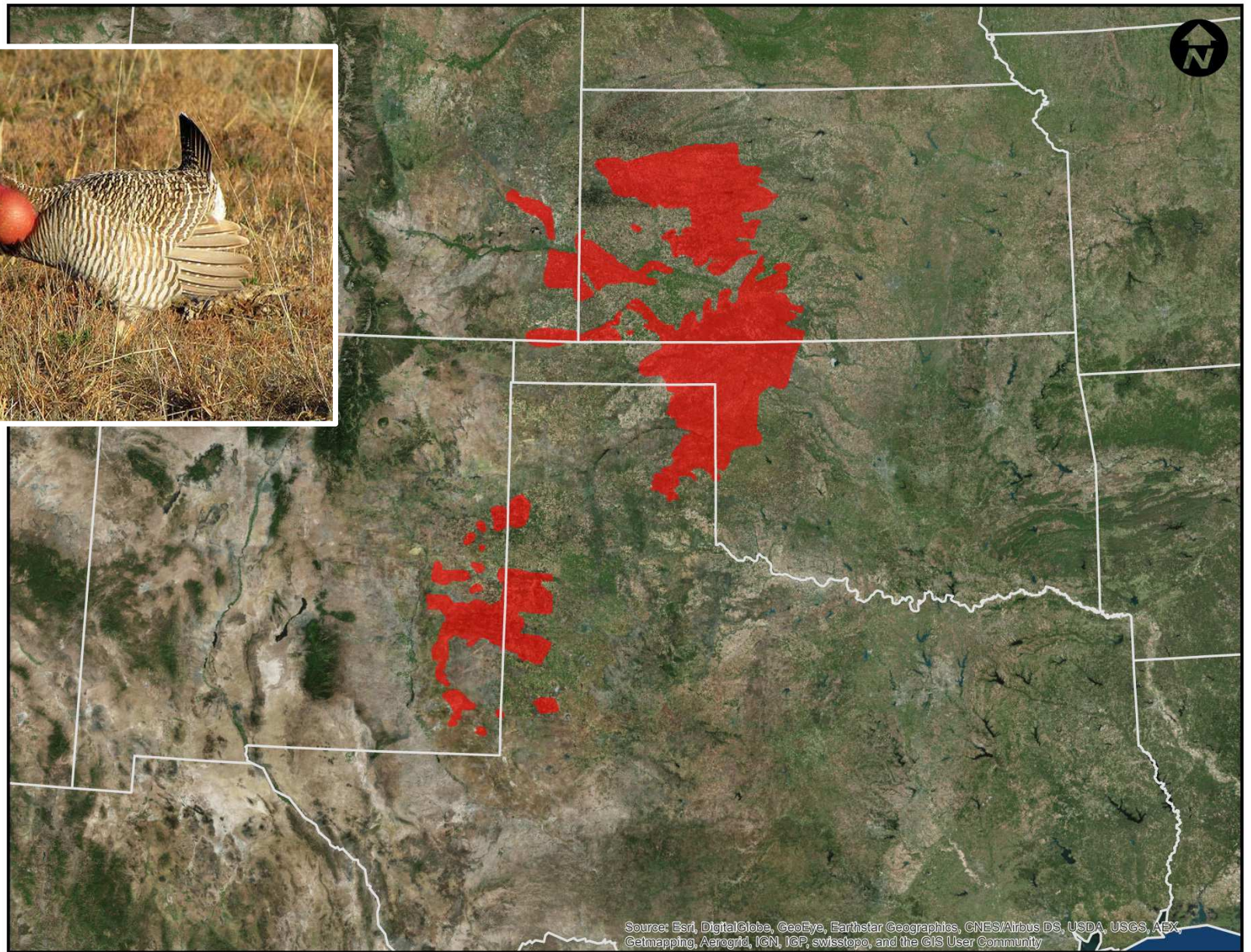


Despite an agreement that the conservation measures in the CCAA for the chicken were adequate, the USFWS listed the species

The result, way less flexibility in the plan and retention of command and control by USFWS

Took away the incentives for landowners to conserve

Lesser Prairie Chicken Current Range



Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community

Federal-State Partnerships



States have historically been the primary protector of wildlife

By the numbers—more agents and regulators than federal government

ESA—Section 6 is the section of the act that defines federal state cooperation

Section 6 Conservation



ESA—Section 6 is the section of the act that defines federal state cooperation

Main function is to cooperate in conservation management

- Prelisting conservation
- Listings of Species
- Consultations
- HCP Planning
- Recovery

Section 6 Funding



Also, states disperse research funding on endangered, threatened, and at-risk species

That funding source has changed dramatically over the years

- Many grants are dispersed to researchers who may or may not be biased in their approach
- Dispersed in a manner that escapes public scrutiny

Section 6 Funding



Result—one day an affected party discovers that a species is petitioned to be listed based on research funded through Section 6

The best scientific information available may not be conducted following standard methodologies and gross generalities on threats, population, and range decline becomes the gospel

- Black-capped vireo

ESA—Section 4(d)



The states can enter into agreements to conserve species through the 4(d) Rule

- Designates species as threatened
- Establishes rules that modify take rules and establishes guidance or goals for recovery of the species
- Poor track record for recovery of species
 - Ex—Grizzly bear
 - Raise the bar when the targets are achieved

Conclusions



What does all this gibberish mean?

- Obviously, we have to reform the ESA
 - However, given the entrenched attitudes that will be difficult
 - I was involved in the reform efforts in the 1990's
 - A lot of talk—No action

Conclusions



The potential listing of 757 species that, for the most part, nobody has ever heard of will intensify the argument and once again bring regional “ecosystem” solutions to the table

The only way to change the behavior is to shine a little light of the process

Light on the Process



Insist that the science be subjected to some scrutiny before it becomes the basis for the listing of a species

Peer review is the biggest farce of an argument I have ever heard. Just because you followed some presubscribed method doesn't make the results correct. Science is trial and error. There should be multiple tests of an experiment. Isn't that the way it is supposed to work.

I am tired of being told, "What the science says," by people who have the flimsiest of evidence.

Increase Funding for Recovery Planning



- Recovery planning funding should be increased and tied to specific management actions and specific goals.
- How come \$50,000 is spent on a recovery plan and \$10 million is spent on a regional HCP/CCAA when the regional HCP/CCAA is supposed to be based on the recovery plan.

Take and Mitigation



- Take and mitigation should be based on realistic assumptions. Isn't it about time that we stop trying to solve all the world's problems through one regional HCP or CCAA?

Affected Parties



- Affected parties are usually the ones who have to pay the most in the process. Should they not have more control of the process?

Questions and Answers



Thanks for your time

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Balcones Canyonlands Preserve "Austin-Travis Lakes" Watershed

