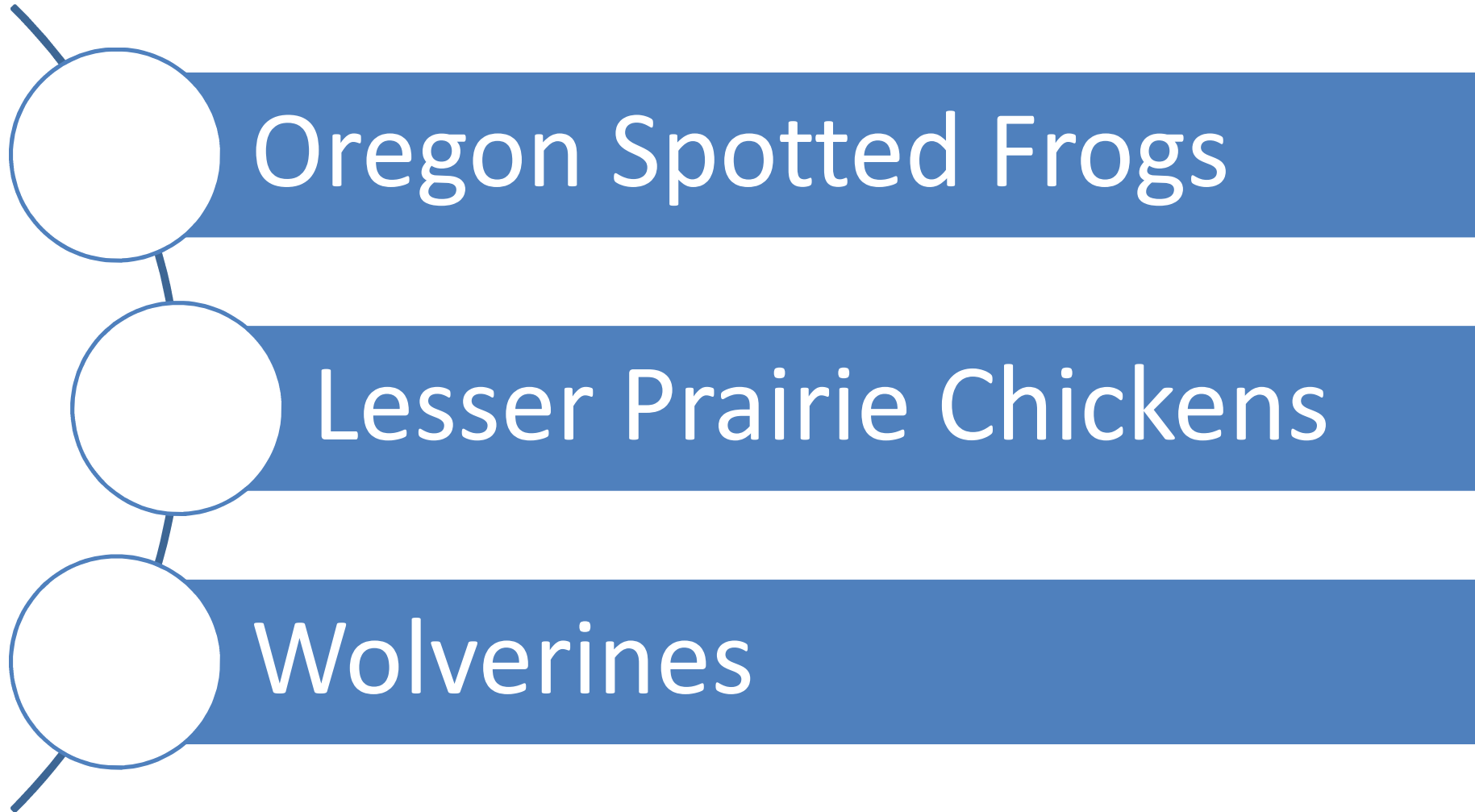


Hot Topics: Endangered Species Act

Presented by
Kirk Maag, Stoel Rives LLP
October 2016

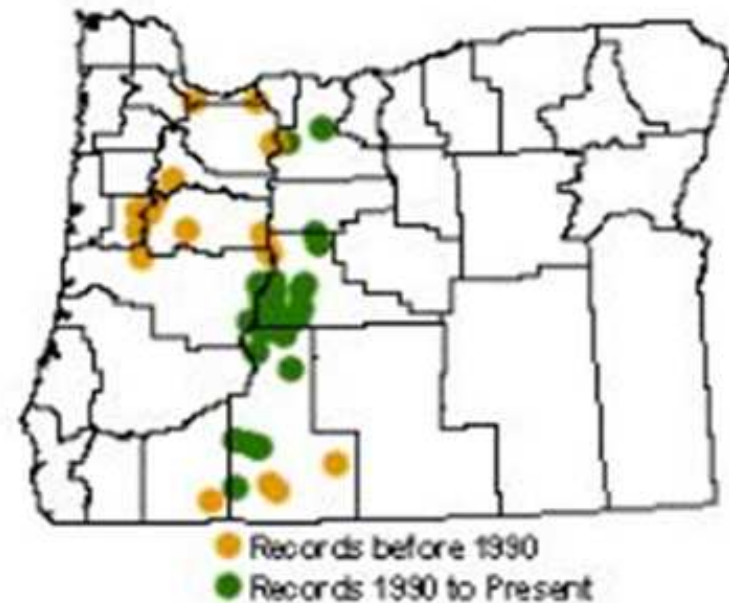
ROADMAP

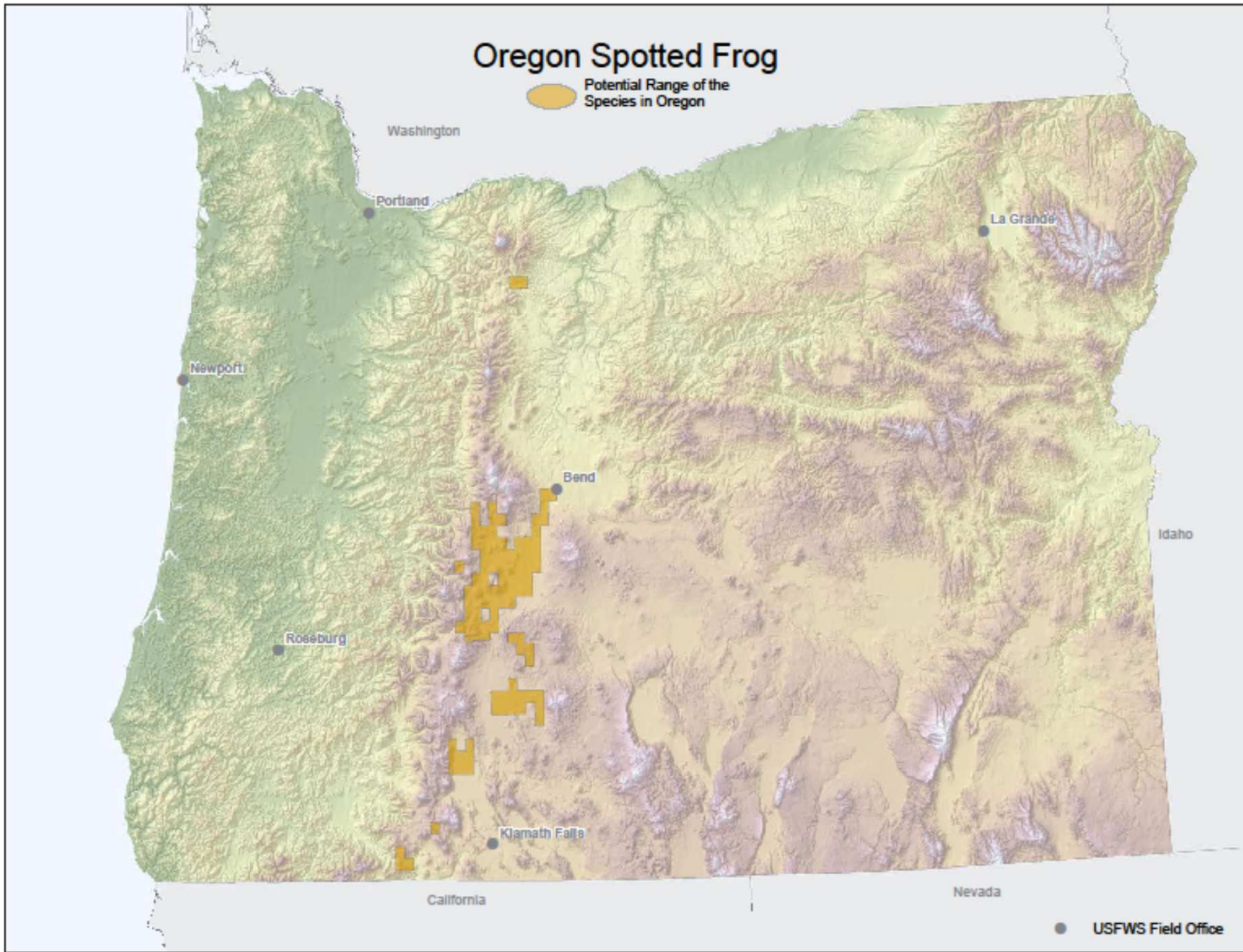


Oregon Spotted Frog

OREGON SPOTTED FROG DISTRIBUTION

- Historic range from British Columbia to northern California
- Currently known to exist in 15 subbasins in British Columbia, Washington, and Oregon
- Lawsuits focused on Upper Deschutes and Little Deschutes subbasins





LISTING & CRITICAL HABITAT DESIGNATION

August
2013

- Proposed rule to list OSF as threatened and to designate critical habitat

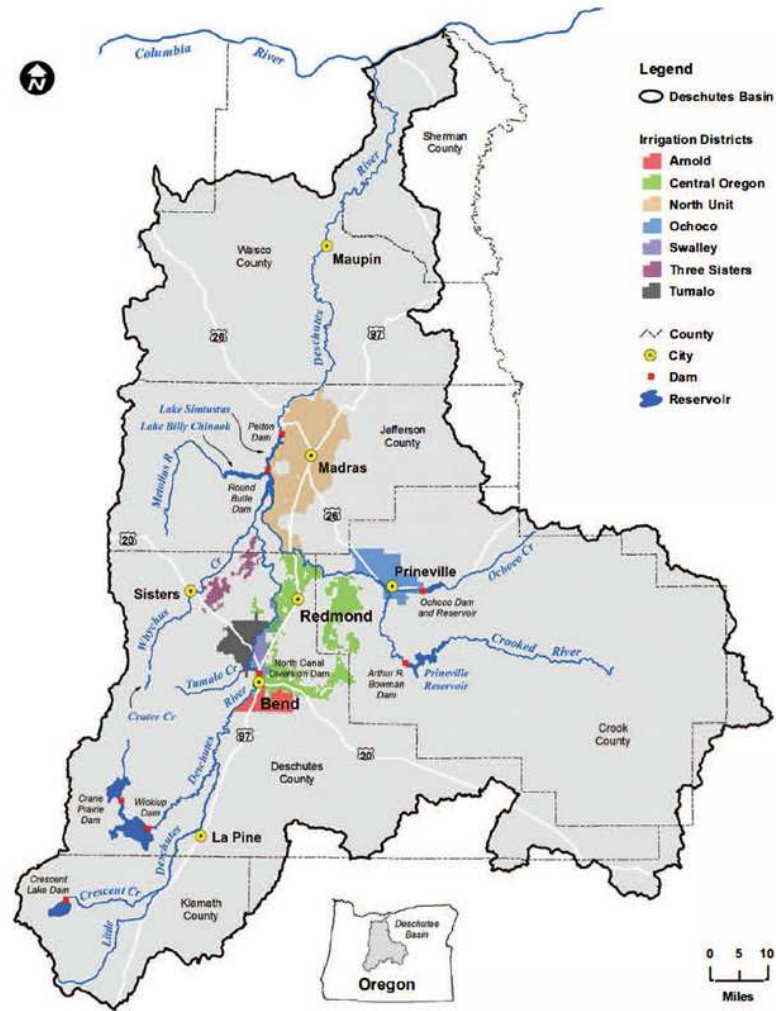
August
2014

- Final rule to list OSF as threatened

May
2016

- Final rule to designate critical habitat

GEOGRAPHY AND GEOLOGY



RESERVOIRS AND IRRIGATION

- Deschutes Project
 - Crane Prairie Dam
 - Improved by Reclamation in 1940
 - Rights to store 50,000 acre-feet
 - Wickiup Dam
 - Constructed by Reclamation in 1949
 - Rights to store 200,000 acre-feet
- Crescent Lake Dam
 - Constructed by Reclamation in 1956 to replace existing dam
 - Rights to store 86,050 acre-feet

PROCEDURAL HISTORY: 60-DAY NOTICES

July 2015

- CBD 60-day notice to Reclamation
- Alleged violations of ESA Sections 7(a)(2), 7(d), and 9

August 2015

- WaterWatch 60-day notice to Reclamation and irrigation districts
- Alleged violations of ESA Sections 7(a)(2) (Reclamation) and 9

September 2015

- Reclamation initiates consultation
- Irrigation districts voluntarily implement conservation measures

PROCEDURAL HISTORY: COMPLAINTS

December 2015

- CBD files lawsuit against Reclamation

January 2016

- WaterWatch files lawsuit against Reclamation and irrigation districts
- Court grants motion to intervene by irrigation districts, motion to appear as amicus curiae by CTWS, and motion to consolidate

February 2016

- Irrigation districts implement additional conservation measures
- CBD and WaterWatch file motion for preliminary injunction

PROCEDURAL HISTORY: PI MOTION

March 2016

- Court grants motion to appear as amicus curiae by State of Oregon
- Reclamation, irrigation districts, CTWS, and State of Oregon file responses to PI motion
- CBD and WaterWatch file reply
- Court hears oral arguments on PI motion and preliminarily rules to deny motion

April 2016

- Court issues written opinion and order denying PI motion and ordering parties to participate in mediated settlement discussions

PI MOTION: PROPOSED OPERATING REGIMES

- Deschutes Project
 - Regulated Option
 - Crane Prairie: constant year-round surface elevation
 - Wickiup: constant summer and winter flows set based on normal, wet, and dry years
 - Run-of-the-River Option
 - Crane Prairie: constant year-round surface elevation
 - Wickiup: all live flow passed through reservoir
- Crescent Lake Reservoir
 - Minimum, year-round instream flow of 40 cfs

PRELIMINARY INJUNCTION MOTION: LEGAL ISSUES AND RESOLUTION

- Key Legal Issues
 - Mandatory/prohibitory injunction standards
 - Likelihood of success on the merits
 - Likelihood of irreparable harm
 - Balancing of harms
 - Public interest
- Court's Opinion and Order

NEXT STEPS

July
2017

- Anticipated completion of FWS biological opinion

July
2019

- Anticipated completion of multi-species habitat conservation plan

Lesser Prairie Chicken

LESSER PRAIRIE CHICKEN

Listing Decision (April 2014)

- Final rule to list lesser prairie chicken as threatened
- Section 4(d) rule provided incidental take protection

Court Vacates Listing Decision (September 2015)

- FWS failed to properly apply Policy for Evaluation of Conservation Efforts (PECE)
- Federal defendants appeal but then file motion to dismiss

Petition to List (September 2016)

- Three groups petition FWS to list species
- 90-days for FWS to make findings

Wolverines

WOLVERINES

Proposed Listing (February 2013)

- Wolverine populations currently expanding
- Proposal based on projected climate change impacts

Withdrawal of Proposed Rule (August 2014)

- 118,000 comments submitted
- Most state wildlife agencies opposed listing or questioned science

Court Remanded to FWS (April 2016)

- FWS erred in ignoring potential climate change threats
- Models relied on in proposed listing were best available science

ISSUES TO WATCH

Projected Versus Observed Threats

- Court largely dismissed concerns about uncertainty
- Opinion suggests FWS was obligated to ignore current population trends

Timing of Listings

- Opinion suggests FWS must list a species if models show dramatic reduction in habitat
- Left unresolved is how far into the future FWS must look

Limited Deference

- Court gave little deference to FWS
- Two of seven peer reviewers criticized the studies that supported listing

Questions