

Committee on Resources

Endangered Species Act Implementation by Region⁽¹⁾

TABLE OF CONTENTS

1. [INTRODUCTION](#)
2. [HISTORY OF THE ESA](#)
3. [REGIONAL ENFORCEMENT](#)
4. [FISH AND WILDLIFE SERVICE](#)
5. [NATIONAL MARINE FISHERIES SERVICE](#)
6. [PROTECTION OF ENDANGERED SPECIES - THE LISTING PROCESS](#)
7. [PETITIONS: HOW MANY, WHERE?](#)
 - [Graphic 1](#) - FWS Petition Findings Processed by Region (1993-1997)
8. [CRITICAL HABITAT DESIGNATIONS BY REGION](#)
 - [Graphic 2](#) - FWS Lists and Critical Habitat by Region
 - [Graphic 3](#) - National Marine Fisheries Service (NMFS) Regions
9. [DISTRIBUTION OF FUNDING FOR LISTING SPECIES](#)
 - [Fish and Wildlife Service Funds](#)

Endangered Species Act Implementation by Region

[Graphic 4](#) - FWS Funding by Region (1993-1997)

[Graphic 5](#) - Full Time Employee Hours Enforcing ESA by Region

[Graphic 6](#) - FWS Candidate Conservation Program Funding (1993-1998)

[Graphic 7](#) - FWS Listing Program Funding (1993-1998)

[Graphic 8](#) - FWS Consultation Program Funding (1993-1998)

[Graphic 9](#) -- FWS Recovery Program Funding (1993-1998)

o [National Marine Fisheries Service](#)

[Graphic 10](#) - NMFS Candidate Conservation Program Funding (1993-1997)

[Graphic 11](#) - NMFS Listing Program Funding (1993-1997)

[Graphic 12](#) - NMFS Consultation Program Funding (1993-1997)

[Graphic 13](#) - NMFS Recovery Program Funding (1993-1997)

10. [SECTION 10 PERMITS & HCPs - Permission to Use Private Land](#)

11. [MITIGATION OF IMPACTS ON SPECIES](#)

o [Mitigation required by HCPs](#)

12. [SAFE HARBORS](#)

13. [CANDIDATE CONSERVATION AGREEMENTS](#)

[Graphic 14](#) - FWS Habitat Conservation Plans (HCPs) by Region

14. [ENDANGERED SPECIES ARE IN ALL REGIONS](#)

15. [STATE SPENDING ON FEDERALLY LISTED SPECIES](#)

16. [ENVIRONMENTALISTS IMPACT WHERE ESA IS ENFORCED](#)

[Graphic 15](#) - Number of Appeals of Cases by Circuit

17. [JEOPARDY TO SPECIES UNDER SECTION 7](#)

[Graphic 16](#) - FWS Formal Consultations and Section 7 Findings: 1990-1996

[Graphic 17](#) - States with less than 25% of Federally Managed Lands

[Graphic 18](#) - States with more than 25% of Federally Managed Lands

18. [SUMMARY](#)

1. [INTRODUCTION](#)

Some observers of the implementation of the Endangered Species Act (ESA) on a national basis

Endangered Species Act Implementation by Region

have commented that there appears to be substantial differences in federal enforcement of the ESA among the regions. Data available from federal agencies support the general impression that greater resources have been committed in the West to protection of endangered species while federal enforcement in the Northeast and Midwest has been minimal. Enforcement in the South appears to have been somewhere in between the two extremes.

These regional differences in the enforcement of the ESA have serious consequences for threatened or endangered species throughout the nation. Aggressive enforcement of the ESA in the West has resulted in strained relations between regulatory agents in charge of administering the ESA and private property owners and federal land permit holders, who are ultimately responsible for species protection on their holdings. On the other hand, as the resources provided for endangered species protection is shifted away from the East and Midwest, species there may be left largely unprotected.

2. HISTORY OF THE ESA

Prior to 1966, authority for wildlife protection rested primarily with the states, except where the wildlife was highly migratory or where wildlife taken in violation of state or federal law was transported across state boundaries. In response to a concern that various species had become or were in danger of becoming extinct, the Federal Government began to enact legislation protecting endangered and threatened fish, wildlife and plants. Congress' efforts culminated in 1973 with the passage of the Endangered Species Act of 1973 (ESA, Public Law 93-205, 16 U.S.C. 1531 et seq.) which has become our Nation's strictest and most stringent environmental law. In conjunction with the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), the ESA embodies a rigid and comprehensive approach to species protection in the United States and throughout the world.

Under the ESA, the Secretary of the U.S. Department of Interior, through the U.S. Fish and Wildlife Service (FWS) has responsibility for plants, wildlife, and inland fishes. The Secretary of Commerce through the National Marine Fisheries Service (NMFS), is responsible for implementing the ESA with respect to ocean going fish and marine animals. In addition, the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) oversees the import and export of endangered species from foreign countries through the nation's ports.

3. REGIONAL ENFORCEMENT

The ESA is enforced on a regional basis both by the FWS and the NMFS. Both agencies divide the country into geographic regions headed by a Regional Director or Regional Administrator who has a great deal of discretion to determine policies within his or her own region. This discretion, coupled with inconsistent judicial precedent in different federal judicial circuits, has left a patchwork of inconsistent and discriminatory implementation of the ESA. In the far West, the ESA has been implemented with a far greater emphasis on regulatory control, while in the upper Midwest and Northeast, there appears to be minimal enforcement and much less emphasis on the protection of

Endangered Species Act Implementation by Region

habitat as a tool for reversal in the decline of species. There also appears to be a greater reliance on state action to provide species protection in the East.

4. FISH AND WILDLIFE SERVICE

The Fish and Wildlife Service (FWS) is divided into seven geographic regions each headed by a Regional Director.

Region 1: Washington, Oregon, California, Idaho, Nevada, and Hawaii.

Region 2: Arizona, New Mexico, Texas, Oklahoma.

Region 3: Minnesota, Iowa, Missouri, Illinois, Michigan, Wisconsin, Indiana, and Ohio.

Region 4: Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, Georgia, Florida, South Carolina, North Carolina, Puerto Rico, and the Virgin Islands

Region 5: Virginia, West Virginia, Maryland, Pennsylvania, Delaware, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine.

Region 6: Montana, Wyoming, Utah, Colorado, North Dakota, South Dakota, Nebraska, and Kansas.

Region 7: Alaska.

5. NATIONAL MARINE FISHERIES SERVICE

The National Marine Fisheries Service (NMFS), headquartered in Silver Spring, Maryland, also implements the ESA on a regional basis, with a great deal of enforcement discretion provided to the Regional Administrators. The NMFS regions are as follows:

Northeast Region: Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, Pennsylvania, Ohio, Michigan, Wisconsin, Indiana, Illinois, Iowa, and Minnesota (although since most of their jurisdiction over salt water fish, they have little impact on noncoastal states, except in the Northwest States where salmon spawn in the inland states.)

Southeast Region: North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Oklahoma, Arkansas, Tennessee, Kentucky, Missouri, Kansas.

Southwest Region: Arizona, California, Nevada, and Hawaii.

Northwest Region: Oregon, Washington, Idaho, Montana, Wyoming, Utah, Colorado, North Dakota, South Dakota, and Nebraska.

6. PROTECTION OF ENDANGERED SPECIES - THE LISTING PROCESS

Endangered Species Act Implementation by Region

For a species to receive the protections afforded by the ESA, it must go through a formal rulemaking process and be placed on either an endangered species list or a threatened species list. The ESA defines a "*species*" to include not only a full species, but to also include any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.

In order to qualify as either "*endangered*" or "*threatened*" a species must be placed on a list kept by the Secretary. The Secretary is required to make his or her decision to list a species as endangered or threatened based on "*best scientific and commercial data available*" at the time of listing.

A decision to list a species may be based on a recommendation made by the Secretary or by a petition filed by an interested private citizen. As of September 31, 1998, a total of 1,713 species were listed. Of those, 1,154 are listed in the United States and 559 are listed as foreign species. Of the species listed in the U.S. 910 are listed as "*endangered*" and 244 are listed as "*threatened*".

Anyone may petition the Service to list, delist, or reclassify a species (such as changing from "*threatened*" to "*endangered*" or the reverse). The listing of a species may occur as the result of one of several processes. An employee of either the Fish and Wildlife Service or NMFS may determine that a species needs to be listed and begin the listing process. However, the more common practice is that members of the public petition the Services to list a species. Once a petition is received the Service has 90 days to review the petition and determine whether the petition has set forth facts that call for further review. If the Service finds that the petition merits further review, they begin a status review that will result in one of three findings:

- the listing is warranted and the formal rulemaking to propose the species is begun by publishing a proposed listing rule in the Federal Register.
- the listing is not warranted and this finding is also published in the Federal Register.
- the listing is warranted but is precluded because of the need to list other species that are of a higher priority.

7. **PETITIONS: HOW MANY, WHERE?**

This chart, showing the number of petitions received by the Fish and Wildlife Service by region, indicates that most petitions are received in the West. Of the 399 petitions received between 1993-97, 75 percent (297) were in the West. In Regions 3 and 5 combined, a total of only 10 species were petitioned for listing.

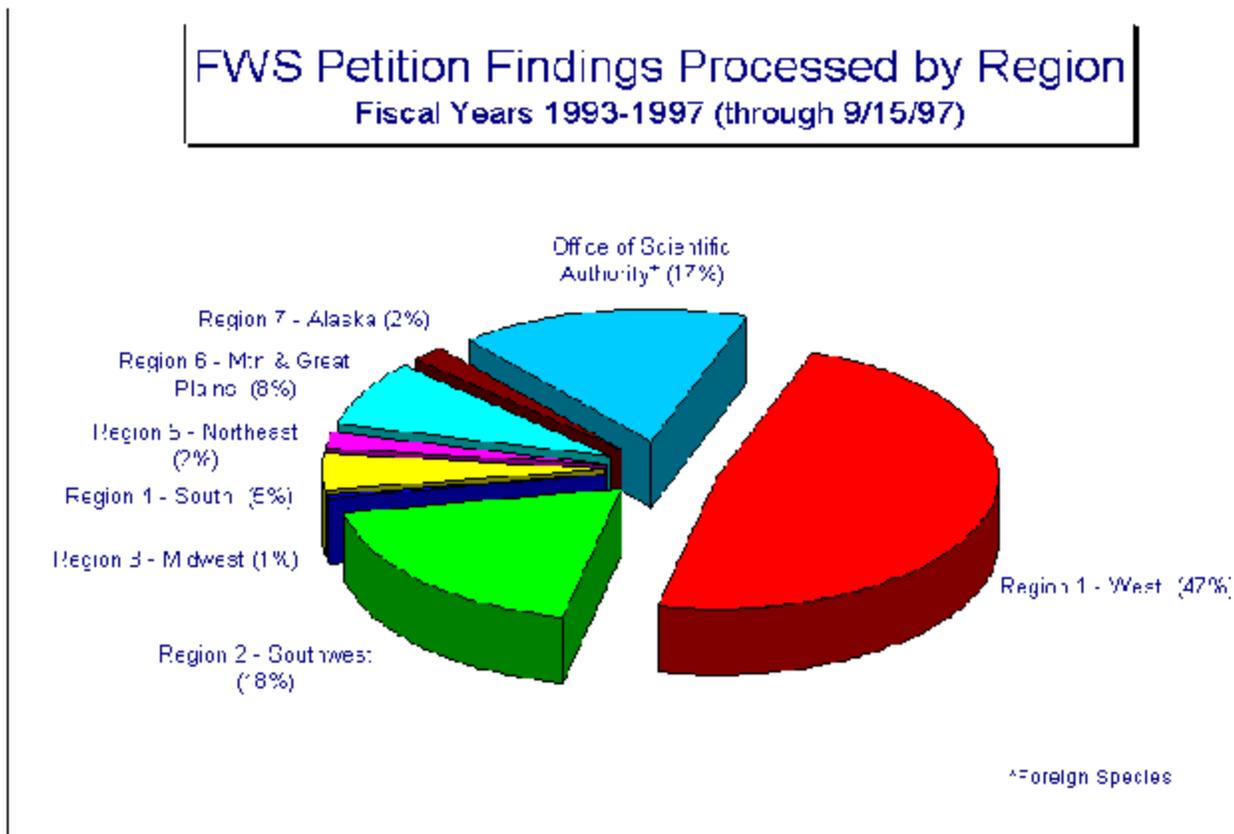
| Petition Findings Processed by FWS Regions, FY 93-97 (through 9/15/97) | | | | | | |
|---|----------------|----------------|----------------|----------------|----------------|--------------|
| Lead Region | FY 1993 | FY 1994 | FY 1995 | FY 1996 | FY 1997 | Total |
| | | | | | | |

Endangered Species Act Implementation by Region

| | | | | | | |
|------------------------------------|---------------------|------------|-----------|-----------|-----------|------------|
| 1 (West) | 25 | 119 | 37 | 7 | 3 | 191 |
| 2 (Southwest) | 7 | 55 | 9 | 2 | 1 | 74 |
| 3 (Midwest) | 0 | 1 | 1 | 0 | 0 | 2 |
| 4 (South) | 3 | 10 | 4 | 0 | 1 | 18 |
| 5 (Northeast) | 0 | 4 | 2 | 1 | 1 | 8 |
| 6 (Mountain & Great Plains States) | 13 (8 on grizzlies) | 10 | 7 | 0 | 2 | 32 |
| 7 (Alaska) | 1 | 3 | 2 | 0 | 2 | 8 |
| OSA (Foreign) | 3 | 61 | 1 | 1 | 0 | 66 |
| Total | 52 Taxa | 263 | 63 | 11 | 10 | 399 |

*OSA - Office of Scientific Authority (foreign species)

Graphic 1 - FWS Petition Findings Processed by Region (1993-1997)



Endangered Species Act Implementation by Region

Future listing decisions have great impacts as well. A "proposed species" is one that has not yet been finally listed, but a proposed rule has been published in the Federal Register in order to receive public comment, and it is likely to be listed within the near future.

A "candidate species" is one that has been found to be warranted or where a petition has presented substantial information that a species may be warranted for listing, but has not yet been the subject of a proposed listing rule. The following chart shows listed, proposed, and candidate species, by region, under the Fish and Wildlife Service.

| Listed, Proposed, and Candidate Species as of July 31, 1997 under FWS | | | |
|--|---------------|-----------------|-------------------|
| Region | Listed | Proposed | Candidates |
| <u>Region 1-Far West</u> | <u>543</u> | <u>84</u> | <u>87</u> |
| <u>Region 2-Southwest</u> | <u>119</u> | <u>7</u> | <u>34</u> |
| <u>Region 3-Midwest</u> | <u>34</u> | <u>2</u> | <u>1</u> |
| <u>Region 4-South</u> | <u>300</u> | <u>7</u> | <u>11</u> |
| <u>Region 5-Northeast</u> | <u>39</u> | <u>2</u> | <u>3</u> |
| <u>Region 6-Mountain West & Great Plains</u> | <u>45</u> | <u>3</u> | <u>30</u> |
| <u>Region 7- Alaska</u> | <u>4</u> | <u>0</u> | <u>1</u> |

| National Marine Fisheries (NMFS) Species by Primary Area of Impact | | |
|---|---|---|
| <u>Atlantic Species</u> | <u>Pacific Species</u> | <u>Gulf of Mexico/Southern Atlantic Species</u> |
| <u>Blue Whale</u> | <u>Blue Whale</u> | |
| <u>Bowhead Whale</u> | <u>Bowhead Whale</u> | |
| <u>Fin Whale</u> | <u>Fin Whale</u> | |
| <u>Humpback Whale</u> | <u>Humpback whale</u> | |
| <u>Northern Right Whale</u> | | |
| <u>Sei Whale</u> | <u>Sei whale</u> | |
| <u>Sperm Whale</u> | <u>Sperm Whale</u> | |
| | <u>Chinook Salmon (Sacramento River Winter)</u> | |
| | <u>Chinook Salmon (Snake River Fall)</u> | |
| | <u>Chinook Salmon (Snake River Spring/Summer)</u> | |
| | <u>Coho Salmon (Central California Coast)</u> | |

Endangered Species Act Implementation by Region

| | | |
|------------------------------------|---|---------------------------------|
| | <u>Coho Salmon (Southern Oregon/Northern Cal.</u> | |
| | <u>Cutthroat Trout (Umpqua River)</u> | |
| | <u>Sockeye Salmon (Snake River)</u> | |
| | | <u>Gulf Sturgeon</u> |
| <u>Shortnose Sturgeon (Inland)</u> | | |
| | | <u>Caribbean Monk Seal</u> |
| | <u>Guadalupe Fur Seal</u> | |
| | <u>Hawaiian Monk Seal</u> | |
| | <u>Stellar Sea Lion</u> | |
| | <u>Green Sea Turtle</u> | <u>Green Sea Turtle</u> |
| | | <u>Hawksbill Sea Turtle</u> |
| | | <u>Kemp's Ridley Sea Turtle</u> |
| | | <u>Leatherback Sea Turtle</u> |
| | | <u>Loggerhead Sea Turtle</u> |
| | <u>Olive Ridley Sea Turtle</u> | |

The above shows that the overwhelming number of listed, proposed, or candidate species are found in the West, but particularly in Region 1. Most of those species are found in California or Hawaii. Hawaii, because of its small size and isolation has a unique problem with loss of species and biodiversity. Ironically, Hawaii, which has the largest number of listed species has had minimal enforcement effort in the State. California, with the largest number of listed, proposed, or candidate species, has been impacted the most by the ESA. Some history is necessary in order to explain why this is so.

In May 1992, a suit was filed by The Fund for Animals, Defenders of Wildlife, the Biodiversity Legal Foundation, and others against the Department of Interior to force the agency to substantially speed up the listing process. At that time there was a backlog of some 600 "Category I" candidate species awaiting listing. In December, 1992 a settlement was reached between the parties to the suit (without any trial or findings of fact by the court) to list certain species by certain dates. The settlement listed 443 plant and animal species for which a final listing decision must be reached by September, 1996. Of the more than 400 species, 310 were found in Region 1 alone with 162 located in California. This settlement has had an enormous impact on the listing program of the Fish and Wildlife Service. The U.S. District Court for the D.C. Circuit continues to oversee the case and to require additional listings pursuant to the settlement.

8. **CRITICAL HABITAT DESIGNATIONS BY REGION**

Endangered Species Act Implementation by Region

At the time a species is listed, the Fish and Wildlife Service or NMFS, is required to designate critical habitat for the species. Critical habitat is designated in order to alert the public and other governmental units to the habitat needs of the species. The only exception to this rule is where the Secretary finds that it is not prudent to do so. Other federal agencies have greater consultation responsibilities in those areas designated as critical habitat. The failure to designate critical habitat has resulted in numerous lawsuits against the FWS or NMFS. However, while it is theoretically mandatory, critical habitat has not been designated for all species.

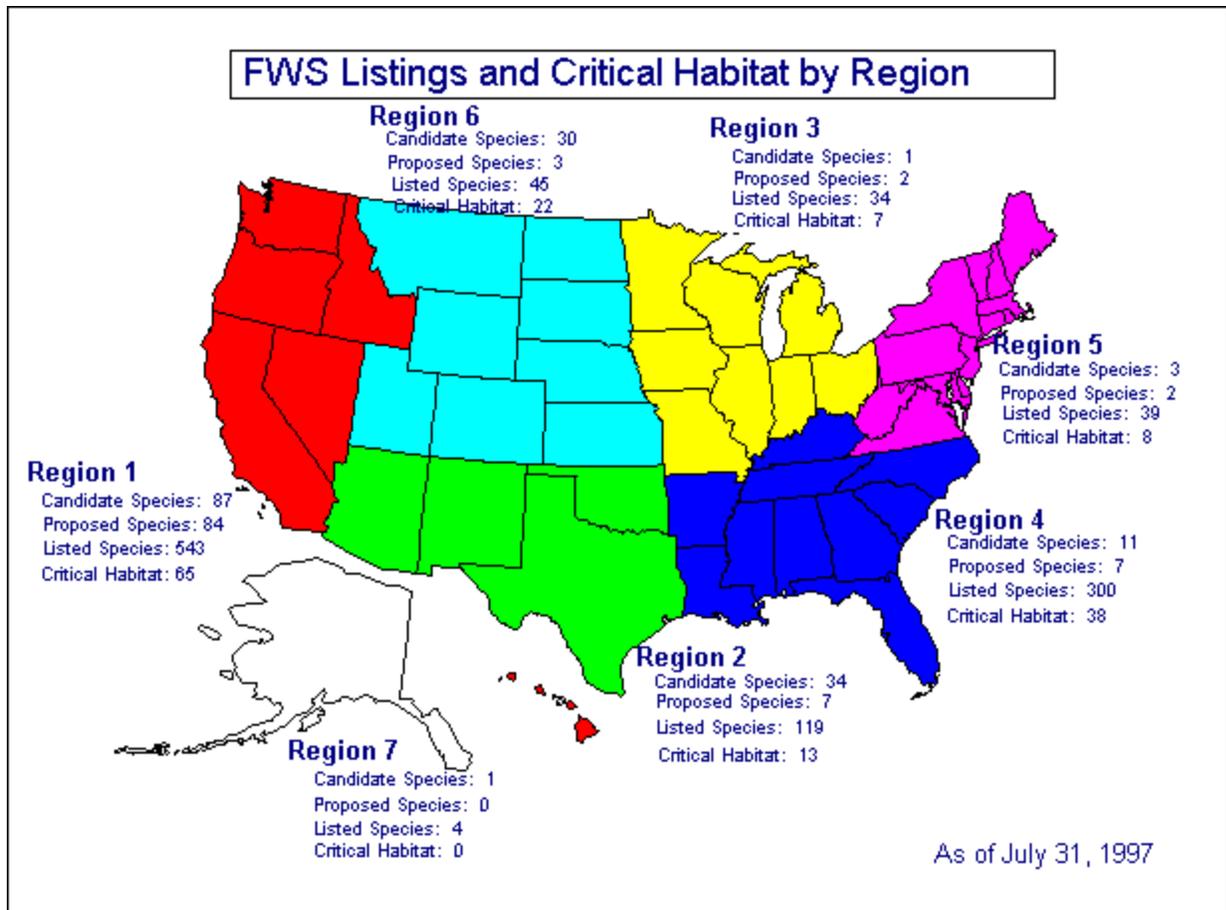
The NMFS has designated critical habitat in both the Atlantic and Pacific Oceans. They have designated critical habitat in the Atlantic Ocean for the northern right whale. In the Pacific they have designated critical habitat for the Hawaiian monk seal, the stellar sea lion, and two species of salmon. Critical habitat for the leatherback sea turtle has been designated around St. Croix in the U.S. Virgin Islands. (50 CFR 226)

Critical habitat designated by the FWS is more likely to be designated in the West and in the South. Some designations for a species may involve areas in more than one state and many times involve multiple areas within a state. (50 CFR 17.95).

| Number of Designations of Critical Habitat by State for Fish and Wildlife Species | | |
|--|----------------------------|------------------------------|
| Western States | Eastern States | Southern States |
| California - 25 | Massachusetts - 1 | Virginia -3 |
| Washington -2 | New Hampshire -1 | West Virginia - 2 |
| Oregon -1 | Maryland - 1 | North Carolina - 4 |
| Utah -8 | Missouri-2 | Georgia -2 |
| Nevada -15 | Illinois - 1 | Florida -7 |
| Idaho-1 | Indiana-1 | Alabama - 4 |
| Colorado -9 | Michigan -1 | Mississippi - 1 |
| Arizona -16 | Minnesota -1 | Arkansas -1 |
| New Mexico- 3 | | Tennessee - 8 |
| Hawaii -4 | | Kentucky- 2 |
| Texas - 8 | | Puerto Rico- 7 |
| Kansas - 1 | | Virgin Islands -2 |
| Nebraska - 1 | | |
| Oklahoma -2 | | |
| Total for West -96 | Total for East -- 9 | Total for South -- 43 |

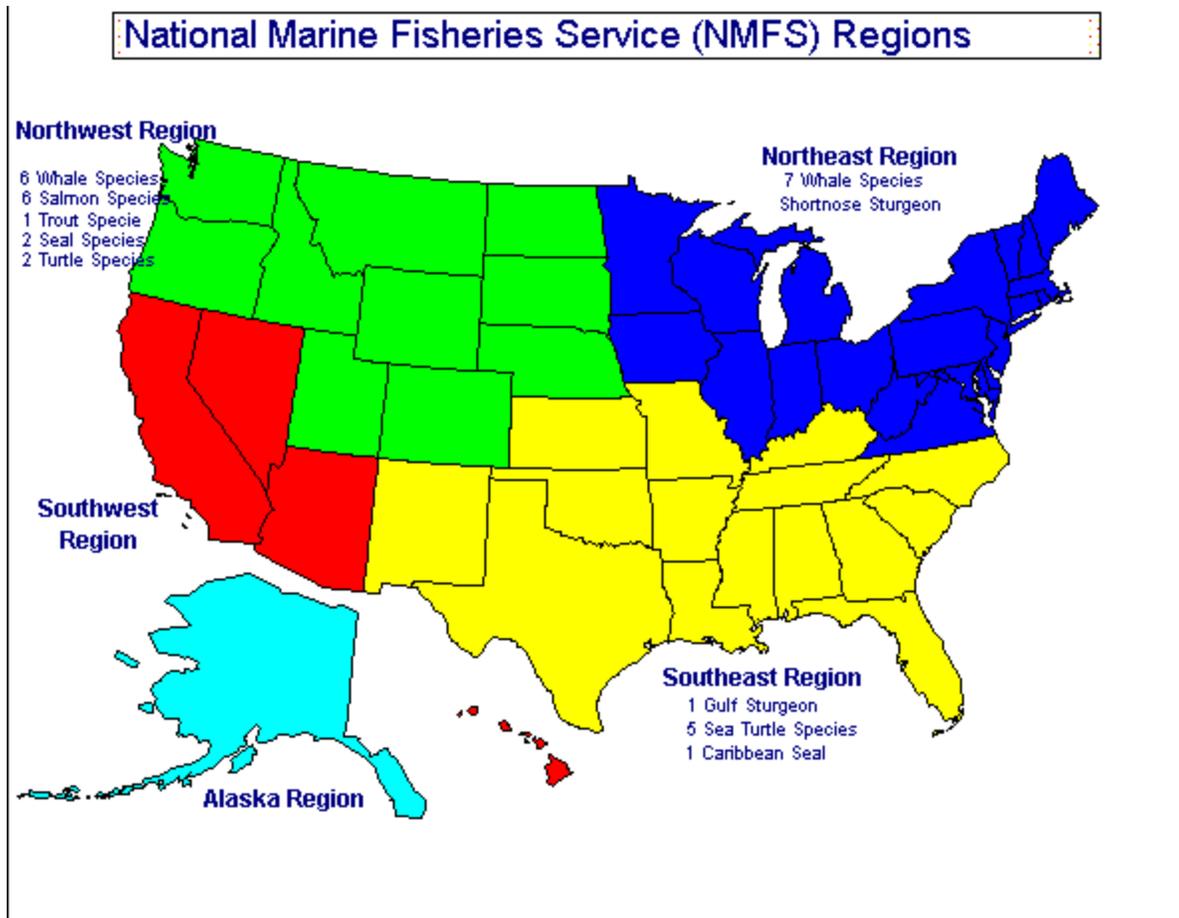
Endangered Species Act Implementation by Region

Graphic 2 - FWS Lists and Critical Habitat by Region



Graphic 3 - National Marine Fisheries Service (NMFS) Regions

Endangered Species Act Implementation by Region



9. DISTRIBUTION OF FUNDING FOR LISTING SPECIES

Fish and Wildlife Service Funds

The budget of the Fish and Wildlife Service reflects its listing effort. The following charts show the Fish and Wildlife Service budgets for its endangered species programs from 1993 through 1997 broken down on a regional basis. Over half of their ESA budget is spent in Region 1 alone.

It is highly unusual for a species to be listed in Region 5 as the result of a petition. Therefore, any proposal to list would be initiated by the Regional FWS employees. They have less than 31 Full Time Employee Hours (FTEs), including clerical staff, in Region 5 assigned to administer the ESA. Allocating a mere \$150,000 for listings in Region 5 insures that few, if any species are listed.

In 1993 the Fish and Wildlife Service began to use a workload formula to allocate funds to each of its regions. That formula resulted in so little funding for Regions 3 and 5 as to ensure that those regions had no capability to even participate in the ESA program. The allocation formula was changed to provide that every region would receive a minimal amount of funding referred to as "capability" funding. The amount however is so low as to ensure that the ESA can not be enforced in

Endangered Species Act Implementation by Region

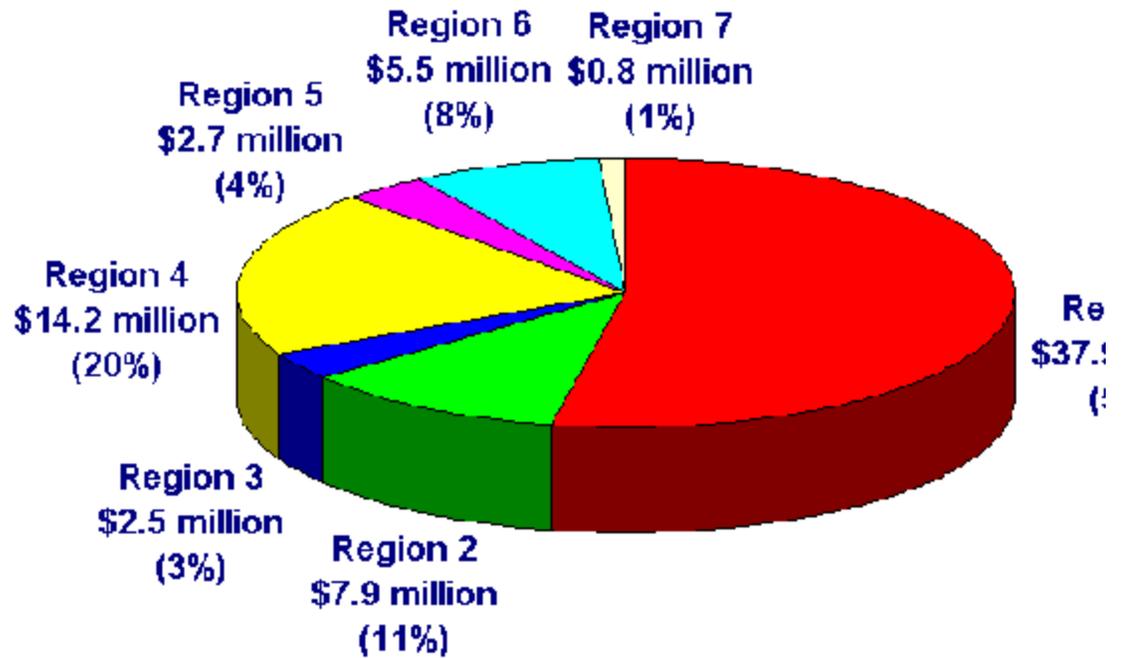
certain areas.

This chart provided by Fish and Wildlife Service showing the number of Full Time Employee Hours (FTE's) in each region shows again ESA enforcement effort, with **569** FTE's (out of 770) assigned to enforce the ESA in Regions 1, 2, & 6. **Only 55 employees are assigned to enforce the ESA in Region 3 & 5 combined.**

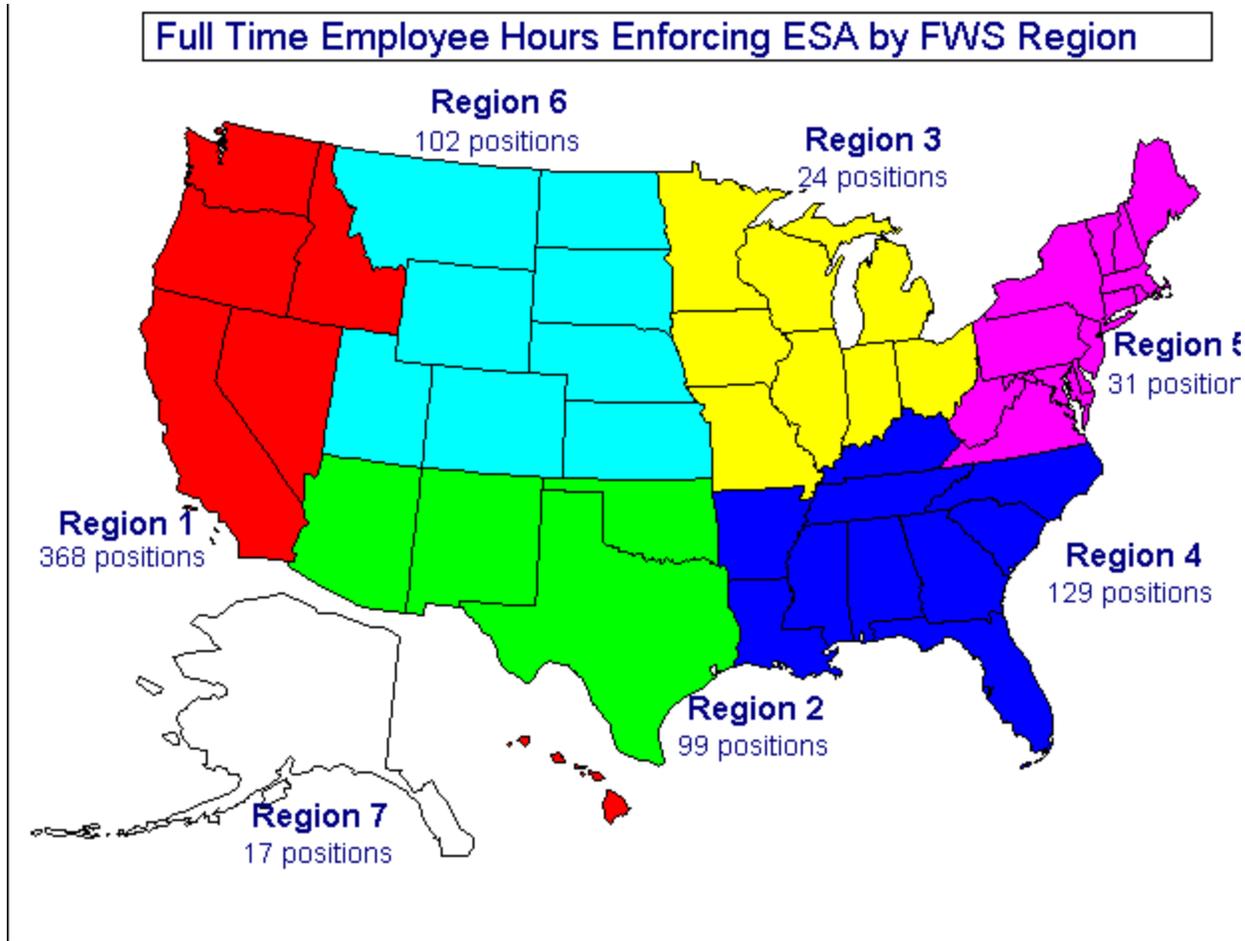
| Full Time Employee Hours enforcing ESA by FWS Regions | | | | | | | |
|--|----------------------------|----------------------|----------------------|-----------------------------|----------------------|-----------------------|-----------------------|
| Program | Region 1 (West) | Region 2 (SW) | Region 3 (MW) | Region 4 (South) | Region 5 (NE) | Region 6 (Mtn) | Region 7 (Ak.) |
| Candidate Conservation | 13 | 5 | 0 | 7 | 3 | 4 | 2 |
| Listing | 47 | 18 | 4 | 15 | 4 | 9 | 3 |
| Consultation | 98 | 43 | 13 | 51 | 16 | 34 | 5 |
| Recovery | 210 | 33 | 7 | 56 | 8 | 55 | 7 |
| Total (All regions=770) | 368 | 99 | 24 | 129 | 31 | 102 | 17 |

Graphic 4 - FWS Funding by Region (1993-1997)

FWS Funding by Region for FY 1998

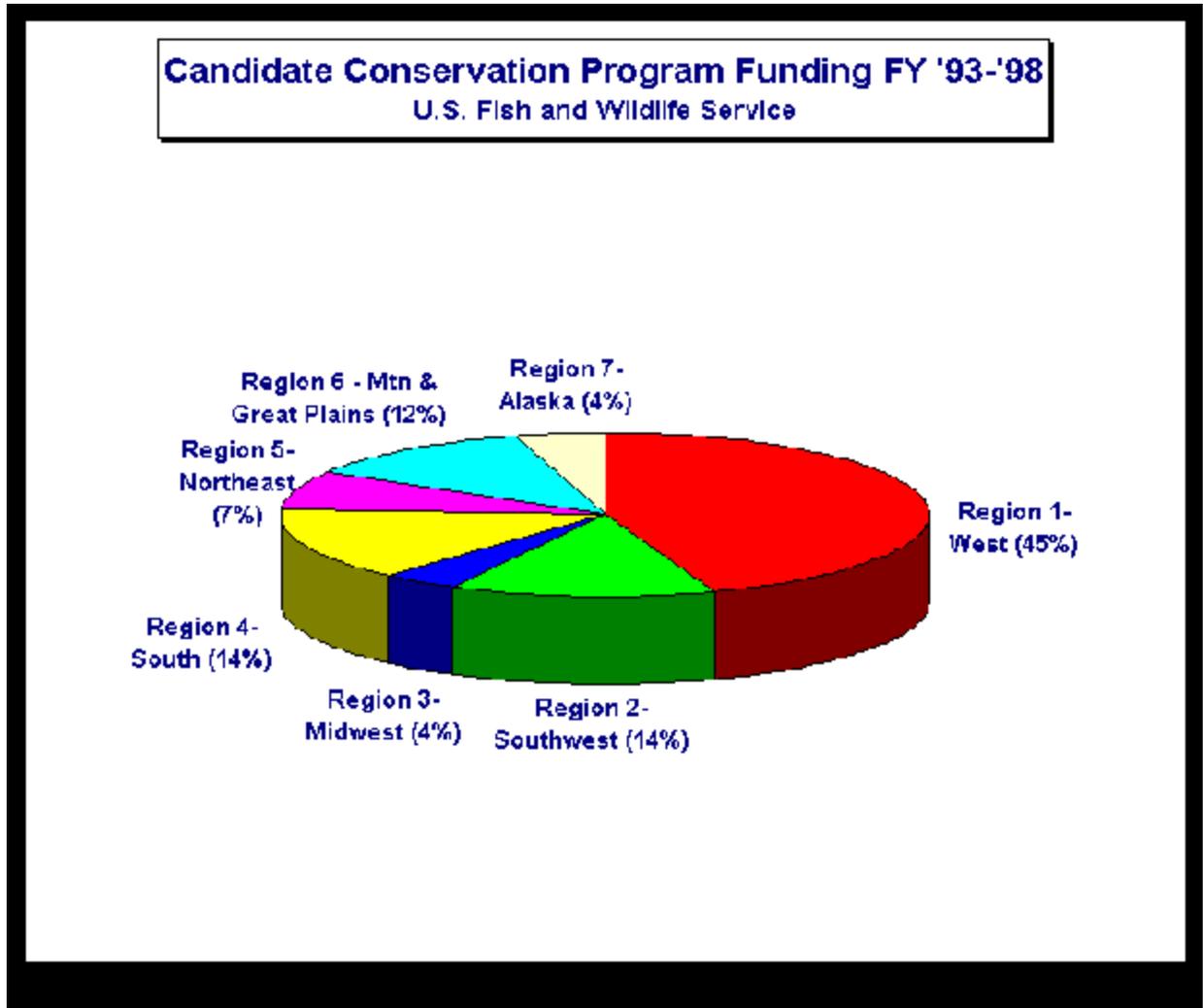


Graphic 5 - Full Time Employee Hours Enforcing ESA by Region



Graphic 6 - FWS Candidate Conservation Program Funding (1993-1998)

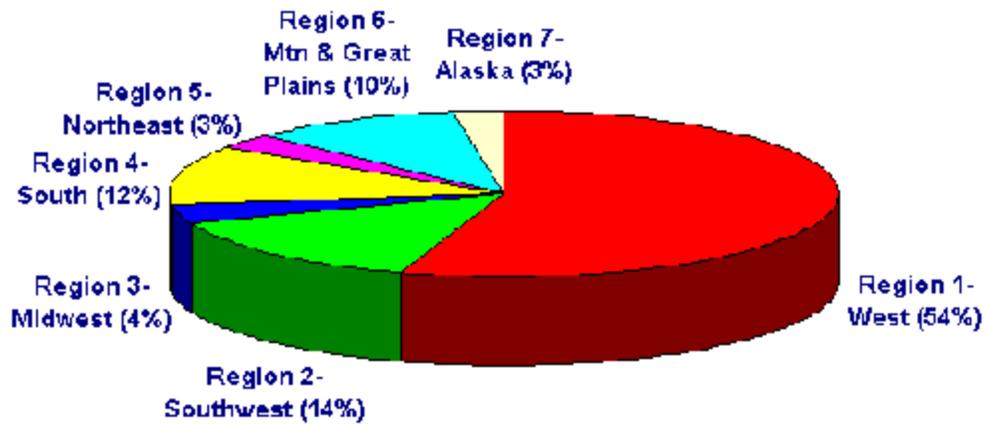
Endangered Species Act Implementation by Region



Total Funding for the FWS Candidate Conservation Program for FY '93-'98 was \$22,695,000.

Graphic 7 - FWS Listing Program Funding (1993-1998)

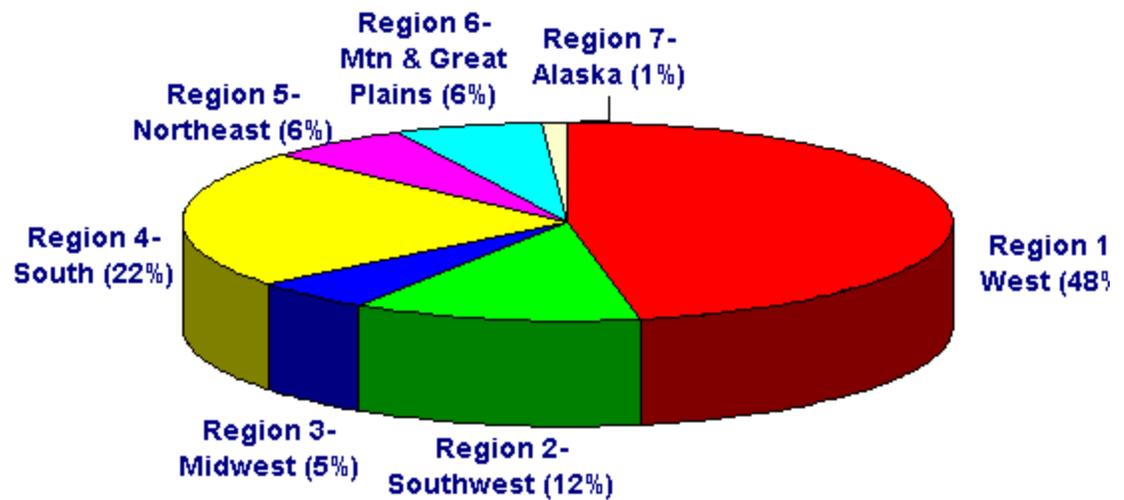
Listing Program Funding FY '93-'98
U.S. Fish and Wildlife Service



Total Funding for the FWS Listing Program for FY 1993 to 1998 was \$29,108,000.

Graphic 8 - FWS Consultation Program Funding (1993-1998)

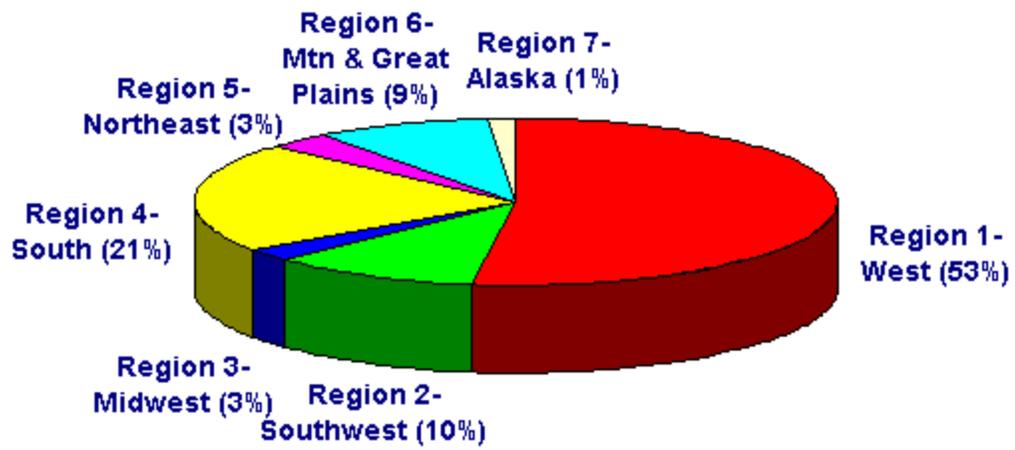
**Consultation Program Funding FY '93-'98
U.S. Fish and Wildlife Service**



Total Funding for the FWS Consultation Program for FY '93-'98 was \$94,144,000.

Graphic 9 -- FWS Recovery Program Funding (1993-1998)

**Recovery Program Funding FY '93-'98
U.S. Fish and Wildlife Service**



Total Funding for FWS Recovery Program for FY '93-'98 was \$187,397,000.

National Marine Fisheries Service Funds

NMFS is spending almost all of its listing and consultation budgets in the West. There are no funds budgeted in the East for listing although the Atlantic Salmon has awaited listing for the last two years.

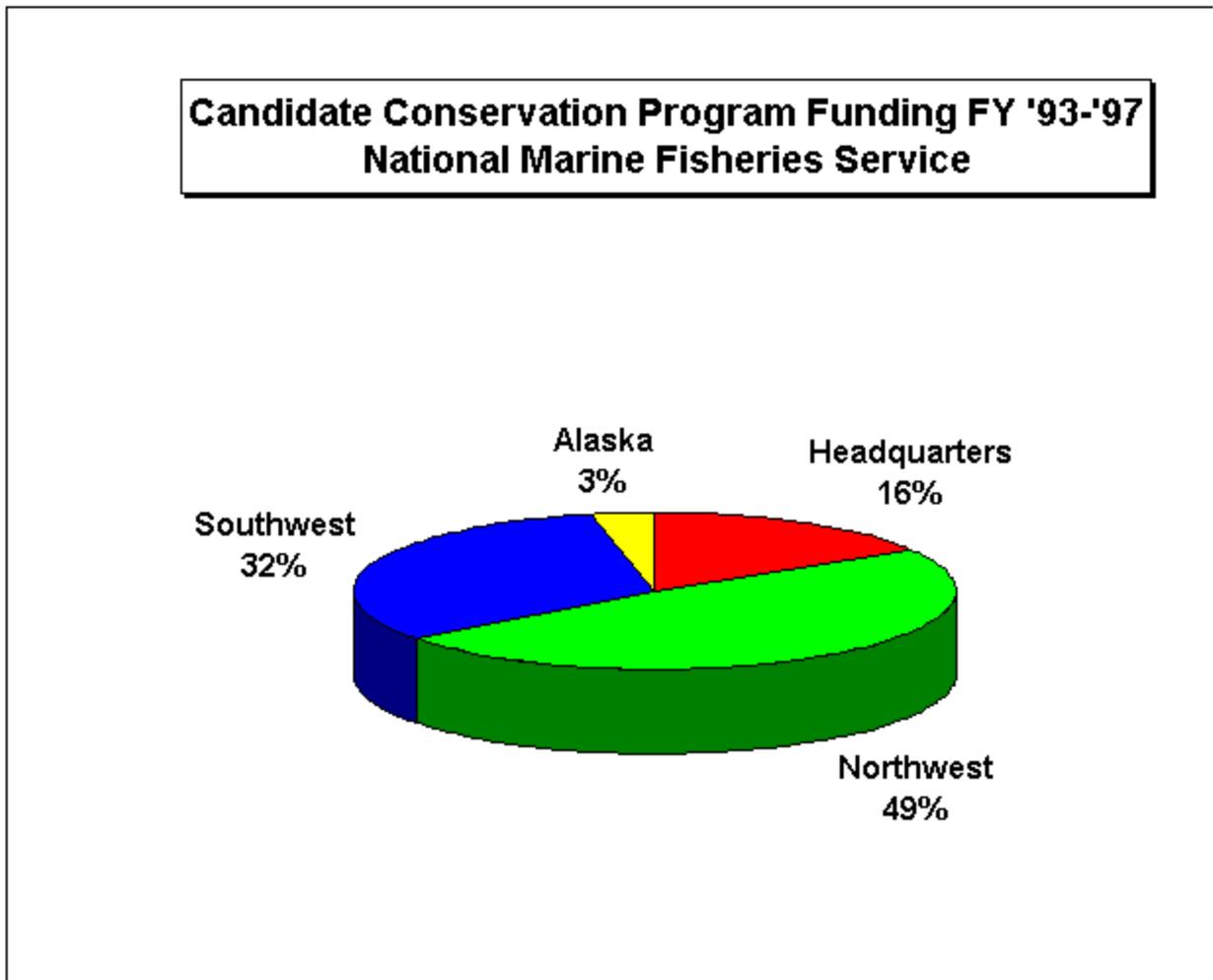
**Funding of Programs and Allocation of Staff at the
Regional Level for ESA Activities for FY 1998
(Includes Marine Mammal Protection Act funds for listed marine mammals)**

| Region | Staff | Funds |
|--------|-------|-------|
|--------|-------|-------|

Endangered Species Act Implementation by Region

| | | |
|-----------|------|----------------|
| Alaska | 11.5 | \$4.4 million |
| Northwest | 146 | \$13.2 million |
| Southwest | 49.3 | \$6.6 million |
| Southeast | 26.5 | \$2.1 million |
| Northeast | 13.5 | \$1.4 million |

Graphic 10 - NMFS Candidate Conservation Program Funding (1993-1997)

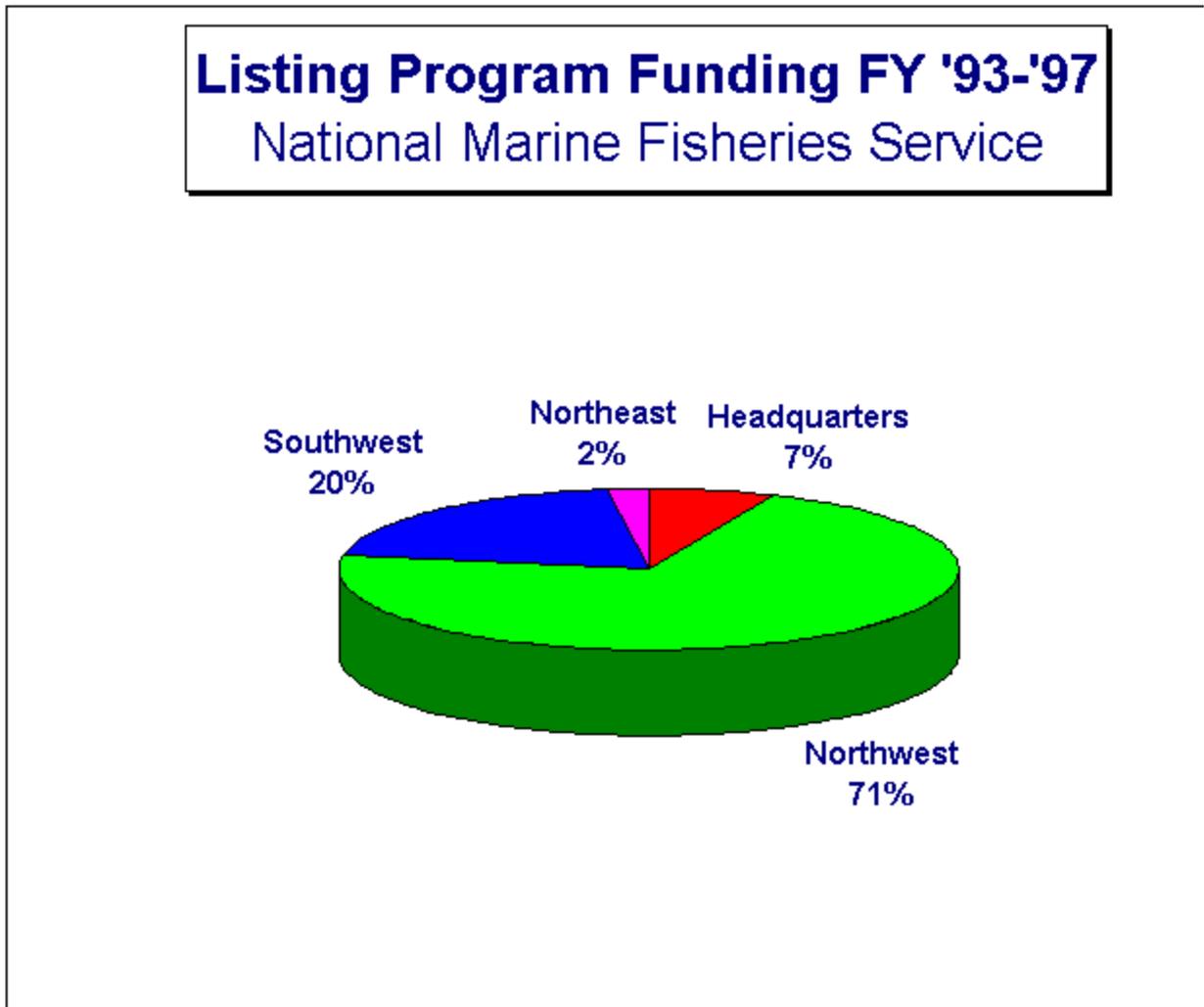


Total Funding for the NMFS Candidate Conservation Program for FY 1993 to 1997 was \$3,100,000.

The Northeast and Southeast Regions did not receive funding from the Candidate Conservation Program.

Endangered Species Act Implementation by Region

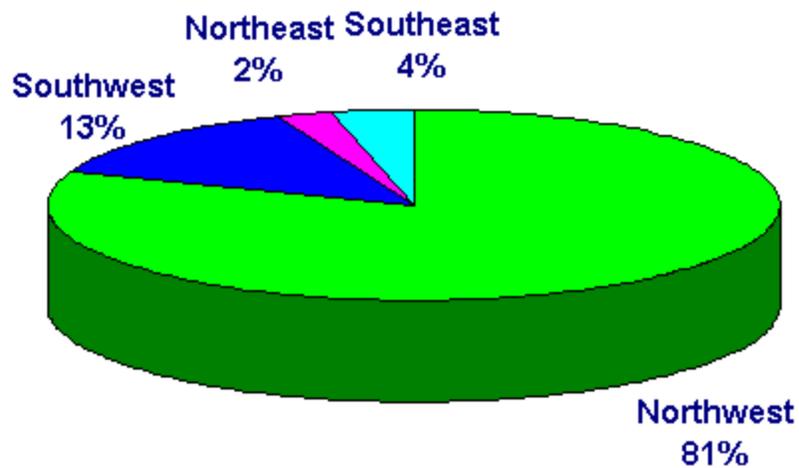
Graphic 11 - NMFS Listing Program Funding (1993-1997)



Total Funding for the NMFS Listing Program for FY 1993 to 1997 was \$9,010,000. Alaska and the Southeast Region did not receive funding from the Listing Program.

Graphic 12 - NMFS Consultation Program Funding (1993-1997)

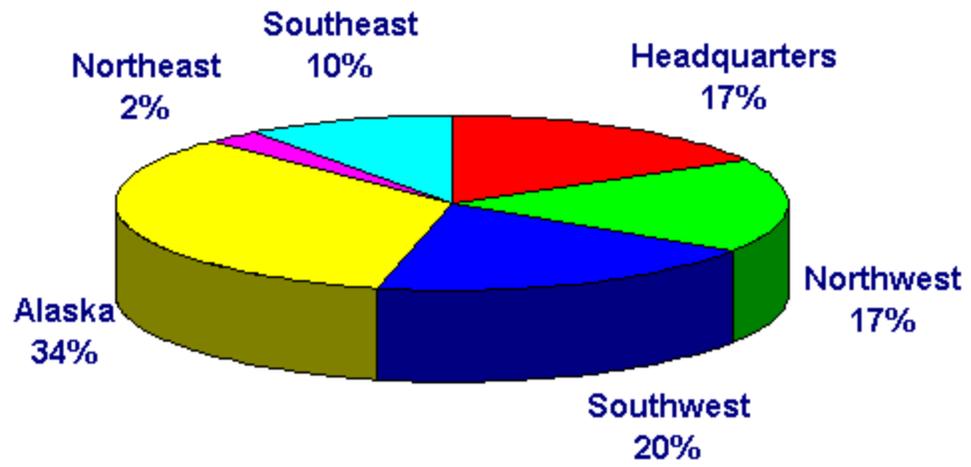
**Consultation Program Funding FY '93-'97
National Marine Fisheries Service**



Total Funding for the NMFS Consultation Program for FY 1993 to 1997 was \$8,300,000. Headquarters and Alaska did not receive funding from the Consultation Program.

Graphic 13 -- NMFS Recovery Program Funding (1993-1997)

Recovery Program Funding FY '93-'97
National Marine Fisheries Service



Total Funding for the NMFS Recovery Program for FY 1993 to 1997 was \$5,660,000.

10. **SECTION 10 PERMITS and HCPs -- Permission to Use Private Land**

Habitat conservation plans (HCPs) are used to attempt to resolve the ongoing struggle between private property interests and the restrictions on land uses imposed by the ESA. Few HCPs were approved before 1995.

Prior to 1982, if a threatened or endangered species were found on private property, a landowner's only options were to abandon or limit his use of the property to avoid a take of the species, or risk civil and criminal prosecution under the ESA. As a result, many landowners have been taking preemptive measures to prevent the accumulation of habitat on their property.

In 1982, Congress added Section 10(a) to the ESA. This section authorizes the Service to issue an

Endangered Species Act Implementation by Region

incidental take permit (ITP) to private property owners allowing them to incidentally "take" listed species as a result of otherwise lawful activity, providing the applicant meets certain requirements. One requirement is the submission of a "conservation plan" that seeks to minimize and mitigate all impacts on the species ("Habitat Conservation Plans" or HCP's).

Specifically, an HCP must identify the impacts that will likely result from the taking, state how the applicant will minimize and mitigate those impacts, give alternatives and the reasons those alternatives will not be used, and list other measures the Service may require as necessary or appropriate. If the Service finds the plan meets these requirements and will not appreciably reduce the likelihood of survival and recovery of the species, and the applicant ensures adequate funding, the Service must issue the permit.

There are several different categories of HCPs. Multi-regional HCPs are usually prepared by state or municipal governments and generally focus on habitat preservation for a number of species. They may cost over a million dollars to prepare and involve the set-aside of large tracts of land for preservation. The costs are often split between the parties involved, sometimes including the federal government. The inclusion of private land may be voluntary or mandatory, depending on its habitat value. In exchange for the land set-asides, which often includes the requirement of a payment into an endowment fund to manage the land, the Service allows the state or local governments to issue building permits in the nonpreserve areas. To finance the HCPs, the state or local governments usually assess development fees on building permits or issue bonds. Thus, the end users of nonpreserve land pay for the preservation of species on the preserve land.

Thus far, every multiregional habitat based HCP has been in the west.

Another type of HCP covers permits issued to single, large landowners, such as timber companies and large-scale developers. The landowner is required to set aside land for habitat, pay a mitigation fee, which goes toward acquiring or managing land suitable for habitat, or otherwise change or curtail land use activities as a condition of obtaining permission to use other lands.

11. **MITIGATION OF IMPACTS ON SPECIES**

One of the more controversial elements of Section 10(a) is the requirement that the permit applicant "mitigate" the take of the species. Mitigation has generally taken the form of land set-asides, special land acquisition or management fees, and assessments. Criticisms of the plans include the enormous costs and delays often associated with the process. Major plans can take years and millions of dollars to finalize, with private landowners bearing most of the costs.

The ESA prohibits the "take" of a listed species or modification of it's habitat. However, if a person wishes to use land that may be habitat for an endangered species in such a way as to "take" the species or it's habitat, they must go through the Section 10 permitting process. The HCP authority has been law for almost fifteen years. However, only twenty-three permits were issued prior to 1993. Permit numbers have risen sharply in recent years.

Endangered Species Act Implementation by Region

As of September 31, 1998, the Fish and Wildlife Service had issued 243 permits or HCP's. (For current information see the List of Habitat Conservation Plans at <http://www.fws.gov/r9endspp/hcp/hcp.html>)

- Region 1: 79 HCP's covering 5.2 million acres.
- Region 2: 98 HCP's covering over 666,228 acres.*
- Region 3: 0 HCP's covering 0 land.
- Region 4: 55 HCP's covering 473,730 acres.**
- Region 5: 1 CP along the shore of Cape Cod, Massachusetts***
- Region 6: 10 HCP's all in Utah of 147,660 acres.
- Region 7: 0 HCP's in Alaska.

*(Every HCP, except for one, for this region is in Texas and most of these were in Travis County, around Austin. Most were individual lots, one was a safe harbor agreement by the Peregrine Fund covering 100 square miles.)

**Most of these were in coastal Florida or coastal Alabama plus 50 miles of beach in Volusia County, Florida.

*** (Not a true HCP, since no habitat is protected for the piping plover and has expired.)

The National Marine Fisheries Service also issues HCP's by region. They do not provide the amount of acreage affected. NMFS has issued 8 "Section 10" permits and appears to have completed 5 HCP's. Some of these were multi species HCP's issued by both the Fish and Wildlife Service and NMFS. Most of the permits were for release of fish from hatcheries. While NMFS states that they have no state conservation agreements, they have failed to list the Atlantic Salmon because of the state conservation measures being implemented. All of their HCP's are in the Northwest and Southwest regions with only 1 low effect Section 10 listed for the eastern half of the country.

Mitigation required by HCPs

Most HCP's require either the permanent preservation of land for habitat or the payment of money into a fund for the acquisition and/or management of habitat? For example, the HCP for Orange County, California requires the preservation of 38,000 acres of land in a Nature Reserve. One private landowner contributed over 21,000 acres to make the HCP possible and to allow for the landowner to use other portions of its property for development.

An HCP developed by the City of San Diego will set aside in preservation status 172,000 acres of land. This HCP is expected to cost \$650 million, which will come from federal, state, and local funding, including future permit fees on development.

Endangered Species Act Implementation by Region

Riverside County, California has agreed to a 30 year HCP which sets aside over 41,000 acres of reserves for the Stephens Kangaroo Rat. The total additional cost of the plan is projected at more \$45,000,000. Of this amount, more than \$41,000,000 comes from local funding, to be generated from permit fees.

The Balcones Canyonlands Conservation Plan (BCCP) encompasses 561,000 acres (87% of Travis County, Texas), of which 100,000 acres are currently developed. Under the plan, 30,000 to 60,000 acres may be developed in the next thirty years. The total cost of the plan, including debt on bond issues, land purchases and maintenance, is \$160 million.

There is only one such plan in Region 5 which does not require the setting aside of land or payment into a fund and no HCP's in Region 3.

The Fish and Wildlife Service was asked to provide information regarding their use of "mitigation" in the regions. In Regions 3 and 5 they have not issued any Section 10 permits, therefore have not required mitigation to be undertaken and therefore, could provide no examples.

According to the Service, in Region 1 each HCP and the accompanying mitigation is individually negotiated with each landowner. Therefore, the extent and cost of mitigation depends to a great extent on the negotiating strength of each individual landowner. As the attached chart shows, mitigation ratios vary from as little as 1:1 to 5:1 and sometimes higher. Much depends on the individual judgment and desires of the Service biologist in charge of the case. It is a process that in the west, includes setting aside land in perpetual protective status, management endowments, mitigation credits, or payments to mitigation funds.

Mitigation can also be required pursuant to a Section 7 consultation. While Section 7 consultation is designed to govern action by federal agencies, these consultations frequently have as their object privately owned lands. Such is the case where a landowner is seeking a federal permit. On many occasions in the west, mitigation has been required in order to obtain an incidental take statement at the end of the Section 7 consultation process.

In response to a letter to the Service asking about the standards for requiring mitigation in the context of Section 7 consultations, Region 3 and Region 5 had this to say: *"While it has been the policy of the Service that it is not appropriate to require mitigation to offset incidental take, it was not explicitly stated in the 1994 Section 7 consultation handbook. Because the Service is aware that there occasionally has been an inconsistent application of this policy, it clarified the policy in its recently approved Endangered Species Consultation Handbook. **The Service's new Handbook clearly states that it is not appropriate to require mitigation for the impacts of incidental take.**(Emphasis added)"* However, after millions of dollars in expenditures and thousands of acres of land given up by landowners in the west, where is the consistent fair treatment of landowners between the regions.

12. SAFE HARBORS

Endangered Species Act Implementation by Region

Some of the HCP's include "safe harbors" agreements. Safe harbor agreements are designed to encourage the creation and maintenance of habitat by holding a landowner harmless from future ESA liability if his habitat protection measures attract new endangered species to the property. There are 5 Safe Harbors nationally: **Region 1**--2 agreements; **Region 2** -- 2 agreements; and **Region 4**-- 1 agreement (Sandhills). There are **none** in the other regions.

13. CANDIDATE CONSERVATION AGREEMENT

A Candidate Conservation Agreement (CCA) allows a nonfederal or federal person to avoid ESA restrictions, while at the same time providing ample protection of the species. If an individual includes non-listed species in a CCA, the Service will decline to list a species either because it is managed under the CCA or by issuing a species permit to cover the species if it does become a listed species. Since these agreements allow the Service to forebear or forego its statutory obligation, they have been challenged in court. Thus far, the FWS has lost several cases challenging these CCA's. For example, in one case in Texas involving the Barton Springs Salamander, the agreement was struck down by a federal judge and the judge ordered the listing of the species without regard to the conservation agreement. More recently, a court struck down a similar agreement for the Coho Salmon.

Although they have been advertised as an incentive for private landowners to conserve species, **most of these involve other governmental entities and not private property owners**. As of June 11, 1997 there were 34 final conservation agreements. By regions they were:

Region 1: 13 (Most were with other federal agencies and/or state agencies)

Region 2: 6 (One was struck down, the others were with other federal and state agencies)

Region 3: 1 (Copperbelly Watersnake with Indiana, Illinois, and Kentucky - DNR and with coal council.)

Region 4: 7 (Some are the same agreement - with federal, state, and private power companies.)

Region 5: 1 (With the U.S. Forest Service.)*

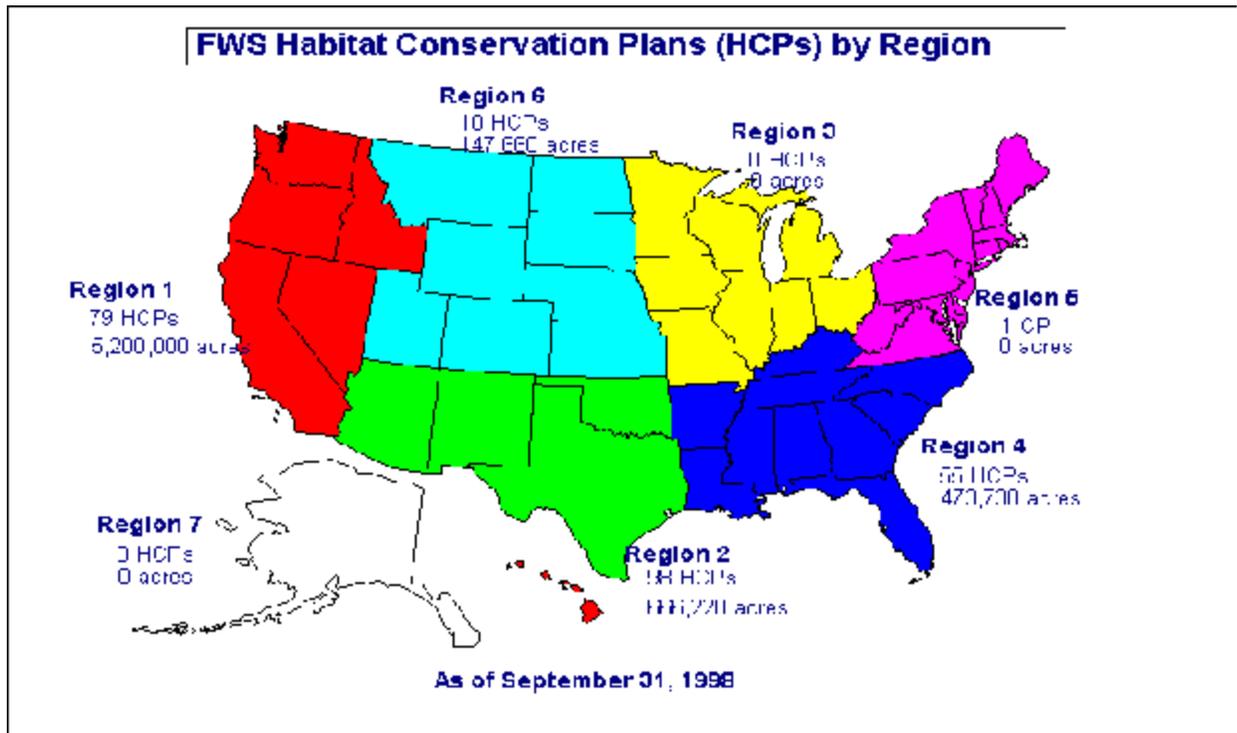
Region 6: 6 (With other federal and state agencies and tribes.)

Region 7: 1 (An Air Force base.)

*Subsequent to receipt of this information a CCA was finalized by the State of Maine for the Atlantic Salmon.

Graphic 14 -- FWS Habitat Conservation Plans (HCPs) by Region

Endangered Species Act Implementation by Region



14. **ENDANGERED SPECIES ARE IN ALL REGIONS**

There are endangered and threatened species in every region that may warrant the protection of a Section 10 permit as required by the ESA. If these species are impacted by human activity on private land, a Section 10 permit is required by the ESA. The FWS has issued no permits for impacts on these species in Regions 3 and 5 where most land is privately owned land. There are no permits for private land in Alaska, but there is little privately owned land in Alaska and almost no listed species on private land. There are a total of 59 listed species and 8 candidate species in Region 3.

In **Region 5** there are also many listed species; there are almost 100.

Almost all States have their own lists of endangered and threatened species. The contrast between the number of State and Federally listed species in States with relatively weak ESAs in comparison to the listings in California which has one of the strictest State ESA's in the nation is interesting.

| Comparison of State and Federally Listed Species | | |
|--|----------------------|--------------------------|
| | State Listed Species | Federally Listed Species |
| Connecticut | 224 | 14 |
| Massachusetts | 425 | 16 |

Endangered Species Act Implementation by Region

| | | |
|------------|-----|-------------------|
| New York | 211 | 19 |
| Virginia | 130 | 48 |
| New Jersey | 393 | 15 |
| Maryland | 433 | 37 |
| Michigan | 327 | 20 |
| Minnesota | 197 | 11 |
| Iowa | 237 | 13 |
| California | 292 | 244 (59 Proposed) |

Many of these States also have separate lists of rare species and species of special concern.

In California 46 of the animals species are duplicate listings by both the State and Federal government, however 26 of those species had already been listed under the California ESA prior to their listing under the Federal ESA. The Federal government has formally proposed to list an additional 51 plants of which, 29 are already listed under the state ESA. Of the 106 plants which are duplicate listed by both the Federal and State government, 84 had already been listed by the State of California when the Federal agency listed them.

Many species may face extinction in states where the Fish and Wildlife Service has failed to invest funds necessary to identify and protect them. For example, a report recently released by the Massachusetts Natural Heritage and Endangered Species Program along with the Massachusetts Chapter of the Nature Conservancy, clearly indicates that in the State of Massachusetts species are declining and face extinction, yet little is being done to protect them. The report, **Our Irreplaceable Heritage** states *"Since European settlement, seven animal species have gone extinct, and many more are no longer found in the state. Currently, 424 species of plants and animals are protected under the Massachusetts Endangered Species Act because of their precarious status in the Commonwealth. Furthermore, many ecosystems and natural communities have been drastically altered or diminished in size. Unless we act now, some of these systems and communities and their constituent species could be lost from Massachusetts. The relatively large quantity of currently protected open space in the state is not sufficient to conserve all biodiversity."* (P. 8-9)

A major problem is the lack of information regarding the status of species. The report states *"A paucity of information and incomplete inventories of certain taxonomic groups - particularly invertebrates, non-vascular plants, and fungi - limit our ability to effectively assess their status.... the true status of most species is poorly known.... more complete species status evaluations are unlikely to occur, and some uncommon species may not receive the serious conservation attention they deserve."* (P. 12)

The report goes on to describe species and their habitats which are facing serious declines and possible extinction, yet many of the species identified in the report are not federally protected. With

Endangered Species Act Implementation by Region

over 400 listed species, Massachusetts provides only \$628,835 in state funds for species protection with an additional \$123,000 in federal grants for species protection in the state.

By contrast, the state of California has 292 state listed species, while annually appropriating more than \$11 million in state funds in 1998 for protection of endangered species. At the same time, the federal government is spending more than \$37.9 million in Region 1 which consists of 5 states, with a substantial percentage being focused on California. Region 5 which includes Massachusetts received only \$2.7 million divided among its 13 states.

There are reports of incidents that constitute the take of endangered species in Regions 3 and 5, but where little or no action has been taken by the Region to require a permit or to protect the species at issue. While in Region 1 more than 4,000,000 acres of habitat has been protected by HCP's, there have been no HCP's that protect the habitat of listed species in Regions 3 or 5.

As of November 1998, the conservation plan for the piping plover is the only final plan of it's kind in either Region 5 or Region 3 and it does not require the protection of plover habitat. The piping plover conservation plan is a two year agreement which ended in 1998 between the Fish and Wildlife Service and the State of Massachusetts. The plan calls for restrictions on vehicular traffic on beaches during the plover nesting season. It also calls for "symbolic" fences around nest sites. "Symbolic" fencing is signs and string alerting beach goers to the presence of the plover nest sites. This is in contrast to the thousands of acres of land being placed in permanent preservation and being fenced in many areas of California.

The New York Times reported on August 9, 1997 that two Fish and Wildlife Service biologists had resigned in protest over the construction of a dune and beach building project on Fire Island, New York where piping plovers are known to nest.

The Boston Globe reported on July 19, 1997 that nearly 20 percent of New England's native plants are at risk of disappearing. "There is no doubt in my mind, we're seeing a loss of certain species largely as a result of human activity," said William E. Brumback, administrator of the New England Plant Conservation Program. Only a few plants are listed under the federal ESA in New England. With only \$150,000 available to consider listing species, Region 5 hasn't listed these endangered plants.

According to the AP wire service on July 28, 1997, despite best efforts to protect 17 piping plover chicks, only 3 remained alive on beaches near Seabrook, New Hampshire. The problem was that after the plovers hatch, the tiny chicks run around on the beach and because of their size they are difficult to see. Beach goers then step on them.

There are numerous other examples, including the failure to list the Atlantic Salmon which has been awaiting a listing decision for several years. On December 16, 1997, Secretary of the Interior Babbitt and Assistant Secretary of Commerce Garcia announced that they had decided not to list the Atlantic Salmon, although a total of less than 200 wild salmon had returned to their spawning grounds in various Maine rivers in the last nine years. Instead, the federal government will defer to a state

Endangered Species Act Implementation by Region

conservation plan to save the Atlantic Salmon. According to the environmental organization RESTORE: The North Woods, "Babbit is caving in to political pressure" by "spiking efforts to list the Atlantic Salmon in seven eastern Maine rivers." (AP Wire Service Story - 12/15/97).

This is in sharp contrast to the listing of numerous ESU's of Pacific Salmon. An ESU is an evolutionarily significant unit of a subspecies. Each particular salmon run is listed separately as though it were a separate species. The impact on the northwest is well over a billion dollars in costs associated with salmon protection efforts. However, the use of the ESU concept is only applied to Pacific Salmon, but not the Atlantic Salmon.

This disparity was recently noted in a letter from Governor John Kitzhaber of Oregon to Secretary of Commerce William Daley complaining about the confrontational attitude of the NMFS in his state. He noted the extreme dissimilarity between the Coho Salmon conservation agreement by which Oregon agreed to avoid a listing of the Coho there and the short and limited agreement for the Atlantic Salmon reached with the State of Maine. *"As a second example, I am enclosing a one-page agreement between NMFS, Interior, and Governor King of Maine that led to a deferral on the listing of Atlantic salmon. I have also noted that the NMFS decision withdrawing the proposed listing of Atlantic salmon in Maine was strongly supportive of that state's plan as a basis for avoiding a listing. In contrast, NMFS decision on Oregon coastal coho was equivocal in its treatment of the Oregon Plan. It is difficult to avoid the conclusion that Oregon is being held to a very different standard than is Maine. In addition to extensive measures to recover coho and steelhead (two plans of 3,000 pages each), extensive monitoring strategies, a commitment to adaptive management, and an annual audit by an Independent Science Team, I signed a long memoranda of agreement for coho that reflects a lack of trust that Oregon will follow through with our recovery plan commitments. I am now being asked to sign a similar agreement for steelhead."*

On June 1, 1998, a federal district judge in Oregon struck down the agreement between the state of Oregon and the federal government to protect coho salmon as a violation of the Endangered Species Act. The federal government then listed coho salmon on August 10, 1998. However, the Service has continued to honor the same type of agreement with Maine that has staved off the listing of Atlantic Salmon.

The AP reported on September 15, 1998 that there had been several recent collisions of whale watching vessels with endangered whales off the coast of Massachusetts. While there are federal regulations in effect that required vessels to maintain a safe distance from whales, there are no speed limits for these vessels. Regulations governing whale watching vessels were proposed in the early 1990's but rejected by the industry. According to an environmentalists who was involved in the earlier proposal, *"Because the New England congressional delegation was very strong back then, those whale-watching regulations were withdrawn."*

15. **STATE SPENDING ON FEDERALLY LISTED SPECIES**

Endangered Species Act Implementation by Region

The International Association of Fish and Wildlife Agents assembles statistics on state funding of protection efforts for federally listed species on an annual basis. The information is given to the U.S. Fish and Wildlife Service to be included in the Annual Report to Congress of Costs associated with the Endangered Species Act. The last year that this information was gathered by the Association was for 1995.

Total state funds spent by states in 1995 in each Region are as follows:

| | |
|----------|-------------|
| Region 1 | \$3,145,000 |
| Region 2 | 1,250,000 |
| Region 3 | 835,000 |
| Region 4 | 1,695,000 |
| Region 5 | 730,000 |
| Region 6 | 2,345,000 |

The states that spent the most money were either in the West or South. Out of the top ten spending states seven were Western States and three were Southern States. The top spenders were:

| | |
|----------------|-------------|
| Washington | \$1,500,000 |
| Wyoming | 1,300,000 |
| Arizona | 1,000,000 |
| Florida | 800,000 |
| California | 600,000 |
| Montana | 575,000 |
| Oregon | 480,000 |
| Hawaii | 360,000 |
| South Carolina | 300,000 |
| Virginia | 250,000 |

16. **ENVIRONMENTALISTS IMPACT WHERE ESA IS ENFORCED**

It is clear that lawsuits filed by environmental organizations greatly influence how the ESA is implemented along with the considerable discretion given to Regional Directors. Many listings are the result of a lawsuit and court order requiring the listing of species after the Fish and Wildlife Service or NMFS have determined that a listing is not warranted or is precluded for some legal reason. In addition, the designation of critical habitat is frequently the result of a court order. Court orders have been responsible for injunctions closing down various activities around the country for failure to consult under Section 7 of the ESA.

Endangered Species Act Implementation by Region

Ordinarily the federal government brings suit or presses charges against citizens who violate the ESA. However, the ESA also authorizes citizens to sue to enforce the provisions of the ESA. "Any citizen" may sue the government and other private citizens whom they believe to be in violation of any provision of the ESA (except that prior to March, 1997 some courts have limited this to environmentalists as per "Bennett v. Spear"). Citizens must give 60 days notice before a suit may be filed. The judge may award the citizen bringing the suit all costs of litigation, including reasonable attorney and expert witness fees when the judge determines the award to be appropriate.

In March, 1997, the United States Supreme Court reversed a decision of the 9th Circuit Court of Appeal in the case of Bennett v. Spear, 117 S.Ct. 1154 (March 19, 1997) which will greatly affect future litigation under the ESA. The Supreme Court held that persons who were asserting an economic injury as a result of action under the ESA, had standing to challenge the action in court. In Bennett, the 9th Circuit Court of Appeal had previously denied the right of economically damaged ranchers to use the citizen suit provision to enforce certain requirements of ESA, because they asserted an economic injury as their motive for bringing suit. The 9th Circuit limited the right to use the citizen suit provision only to those with the "correct" motive -- protecting endangered species. The end result has been one sided court orders, consent decrees, and decisions that fail to consider all the facts of the cases, that fail to consider the consequences of the courts actions, and deprive many citizens of the basic due process considerations granted by the Bill of Rights of the U.S. Constitution.

Prior to the Supreme Court's ruling in Bennett, the Clinton/Gore Administration consistently opposed standing in court for persons economically injured by the ESA thus stopping judicial review of many of their decisions. This standing barrier has also been used to preclude judicial review under other environmental laws as well, including the National Environmental Policy Act, the National Forest Management Act and others.

Therefore, most lawsuits under the ESA have been brought by environmental organizations and their members. Many of these groups focus their efforts on litigation as their priority activity.

The Department of Justice has provided a list of **pending** lawsuits filed under the ESA between 1990 and 1996 as well as a list of cases in which attorneys fees have been paid which, along with a number of other important cases totaled 262 cases.

By FWS region affected, the break down of those cases is as followed:

| | |
|----------------------------|--------------|
| Region 1 (West): | 103 lawsuits |
| Region 2 (Southwest): | 44 lawsuits |
| Region 3 (Midwest): | 4 lawsuits |
| Region 4 (South): | 20 lawsuits |

Endangered Species Act Implementation by Region

| | |
|--|-------------|
| Region 5 (Northeast): | 8 lawsuits |
| Region 6 (Mountain West & Great Plains): | 29 lawsuits |
| Region 7 (Alaska): | 4 lawsuits |

In addition, some 25 other cases were pending in the District of Columbia Federal Court. These are primarily cases challenging a decision made under the ESA, but limiting the case to the Administrative Record developed by the agency. Most of these cases impact species found in the west.

Some groups seek out certain friendly jurisdictions to file suit in order to set judicial precedent. The 9th Circuit Court of Appeal has become well known as a jurisdiction in which the environmental community will find a receptive court willing to issue injunctions and award substantial attorney fees. The jurisdiction of the 9th Circuit includes the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii.

*** Of the above 262 cases, 141 were filed in courts under the jurisdiction of the 9th Circuit.**

To make matters worse, the Justice Department and the Department of Interior have failed to seek judicial review of these decisions in the Supreme Court, leaving the ESA case law an inconsistent, unfair, and discriminatory mess.

Environmentalists in the West are far more active and likely to file an ESA lawsuit than environmentalists elsewhere. An article in the *Albuquerque Journal* on August 24, 1997 reported that "*Environmental activists in the Southwest, more so than in other regions of the country, are suing to protect endangered species*". The article cited the many cases filed by a group known as the Southwest Center for Biological Diversity based in Tucson, Arizona. One active member of the group who frequently allows himself to be named plaintiff for the group is Dr. Robin Silver. SCBD and Dr. Silver have received over \$420,000 in attorneys fees and court costs from the U.S. Treasury thus far and have numerous other suits pending in which they will receive additional funds from the taxpayers.

Federal court judges awarded attorneys fees ranging from a low of \$1,000 to \$3,550,000 in some 101 cases filed under the ESA in the last ten years according to information submitted to the Committee on Resources by the Justice Department. As of early 1997, the total for ESA related cases was \$7,463,074. This figure added to other cases based on other statutes but used to protect a listed species (\$2,452,863) comes to a total of \$9,915,937 to attorneys. Many of these are not final awards therefore, the figure will continue to rise even if no additional cases are filed (and many additional cases are being filed). In some cases these awards were preliminary and additional attorneys fees would be awarded at a later stage of the litigation. This list does not include cases filed under other laws, based on the presence of a listed species. The taxpayers pay these attorneys fees.

Endangered Species Act Implementation by Region

Other substantial fees awarded have included \$262,096 in the case of Natural Resources Defense Council, v. Babbitt, 93-0301; \$518,000 in Natural Resources Defense Council v. Hodel; \$322,500 in Defenders of Wildlife v. Thomas.

Of the 100 cases in which environmental plaintiffs received attorneys fees from the U.S. taxpayers, 60 were in the 9th Circuit although there are 11 Appellate Circuit jurisdictions. Another 14 were in the D.C. Circuit, and the remainder were generally in the west and south. It is clear that the 9th Circuit is popular with environmental plaintiffs not only because they are more likely to win, but are also more likely to be awarded attorney fees and costs.

The award of substantial attorneys fees to plaintiffs who sue in jurisdictions where they are likely to win, encourages constant, expensive and time consuming litigation in those areas. Many times this litigation makes it much more difficult to actually protect the endangered species at issue by taking time and money from ESA programs and transferring the money to lawyers for litigants.

Another potential factor is the increasing role that environmental grantmakers play in focusing advocacy dollars. Groups such as the Pew Charitable Trust or the W. Alton Jones Foundation provide grants to small localized environmental groups. Many of these grants target the west and more specifically forests in the west.

Some foundations even limit their grant giving to organizations that work in the west. The Brainerd Foundation home page states: *"The Brainerd Foundation is dedicated to protecting the environmental quality of the Pacific Northwest. Our website will tell you more about how we support grassroots-oriented projects to protect the environment in Washington, Oregon, Idaho, Montana, Alaska and British Columbia."* Some of the groups being funded by the Brainerd Foundation have been involved in lawsuits involving listing of endangered species or injunctions to stop activities affecting endangered species in the west. These include Friends of the Wild Swan, Pacific Rivers, Pilchuk Audubon Society, and the Sierra Club Legal Defense Fund.

Even the press is beginning to take note of the enormous influence exerted by environmental grantmakers in focusing dollars on favored groups and favored causes. Scott Allen of the Boston Globe wrote a series of articles on environmental grantmakers in which he noted *"collectively they are putting an indelible stamp on the movement by picking which issues get the public's attention - and which don't. For instance, foundations have pumped millions of dollars into Alaska in recent years to preserve wilderness... Meanwhile, urban-based groups that work on issues like hazardous waste complain they can't get the attention of major funders."* (Boston Globe, October 19, 1997)

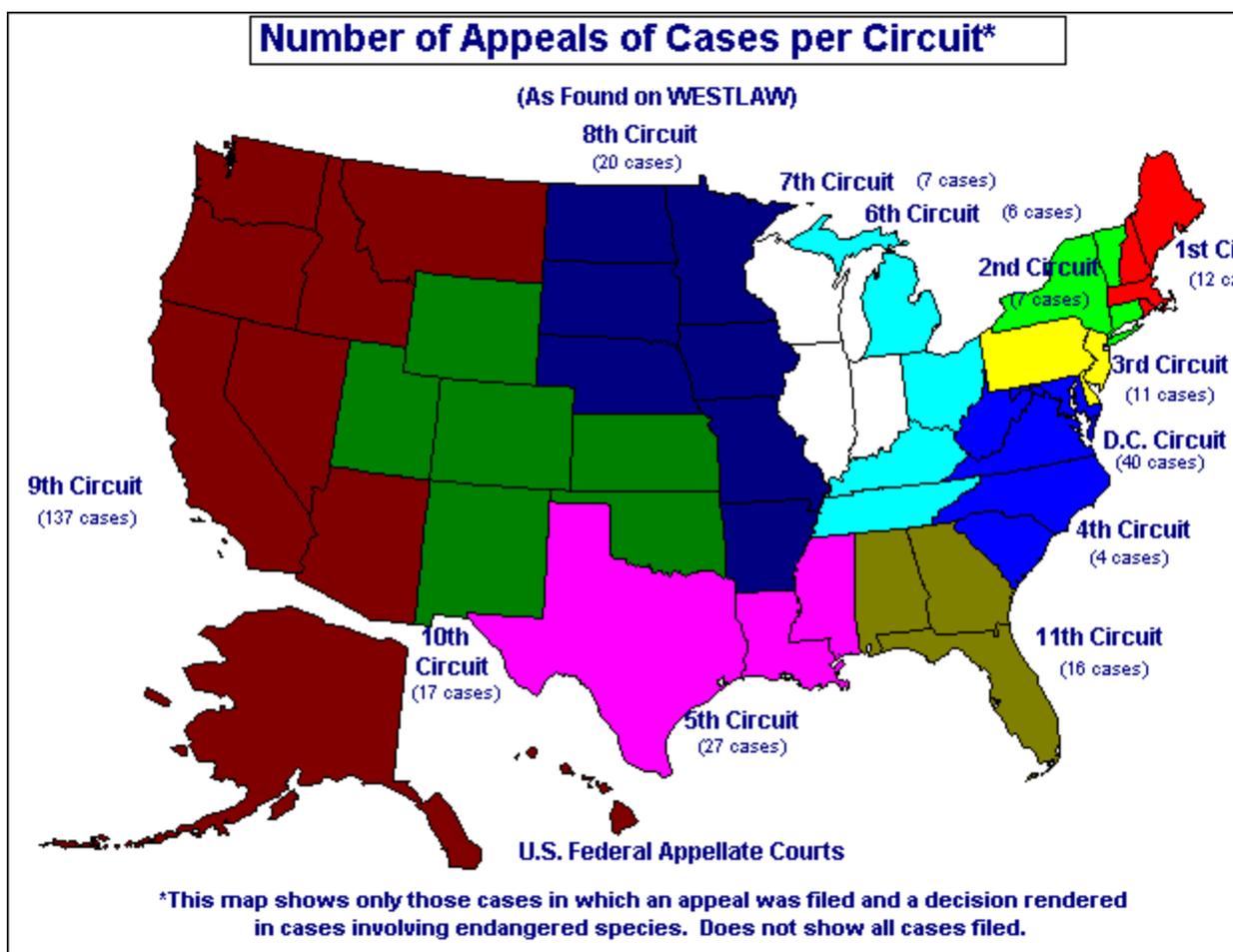
According to the Allen article in the Boston Globe, not only have the foundations encouraged more advocacy in the west, they have also discouraged certain types of advocacy in the east. *"In New England, four leading foundations met with area groups in 1995 and concluded that the movement needed a less confrontational approach..."*

Certainly, the environmental grantmakers have not created the disparity between enforcement of the

Endangered Species Act Implementation by Region

ESA, however, the enormous infusion of grant dollars to litigious western environmental groups contributes to the continuing pattern of conflict and litigation in the west and neglect of serious environmental problems in the east.

Graphic 15 -- Number of Appeals of Cases by Circuit



17. JEOPARDY TO SPECIES UNDER SECTION 7

Section 7 of the ESA provides that when any Federal agency takes an action, authorizes an action, or funds an action which might affect a listed species, the agency is required to consult with the Fish and Wildlife Service (or NMFS in cases involving marine species such as salmon or sea turtles) to ensure that the action will not likely jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of that species. This consultation requirement

Endangered Species Act Implementation by Region

applies to all actions to conserve listed species or their habitat; to the promulgation of regulations by federal agencies; to the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or to actions directly or indirectly causing modifications to the land, water, or air. This includes permits under Section 404 of the Clean Water Act. This process is only available to the parties involved in a Federal consultation involving a Federal activity which includes only the federal agencies undertaking the action.

A federal agency may not proceed with an activity that "may affect" a listed species until they have consulted with the appropriate Service and may not under Section 7(d) make any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would not violate the ESA. If an agency proceeds with its activities, it may be subject to a lawsuit and a federal court injunction halting its actions. Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Circuit, 1994)

If the Fish and Wildlife Service (or NMFS) determines that jeopardy to the species will occur should the federal action proceed, they are required to issue a biological opinion stating whether there are other reasonable and prudent alternatives that may be used that would allow the activity to proceed. If the federal action agency proceeds without obtaining a statement from the Fish and Wildlife Service (or NMFS), they may find themselves in violation of the ESA, subject to injunction from a federal court and the subject of continuing litigation. Therefore, for all practical purposes the Fish and Wildlife Service (or NMFS), through its use of jeopardy findings and the biological opinion, is allowed to exercise a central command and control function over all other federal actions affecting endangered or threatened species. The practical result for both public and private sector permit applicants has been lengthy delays in obtaining federal approvals and permits, increased costs, and in some cases the inability to use private property subject to a federal permitting system. In addition, on federal lands where use permits are required, many jobs have been lost due to the inability to obtain federal approvals. Another substantial consequence is the continuing increase in federal costs associated with protecting endangered and threatened species.

In the past, the NMFS conducted few Section 7 consultations, however, some of these have had significant impacts Salmon, for example. Since 1990 the Northwest Region and the Southwest Region together account for 145 consultations that resulted in findings of no jeopardy, with 14 findings of jeopardy. The East had 141 consultations that resulted in no jeopardy and 9 that resulted in jeopardy. The role of the NMFS in consultation has increased dramatically in the last several years.

The Fish and Wildlife Service provided a summary of all consultations by region for FY 1990 through 1996. An examination of the data indicates that jeopardy findings are more likely to occur in every year in western regions, than in regions in the Northeast or Midwest.

- In 1990 there were jeopardy findings in Regions 1,2,4, and 6 but **none in Regions 3 & 5.**
- In 1991 there were **62 jeopardy findings in Region 1** versus **only 2 in Region 3 and only 2 in Region 5.**
- In 1992 there were again jeopardy findings in each region with the highest number (7) in

Endangered Species Act Implementation by Region

Region 4 (the South).

- In 1993 the highest number of jeopardy findings were in the South, Region 4 and in Region 6, the northern Mountain West with 56 jeopardy findings while there was **1 in the Region 3 and none again in Region 5.**
- In 1994 there were **106 jeopardy findings** in Region 6 with **only 2 in Region 3 and none again in Region 5.**

Over the period 1990 to 1996 the total **jeopardy findings** for each Region again reveal differences between regions.

Section 7 Jeopardy Findings by FWS, 1990-96

| | |
|------------------|----------------|
| Region 1: | 72 jeopardies |
| Region 2: | 8 jeopardies |
| Region 3: | 8 jeopardies |
| Region 4: | 67 jeopardies |
| Region 5: | 3 jeopardies |
| Region 6: | 269 jeopardies |
| Region 7: | 0 jeopardies |

Most of the formal consultations over that time period occurred in Regions 1, 4, and 6.

Formal Consultations by FWS, 1990-96

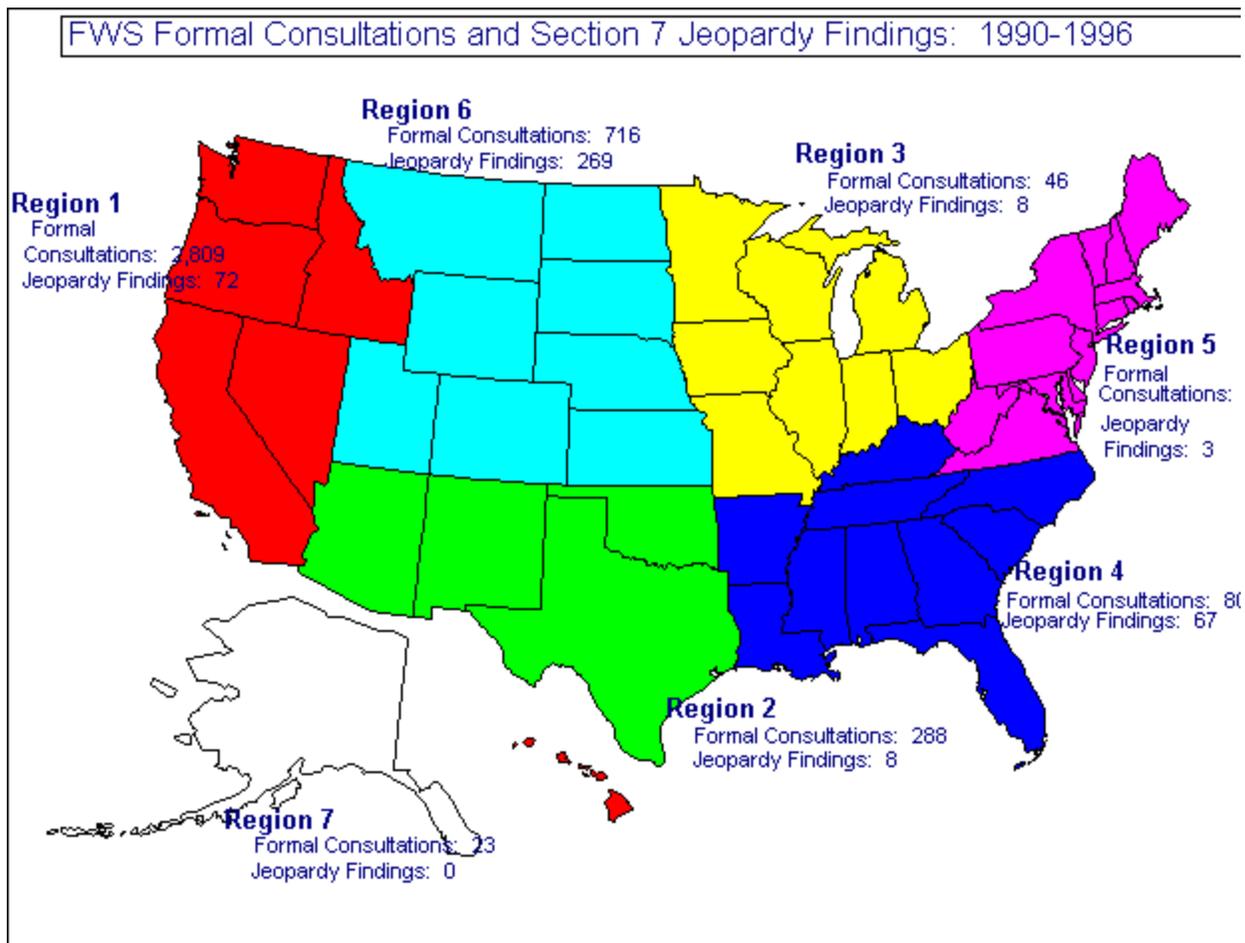
| | |
|------------------|-------|
| Region 1: | 2,809 |
| Region 2: | 288 |
| Region 3: | 46 |
| Region 4: | 805 |
| Region 5: | 81 |
| Region 6: | 716 |
| Region 7: | 23 |

| Programmatic Consultations by Region 1990-97 | | | | | | | | |
|---|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Year | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 |
| Region 1 | 5 | 6 | 9 | 8 | 11 | 10 | 23 | 9 |

Endangered Species Act Implementation by Region

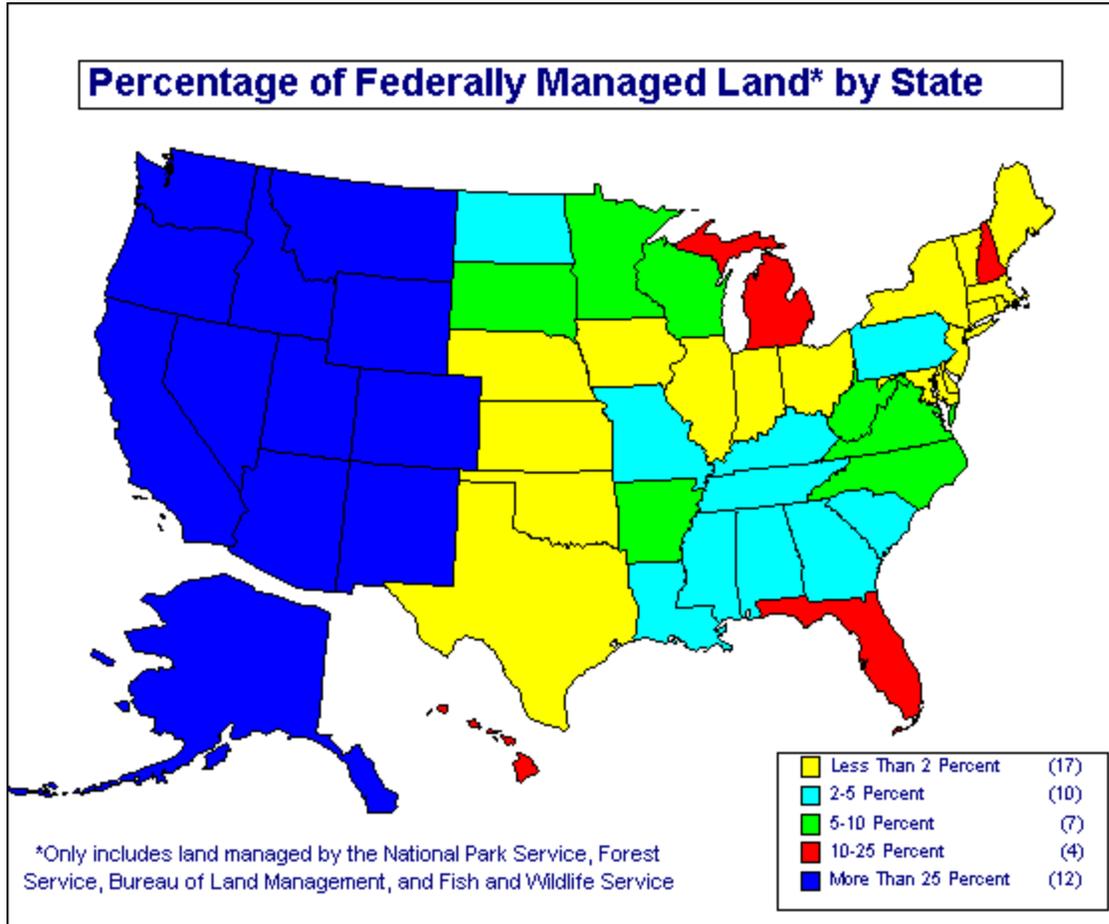
| | | | | | | | | |
|----------|---|---|---|---|---|---|---|---|
| Region 2 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 5 |
| Region 3 | 1 | 0 | 2 | 0 | 1 | 2 | 0 | 2 |
| Region 4 | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 2 |
| Region 5 | 1 | 0 | 4 | 2 | 5 | 4 | 5 | 6 |
| Region 6 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 0 |
| Region 7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Graphic 16 - FWS Formal Consultations and Section 7 Findings: 1990-1996



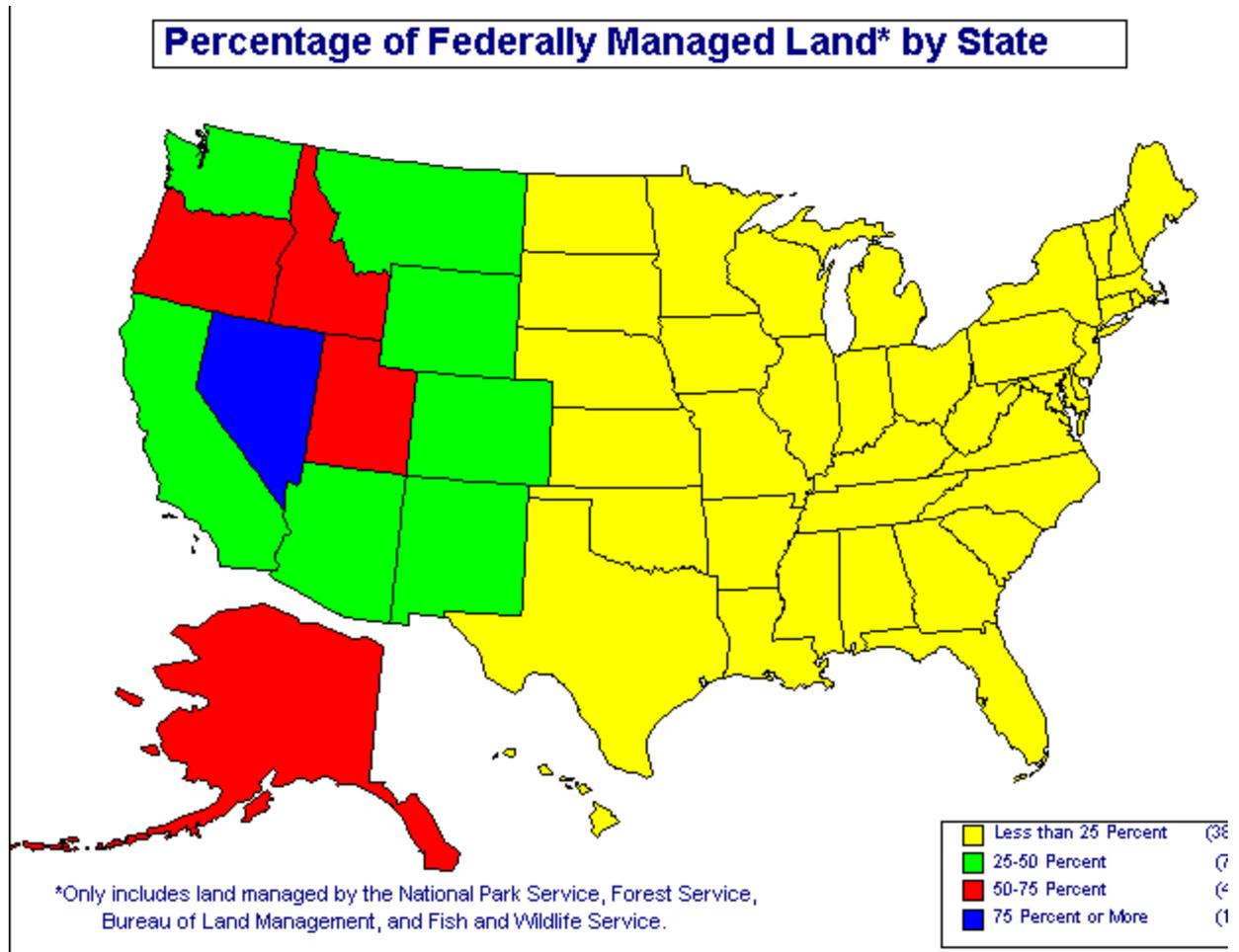
Graphic 17 - States with less than 25% of Federally Managed Lands

Endangered Species Act Implementation by Region



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18. **SUMMARY**

The Endangered Species Act is a national law, designed to prevent the extinction of species on a national and international level. Limiting implementation of the law to one geographic region defeats the overall purpose of the Act, by allowing species in other areas to be in danger of extinction.

1. This report was prepared by the Majority Staff of the House of Representatives, Committee on Resources. This report has not been officially adopted by the Committee on Resources and may not therefore necessarily reflect the views of its Members. Portions have been updated as of September 1, 1999.

Endangered Species Act Implementation by Region

Committee Reports can be obtained from the Committee on Resources by phoning 202-225-2761 or writing the Committee on Resources, 1324 Longworth HOB, Washington, D.C. 20515 or e-mail the Committee at resources.committee@mail.house.gov.

The full text of the *Endangered Species Act of 1973* (as amended through December 1996) is available at the Committee's web site as Publication **Serial Number 105-C** in [HTML](#), [TEXT](#), or [PDF](#) (52 pages).

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