



Threatened or Endangered Species on State Endowment Trust Lands

This guidance document is not a new law. This document is an agency interpretation of existing law, except as authorized by Idaho Code or incorporated into a contract. This document may reference other documents that are not currently available online. Copies of these reference documents may be obtained by filing a public records request at <https://www.idl.idaho.gov/public-records-request/>.

Agency Contact

Division Administrator, Trust Land Management

Purpose

The purpose of this policy is to comply with the Endangered Species Act (ESA) and other federal laws associated with the ESA.

Applicability

Applies to all land management activities on state endowment trust land.

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Background

A variety of wildlife species, that are listed as either threatened or endangered species under the Endangered Species Act (ESA), inhabit some Idaho state endowment trust lands. The ESA prohibits the “taking” of any threatened or endangered species by “any person subject to the jurisdiction of the United States...within the United States.” Therefore, any endowment land use activity which would result in the “taking” of a threatened or endangered species would be prohibited under the Act except an authorized “incidental take.”

In the early 1980’s, Congress amended the ESA to allow “incidental taking” of threatened or endangered species, if the Secretary of the Interior (the Secretary of Commerce is the authorizing entity for anadromous fish) gave permission. There are stringent procedural requirements that must be met before a permit will be granted. An applicant must submit a conservation plan to the Secretary of the Interior that “...specifies:

- (i) the impact which will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.”

Following formal negotiations, including review of the conservation plan, between the Secretary of Interior (or Secretary of Commerce) and the applicant, an “incidental take” permit may be issued.

The Idaho Department of Lands (IDL) recognizes the importance of having the ability to enter into negotiations with the US Department of Interior Fish and Wildlife Service and the US Department of Commerce National Marine Fisheries Service (Services); On April 13, 2004, the State Board of Land Commissioners authorized IDL, when appropriate, to enter into formal negotiations with the Services for the purpose of acquiring incidental take coverage for listed species on state endowment trust lands. The potential lands included and species covered would depend upon the situation.

Land is not considered critical habitat until designated as so by the Services. A critical habitat designation can include state and private lands, but the designation of critical habitat only restricts federal activities. A critical habitat designation does not affect non-federal activities on state or private lands unless the activity involves federal funding, a federal permit, or other federal action.

Absent federal funding, a federal permit, or other federal action, the scope of a state or private entity’s liability is defined by the taking provisions of ESA Section 9, which apply equally to all members of a species whether within or beyond land designated as critical habitat. This point bears repeating: the designation of critical habitat does not make it more likely that a court will conclude that non-federal activities adversely affecting habitat have resulted in a taking.

Non-federal activities adversely affecting habitat can, however, result in an ESA Section 9 taking since Services regulations provide that a taking occurs if there is “significant habitat modification or degradation where it actually kills or injures wildlife.” 50 C.F.R. § 17.3. The primary difference between the prohibitions on destruction of critical habitat and the § 9 regulations prohibiting adverse habitat modification is the requirement that § 9 actions can only be pursued if there is proof of actual death or injury to a listed species.

GIS layers of critical habitat can be found on the 'USFWS Critical Habitat Portal' website at: <http://criticalhabitat.fws.gov/>

1. Associated Policies

- A. 16 U.S.C. sections 1531-1544, The Endangered Species Act (ESA)
- B. Land Board Policy 4/13/2004: Incidental Take Coverage under the Endangered Species Act
- C. Department Policy 1904: Wildlife Policy on State Endowment Trust Lands

2. Definitions

Critical Habitat: 16 U.S.C. § 1532 (5) defines this as:

“(A) The term “critical habitat” for a threatened or endangered species means—

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of [section 1533](#) of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [section 1533](#) of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.”

Endangered Species: 16 U.S.C. § 1532(6) defines this as “...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 whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.”

Harass: As further defined in 50 C.F.R., section 17.3 states: “Harass in the definition of ‘take’ in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”

Harm: as further defined in 50 C.F.R. section 17.3 “...means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”

Incidental Take: 16 U.S.C. § 1539 (a)(1)(B) defines this as “...any taking otherwise prohibited by § 1538 (a)(1)(B) [take any such species within the United States or the territorial sea of the United States;] of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”

Plant: 16 U.S.C. § 1532(14) defines this as “...any member of the plant kingdom, including seeds, roots and other parts thereof.”

Take: 16 U.S.C. § 1532(19) defines take as “...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

Threatened Species: 16 U.S.C. § 1532(20) defines a threatened species as “... any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”

3. Policy

- A. The IDL will not “take,”(except for any authorized incidental take), any federally listed endangered or threatened species. This includes direct forms of harm such as killing an individual, and indirect forms of harm such as the destruction of habitat which kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.
- B. Resource management staff will cooperate with adjoining land managers as appropriate in maintaining or improving the habitat of threatened or endangered species without burdening or violating the intent expressed in the enabling legislation and endowment trust mandate. Any cooperative habitat agreements or measures require the appropriate Bureau(s) and Threatened and Endangered Species Program Manager notification and discussion.
- C. Resource management staff will notify Idaho Fish and Game before any management activity occurs on endowment lands known to contain designated “critical habitat.” In cases where IDFG contacts the Services, and additional discussions are needed, any communication between IDL and the Services requires the appropriate Bureau(s) and Threatened and Endangered Species Program Manager notification and discussion.
- D. ESA Section 9 imposes different prohibitions on acts involving endangered plants from those involving endangered fish and wildlife. A listed plant species occurring on state endowment trust land generally will not be protected by ESA Section 9 unless it is protected under an applicable state law. At this time, there are no applicable Idaho laws. Plants on non-federal land will be protected by ESA Section 7 if a non-federal landowner applies for a Habitat Conservation Plan, or if an activity on non-federal land is subject to federal permitting. (Stanford Environmental Law Society, The Endangered Species Act, p.114, 2001.)

Prohibited acts in ESA Section 9 (16 U.S.C. § 1539(a)(2)) are listed as:

“Except as provided in sections 1535 (g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

- (A) import any such species into, or export any such species from, the United States;
- (B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law;
- (C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- (D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.”

- E. If other agencies (IDFG, Services) request modifications in IDL planned management actions, and these requests are viewed as beyond the minimum necessary for ESA compliance by IDL’s Executive Staff, there must be appropriate compensation for the restricted property rights. In situations where a permanent encumbrance is appropriate, such lands should be targeted for sale or exchange to an entity capable of long-term protection or preservation.

4. Procedures

Not applicable

5. Exception Authorization

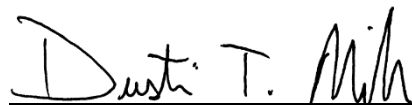
None

6. Revision History

06/30/2011	New department policy.
06/18/2020	Version 2.0.
01/01/2024	Version 2.1, renumbered from Policy #5 to #1905 and reformatted. No content changes; review due by 6/18/2025.

7. Implementation

This policy revision is effective immediately and will remain in effect for five years unless amended, replaced, or rescinded prior to expiration.



DUSTIN T. MILLER
Director

January 1, 2024
Date