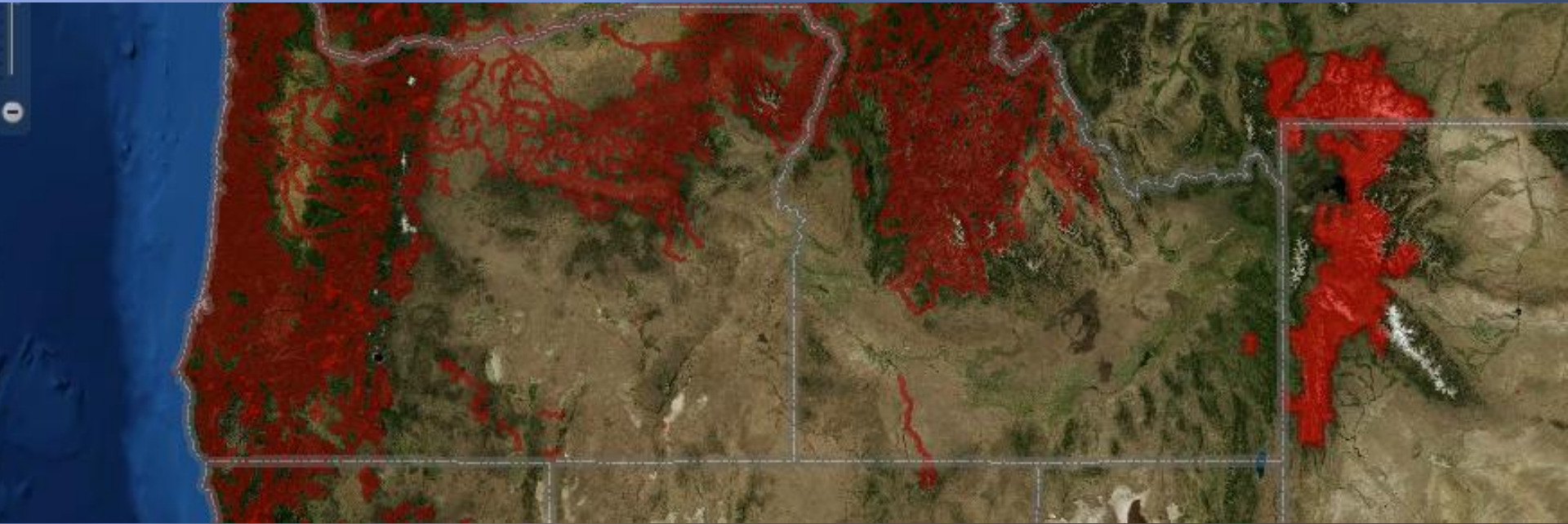
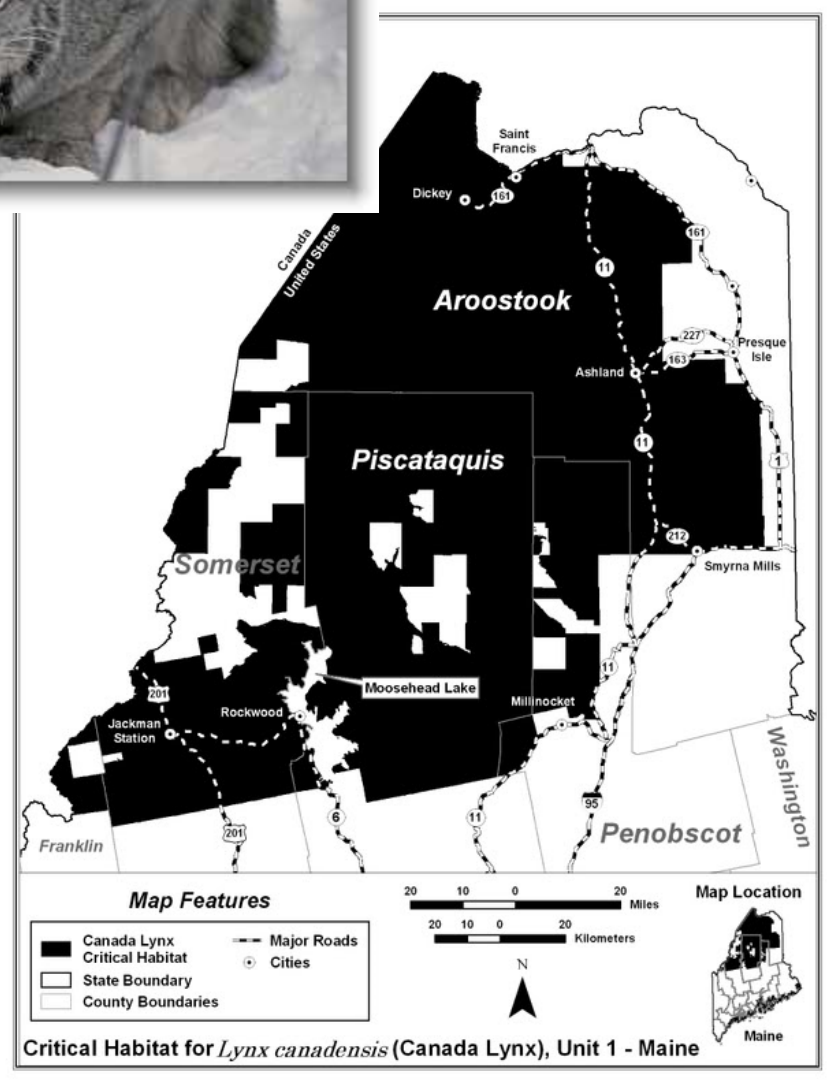
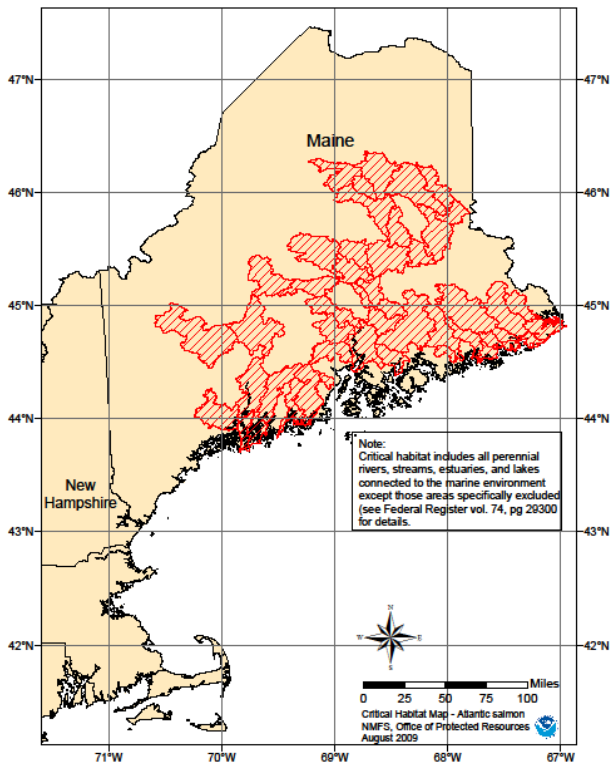


# Critical Habitat and the Challenge of Regulating Small Harms

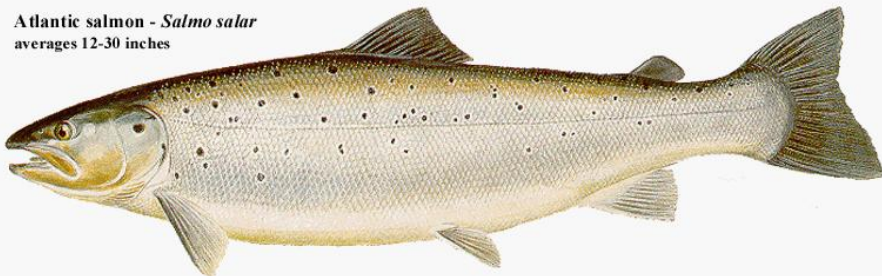


Dave Owen  
University of Maine School of Law  
Environmental Law and Policy Annual Review 2012-13 Conference  
March 22, 2013

### Atlantic Salmon Critical Habitat



Atlantic salmon - *Salmo salar*  
 averages 12-30 inches



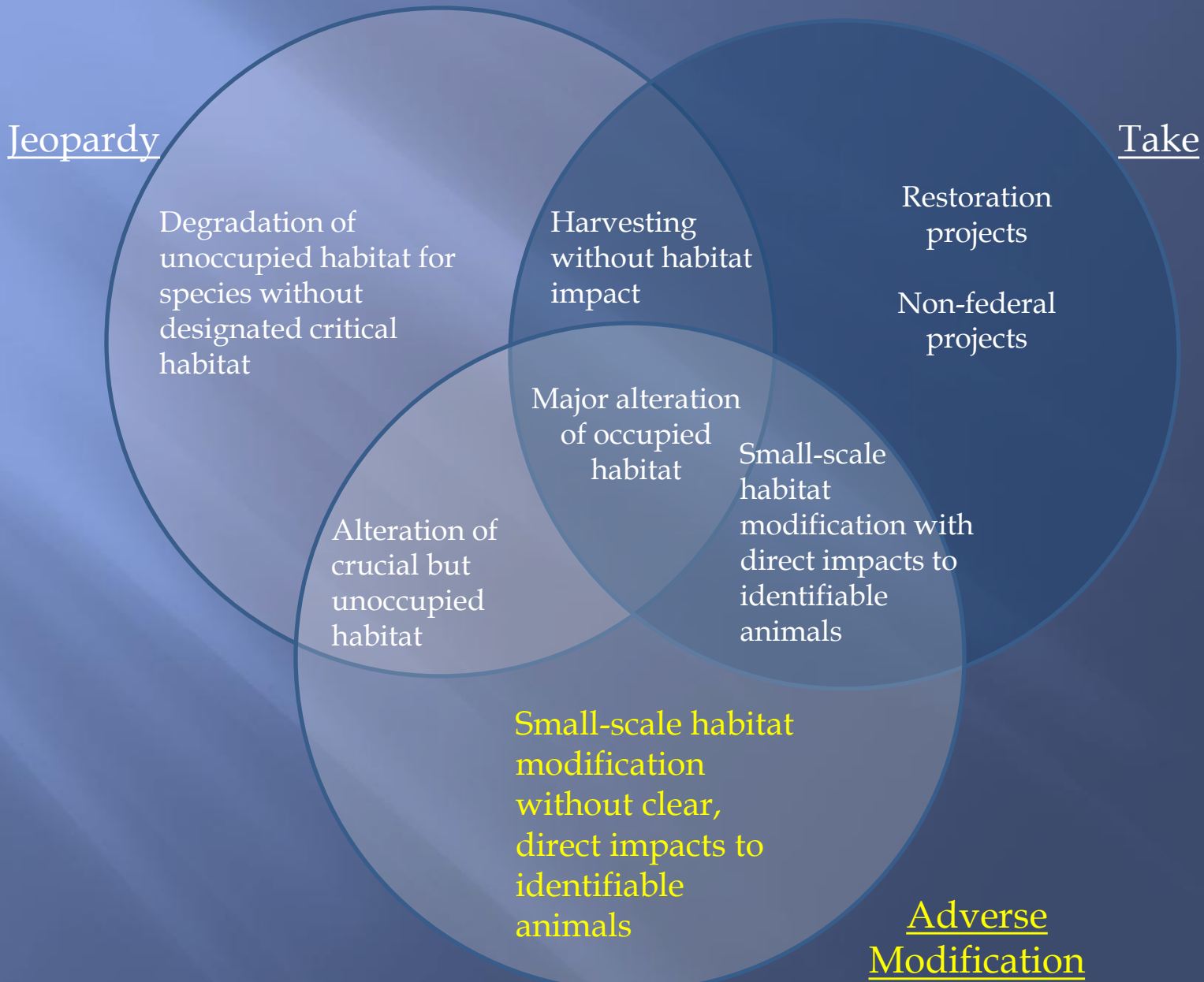
## ESA § 7(a)(2)

- ▣ “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to .... result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical...

# The ESA's Regulatory Prohibitions

- ▣ Federal agencies prohibited from taking actions likely to **jeopardize** listed species
- ▣ Federal agencies prohibited from takings actions likely to **destroy or adversely modify critical habitat**
- ▣ All persons prohibited from **taking** endangered and, in most cases, threatened species, subject to limited exceptions

# THE ESA'S PROHIBITIONS



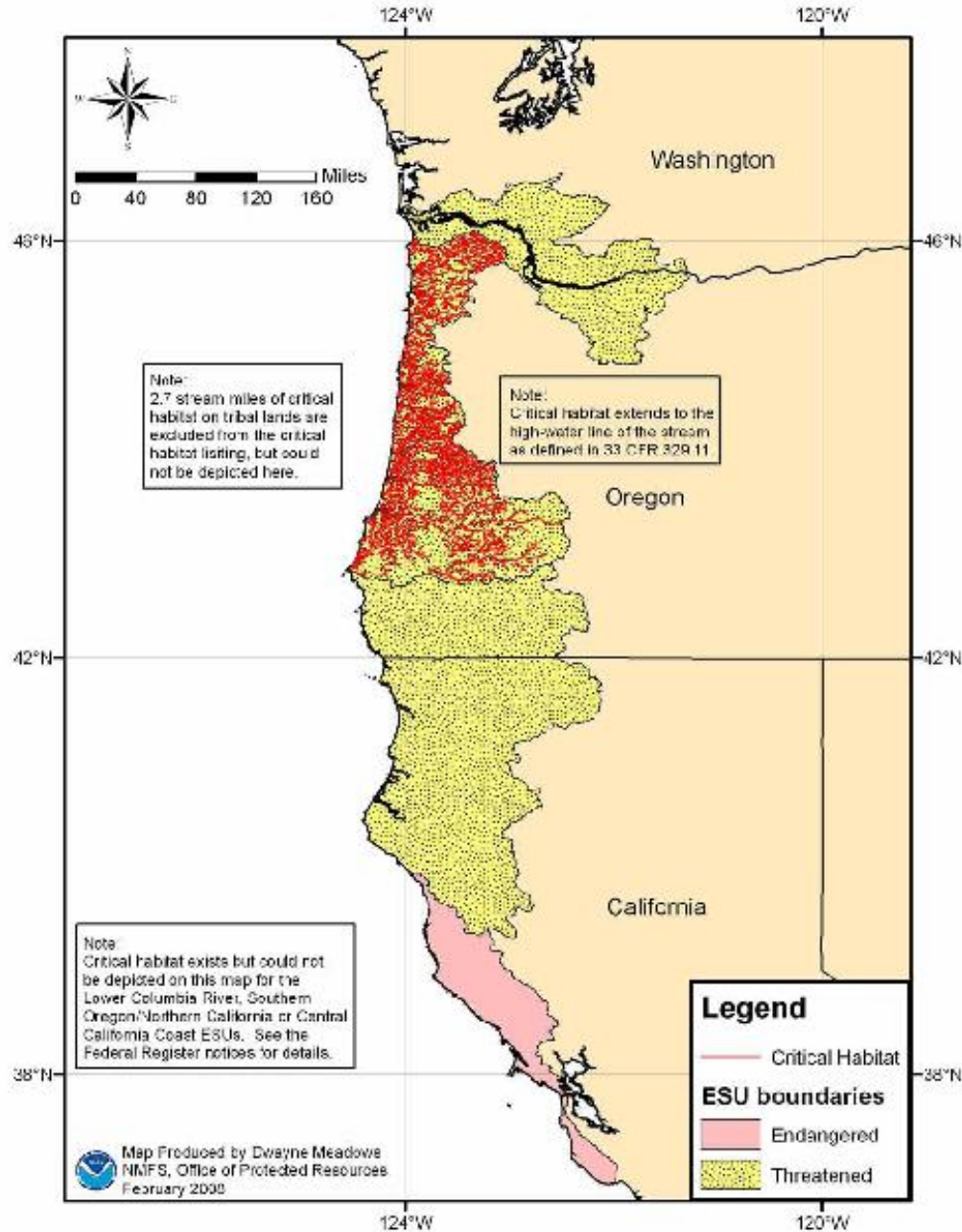
“For almost all species, the adverse modification and jeopardy standards are the same., resulting in critical habitat being an expensive regulatory process that duplicates the protection already provided by the jeopardy standard.”

Department of the Interior, Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants;  
Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31871,  
31872 (1999)

“I believe the bar for an adverse mod/destruction determination is much lower than a jeopardy determination. That is, even a relatively small but permanent loss of CH should be adverse mod/destruction.”

Email from NOAA Fisheries biologist, October 15, 2010.

# Coho Salmon Critical Habitat



# Frequency of jeopardy and adverse modification determinations, all fish species, 2005-2009

	NOAA Fisheries (2962 opinions total)			FWS (1085 opinions total; 786 non-Utah opinions)		
	Total	Bush Admin.	Obama Admin.	Total	Bush Admin.	Obama Admin.
Frequency of J determinations	0.54%	0.66%	0%	7.2%	8.5%	0%
w/o Utah				2.4%	2.9%	0%
Frequency of AM determinations	0.64%	0.81%	0%	6.7%	8.2%	0%
w/o Utah				0.67%	1.0%	0%
# AM determinations w/o jeopardy	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
Jeopardy percentage for species w/o CH	0.13%	0.15%	0%	3.7%	4.1%	0%
Jeopardy percentage for species w/ CH	0.68%	0.87%	0%	7.9%	9.5%	0%
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Table 2: Frequency of jeopardy, adverse modification, and take findings for selected subsets of biological opinions

Species group (paired sets in similar colors)	Total # opinions	Percent predicting negative habitat trends	J findings	AM findings	Percent (for opinions predicting negative habitat trend and for all opinions) finding take partly or entirely due to habitat modification	Percent imposing reasonable and prudent measures
Coho (CH)	47	36% -	0	0	94% - 94% overall	96%
Coho (no CH)	13	23% -	0	0	100% - 77% overall	92%
Rio Grande silvery minnow (CH)	18	39% -	0	0	14% - 56% overall	100%
Gila topminnow (no CH)	9	22% -	0	0	100% - 89% overall	89%
Oregon (CH)	18	39% -	0	0	100% - 94% overall	100%
Oregon (no CH)	29	28% -	0	0	88% 66% overall	100%
Oregon (mixed)	4	0% -	0	0	NA 75% overall	100%
All non-CH opinions	51	25.5% -	0	0	92% -* 73% overall	90%
All CH opinions	83	37% -	0	0	76% - 86% overall	98%

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# Quotes from Interviews:

- ▣ In response to a question about how critical habitat designations affect negotiations with action agencies and project proponents:
- ▣ People are “more willing to negotiate and mitigate.”
- ▣ “It makes a really big difference.”
- ▣ “It’s like, oh, we have to do the adverse mod’... It’s just another thing we have to do.”
- ▣ “In any section 7 consultation, we strive to protect the species and the ecosystem it depends upon.”

# Adverse Modification in the Courts

Time Period	1973–1976	1976–1980	1981–1985	1986–1990	1991–1995	1996–2000	2001–2005	2006–2010	2011*
Cases	1	1	0	0	1	1	2	14	5

Plaintiffs prevail	Government prevails
19	6

# Adverse modification and the courts, part 2

“The FWS’s determination that (several hundred acres of) critical habitat would be destroyed was thus not inconsistent with its finding of no ‘adverse modification.’ After all, the project would affect only a very small percentage of the total critical habitat.”

Butte Environmental Council v. U.S. Army Corps of Engineers, 607 F.3d 570, 583 (9th Cir., 2010)



# Reforming Critical Habitat Protection



# Recommendation 1: Keep Critical Habitat Protections

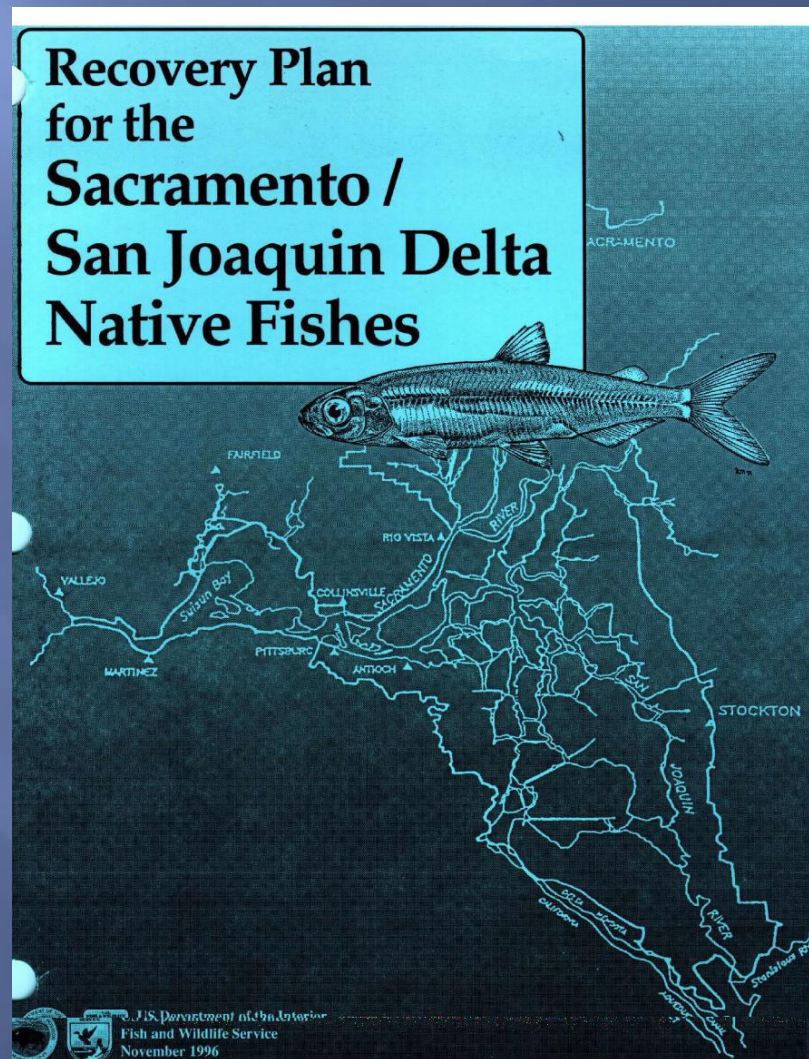
- ▣ “We have the flexibility administratively to make it a very effective tool.”
- ▣ Adverse modification is an “evolving concept.”
- ▣ “[We] probably need a higher-level discussion on doing these analyses.”



# Proposal 2: Increased Use of, and Guidance on, Offsite Mitigation



# Proposal 3: Integrating Threshold-Setting and Planning



**Thank you!**

