

## Hot Topics in ESA Litigation: Defending Preliminary Injunction Motions

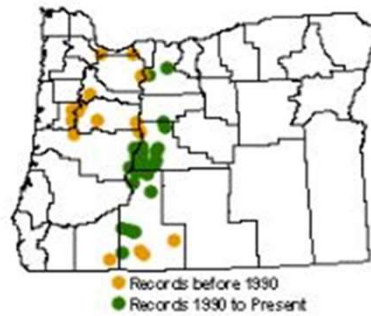
Presented by  
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American Agricultural Law Association  
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### OREGON SPOTTED FROG



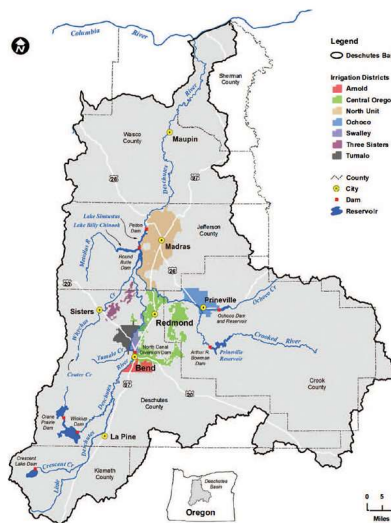
## OREGON SPOTTED FROG DISTRIBUTION

- 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



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## GEOGRAPHY AND GEOLOGY



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## 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

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## LISTING & LITIGATION

- Aug 2014: Listed as threatened under ESA
- July/Aug 2015: Notices of intent to sue
- Sept 2015: Irrigation districts voluntarily implement conservation measures; Reclamation initiates consultation
- Dec 2015/Jan 2016: Lawsuits filed
- Feb 2016: Irrigation districts implement additional conservation measures; plaintiffs move for injunction
- April 2016: Court denies motion
- Nov 2016: Settlement agreement entered by court

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## 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

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## PI MOTION: LEGAL ISSUES

- Plaintiff must show:
  - Likely to succeed on the merits
  - Likely to suffer irreparable harm in absence of relief
  - Balance of equities tips sharply in plaintiff's favor
  - Injunction is in the public interest
- A preliminary injunction is an “extraordinary and drastic remedy.”
- A plaintiff's burden is “doubly demanding” when seeking a mandatory injunction.

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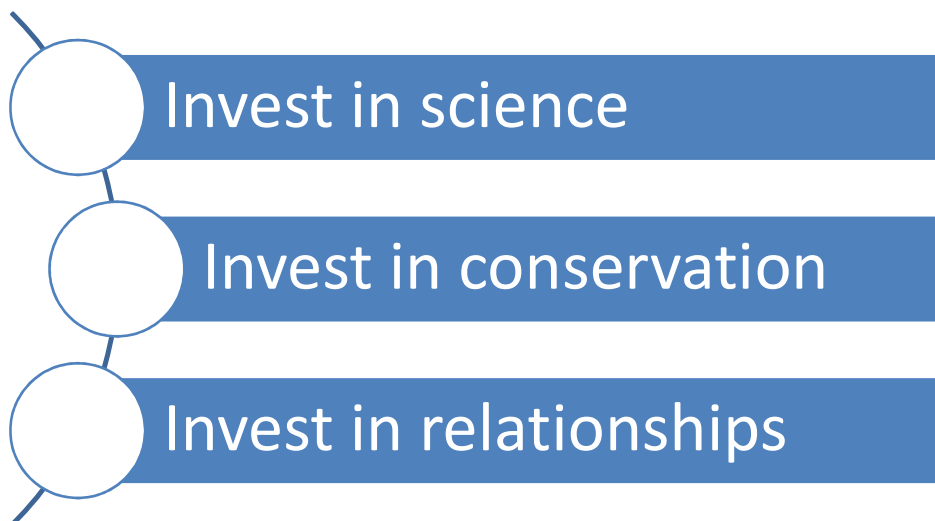


## PI MOTION: OPINION AND ORDER

- Merits
  - Court did not resolve.
- Irreparable Harm
  - Plaintiffs failed to present evidence that dams' operations would cause harm that would be significant to species as a whole.
- Balancing of Equities & Public Interest
  - Plaintiffs failed to show that their proposed injunction would benefit species pending resolution of the case.
  - Proposed injunction would harm ongoing collaborative efforts, which would not benefit the species or the public.
  - Proposed injunction could cause flooding and harm to other species.

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## TAKEAWAYS



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## BIOLOGICAL OPINION

- Concludes that operation of the reservoirs, as provided under the settlement agreement, does not jeopardize the continued existence of the Oregon spotted frog
- Allows for incidental take of Oregon spotted frogs when reservoirs are operated as provided under the settlement agreement

## HABITAT CONSERVATION PLAN (HCP)

- Section 10(a) of the ESA authorizes FWS/NMFS to issue incidental take permits (ITP)
- Applicant must first submit an HCP
- Deschutes Basin Board of Control and the City of Prineville initiated HCP planning process in 2009
- HCP will cover bull trout, Oregon spotted frog, steelhead, sockeye, and spring-run Chinook
- Approval of final HCP and issuance of ITP anticipated in 2019

## WICKIUP RESERVOIR: FALL 2018



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## QUESTIONS

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