

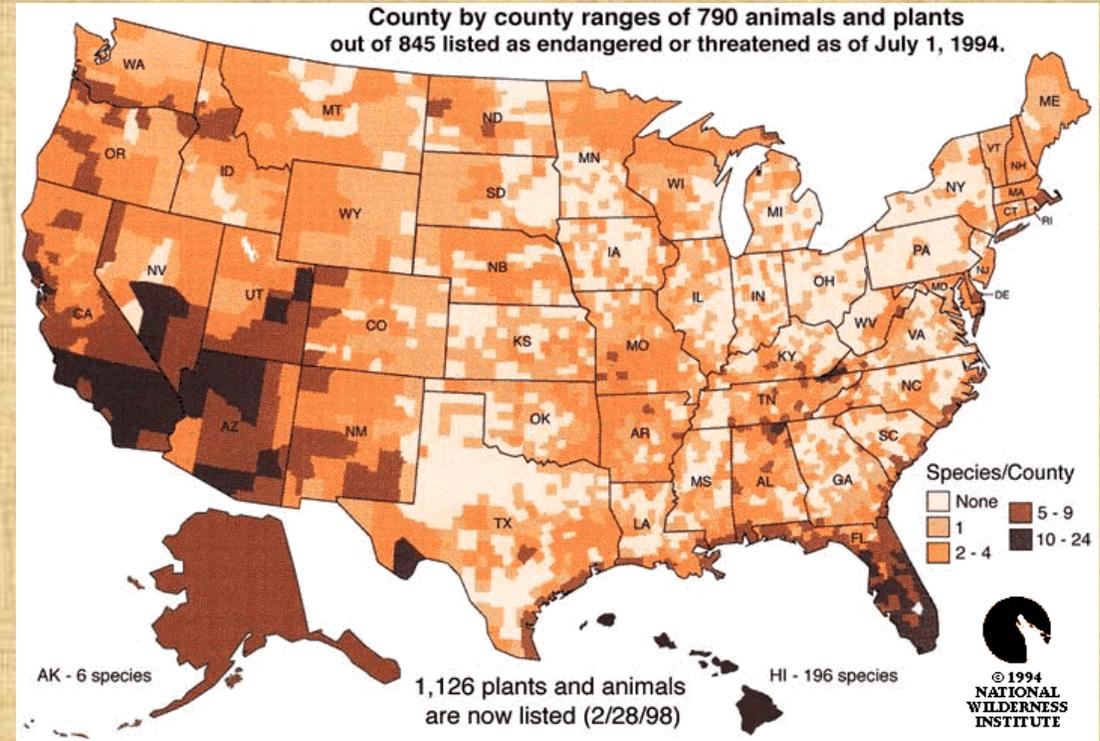
**Species Conservation Agreements
As a Defensive Tool for State Land Portfolios:
The Not-Yet-Complete Story of the Uintah
Basin Rare Plant Conservation Agreement**

WSLCA Winter Meeting

January 2017

Endangered Species Act Compliance is a Fact of Life for Large Landowners in the West

- ESA applies broad “take” prohibitions to all endangered and threatened animal species.
- Requires all federal agencies to consult with USFWS to determine if agency action will jeopardize T&E species
- Plant species protected on federal lands only, but consultation requirement means that if any federal permits are required for an activity, non-federal lands may be regulated as a condition of permitting.



The Five Factors – what FWS Must Consider in Listing A Species Under the ESA

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms;
- (5) Other natural or manmade factors affecting its continued existence (climate change, herbicides, road mortality, invasive species).

Species of Agreements: CAs, CCAs, CCAAs, and HCPs

- Conservation Agreement (CA) and Candidate Conservation Agreement (CCA)
 - Voluntary pre-listing agreements undertaken to help USFWS conclude that the five listing factors do not warrant listing, by creating adequate regulatory mechanisms, limiting threatened habitat destruction.
 - May require parties to protect or restore habitat to forestall listing.
 - If species is listed, parties receive no special protections from regulatory action
- Candidate Conservation Agreement with Assurances (CCAA)
 - Same as CA/CCA, except that assurances given by USFWS that as long as landowner is in compliance with CCAA, no additional regulatory measures imposed upon listing
- Habitat Conservation Plan (HCP)
 - Post-listing plan that may allow incidental take of species in some areas if other negotiated actions are taken

Energy vs. Plants?

- Graham's beardtongue (*penstemon grahamii*) & White River beardtongue (*p. scariosus* var. *albifluensis*)
- Typically found on oil shale outcrops in energy-rich Uintah Basin in Utah, Colo.
- Mid-2000s energy boom prompted initial listing petition from environmental groups who oppose fossil fuel development

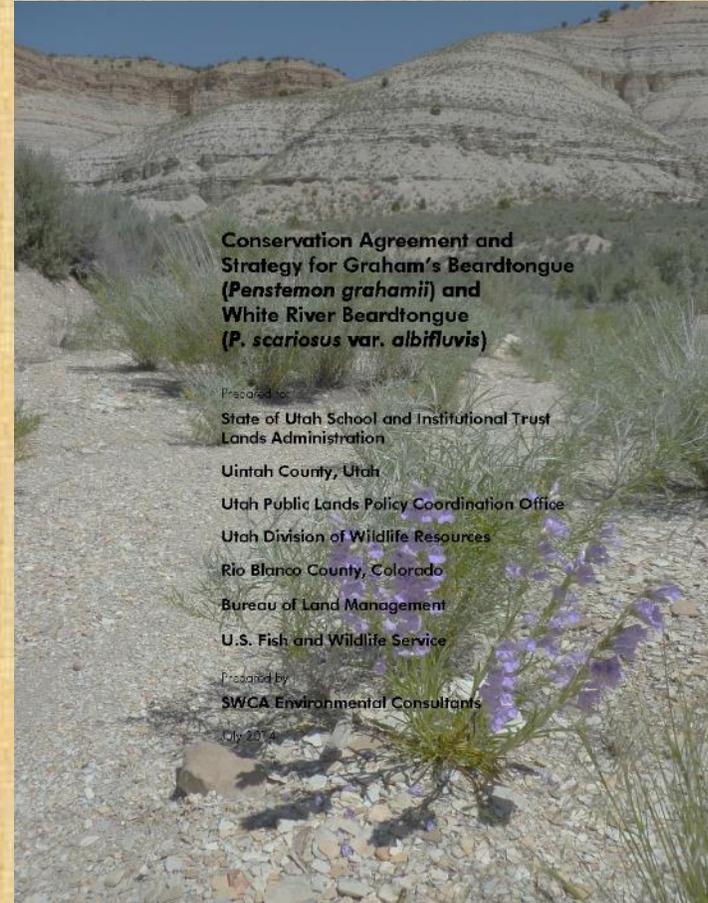


USFWS Listing Decisions

- G.W. Bush administration decision not to list in 2006. 71 FR 3158 (Jan. 19, 2006).
- 2011 federal court decision directing USFWS to reconsider listing based on finding that rampant energy development in beardtongue habitat was not adequately considered. *Center for Native Ecosystems v. USFWS*, 795 F. Supp. 2d 1199 (D. Colo. 2011)
- 2013 USFWS decision to list based primarily on threat of increased oil & gas and oil shale activity in Uintah Basin. 78 FR 47590 (Aug. 6, 2013)
- State of Utah, School & Institutional Trust Lands Administration (SITLA), local governments and industry approached USFWS about development of CA that would provide sufficient protections to allow USFWS to not list the species. CA entered July 22, 2014.
- USFWS withdraws listing decision. 79 FR 46042 (July 22, 2014)

Why Enter a Conservation Agreement?

- Certainty – identification of where plants must be protected. Development in other areas could proceed after plant survey.
- Lack of downside – USFWS had overestimated future mineral development, so much planned development unaffected.
- Opportunity – opportunity to prove that reclamation, revegetation possible during 15 year agreement term.

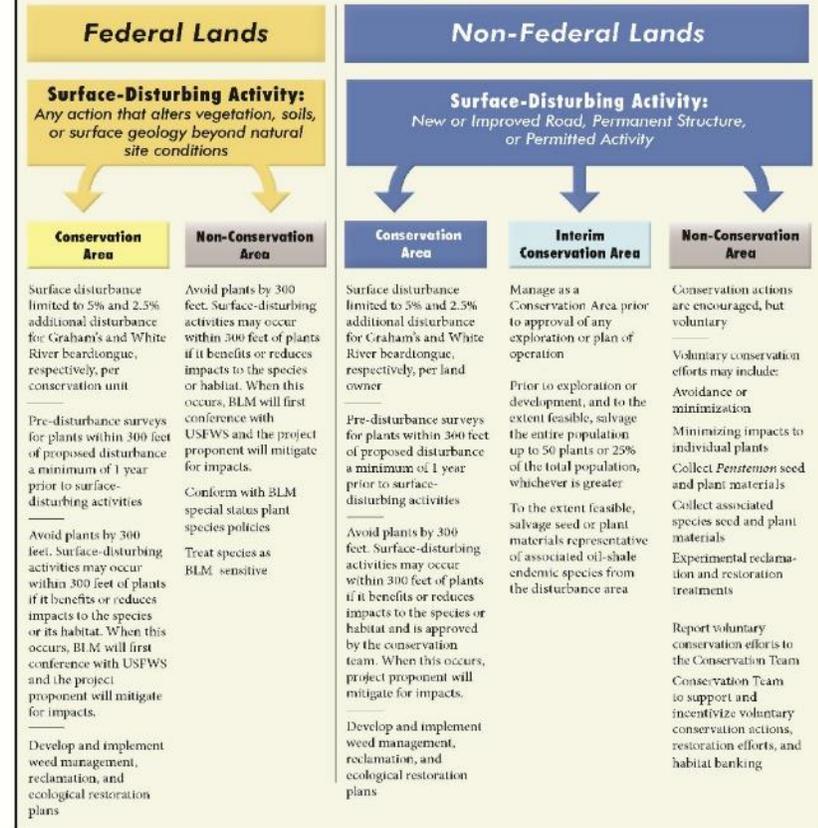


CA Terms

- Conservation areas set aside – 44,373 acres
- Limit disturbance to 5% total/2.5% additional in CA
- Avoid plants by 300 feet
- SITLA, County to adopt regulatory enforcement, zoning overlay
- 15 year term

Conservation Areas

On both federal and non-federal lands, designated Conservation Areas will be managed to identify, avoid, mitigate, and minimize impacts to Graham's and White River beardtongue from the date the agreement is signed. Where surface-disturbing activities occur, the following management is required:



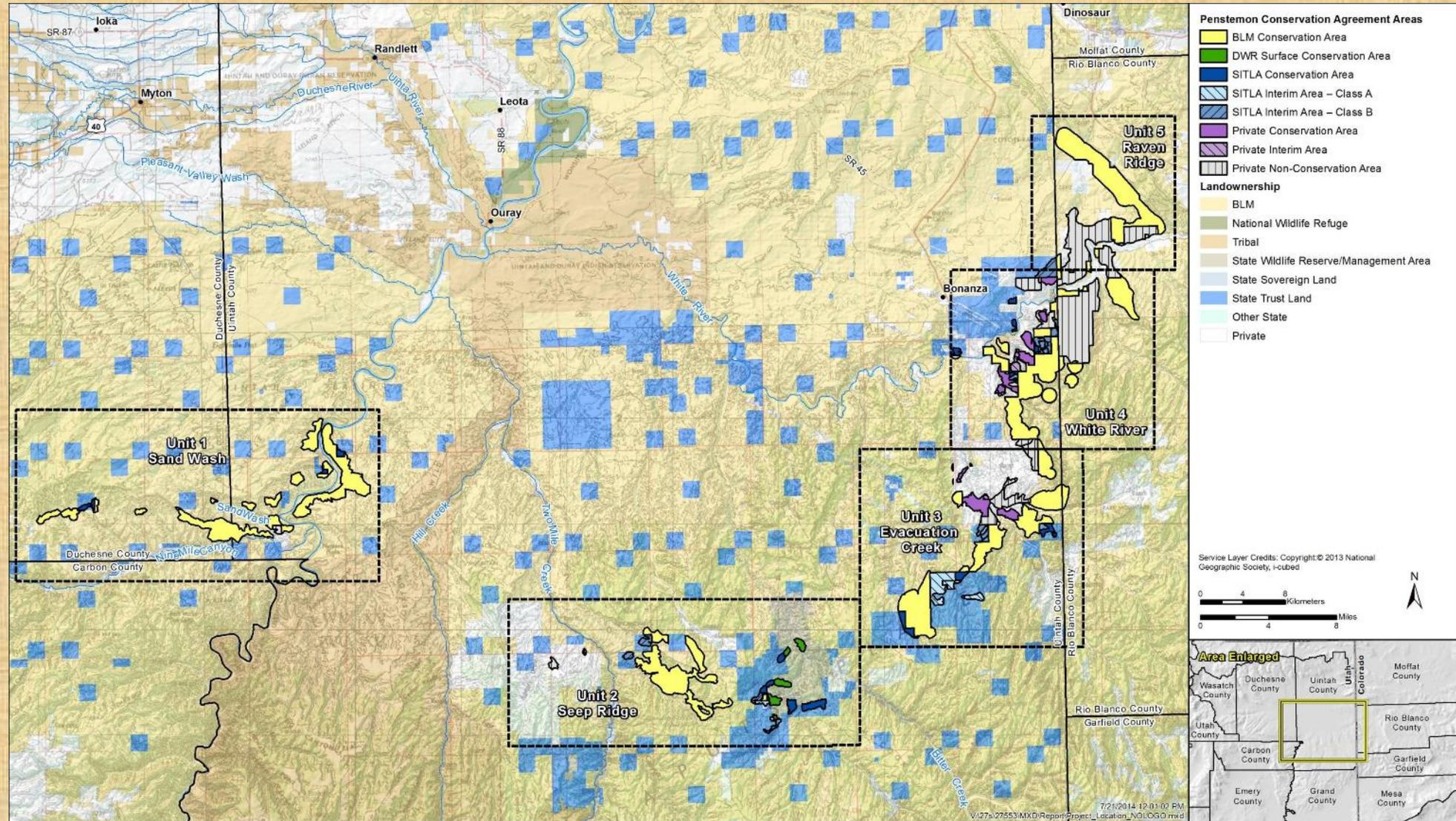


Figure 1. Conservation Areas by land owner/manager, status, and unit.

Subsequent Judicial Action

- USFWS declines to list based on CA, environmental groups sue.
- *Rocky Mtn. Wild, et al v. Walsh*, U.S. District Court, D. Colo., Civ. No. 15-cv-0615-WJM
- Judge Martinez finds three faults in CA:
 - Relied on not-yet-enacted regulatory mechanisms by SITLA, County
 - 15 year term does not put harm to plants outside of foreseeable future
 - 300 foot buffer not based on adequate evidence
- Orders parties to meet and confer on restructuring CA – mediated conference scheduled for January 23, 2017.