

# **AOGA Educational Seminar**

**Endangered Species Act**

**Legal Challenges**

**Federal Initiatives**

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# Overview of Presentation

- ESA overview
  - What happens after listing?
  - Listed species in Alaska
  - State of Alaska involvement
- Other legal challenges
- Federal initiatives

# ESA Overview

- Administration
  - National Marine Fisheries Service
    - Authority over marine species
      - Ex: Cook Inlet beluga, ice seals, stellar sea lion
  - U.S. Fish & Wildlife Service
    - Authority over fresh water fish and all other terrestrial species
      - Ex: polar bear, sea otter, walrus

# ESA Overview

- Primary elements of the ESA
  - Section 4:
    - Listing decisions, critical habitat designations
  - Section 7: Consultation requirements
  - Section 9: Prohibition of unauthorized takes
  - Section 11: Enforcement provisions
    - Authority for citizen lawsuits

# ESA Overview

- Definitions:
  - Endangered: in danger of extinction throughout all or a significant portion of its range
  - Threatened: likely to become endangered within the foreseeable future throughout all or a significant portion of its range

# ESA Overview

- 5 factors for listing decisions:
  - Present or threatened destruction, modification or curtailment of the species' habitat or range;
  - Over-utilization of the species for commercial, recreational, scientific or educational purposes;
  - Disease or predation;
  - Inadequacy of existing regulatory mechanisms; or
  - Other natural or manmade factors affecting the species' continued existence.
- Any one of the factors is sufficient to support a listing determination

# What Happens After Listing?

- Designation of critical habitat
  - Supposed to be designated at time of listing or within one year
  - Specific areas that contain physical or biological features essential to a species' conservation
  - Economic impacts must be considered
  - May exclude areas where benefits of exclusion outweigh benefits to species

# What Happens After Listing?

- Section 7 consultations:
  - Consultation: For projects that have a federal nexus, federal agencies must consult with NMFS or FWS on any project that may affect a listed species or its critical habitat
    - Federal nexus: Projects that require federal approval, permit or funding
    - Action agency must ensure the project is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat
  - Biological opinion:
    - Agency's views on whether the project jeopardizes a listed species or destroys or adversely affects critical habitat
    - If jeopardy is found, the agency must identify reasonable and prudent alternatives

# What Happens After Listing?

- Section 7 consultations:
  - Time periods:
    - Consultation = 90 days (up to 150 days or longer by agreement)
    - Biological Opinion = additional 45 days
  - Potential consequences:
    - Restriction or prohibitions on activities in critical habitat areas for listed species
    - Ex: no discharges, no lease sales

# What Happens After Listing?

- Section 9 prohibition of unauthorized takes
  - Illegal to “take” a listed species within the U.S. or the territorial sea of the U.S. or upon the high seas
  - Definition of “take” is broad: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect
    - Has hindered public and private development
    - Can result in restrictions on habitat modification
    - Does not apply to subsistence use by Alaska Natives or non-Native permanent residents of Alaska Native Villages
  - Exceptions: incidental takes (Sec. 7; Sec. 10)

# What Happens After Listing?

- Section 11 citizen suit authority
  - Any person may commence a civil suit on his own behalf
    - To enjoin any person, including the U.S....alleged to be in violation of any provision of the ESA; or
    - To compel the [FWS or NMFS] to apply section 4(d) or section 9 prohibitions with respect to the taking of any resident listed species; or
    - Against the [FWS or NMFS] where there is alleged failure to perform an act or duty under section 4 which is not discretionary
  - Must be preceded by 60-day notice of intent to file an ESA lawsuit

# Listed Species in Alaska

- Endangered Species in Alaska
  - Short-tailed albatross (FWS)
  - Eskimo curlew (FWS)
  - Aleutian shield fern (FWS)
  - Stellar sea lion (western DPS) (NMFS)
  - Whales (NMFS)
    - Bowhead, Cook Inlet beluga, fin, humpback, North Pacific right

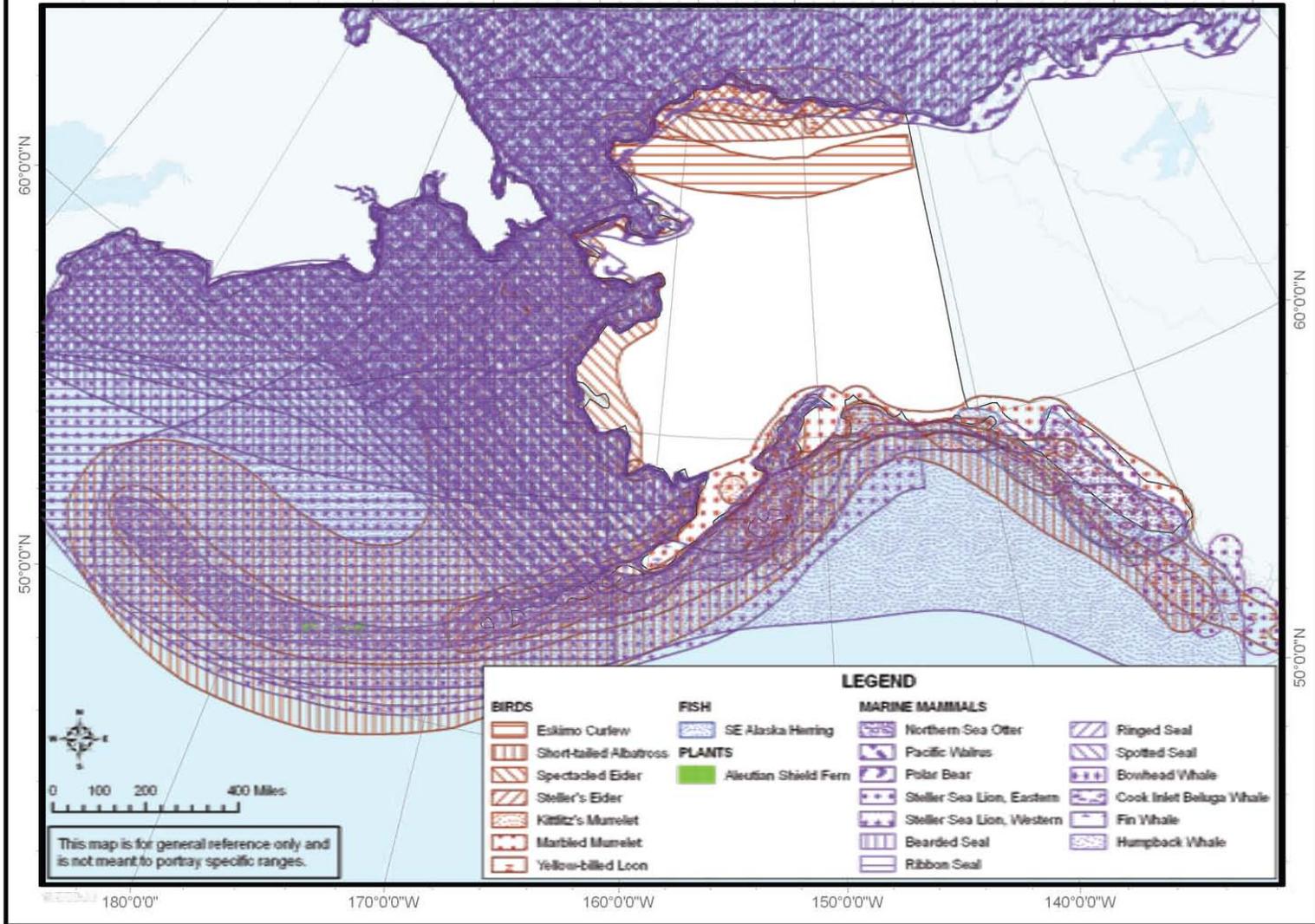
# Listed Species in Alaska

- Threatened Species in Alaska
  - Spectacled eider (FWS)
  - Steller's eider (FWS)
  - Northern sea otter (southwest DPS) (FWS)
  - Stellar sea lion (eastern DPS) (NMFS)
  - Polar bear (FWS)

# Listed Species in Alaska

- Candidate species or species under consideration for ESA protection:
  - Ice seals (NMFS)
    - Bearded, ringed
  - Black-footed albatross (FWS)
  - Lynn Canal-SE AK herring (NMFS)
  - Pacific walrus (FWS)
  - Queen Charlotte goshawk (FWS)
  - Kittlitz's murrelet (FWS)
  - Marbled murrelet (FWS)
  - Yellow-billed loon (FWS)

# Range of Listed or Candidate Species



# Impacts of Listing

- Litigation
  - All final agency decisions subject to citizen lawsuits (e.g. listing, critical habitat designation)
- Project delay
  - Agency decisions/consultation process take time
- Increased costs
  - Consultation is expensive
  - Litigation is expensive
- Development projects restricted or prohibited
- Competing critical habitat needs and recovery objectives

# State of Alaska Involvement

- Ongoing lawsuits:
  - Polar bear (listing; 60-day notice for critical habitat)
  - Cook Inlet beluga (listing)
  - Stellar sea lion (proposed closures for fisheries)
  - Ribbon seal (intervened to support NMFS' decision not to list)
- State-funded grants
  - \$450,000 to UAF to collect data about the consequences of ESA listings and critical habitat designations

# Other Legal Challenges

- Chukchi Sea Lease Sale 193
  - Court halted all lease sale activity in July 2010
  - Draft SEIS – comment period closed Nov. 30, 2010
- 2007-2012 OCS Oil & Gas Leasing Program
  - Court vacated in April 2009
  - Includes Chukchi Sea Lease Sale 193
  - DOI submitted Final Revised plan to court on Dec. 23, 2010
- State of Alaska lawsuit challenging moratorium on OCS development in the Arctic
  - Court ordered clarification from parties on whether a moratorium exists on Dec. 28, 2010. Parties' responses due Jan. 2011

# Other Legal Challenges

- Incidental Take Regulations for the Beaufort Sea and Chukchi Sea
  - Beaufort: CBD filed suit on July 30, 2007. ITRs upheld by the U.S. District Court for Alaska. Court's decision affirmed by the Ninth Circuit on Dec. 2, 2009.
  - Chukchi: CBD filed suit on July 8, 2009. Briefing completed July 2010. Decision on the merits or notice setting date for oral argument expected Spring 2011.
- Shell's 2011 drilling program

# Federal Initiatives

- “Wildlands” Initiative
  - Secretarial Order directing BLM to designate areas with wilderness characteristics as wildland and manage those lands to protect their wilderness values
  - Protection akin to congressionally designated wilderness areas
  - Could lock up thousands of acres of federal lands from development, including oil and gas development
  - May impact planning process for NPR-A
- Integrated Activity Plan /Environmental Impact Statement for NPR-A
  - Scoping phase
  - Wilderness designations to be reviewed
  - Draft IAP/EIS expected Jan. 2012; ROD expected Sept. 2012

# Federal Initiatives

- ANWR wilderness designations
  - FWS reviewing 3 areas of ANWR, including the coastal plain, for wilderness designation
  - Wilderness designation would foreclose any oil and gas exploration, production and development
- 2012-2017 OCS Oil & Gas Leasing Program
  - Cook Inlet, Chukchi Sea and Beaufort Sea will be considered for potential leasing
  - Scoping meetings will be held in 8 locations in Alaska in Feb. 2011
- National Ocean Policy/Coastal & Marine Spatial Planning
  - Nine regional planning bodies, including Alaska/Arctic
    - Members will consist of federal state and tribal authorities
    - Develop CMS plan for Alaska/Arctic region

A wide-angle landscape photograph showing a dirt road that curves through a valley. The valley floor is covered in dry, yellowish-brown grass. In the background, there are large, rugged mountains with significant snow cover under a clear blue sky with a few wispy clouds. The overall scene is bright and clear.

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