



# What is a 10(j) Rule?

## Species Recovery

Working with partners, the U.S. Fish and Wildlife Service (FWS) uses a range of conservation tools to “recover” endangered and threatened species—to ensure that they are able to survive on their own in the wild. These tools include restoring and acquiring habitat, removing invasive species, conducting surveys, monitoring individual populations, and breeding species in captivity to release them into their habitat. Collaborative efforts are critical to recovery success. Our partners include federal, state, and local agencies, Tribes, conservation organizations, the business community, landowners, and other concerned citizens. As a result of these efforts, the Endangered Species Act (ESA) has been credited with saving species including the gray wolf, California condor, black-footed ferret, peregrine falcon, and our Nation’s symbol, the bald eagle, from extinction.

Recovering listed species cannot be accomplished solely by the FWS because many species occur on a range of other federal, state and private lands. Achieving recovery for most species typically requires cooperative conservation with multiple landowners. To stabilize populations, put species on the road to recovery, and ultimately delist endangered and threatened species, the FWS engages a range of stakeholders.

## What is a 10(j) Designation?

One conservation tool to help a threatened or endangered species recover is to re-introduce them into their habitat. To relieve landowner concerns that reintroductions may result in restrictions on the use of private, tribal, or public land, Congress added the provision for experimental populations under section 10(j) of the ESA. Under section 10(j), the FWS may designate a population of a listed species as experimental if it will be released into suitable natural habitat outside the species’ current range. An experimental population is a special designation for a group of plants or



Kimberly Fraser / USFWS

*Endangered black-footed ferret kits.*

animals that will be reintroduced in an area that is geographically isolated from other populations of the species. With the experimental population designation, the specified population is treated as threatened under the ESA, regardless of the species’ designation elsewhere in its range. Treating the experimental population as threatened allows the FWS the discretion to devise management programs and special regulations for that population.

An experimental population may be considered essential or nonessential. An essential population is one that is considered essential to the continued existence of an endangered or threatened species. Under a 10(j) designation as “nonessential, experimental,” both the take prohibitions and consultation requirements of the ESA are relaxed, easing regulatory burden associated with endangered species. For example, the 10(j) rules for black-footed ferrets makes certain

incidental harm to ferrets legal when it happens as a result of otherwise lawful activities including traditional management or land use. This flexibility has allowed FWS biologists to introduce ferrets into a number of sites on public and private lands from Mexico to Canada. With the special allowances afforded under the 10(j) rule, landowners can continue to manage their lands without concern about violating the ESA by inadvertently harming a ferret.

## Making the Difference

The recovery of each listed species is a collaborative effort that involves numerous partners. The Rio Grande silvery minnow, grizzly bear, whooping crane, Oregon silverspot butterfly, and gray wolf are all examples of species where the FWS worked with partners to designate 10(j) populations and reintroduce species into their habitat, and has a successful impact on the species’ recovery.



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*California condor at Grand Canyon National Park.*

### **Technically Speaking**

Section 4(d) of the ESA allows the FWS to adopt any regulations necessary and advisable to provide for the conservation of a threatened species. When designating an experimental population, the general regulations that extend most of the ESA's prohibitions for threatened species (section 9) do not apply to experimental species, so the 10(j) rule contains the prohibitions and exemptions necessary and appropriate to conserve the designated experimental population.

Under section 10(j), the FWS may designate a population of a listed species as experimental if it will be released into suitable natural habitat outside the species' current range, but within its probable historical range, absent a finding by the Director of the FWS in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed. For purposes of section 7, nonessential

experimental populations are treated as proposed for listing. In these instances, a nonessential experimental population provides additional flexibility because other federal agencies are not required to consult with us under section 7(a)(2).

Section 7(a)(4) requires federal agencies to confer (rather than consult) with the FWS on actions that are likely to jeopardize the continued existence of a species proposed for listing, except on National Wildlife Refuge System or National Park System lands, where they are treated as threatened species. The results of a conference are in the form of conservation recommendations that are optional as the agencies carry out, fund or authorize activities. Because the nonessential experimental population is, by definition, not essential to the continued existence of the species, the effects of proposed actions affecting the nonessential experimental population will generally not rise to the level of

jeopardizing the continued existence of the species. As a result, a formal conference will likely never be required for individuals established within the experimental population area.

Activities that are not carried out, funded, or authorized by federal agencies are not subject to provisions or requirements in section 7. In addition, the FWS does not designate critical habitat for nonessential experimental populations.

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