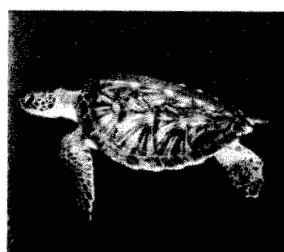


ENDANGERED SPECIES ACT

Law, Policy, and Perspectives



SECOND EDITION

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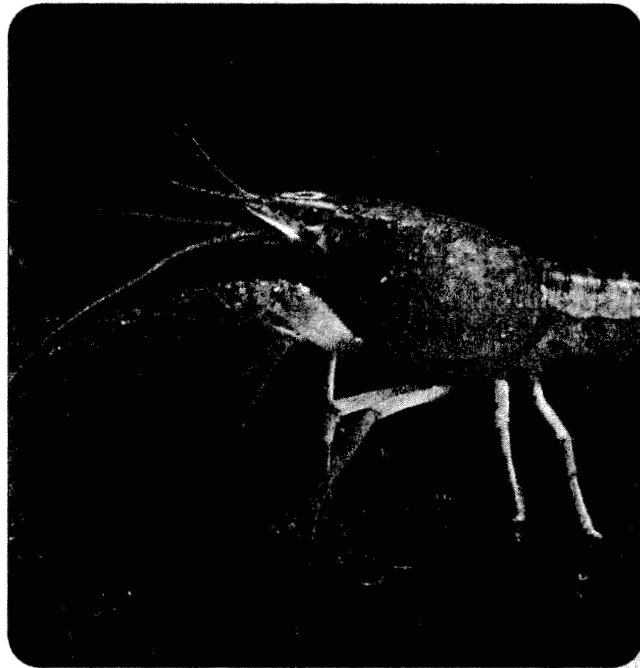
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State Endangered Species Acts

Susan George and William J. Snape III

Introduction

The role of state governments in protecting not just endangered species but all species can be summed up with one fact: state governments traditionally have been the chief stewards of wildlife within their borders. The states therefore serve a vital role in protecting and conserving their own plants, animals, and habitats. Yet while states historically were given the role of protecting the wildlife within their borders and still retain significant rights and powers, the federal government in many instances has assumed primary responsibility over these national resources under its constitutional authorities.¹ Under the Commerce Clause, *inter alia*, Congress enacted a wide range of environmental laws, including the Endangered Species Act of 1973 (ESA).²

Through the ESA, the federal government now exercises its vitally important power to regulate listed species and their associated habitat to achieve conservation and recovery. But the role of the states in endangered species protection was recognized from the outset, as the ESA authorized the Secretary of the Interior to enter into cooperative agreements with states that established "adequate and active" programs of protection. This chapter will explore those programs, enacted statutorily and dubbed "state endangered species acts," as well as their history, current status, and role.

The role of the states, and how to enhance the conservation of threatened and endangered species through greater state involvement, has been and likely will continue to be a topic of national discussion. Although many states have lacked the capacity, both legal and programmatic, to protect nongame species, many states are significantly increasing their focus on nongame management. By increasing their capacity, the states not only can increase their ability to manage threatened and endangered species as an extra safety net but, more important, can fulfill their trust responsibility for all wildlife species in a way that supplements and complements irreplaceable federal protections.

Current State of the Law

The laws in place today vary as widely as the landscapes from which they come. These laws range from simply prohibiting either the "taking" of or trafficking in an endangered species to more comprehensive schemes for their listing, management, and protection. Nevada, in 1969, was the first state to declare that its people had a legal obligation to conserve and protect native species threatened with extinction.³ Kentucky was the most recent state to enact a law protecting imperiled species, passing its Rare Plant Recognition Act in 1994.⁴

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Most of the existing state endangered species acts merely provide a mechanism for listing and prohibit the taking of or trafficking in listed species. No mechanisms for recovery, consultation, or critical habitat designation exist in 32 state acts. Such a framework exists in states such as Florida, where the only provisions relating to endangered species provide for listing and make it "unlawful for a person to intentionally kill or wound any fish or wildlife of a species designated by the Fish and Wildlife Conservation Commission as endangered, threatened or of special concern."⁵ Kentucky prohibits only the import, transport, possession for resale, or sale (trafficking) of an endangered species listed by the state.⁶ Georgia, although it has an Endangered Wildlife Act, is primarily governed by rules and regulations, and has no specific statutory provisions related to endangered species other than penalty provisions.⁷ Five states have no act at all; they simply rely on the federal act or nongame programs.⁸

The California Endangered Species Act is the most comprehensive of the state acts. Modeled after the federal act, it provides a mechanism for listing and prohibits the taking of or trafficking in listed species.⁹ In addition, it covers both plants and animals and requires recovery plans and agency consultation on the impact of proposed state agency projects on endangered species.¹⁰ Acts in several other states, including Kansas and Hawaii, also provide substantial measures.¹¹ In general, however, most acts lack all but the most basic elements of a legislative scheme to protect a state's imperiled species.

History

Before enactment of the ESA, 16 states had adopted legislation classifying certain wildlife species as endangered and tried to protect them through import and sale restrictions. The focus of these acts was on taking and commerce prohibitions rather than habitat protection. Then, with the enactment of the 1973 legislation, Congress adopted a federal scheme to improve state efforts. In 1973, Section 6(f) of the federal act was created in part to bolster more state participation by defining what state acts must look like. An acceptable state program had to do the following:

1. Include the authority for a state agency to implement the program;
2. Establish acceptable conservation programs for all resident listed species;
3. Include the authority to determine the status and survival requirements for resident fish and wildlife;
4. Authorize the establishment of programs to conserve listed species; and
5. Provide for public involvement in decisions on the listing species.

Federal funding was provided as an incentive.

Twenty-one states responded to the call. Seeking to encourage even greater state participation, Congress amended the ESA in 1977 to create an alternative. The 1977 amendment authorized the Secretary to enter into more limited cooperative agreements with those states that met the final three criteria and whose programs addressed

those species in the greatest need of attention. The loosened requirements appear to have had the desired effect, as eight states adopted laws following the amendment. Today, 46 states have some form of endangered species legislation on the books.

Listing

Listing is the first step in the protection of imperiled species. Under this procedure, plants and animals are classified according to the degree of risk to the species. Based on this classification, a species is then given varying degrees of protection.

The courts have confirmed that states can list animals that are not on the federal endangered list. In *Nettleton Co. v. Diamond*,¹² a New York court found that because scientific uncertainty sometimes exists as to whether an animal should be classified at the federal level as threatened or endangered, states can step in and list species that the federal government decides not to list. Further, the court in *Nettleton* stated that this state authority applied not only to species indigenous to the state but to nonindigenous species as well.¹³

Every state with its own act requires or authorizes promulgation of a list of endangered species within the state. Listing is required in each of these states except New Jersey, where by law the Commission of the Department of Environmental Protection may list species that are endangered.¹⁴ Three other state statutes require that species be listed but provide significant exceptions to the rule. In Oregon, the Fish and Wildlife Commission can decide not to list if the species is secure outside the state and is not of "cultural, scientific or commercial significance to the state."¹⁵ And in Kentucky, the listing of plants "shall not serve to impede the development or use of private or public lands."¹⁶

Most acts, however, are written to exclude cost/benefit considerations from the decision about whether or not to list a species for protection.¹⁷ In general, the rationale is that socioeconomic impacts can be considered when protective regulations are actually implemented and that an honest accounting of the state's biota is owed to the public. In California, for example, which has a comprehensive process for listing, "sufficient scientific information" is necessary for a listing decision.¹⁸ An amendment to New Mexico's Wildlife Conservation Act states that listings cannot be based on public information concerning social and economic impact, but input from affected landowners and resource managers must be taken and kept in a public repository.¹⁹

An additional criterion used in listing a species is geographic location. Unlike the federal act, which lists a species found to be imperiled within its entire geographic range, most state acts focus on the species' status within that state's geographic borders. Typical language can be seen in Maine's act: protected species are those "in danger of being rendered extinct within the State of Maine."²⁰ This protection is extended to subspecies in almost three-quarters of the state acts. Connecticut goes further, extending protection to distinct populations of imperiled species.²¹

In addition to listing state endangered species, 37 states also adopt the federal list. New Mexico is one exception. In that state, the Game and Fish Commission

must adopt the federal list by regulation, and to date, only select species from the federal list have become part of the state list.²² The Mexican spotted owl is federally listed in New Mexico but does not appear on the state list, although the Mexican gray wolf appears on both lists.²³

Listing procedures vary in complexity. Typically, the state wildlife commission, agency, or division is empowered to make listing decisions. North Carolina, however, until recently permitted a species to be listed only after several independent bodies concurred—a Scientific Council, a Nongame Wildlife Advisory Committee, and the Wildlife Resources Commission.²⁴ Montana allows a wildlife administrator to make recommendations about listing, but final decisions are reserved for the legislature.²⁵

While all states with acts recognize both threatened and endangered status for listed species, 12 states also authorize the listing of “candidate species” or “species of special concern.” For example, Minnesota designates a “species of special concern” if it is uncommon in the state or has “unique or highly specific habitat requirements.”²⁶ As with the federal act, however, these species are not given any protection except in California, where the state’s prohibitions on taking apply to candidate species.²⁷

One legal issue that has arisen recently is whether an environmental analysis must be performed prior to listing decisions at the state level. Several states have statutes requiring an environmental analysis for agency actions similar to the process under the National Environmental Policy Act (NEPA).²⁸ At least one state court has held that before delisting a state species, an environmental impact report under the state’s “little NEPA” must be prepared.²⁹ In that case, the California Supreme Court held that before delisting the Mojave ground squirrel under the California Endangered Species Act, the state Fish and Game Commission must prepare a report under the California Environmental Quality Act, the state’s “little NEPA.” The court reasoned that an impact analysis was necessary when a state action lessened protections for a species, as would delisting. It is too early to say whether other states will follow this trend, as the federal courts currently are split on the issue of whether the federal NEPA applies to the designation of critical habitat under the ESA.³⁰

Critical Habitat

The designation of critical habitat, or other explicit habitat protection, is one of the protections sometimes given to listed species at both the state and federal level. This requirement is based on an understanding that habitat is crucial to species’ survival and recovery, and that the habitat most important to a species should be identified at the time the species is listed under the federal ESA. Critical habitat designation does not affect private landowners unless they are applying for a federal permit or funding, but it requires that government agencies review the impact of their actions to ensure that this habitat is not adversely affected.

Only six states have a provision requiring critical habitat designation, and it is rarely used. For example, Connecticut directs the Commissioner of Environmental

Protection to adopt regulations to identify “essential” habitat for threatened and endangered species.³¹ Critical or essential habitat has never been designated in that state, however. In Maine, critical habitat designations are not required, although the Commissioner of Inland Fisheries and Wildlife has the authority to make such designations.³² And in New Hampshire, critical habitat is designated for purposes of consultation, similar to the federal act.³³

Many of the remaining states authorize the purchase of land to protect threatened and endangered species. The authority of a state wildlife agency to acquire land or aquatic habitat “for the conservation of resident endangered or threatened species” is one of the requirements that a state program must satisfy to be deemed “adequate and active” under Section 6 of the federal ESA, which authorizes federal funding for state cooperative programs. Nonetheless, only 32 states explicitly authorize the acquisition of habitat for imperiled species.³⁴

Prohibitions

Restrictions on certain commercial activities and on the taking of listed species are common in state statutes. Most, though not all, prohibit the take of listed species, generally defined as the killing, injuring, or harming of listed species. Forty-one state acts prohibit, in some form, the import, export, transportation, sale, or take of listed species.

The most variety exists in how or whether the term “take” is defined. While the federal act includes habitat modification as a take in its implementing regulations,³⁵ only Massachusetts has followed the federal lead. In that state, “take” is defined as including the disruption of an animal’s “nesting, breeding, feeding, or migratory activity.”³⁶ A separate section explicitly prohibits the alteration of significant habitat.³⁷ Alaska, on the other hand, follows the majority of states in narrowly defining the term to include only harvesting, actually injuring, or capturing listed species.³⁸

Some states have statutory or regulatory language that might be construed to prohibit habitat modification, but they have chosen not to do so. The language of Nebraska’s statute, for example, is similar to the federal act and might support a similar interpretation, but the state has taken no position on the question. In California, until recently, the term “take” was administratively interpreted by the state Department of Fish and Game (DFG) to parallel the federal definition, which includes habitat modification. Both the legislative counsel for DFG and the state’s attorney general have changed courses, however, opting for a narrow definition that does not include habitat modification.³⁹ Recent legislative changes in the state continue to exclude references to impact on habitat.⁴⁰

The take prohibition, not surprisingly, has landed in the state courts for interpretation. The issue, as in the federal courts, is whether a take constitutes only a direct killing or whether it can include indirect threats such as habitat modification. The recent U.S. Supreme Court ruling in *Babbitt v. Sweet Home Chapter of Communities*

for a *Great Oregon*⁴¹ may set the stage for a more consistent line of rulings on the species takings issue at the state level. In *Sweet Home*, the Court found that federal regulations that defined “take” of an endangered species to include harm to its habitat were reasonable and valid.

Rulings on the issue, however, are not consistent in state courts across the country. In *Department of Fish and Game v. Anderson-Cottonwood Irrigation District*,⁴² the California Department of Fish and Game sought to prevent an irrigation district from operating its pump diversion, which was killing chinook salmon. On appeal, the court found that the terms “take” and “possess” applied to incidental killings of endangered species and that the killings violated the state’s endangered species act.

Different results were obtained in Hawaii. In *Stop H-3 Association v. Lewis*,⁴³ the U.S. District Court found that destruction of habitat was not covered by the state’s statutory definition of “take.” Thus, construction of a highway through the habitat of an endangered species of bird, even when it destroyed its habitat, was not considered to be illegal.

Permits

Many states’ acts recognize exceptions to the take and commerce prohibitions, just as sections 7 and 10 of the federal act do. Thirty-nine states authorize permits for taking listed species under limited circumstances. Typically, permits are authorized for scientific, educational, or zoological purposes, or to enhance the propagation or survival of listed species. A number of states include provisions to capture or destroy species to reduce property damage or to protect human health. Others permit the capture, removal, or devastation of a listed species without a permit if an immediate threat to human life exists. Louisiana, Maine, and Michigan authorize permits for “regulated takings” where population pressures cannot otherwise be relieved.⁴⁴

Six states also permit incidental takings of listed species pursuant to a habitat conservation plan. California, Hawaii, Illinois, Massachusetts, Maine, and Wisconsin allow incidental takes if individuals proposing to alter significant habitat submit detailed plans that include mitigation.⁴⁵ California, Illinois, and Maine amended their acts specifically to add a procedure for incidental take permits.⁴⁶ The new provision in California retroactively validates take permits previously authorized by the state without statutory authority. Hawaii’s provision goes beyond the federal Section 10 habitat conservation plan provision by codifying a “No Surprises” policy into its provision as well.⁴⁷

Conservation Agreements

Recognition is growing that programs are needed to foster voluntary private landowner conservation. Two states have begun to experiment with conservation agreements designed to encourage private landowners to conserve species and habitat.

Kansas amended its act in early 1997, authorizing three new types of agreements—prelisting, safe harbor, and no-take agreements.⁴⁸ The prelisting agreement allows management activities “without penalties of law enforcement action or permitting requirements if the species is listed at a late-date.”⁴⁹ The intent of the safe harbor agreement is to “protect the contracting entity from any restrictions on land use that might otherwise occur if a listed species immigrates into the habitat.”⁵⁰ No-take agreements provide “assurance that the management activities specified in the agreement would not lead to penalties of law enforcement action or permitting requirements if future changes in land use are needed.”⁵¹ Hawaii followed soon after, adding a provision for safe harbor agreements.⁵² Unlike Kansas, this provision contains several restrictions, such as the requirement that the agreement increase the likelihood of recovery. In general, however, explicit language authorizing voluntary conservation agreements does not appear in most state acts.

Penalties and Enforcement

State endangered species acts are no exception to the rule that a law must be enforced to be effective, yet most states suffer from a lack of proper enforcement. Although most of the state acts provide for penalties, little consistency exists in this area. In Minnesota, for example, violation of the state’s provisions constitutes a misdemeanor,⁵³ with fines up to \$1,000 and/or 90 days’ imprisonment. In Massachusetts, violation can result in penalties from \$5,000 up to \$10,000 and imprisonment of 180 days. Furthermore, if the violation involved significant habitat, the offender may also be required to restore the habitat.⁵⁴ Some states, such as Oklahoma, authorize the seizure and forfeiture of property used as an aid in violation of any provision of the state’s endangered species act.⁵⁵ Prohibitions and permit provisions typically are enforced by the state through its wildlife wardens and the state attorney general’s office.

Citizen enforcement also can aid government efforts, especially when the government is unable or unwilling to pursue enforcement.⁵⁶ Yet none of the state endangered species acts has a citizen suit provision that allows lawsuits to force compliance with the law.

Because no state endangered species act has a mechanism for citizen enforcement, the public has been forced to rely on other means. Several states have statutes that grant standing to citizens to protect the environment.⁵⁷ Yet few of these laws define “environment” to include wildlife or plants, and fewer courts have interpreted the word as broadly. A citizen from Illinois was once trapped in this very dilemma.

In 1989, the city of Marion, Illinois, submitted an application under the Clean Water Act⁵⁸ to build a dam. Dr. Joseph Glisson, a 24-year resident, had evidence that the project would extirpate two state-listed species, the Indiana crayfish and the least brook lamprey. He sued, alleging a violation of the Illinois Endangered Species Act,⁵⁹ but his complaint was dismissed for lack of standing. He appealed, arguing

that the Illinois Constitution, which gives standing to citizens to promote a “healthy environment,” should include wildlife.⁶⁰ The appellate court reversed, finding that he had standing.⁶¹ The Illinois Supreme Court, however, agreed with the trial court, ruling that wildlife is not part of the “environment” and that Dr. Glisson therefore had no standing to sue.⁶²

Without the ability to enforce endangered species laws, these acts have no teeth. In the Southwest, for example, nearly every federal listing of an endangered species in the last decade was the result of a citizen suit or petition against the U.S. Fish and Wildlife Service. Citizen suit provisions are often the only means of ensuring compliance with environmental laws.

Recovery Plans

The purpose of a recovery plan is to detail what is needed to restore the listed species and its habitat so that the provisions of the endangered species act are no longer necessary. Yet states rarely require recovery plans, and the few that do have not promulgated final recovery plans. Of the five states that require a plan, only two—California and New Mexico—set deadlines for its implementation.⁶³ Maine requires a recovery plan only when a species will be transplanted, introduced, or reintroduced.⁶⁴ North Carolina requires recovery plans, although they can’t restrict the use or development of private property.⁶⁵ Kansas law establishes a volunteer local advisory committee to assist in drafting recovery plans.⁶⁶

Most of the states requiring recovery plans rely on a model in which recovery efforts are directed at a single species. Two states are moving toward an ecological model emphasizing a multispecies approach to protection. In New Mexico, recovery plans must include multiple threatened and endangered species if the species use similar habitats or share a common threat or both.⁶⁷ Kentucky also is beginning to use a multispecies approach to management.

Consultation

Consultation provisions are designed to ensure that government agency actions do not jeopardize a listed species or adversely modify critical habitat. Eight states have laws that require agency consultation on proposed state projects to ensure that any action funded, authorized, or carried out by a state agency is not likely to jeopardize an endangered or threatened species or adversely impact its habitat. These requirements are similar to requirements under the federal act, except that they extend only to state and local agency actions.⁶⁸ Unlike the federal act, however, none of the state statutes requires the preparation of a biological assessment by the action agency.

If no feasible alternative to a project exists, exemptions can be approved in California, Connecticut, and Minnesota. California also can require mitigation if a state project will “result in the destruction or adverse modification of habitat essential to the continued existence of the species.”⁶⁹ Several states, such as Hawaii, do not

require consultation but state that the governor shall “encourage” other agencies to ensure that their actions do not jeopardize listed species.⁷⁰

Plant Protection

The different treatment given to plants and animals reflects a legal rather than a scientific reality. While wild animals are held in trust by a state for the benefit of its citizens, plants “attach” to the real property on which they are found. The result is that plants and animals generally receive different statutory treatment, even at the federal level, where both plants and animals are covered by the ESA.

Differences abound as to whether the various state provisions cover plants and animals, just animals, or plants and animals separately. Only 15 state acts include plants within the definition of “species.” Seventeen states have separate acts for plants, and the remaining 13 protect only animals. Alaska, for example, protects only vertebrate species and subspecies,⁷¹ while Connecticut statutes protect both plant and animal species.⁷² In Kansas, where innovative new measures have been incorporated, no protection for plants is included.

In states such as Kentucky, separate provisions exist to protect animals and plants.⁷³ Even in such cases, however, most states provide less protection for plant species than for animals. The Kentucky Rare Plant Recognition Act requires that threatened and endangered plant species be listed and that location and population information be kept.⁷⁴ The species, however, are declared to be the property of the landowner, and no interference with construction projects is allowed.⁷⁵ Maine’s act requires the listing of imperiled plants, but no other protections exist.⁷⁶ The New Hampshire Native Plant Protection Act of 1987 prohibits the taking of listed plant species, but from public property only; an exception exists for private property owners.⁷⁷ In California, on the other hand, the “take” prohibitions apply on public as well as private land. South Dakota’s prohibitions also apply equally to plants and animals.⁷⁸

Funding

A critical element in any program is adequate funding. Without it, even the best-written laws will stay unimplemented. Funding mechanisms and funding levels for the various statutory programs vary widely, with sources generally falling into three categories: federal, state, and private.

Typically, the majority of funding for a state program comes from the federal government. Under Section 6 of the federal ESA, the federal government can enter into cooperative agreements “with any state which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species.”⁷⁹ To date, each state has a signed cooperative agreement with the U.S. Fish and Wildlife Service (FWS) for vertebrates; fewer have cooperative agreements for plants.⁸⁰ Along with the cooperative agreements comes the incentive of funding.

Under the cooperative agreements, Congress can appropriate to the states up to 5 percent of the combined amounts collected by the Federal Aid in Wildlife Restoration Act and the Federal Aid in Fish Restoration Act.⁸¹ The appropriation is distributed to the seven FWS regions based on the number of listed Section 6 species within that region. States then submit proposed projects to the regional FWS office for approval. The federal government will fund up to 75 percent of project costs for a single state, or up to 90 percent if the project involves a joint agreement by two or more states for the conservation of a species.⁸² These federal acts generated over \$740 million in 2009,⁸³ with over \$57 million available to the states for threatened and endangered species protection efforts.⁸⁴

In addition to federal monies, state general funds also provide a percentage of funding.⁸⁵ Kentucky's Nature Preserves Commission receives a significant amount of its plant protection budget from state general fund revenues. In Nebraska, over half of the nongame and endangered species funding, totaling \$495,000,⁸⁶ comes from a legislative appropriation from the general fund.⁸⁷

Most states also have private funding mechanisms. Louisiana, for example, authorizes the issuance of endangered species stamps.⁸⁸ Nebraska and Texas laws both create a Nongame and Endangered Species Conservation Fund.⁸⁹ Missouri voters established a conservation sales tax in 1976, portions of which go to support endangered species conservation;⁹⁰ Arkansas has passed similar legislation.⁹¹ Tax check-offs also are common, although revenues from these programs have been declining; in South Carolina, revenues from check-offs for endangered wildlife have dropped to nearly half of 1989 figures, most likely due to competition with other check-off programs. Wildlife license plate sales show promise as a significant source of income, available for purchase in 42 states.⁹² In Massachusetts, sales of wildlife plates have generated more than \$16 million since the program began in 1994.⁹³ Bald eagle and other wildlife conservation plates brought in over \$1.5 million for conservation in 2003 in Ohio.⁹⁴ Other programs include Minnesota's successful Critical Habitat Matching Program, which provides a dollar-for-dollar match to buy wildlife management areas, restore wetlands, and protect spawning sites.⁹⁵ Over \$26 million in land and cash donations have been matched by the state since 1986.⁹⁶

States Without Acts or Provisions

States without statutory provisions related specifically to endangered species protection rely predominantly on the federal ESA and other nongame programs, such as habitat acquisition, and scattered regulatory measures. Wyoming, Utah, and West Virginia, for example, simply abide by the federal ESA and rely on their nongame wildlife programs to protect threatened and endangered species. Alabama and Arkansas have their own lists of endangered, protected, or "special concern" species based on regulatory authority, but except for nongame programs, they have no other program of protection.

While Arizona does not have a state endangered species act for animals, it does have a protective framework. In addition to having a statute protecting imperiled

plants,⁹⁷ the state Game and Fish Department prepared procedures for the reestablishment of threatened native wildlife. This was the result of a Game and Fish Commission policy approved in June 1987 requiring the department to "pursue an active program of re-establishing, where appropriate to do so, all species on the Commission's list of Threatened Native Wildlife in Arizona."⁹⁸ The program does not include recovery plans or critical habitat designation but is designed to work in conjunction with the federal ESA. Thus, Arizona has an established program, though not legislative in nature.

Emerging Issues and Future Directions

State endangered species acts have a vital role to play in endangered species protection. First, they give a state the ability to protect non-federally listed species. In the Northeast, for example, upland sandpiper numbers are declining, though not widely enough to warrant federal protection. In an effort to stem the decline, several states have put the bird on their state lists and have begun local recovery efforts. Nearly everyone agrees that if the states stopped working on the species, it would need federal protection. So, state listing can be the first line of defense on behalf of recovery.

Second, for species already on the federal list, a state act can provide another line of defense. Most acts include a prohibition against taking; others give the state the authority to do research and acquire land for protection. In New Mexico, the federally endangered Rio Grande silvery minnow was uplisted on the state list from threatened to endangered, giving the state the ability to prepare a recovery plan, prohibit taking of the species, and authorize research. The state Department of Game and Fish has stated that it won't prepare a separate recovery plan but instead will pool its resources with the FWS and coordinate its activities to aid the federal efforts, including providing biological research and a species database.

Finally, states can play an innovative role in preventing ecosystem fragmentation. In cooperation with their neighbors and the federal government, states could develop regional ecosystem plans to identify key habitats, protect ecologically important areas, and allow human development in the least sensitive areas. A regional ecosystem plan would maintain each state's wildlife program's flexibility while guaranteeing that whole ecosystems are rationally protected. State wildlife action plans are also important in this regard.⁹⁹

Conclusion

In today's world of changing climates, increasing human populations, and decreasing federal budgets, the need to find creative solutions for wildlife protection is evident. The states, with their historical jurisdiction over wildlife and local resources, are one obvious focus. The states' need for increased legal authority, responsibility, and programmatic resources, however, means that these serious gaps must be addressed in order for the states to become truly effective partners in the management of threatened and endangered species.

Although most states have enacted their own state endangered species laws, these laws remain far from comprehensive, and many fall short of what is mandated for a state program under the federal ESA. State-level statutory changes are needed to shore up species coverage, enforcement provisions, and recovery requirements. Also needed, of course, is infrastructure in the form of funding and staffing to support those improved programs. With such changes, the next phase of wildlife protection in this country could see a greatly enhanced state role, not just in managing endangered species, but in conserving wildlife and habitat as an integral part of each state's natural infrastructure, as part of the national conservation fabric and as part of the worldwide effort to address the impacts of global climate change. Biological diversity needs help at all levels of government if we are to pass along a healthy natural estate to future generations, keeping intact the world we inherited.

Notes

1. The current doctrine recognizes a state's primary responsibility over wildlife but subjects it to strict constitutional limits. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979) (explicitly overturning the state ownership doctrine but recognizing a state's right to the wildlife within its borders).
2. 16 U.S.C. §§ 1531–1543 (1973). The federal government's role of protecting migratory waterfowl, birds of prey, marine mammals, and species listed as threatened or endangered under the Endangered Species Act of 1973 has arisen because of the decline of these species nationwide and a concomitant failure on the part of the states to protect these species locally. *See DEFENDERS OF WILDLIFE & CTR. FOR WILDLIFE LAW, SAVING BIODIVERSITY: A STATUS REPORT ON STATE LAWS, POLICIES, AND PROGRAMS* (July 1996). *See also DEFENDERS OF WILDLIFE, ESA SECTION 6: THE ROLE OF THE STATES* (Sept. 2005).
3. NEV. REV. STAT. ANN. §§ 503.584–.589, 527.260–.300.
4. KY. REV. STAT. ANN. §§ 146.600–619.
5. FLA. STAT. ANN. § 379.411.
6. KY. REV. STAT. ANN. § 150.183.
7. GA. CODE ANN. §§ 27-3-130, -133.
8. These states are Alabama, Arkansas, Utah, West Virginia, and Wyoming.
9. CAL. FISH & GAME CODE §§ 2050–2100.
10. *Id.* Amendments in the 1997 legislative session may negate some of the protective measures, however.
11. *See* KAN. STAT. ANN. §§ 32-957 to -963, HAW. REV. STAT. ANN. §§ 195D-1 to -10.
12. *Nettleton Co. v. Diamond*, 315 N.Y.S.2d 625 (1970).
13. *Id.* at 631.
14. N.J. STAT. ANN. § 23:2A-4.
15. OR. REV. STAT. § 496.176(9)(a).
16. KY. REV. STAT. ANN. § 146.615.
17. *See Amy Ando, Delay on the Path to the Endangered Species List: Do Costs and Benefits Matter?*, in *RESOURCES FOR THE FUTURE* (1997).
18. CAL. FISH & GAME CODE § 2062.
19. N.M. STAT. ANN. § 17-2-40.
20. ME. REV. STAT. ANN. tit. 12, § 12801.
21. CONN. GEN. STAT. ANN. § 26-304(6).
22. N.M. STAT. ANN. § 12-2-41.
23. N.M. Dep't of Game & Fish, Biota Information System of N.M., <http://www.bison-m.org>.

24. N.C. GEN. STAT. § 113-334.
25. MONT. CODE ANN. § 87-5-107.
26. MINN. STAT. ANN. § 84.0895.
27. CAL. FISH & GAME CODE § 2085.
28. National Environmental Policy Act of 1969, 42 U.S.C. §§ 7601 *et seq.* This law requires an analysis of the impacts of federal agency actions on the environment. States with similar requirements include California, Connecticut, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, Virginia, Washington, and Wisconsin.
29. Mountain Lion Found. v. Fish & Game Comm'n, 51 Cal. Rptr. 2d 408 (Cal. Ct. App. 1996), *aff'd*, 939 P.2d 1280 (1997).
30. See Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995); Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996) (Secretary of the Interior must comply with NEPA when designating critical habitat).
31. CONN. GEN. STAT. ANN. § 26-306.
32. ME. REV. STAT. ANN. tit. 12, § 12804.
33. N.H. REV. STAT. ANN. § 212-A:9.
34. The fact that all 50 states have active cooperative agreements in place indicates that the various state agencies have at least general authority to acquire habitat, even if that authority does not explicitly mention endangered species.
35. 62 Fed. Reg. 32,183.
36. MASS. GEN. LAWS ANN. ch. 131A, § 1.
37. *Id.* § 2.
38. ALASKA STAT. §§ 16.20.195, .200.
39. Tara Mueller, The Wilson Administration's Interpretation of CESA and CEQA, paper presented at Saving Biodiversity in the United States: A Conference for Wildlife Advocates, Catholic University, Washington, D.C. (Feb. 8, 1997).
40. CAL. FISH & GAME CODE § 2062.
41. 515 U.S. 687 (1995).
42. 11 Cal. Rptr. 2d 222 (1992).
43. 538 F. Supp. 149 (D. Haw.), *aff'd in part, rev'd in part*, 740 F.2d 1442 (9th Cir. 1984).
44. LA. CIV. CODE ANN. art. 56, § 1904G; ME. REV. STAT. ANN. tit. 12, § 12804; MICH. COMP. LAWS ANN. § 324.36505.
45. CAL. FISH & GAME CODE § 2080.1; HAW. REV. STAT. ANN. § 195D-4(G); MASS. GEN. LAW ANN. ch. 131A, § 5; WIS. STAT. ANN. § 29.604(6).
46. CAL. FISH & GAME CODE § 2081, 520 ILL. COMP. STAT. 10/1; ME. REV. STAT. ANN. tit. 12, § 12808.
47. HAW. REV. STAT. § 195D.
48. KAN. STAT. ANN. § 32-962(b)(1).
49. *Id.*
50. *Id.* § 32-962(b)(1)(i).
51. *Id.*
52. HAW. REV. STAT. ANN. § 195D-22. Note that no new safe harbor agreements, HCPs, or incidental take licenses shall be approved or issued under the statute after July 1, 2012.
53. MINN. STAT. ANN. § 84.0895(9).
54. MASS. GEN. LAWS ANN. ch. 131A, § 6.
55. OKLA. STAT. ANN. tit. 29, §§ 5-402, -412.
56. For a thorough analysis and discussion of citizen suit laws, see DEFENDERS OF WILDLIFE & CTR. FOR WILDLIFE LAW, THE PUBLIC IN ACTION: USING STATE CITIZEN SUIT STATUTES TO PROTECT BIODIVERSITY (1996).
57. *Id.*
58. 33 U.S.C. §§ 1365 *et seq.*
59. 520 ILL. COMP. STAT. 10/1.

60. Defenders of Wildlife and the Illinois chapter of the Sierra Club filed an amicus brief in both the appellate and state supreme court actions. *See* *Glisson v. City of Marion*, 97-CH-7 (Ill. App. Ct.).
61. *Glisson v. City of Marion*, 697 N.E.2d 433 (Ill. App. Ct. 1998).
62. *Glisson v. City of Marion*, 720 N.E.2d 1034 (Ill. 1999).
63. CAL. FISH & GAME CODE §§ 2105–2116; N.M. STAT. ANN. §17-2-40.1.
64. ME. REV. STAT. ANN. tit. 12, § 12804.
65. N.C. GEN. STAT. § 113-333(6).
66. KAN. STAT. ANN. § 32-960.
67. N.M. STAT. ANN. § 17-2-40.1.
68. State consultation requirements cannot be applied because of the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2.
69. CAL. FISH & GAME CODE §§ 2052.1, 2054.
70. HAW. REV. STAT. ANN. § 195D-5(B).
71. ALASKA STAT. § 16.20.180.
72. CONN. GEN. STAT. ANN. § 26-303.
73. KY. REV. STAT. ANN. §§ 150.183, 146.600–.619.
74. *Id.* §§ 146.600–.619.
75. *Id.*
76. ME. REV. STAT. ANN. tit. 5, § 13078.
77. N.H. REV. STAT. ANN. § 217-A:3.
78. CAL. FISH & GAME CODE § 2080; S.D. CODIFIED LAWS § 34A-8-9. The federal act prohibits takings on federal lands, while takings on private lands are banned only if state law forbids the practice. Very few states have such laws.
79. 16 U.S.C. § 1535(c).
80. Only 20 states have full cooperative agreements for plants; 15 have limited agreements.
81. 16 U.S.C. § 1535 (i).
82. 16 U.S.C. § 1535 (d)(2)(D)(i)–(ii).
83. U.S. Fish and Wildlife Serv., Final Apportionment of Wildlife Restoration Funds 3 (2009), <http://wsfrprograms.fws.gov/Subpages/GrantPrograms/WR/WRFinalApportionment2009.pdf>.
84. Press Release, Secretary Salazar Announces \$57.8 Million in Grants to Support Land Acquisition and Conservation Planning for Endangered Species, U.S. Fish and Wildlife Serv. (Apr. 20, 2009).
85. A report by the International Association of Fish and Wildlife Agencies found that in 1995, states spent over \$11 million of nonfederal money on federally listed species. INT'L ASS'N OF FISH & WILDLIFE AGENCIES, ENDANGERED SPECIES SURVEY FINAL REPORT FOR 1996.
86. Rick Schneider, Program Manager, Nebraska Natural Heritage Program (June 26, 2009).
87. NEB. STAT. § 37-811.
88. LA. CIV. CODE ANN. art. 56:1906.
89. NEB. REV. STAT. § 37-431; TEX. PARKS & WILD. CODE ANN. §§ 68.001, 11.051–056.
90. A constitutionally mandated sales tax of one-eighth of 1 percent provides the funding. MO. CONST. art. 4, § 43(a).
91. Arkansas voters passed a constitutional amendment in 1996 that provides for a one-eighth-cent sales tax for conservation. ARK. CODE ANN. § 19-6-484.
92. Conn. Dep't of Env'tl. Prot., Wildlife License Plates (2009), http://www.ct.gov/Dep/cwp/view.asp?a=2723&q=325714&depNav_GID=1655.
93. Mass. Office of Energy and Env'tl. Affairs, Environmental License Plates (2009), [http://www.mass.gov/?pageID=eoeesubtopic&L=5&L0=Home&L1=Grants+%26+Technical+Assistance&L2=Grant+%26+Loan+Programs&L3=Massachusetts+Environmental+Trust+\(MET\)&L4=Environmental+License+Plates&sid=Eoea](http://www.mass.gov/?pageID=eoeesubtopic&L=5&L0=Home&L1=Grants+%26+Technical+Assistance&L2=Grant+%26+Loan+Programs&L3=Massachusetts+Environmental+Trust+(MET)&L4=Environmental+License+Plates&sid=Eoea).
94. Ohio Dep't of Nat. Res., Wildlife License Plates (2009), http://www.dnr.state.oh.us/Home/license_platesplaceholder/WildlifeLicensePlates/tabid/9467/Default.aspx.

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95. Trust for Pub. Lands, *GreenSense 4* (Spring 1997).
 96. Minn. Dep't of Nat. Res., Reinvest in Minnesota: Critical Habitat Match Program (2009), <http://www.dnr.state.mn.us/grants/land/rim.html>.
 97. ARIZ. REV. STAT. ANN. § 3-903.
 98. The Arizona Game and Fish Department now designates these species as "species of special concern." See, e.g., Preserving Humpback Chud from Extinction, http://www.azgfd.gov/w_c/research_loach_minnow.shtml.
 99. See Ass'n of Fish & Wildlife Agencies, State Wildlife Action Plans, <http://www.wildlifeactionplans.org/>.