



## Western Governors' Association Policy Resolution 2017-11

### *Species Conservation and the Endangered Species Act*

#### A. BACKGROUND

1. Western Governors applaud the principles and intent of the Endangered Species Act (ESA). Since its enactment in 1973, the ESA has helped prevent the extinction and assisted the recovery of some threatened and endangered species, while providing ancillary benefits to other species.
2. Through broad trustee, statutory and police powers, States have primary management authority over all fish and wildlife within their borders. States also exercise sovereign authority over the administration of water rights within their borders.
3. Western states are proactively engaged in species conservation, including development of state and/or multi-state conservation plans to manage species at the local level as an alternative to federal ESA regulation.
4. Through decades of work by staff and contractors, States have developed extensive science, expertise, and knowledge of species within their borders.
5. Western states are particularly and uniquely affected by the ESA. States are the primary recipients of economic benefits associated with healthy species and ecosystems. Tourism and recreation in wildlife-dependent communities help sustain rural economies and promote healthier communities throughout the West. At the same time, species listings and the associated prohibitions and consultations can impact western states' abilities to promote economic development, accommodate population growth, and maintain and expand infrastructure such as roads, water projects, and transmission lines. In these circumstances, the economic costs of ESA compliance can fall disproportionately on western states and local communities.
6. Given the impact ESA listing decisions have on vital state interests, states should be provided the opportunity to be full partners in administering and implementing the ESA. Federal agencies should work with states in a meaningful and productive manner on all ESA matters potentially impacting the states, as required by Section 6(a) of the ESA: "In carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States."

7. The ESA is premised on a strong federal-state partnership. But the Act and its implementation should seek to provide expanded and meaningful consultation opportunities for states to comment, participate, or perform before the federal government takes action under the ESA. Such participation is largely optional under the current scheme and has been provided inconsistently. The role of states also has been limited by rigid internal federal processes, interagency jurisdictional disputes, and interpretations of the provisions of the Federal Advisory Committee Act (FACA). This scenario has prevented the sharing of scientific information and the consideration of state determined, science-based information.
8. Western Governors recognize that species and habitat protection can be enhanced through working with the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS) (referred to collectively as “the Services”), the Department of the Interior (DOI), and appropriate changes in the Act. However, determining the shape of those changes has proven controversial and Congress has been unable to reauthorize the ESA since its spending authority expired in 1992. Key areas that need to be addressed in the ESA in addition to reauthorization include:
  - a) Defining a clear methodology and practice for de-listing recovered species;
  - b) Delaying judicial review of a rule delisting a species until the conclusion of the federally identified post-delisting monitoring period to allow state management of recovered species an opportunity to succeed so long as there is a federally reviewed and endorsed conservation plan in place;
  - c) Improving regulatory flexibility for federal agencies to prioritize petitions received to list or change the listing status of a species under the ESA;
  - d) Establishing a comprehensive system of incentives to encourage state and local governments to develop water, land-use and development plans that meet the objectives of the ESA as well as local needs, both before and after a species is petitioned for listing under the ESA;
  - e) Providing adequate tools and incentives that encourage private landowners to engage in species and habitat conservation activities both before and after a species is petitioned for listing under the ESA;
  - f) Addressing ways to dis-incentivize litigation that strains federal resources and impedes the Services’ ability to direct resources to truly imperiled species;
  - g) Increasing grants authorized under ESA Section 6 – and other federal funding for the recovery of listed species – for: 1) state and local implementation of the Act;

and 2) federal efforts to prevent additional listings in active partnership with the states;

- h) Improving the functionality of ESA Section 6 to increase partnerships and cooperation between states and the federal government in addressing ESA issues;
  - i) Alleviating the pressure on states to expend scarce funds to address, mitigate and recover endangered and threatened species, at the expense of non-listed species within the state's jurisdiction;
  - j) Providing greater distinction between the management of threatened versus endangered species in ESA to allow for greater management flexibility, including increased state authority for species listed as threatened; and
  - k) Providing more extensive state engagement in development and implementation of Section 4(d) special rules or other mechanisms under the ESA that promote species conservation while addressing situations that merit flexibility or creative approaches.
9. Climate change is increasingly being used as a determinant factor in the assessment of the need to list a species under the Act; however, the ESA may not be equipped to address this potential global threat to species and habitat. Nevertheless, the meaning of "foreseeable future" with the use of climate modeling is still undefined for effective management decisions related to implementation of the ESA. Predictions from climate models grow increasingly uncertain over time. Additionally, the Services currently have no criteria to weigh the model uncertainty related to projected scientific information, such as climate change, in their scientific review.
10. States are concerned about the use of the precautionary principle in the Services' recent listing regulations and recovery planning processes, both proposed and adopted. This principle, coupled with over-reliance on predictive models that have not been validated with independent observational data, can have the effect of removing species from state jurisdiction and extending critical habitat into areas requiring extensive ground-truthing. In some instances, such listed species are at a healthy population level and are expected to remain healthy for decades into the future. Listings based on climate change modeling makes it difficult for the federal government and the states to identify a recovery timeline or plan for management of the listed species.
11. States are capable of managing species, including those that might be impacted by future conditions. States should be viewed as full partners in all ESA decisions, but particularly when reviewing and considering the challenges that could be faced by species in the future. States bring a wealth of observational knowledge and information

about the current status of a species and its habitat that must be factored into any ESA analysis or decision beyond just responding to data calls. The full depth of state capabilities should be incorporated in any listing decision or critical habitat designation based on the precautionary principle and best professional judgment. Federal consultation with states in analyses and final decision making will result in more durable and implementable solutions, better conservation outcomes, and allow for strained federal budgets and resources to be allocated to protecting and conserving species at serious risk of extinction.

12. The Services have administratively expanded the definition of “(unoccupied) critical habitat” beyond the “specific areas... essential to the conservation of the species” (ESA, Section 3(5)(A)(ii)) to include areas not currently capable of supporting the species but determined to have the potential of becoming habitat in the future. Because the designation of “critical habitat” can limit activities on state, county, municipal, and private lands, this overly broad reading can add unnecessary and uncompensated regulatory burdens and costs. Some recent critical habitat designations (and proposed designations) have been overly expansive, including nearly all or all of the geographical area of a broadly distributed species including peripheral habitat. This runs counter to statutory guidance and adds unnecessary regulatory burdens. For broadly distributed species, critical habitat should not include the entire or nearly all of the geographic area which can be occupied by a threatened or endangered species.
13. The ESA requires that the Services use the “best available” biological information in making determinations about individual species’ status for the purposes of the ESA. Biological information should be collected as thoroughly as possible in the timeframe provided by the Act, and should include scientific information and biological opinions from affected states.

## **B. GOVERNORS' POLICY STATEMENT**

1. Western Governors support all reasonable management efforts to conserve species and preclude the need to list a species under the ESA.
2. Western Governors believe that state and multi-state conservation plans, upon review, consultation, and endorsement by the Services, should give rise to a regulatory presumption by federal agencies that an ESA listing is not warranted so long as resources and mechanisms are in place to implement such plan and listing factors affecting the viability of the species are addressed in the plan. To that end:
  - States need clear, concrete guidance from the Services about the requirements of state and multi-state conservation plans in meeting minimum conservation goals and objectives that would lead to stable or increasing populations, eliminate perceived threats to the species, and eliminate the need for listing.

- The Services should acknowledge that variability in state approaches for conservation of species is acceptable, particularly for species with a wide geographic range, as long as conservation goals and objectives are met.
3. Governors support legislative initiatives, court rulings, petitions or regulatory measures which allow local, state, federal and private conservation efforts adequate time to be implemented and demonstrate their efficacy.
  4. Western Governors recognize that much can be accomplished by working with DOI and the Services, and they believe that the ESA can only be reauthorized through legislation developed in a fashion that results in broad bipartisan support and maintains the intent of the ESA to protect and recover imperiled species.
  5. Western Governors call on Congress to amend and reauthorize the Endangered Species Act of 1973 based upon seven broad goals. These goals should be achieved while maintaining the Act's integrity and original intent to protect and recover listed species to a point where the protections of the Act are no longer necessary. Implementation of these goals will improve the effectiveness of the Act by making it more workable and understandable. The seven goals are:
    - **Require clear recovery goals for listed species, and actively pursue delisting of recovered species.** Western Governors believe that recovery, and ultimately delisting of species covered by the ESA, should be the highest priority of the Act. Every effort should be made to complete a recovery plan within one year of a species being listed, when doing so will not compromise the integrity of the plan. For climate change listings a two to three year process may be reasonable. Federal funding for ESA activities should be prioritized to achieve species recovery. Western Governors believe that the best way to accomplish this goal is to require the Services to publish clear and quantifiable recovery goals, in consultation with the individual affected state(s), for threatened or endangered species at the time of the listing decision. This will provide objective recovery criteria that both state and federal agencies may work toward in the recovery process. Recovery plans should also provide guidance, in the case of species listed as endangered, regarding the criteria for a down-listing from endangered to threatened. In cases where quantification of recovery goals is not initially feasible, the services should be required to publish a plan, including a timeline, describing the steps the federal agencies will take in identifying measurable goals. Recovery goals should be reviewed and changed using an adaptive framework. Further, the Western Governors believe the required objective recovery criteria should include a clear articulation of the required population, population trends, or other relevant criteria, including amelioration of threats identified in the listing process.

- **Increase the regulatory flexibility of the Services to review and make decisions on petitions to list or change the listing status of a species under the ESA.** The current statutory time frames provided for making listing determinations are not sufficient to allow for adequate data collection and analysis. Consequently, instead of prioritizing listing decisions based upon resource availability and for the species needing the most immediate attention, the agencies are often forced to prioritize listing determinations through legal action. This can result in making determinations based on insufficient data for a species. Further, it can jeopardize opportunities to partner with states, landowners and other stakeholders for preemptive species conservation efforts that could eliminate any need to list the species.
- **Enhance the role of state governments in recovering species.** The Endangered Species Act can effectively be implemented only through a full partnership between the states, federal government, local governments and private landowners. One way to accomplish this partnership is to authorize the delegation of authority for the development of conservation plans on a voluntary basis to states that choose to accept such delegation, and agree with the appropriate Secretary to perform them in accordance with specified standards. Authority should also be given to the appropriate Secretary to provide grants for the additional administrative costs to the state. States will benefit by a right of refusal to be partners in recovery planning and species management. Additionally, states should also be offered tools such as incidental take authority, as authorized by the ESA.
- **Ensure the use of sound science in ESA decisions.** Given the broad implications that may arise when ESA actions are taken, significant decisions must be made using objective, peer-reviewed scientific literature and scientific observations. A review of the scientific and management provisions contained within listing, recovery and delisting decisions by acknowledged independent experts is important to ensure the public that decisions are well-reasoned and scientifically based. State agencies often have the best available science, expertise and other scientific and institutional resources such as mapping capabilities, biological inventories, biological management goals, state wildlife action plans and other important data. This wealth of resources is highly valuable; the federal government should recognize, consult, and employ these vast resources in developing endangered species listing, recovery and delisting decisions. Scientific and management review committees, as well as the scope and extent of the appropriate scientific and management review, should be agreed upon by the Services and the affected states. Federal agencies may delegate their responsibility to name these review committees, and determine the scope of review to states in order to enhance state ownership of the committee's decision.
- **Incentives and funding for conservation are essential.** Western Governors believe that providing economic incentives for landowners to participate in conservation

efforts is likely to achieve more efficient and cost-effective results, and may lead to more rapid conservation, and even obviate the need to list a species in the first instance. In addition, funding for ESA related activities should be enhanced to address the growing list of threatened and endangered species. Funding needs to escalate rapidly as state and federal agencies increasingly assume ESA management activities and embrace ecosystem and multi-species management strategies. The Cooperative Endangered Species Conservation Fund authorized under Section 6 should be funded and managed as a block grant, with state discretion on spending priorities. A broad range of programs, from the Farm Bill to the Water Resources Development Act, should be reviewed for opportunities to assist communities and landowners in their efforts to conserve species in a manner that respects water and property rights. Funding needs to be made available for proactive and incentive-based efforts to prevent listings, and for recovery plans and de-listing activities.

- **Foreseeable future must be defined.** The ESA does not contain a clear definition of “foreseeable future,” a term of art in the Act. As a result, there is considerable variation in the Services’ interpretation of this factor in listing, recovery planning, and delisting decisions. This lack of clarity is becoming a critical point for divergent and unfocused decisions as the scientific effects of climate change are being incorporated into these decisions. The meaning of “foreseeable future” with the use of climate modeling needs to be defined for listing decisions where climate change is critical to the decision. The re-authorization of the Act needs to provide further definitions for this term including an exception if there is a determination made that conservation objectives can be met or maintained for 5 years under state management authority, at which time another status review should occur. The Solicitor’s 2009 M-Opinion that has been the basis for the Services’ interpretation of the term provides only vague guidance, explaining that Congress intended “foreseeable future” to “describe the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of a species.” M-37021, Jan. 16, 2009.
- **States should be full partners in listing, critical habitat designations, recovery planning, and delisting decisions, particularly when modeling is used in analysis.** When federal agencies intend to rely on the precautionary principle or best professional judgment, particularly when coupled with the use of long-term modeling and forecasting, in place of current observational science and measurable impacts, the states should be a full partner in the analyses, model development and consulted with prior to final decisions. Furthermore, the Services need to establish consistent criteria to assess modeling uncertainty related to projected scientific information, such as climate change, in their scientific review. In these circumstances, federal agencies should partner with states to develop and utilize mutually acceptable predictive techniques and consensus-based metrics that

maintain state primacy in the management of the species and are strongly grounded in observational science and measurable outcomes.

6. Western Governors encourage the federal government to consider sound science, particularly from state agencies, and to include such science in its species status assessments and listing decisions.

**C. GOVERNORS' MANAGEMENT DIRECTIVE**

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual action/work plans that shall include specific targets, actions, and timelines necessary for furthering the policy positions and goals contained in this resolution. The Governors direct Governors' staff and the WGA Staff Advisory Council to participate with WGA staff in the development of the action/work plans. Those action/work plans shall be presented to, and approved by, Western Governors prior to implementation. The first work/action plan shall be presented to the Western Governors not later than three months after adoption of this resolution. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual action/work plans.
3. As of their adoption on June 23, 2017, Governors incorporate by reference the "[WGA Species Conservation & ESA Initiative Year Two Recommendations](#)" as a means of implementing the principles forwarded in this resolution.

*Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult <http://www.westgov.org/resolutions> for the most current copy of a resolution and a list of all current WGA policy resolutions.*