



## Western Governors' Association Policy Resolution 13-08

### *Endangered Species Act*

#### A. BACKGROUND

1. Western Governors applaud the principles 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 sensitive species.
2. States possess broad trustee, police powers and primacy over fish, wildlife and water within their borders.
3. Through decades of work by employees and contractors, States have developed extensive expertise related to – and knowledge of – species within their borders.
4. Western states are particularly and uniquely affected by the ESA. Natural resource development, economic development, and maintenance of existing infrastructure in the West sometimes impact species and their habitats. Consultations associated with threatened and endangered species often impact western states' abilities to maintain infrastructure and provide for natural resource and economic development.
5. Given the impact ESA listing decisions have on vital state interests, states should be full and equal 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 defined in 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."
6. The ESA is premised on a strong federal-state partnership. But the Act and its implementation need to provide expanded, meaningful opportunities for states to comment, participate, or take the lead before the federal government makes any number of decisions 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.
7. Western Governors recognize that species and habitat protection can be enhanced through appropriate changes in the Act. However, determining the shape of those

changes has proven to be 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 include:

- a. defining a clear methodology and practice for de-listing recovered species;
  - b. establishing a comprehensive system of incentives to encourage state and local governments to develop water, land-use and development plans that balance habitat conservation and environmental concerns with necessary development and economic growth;
  - c. providing adequate tools and incentives that encourage private landowners to engage in species and habitat conservation activities;<sup>1</sup>
  - d. 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; and
  - e. addressing 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.
8. Climate change is increasingly being used as a determinant factor in the assessment of the need to list a species under the Act. 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 Service currently has no criteria to weigh the model uncertainty related to projected scientific information, such as climate change, in their scientific review.
9. States are concerned about the use of the precautionary principle in various recent listing regulations and recovery planning processes, both proposed and adopted. This principle, coupled with the use of studies based upon modeling (rather than observational science, such as accurate species population counts), has 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

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<sup>1</sup> The USFWS and NMFS has gathered information on this via a State-Federal ESA Joint Task Force and has published a Federal Register Notice on the issue, and now has a team working on development of incentives. We encourage the completion of this effort with an output of meaningful incentives.

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.

10. 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, including listing a species or determining range, 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, and allow for strained federal budgets and resources to be allocated to protecting and conserving species at serious risk of extinction.
11. Federal agencies have also administratively expanded the definition of “critical habitat” beyond the “specific areas ... essential to the conservation of the species” (*ESA, Section 3(5)(A)*) to those areas determined to represent areas which could, in theory, become habitat, but are not currently capable of supporting conservation of the species. Because the designation of “critical habitat” federalizes state, county, municipal, and private lands, such a broad application adds unnecessary and uncompensated regulatory burdens and costs.
12. The ESA requires that the “best available” biological information be used by the federal government 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.
13. The negative economic impacts of federal ESA decisions fall solely on states, local communities, businesses, jobs, and private property owners.

**B. GOVERNORS’ POLICY STATEMENT**

1. After working through their own strongly-held differences in how the Act should be renewed, Western Governors believe that the ESA can only be reauthorized through legislation developed in a consensus fashion that results in broad bipartisan support and maintains the intent of the Act.
2. 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 listed species.

Implementation of these goals will improve the effectiveness of the Act by making it more workable and understandable. The seven goals are:

- **Require recovery goals for listed species.** Western Governors believe that recovery, and ultimately de-listing 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. 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 U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (“NOAA-Fisheries”) to publish quantifiable recovery goals, in consultation with the 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. 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. 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.
- **Significant portion of the range must be defined.** Listing and delisting decisions under the ESA are inextricably linked to a species’ endangered or threatened status “throughout all or a significant portion of its range.” The ESA does not define the phrase and current interpretations apply the Act’s listing and delisting criteria on a range-wide basis, regardless of a species’ healthy status through proactive conservation efforts in a particular state. The success of the ESA in conserving endangered and threatened species largely depends on state participation. “Significant portion of the range” should be defined to incentivize and reward state conservation efforts by listing species only in states or areas where they are actually imperiled and conversely, delisting them where recovered. The incentive for proactive conservation efforts by states is significantly undermined by listing and delisting decisions that fail to recognize such efforts.
- **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(s) 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 full 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 de-listing 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 U.S. Fish and Wildlife Service, NOAA-Fisheries 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. 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 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 landholders 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. As a result, there is considerable variation in the Service's 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 re-authorization of the Act needs to provide further definitions for this term.

- **States should be full partners in listing and recovery planning 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. 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.

3. 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 work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.