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Essential Elements of Amendments to the Endangered Species Act

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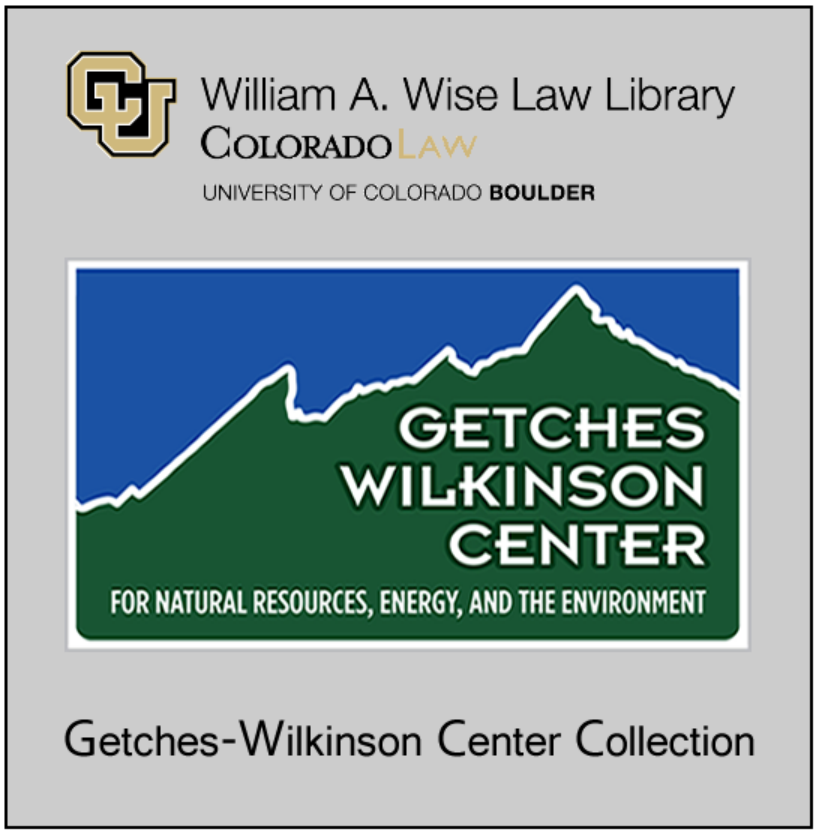

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WESTERN GOVERNORS' ASSOCIATION

ESSENTIAL ELEMENTS OF AMENDMENTS TO THE ENDANGERED SPECIES ACT

The Western Governors applaud the goals of the Endangered Species Act (ESA). However the ESA, which was designed as a last ditch effort to protect species from extinction, is being used more frequently for purposes other than protecting species.

The Western Governors believe the ESA should provide for shared authority with the states. The governors have, therefore, developed this comprehensive set of principles to guide lawmakers in making thoughtful and positive changes to the Act. WGA representatives have held discussions with the administration and this document reflects many areas of common ground. The Western Governors also point out that funding for implementation of the Act has been inadequate in light of the broad scope of the Act. If states are to assume a larger role in implementing the Act, funding must match the design of a reauthorized ESA.

Our essential elements for revisions of the Act are based upon the three following goals:

* Increase the Role of the States
* Streamline the Act
* Increase Certainty and Assistance for Landowners and Water Users

I. INCREASE THE ROLE OF THE STATES

The roles, responsibilities and incentives provided to the states and landowners in the protection and recovery of threatened and endangered species must be significantly enhanced. The Act and its implementation must clarify, affirm, and enhance this federal-state partnership.

A. State Role

1. The findings declared by Congress in the Endangered Species Act must recognize and affirm

that states possess broad trustee and police powers for fish and wildlife management, including those found on federal lands within their borders. With the exception of marine mammals, states retain concurrent jurisdiction even where Congress has previously limited state authority, as in the case of endangered species. The authority, primacy, and role of the states must be recognized and affirmed with respect to the conservation of species.

2. Revisions to the Act are needed to ensure a greater level of active involvement by the states. States with species protection programs approved by the Secretary, should be given the option to assume primacy for implementation of certain aspects of the Act depending upon each state's capability and resources as long as the goals of the Act are being met. If states assume primacy, then they should retain authority over prelisting prevention activities, recovery planning and implementation, including critical habitat designation, and all other aspects associated with land, resource and wildlife protection. If states chose not to exercise primacy, they should still retain a full co-equal partnership role in administering the federal program.[1] States should also be provided the opportunity to accept the primacy role at any time. Federal oversight of those aspects of the Act under state assumption should be in the form of a periodic program audit.

3. Coordination and consultation with affected states must occur prior to rule making to integrate state findings and programs with federal actions to achieve maximum benefits while minimizing impacts. The Act should provide for a cooperative federal-state rule making process to identify standards and criteria within which state programs will be designed to conserve habitat and species under the Act. The states and the Secretary should be directed to jointly develop a model containing the standards and guidelines for subsequent approval of state programs.

4. The States and the Secretary should be given the authority to utilize the resources available under the Act and other programs to promote the sustainability of ecological communities and conservation of endangered or threatened species on a prioritized basis of rarity and threat over

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[1] Some governors believe that an option must be provided for states to assume the total responsibility for implementation of the entire Act. They feel that if a state is administering a comprehensive endangered species program pursuant to state statute, and the program meets criteria and standards defined in the Act, then the Secretary of the Interior should be required to defer to the state program including interstate issues to be addressed by compact.
Other governors believe that, while an increased state role is essential, there remains an important and appropriate role for federal agencies -- particularly in ensuring standards are being met and in facilitating protection for species that cross state boundaries.

the range of the species, as opposed to an equivalent emphasis given to subspecies and distinct

vertebrate populations.[2] Habitat conservation and management, better integration of natural resources and land management programs across all jurisdictions and preventative/incentives measures designed to preclude the need for the listing of species under the Act should be aggressively pursued.

5. Obstacles to meaningful state participation, such as those created by the Federal Advisory Committee Act, should be eliminated.

6. States should be allowed to assume responsibility for issuing permits under section 10(a)(2)(HCPs) for areas within a state which have adequate comprehensive, habitat-based programs which have been approved by the Secretary.

B. Funding State Assumption of ESA Activities

Federal funding should be provided to support state and local comprehensive, preventive conservation programs to preclude the need to impose the consequences of listing under the Act by addressing the stability of ecological communities before precipitous declines. The entire nation and its future generations benefit from these programs, so they should be financed from an appropriate combination of sources devoted to national interest, including predominantly the federal government.

Many states have already committed significant amounts of funds and will need to commit additional funds in the future for implementation of the Act. However, serious attention must be devoted to identifying funding sources within existing budgetary parameters to facilitate greater state assumption of the Act. The following areas may prove fruitful as potential funding sources/mechanisms, and deserve further investigation.

1. Federal appropriations under the Act (not associated with section 6 of the Act) need to be redistributed to those states which assume a greater role under the Act. States should be reimbursed for their costs in an amount approximating, but not exceeding, the reasonably

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[2] The governors concur that more clarity to the terms "subspecies" and "distinct population segments" in the Act is necessary. As it should, science is continually revisiting the relationship within and between species. Some governors believe that the use of the terms "subspecies" and "distinct population segment" for listing a portion of a species' population has been abused for purposes of halting land and economic activity under the Act and should not be used in listing. Other governors believe that sufficient latitude must remain under the Act to list portions of a population on the merits of each case when they are truly isolated and threatened with local extinction.

estimated amount the federal agency would have expended. Current appropriations now going to federal agencies should also be made available to those states, which have Secretary approved programs, as block grants, for conservation agreements, listing investigations/reviews, all aspects of recovery planning and implementation, HCP administration, etc.

2. In establishing the Land and Water Conservation Fund (LWCF), Congress dedicated revenues from Outer Continental Shelf oil and gas production as its major source of funds. It reasoned that a portion of the revenues from the development of non-renewable resources should be used to protect other natural resources. In 1977, Congress authorized the LWCF to expend up to $900 million annually, yet in most years the program receives about $250 million. While the unobligated balance is used to off-set the federal deficit, $50 to $100 million, within the existing LWCF discretionary appropriation, should be earmarked to address one of the most divisive and critical natural resource issues facing the nation. This funding should be made available to the states, as block grants, to facilitate private landowner and water user involvement in conservation agreements and recovery plans. These needed funds could also be used to provide incentives to landowners and water users to enhance habitat conservation, secure easements for essential habitat, etc.

3. Revenues authorized by the Sikes Act and generated from use fees on certain federal public lands may be used to facilitate better integration of land management objectives with ESA objectives through conservation agreements or implementation agreements associated with recovery plans.

II. STREAMLINING THE ACT

The goal of recovering and delisting the species must receive greater attention in administering the Act. The recovery planning process must be revitalized as the key point where implementation of the Act is centered.

A. Improving Management of the Listing Process

The management of the listing processes is critical to success of the ESA. In order to improve the management of the listing process the following items should be addressed.

1. Prior to federal agency use of a listing process or the designation of critical habitat, the agency must consider whether the state agencies have developed their own programs for that species which are designed to protect the species, consistent with the Act.. In evaluating state programs, the Secretary should provide significant flexibility to the states to develop adequate broader habitat (ecosystem) species protection programs.

2. A more rigorous burden should be placed on petitioners (along the lines of the Secretary's draft guidelines release in December, 1994) to demonstrate that a listing action is warranted and the standard for what constitutes "substantial information" should be tightened. In addition, if information which does not support a listing exists, that information must also be referenced and used in the analysis and proposed rule. An audit of current listings should be completed utilizing the new criteria to ensure previous listing decisions are consistent with the new standards.

3. Upon receipt of a listing petition by the Secretary, a copy must be sent to each affected state. If a state recommends against proposing the species for listing, the Secretary should be required to conduct substantive peer review and rebut a presumption in favor of the state's position in order to propose that species for listing. The standard of review for such a presumption should be preponderance of the evidence. The review should be completed within one year. There should be opportunity for interjection of independent scientific evidence, a record of decision on the information utilized in making the decision, and an opportunity for judicial review of the listing decision by the federal agency.

4. Species listing is to continue to be a scientific based decision and should utilize the new process contained in this document. Improved certainty, however, could be provided to affected parties if biological recovery goals are established at the time of listing when sufficient information is available to do so. The goals, considering the health of the habitat and overall sustainability, would be a number of individuals, number of populations, or acres conserved or occupied that, if met, would constitute sufficient recovery for delisting. It could be refined during recovery planning.

5. If the Secretary determines a species will become extinct despite the protection afforded by the Act, the consequences of the Act regarding that species may be suspended. [3]

6. A clear, scientifically defensible regulation defining which acts are prohibited under section 9 and 10 should be published concurrently with the listing rule, when possible.

7. The Secretary should be given explicit authority to concur with approved conservation management agreements entered into by states, federal, tribal and local agencies, and private land owners in order to conserve declining species before the need to list those species. Agreements would address those actions to be taken by the respective parties to eliminate the need to list species by reducing the threats and providing for species recovery. This would include a determination by the Secretary of the adequacy of the program, which would have the force of law. Such agreements would also provide assurances to cooperating landowners that further conservation measures would not be required of the landowners should the species be subsequently listed.

8. Subsequent to a proposal to list or designate critical habitat, the Secretary should have the authority to suspend the consequences of listing or designation of critical habitat under the Act if the Secretary determines that the state(s) had initiated and is making satisfactory progress in implementing measures that are likely to protect or conserve the species. An extension of this suspension should be allowed, if the time for a listing or critical habitat designation decision arises, if the agreement is not in place but the state is demonstrating progress toward such agreement, unless such an extension is likely to jeopardize the species. Any force of law aspects

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[3] The Western Governors have varying opinions regarding the point in the listing process when the full extent of regulations under the Act would come into effect and have debated the issue extensively.
Some governors believe that the full regulatory protection provided by the Act must remain in effect to ensure that all possible measures are undertaken to prevent the loss of species. They believe that states are or can be adequately informed of the decline of a species, and react accordingly. Because the Act is designed as a last ditch mechanism to reduce the likelihood of species extinction, the Act must cause all protective measures to apply at listing to save species after those earlier conservation efforts have failed.
Other governors believe the Act should be amended so that listing becomes a tool to inform the public about those species perceived to be at risk of extinction from a biological perspective. This would lessen the incentive, perceived or real, to list or fail to list species for reasons other than biology. Thereafter, a partnership of federal and state agencies and other stakeholders would determine the level and type of regulations, incentives or other available protective measures needed to stop the decline of the species. One of the goals of this change would be to enhance the level of accountability vested in elected decision makers.

of an agreement or suspension of the effects of the Act implemented due to the existence of an agreement should be applicable on a state by state basis for those protecting habitats and species.

9. Subsequent to listing, the Secretary should also have this suspension authority subject to the state completing an agreement demonstrating the adequacy of such programs.

B. Improving the Conservation Provisions of the Act

1. The Act should provide greater flexibility to both federal and state agencies to determine when a regulated take of species is appropriate.

2. Section 4(d) should be modified so that the distinctions envisioned by Congress between a threatened and an endangered species are reflected in regulatory practices:

(a) The Secretary should, in conjunction with the state, be given the maximum flexibility to choose from the widest available range of incentives, prohibitions and protection, using administrative process and rule making in consultation with the states, to provide the creative assistance and necessary impetus to prevent a threatened species from becoming endangered;

(b) The regulations required of the Secretary should be "consistent with" the conservation of a threatened species and "necessary and advisable" for the conservation of an endangered species;

© The authority of the Secretary to prohibit any act prohibited under section 9(a)(1) or 9(a)(2) for a threatened species should be exercised only if the taking of that threatened species is determental to the continued existence of the species;

(d) The "extraordinary case" language of section 3(3) should not be applicable to threatened species and applicable to endangered species only if the Secretary determines that regulated take is detrimental to that species' conservation; and

(e) Language defining conservation under section 3(3) should be modified to provide that a regulated take conservation program authorized by the Secretary is appropriate in promoting the conservation of threatened species, distinct vertebrate populations, and, in some cases, may be appropriate for endangered species.

(f) HCP's should be explicitly available as a reasonable and prudent alternative in consultation under section 7.

C. Section 7 Consultation Process

1. The section 7 process should be streamlined. Full, formal consultation should be limited to high impact plans and projects that may affect the continued existence of the species, while an expedited process should be provided for low impact federal actions. The Secretary should, in

conjunction with the states, propose specific streamlining measures within one year of reauthorization of the Act.

2. In Section 7 consultations, state information and comment should be actively solicited and utilized in the development of the biological opinion and the federal agency management decisions resulting from that opinion. The ability of project applicants and the public to participate in the section 7 consultation process must be affirmed.

3. Projects or certain similar federal actions should be given expedited *proforma* review under Section 7 when they are addressed in an approved recovery plan or HCP and determined to be consistent with or incidental to recovery objectives. This would ensure that where a recovery program is making sufficient progress toward the identified goals that individual projects will be viewed as achieving compliance under Section 7 and are therefore not subject to additional review.

D. Development of Recovery Plans

1. Where the states opt to do so, through a program approved by the Secretary, recovery planning authority should lie with that state. Under those circumstances, the state shall assume the lead in facilitating the involvement of all jurisdictional parties in developing recovery plans. When a species' habitat or range cross state boundaries, the Secretary should act as a facilitator to bring the involved states together to develop the recovery plan. If the Secretary determines that conservation programs across the species range are inconsistent or not complementary, the Secretary may assume recovery authority. This assumption will only occur after notifying the states of such inconsistency and providing the states with adequate time to correct the noted problems.

2. The regulations and standards for recovery plans should require analysis of community and tribal impacts; provide for flexible management when conditions change; establish a definitive time line; and recognize that, upon analysis, some species may not be recoverable because of biological or economic reasons. Where possible, recovery plans should contain a range of options or scenarios with the proviso that all options would achieve recovery objectives for the listed species.

3. The Act should specify that recovery plans have objectives and quantifiable criteria (e.g., size of population, amount of suitable habitat, sufficiency of data, and the like) that, if met, would require the agencies to initiate the delisting process within 120 days. The development of the criteria should consider the overall health of the habitat, impacts on species diversity, and other relevant ecological factors to ensure sustainability of the entire community. Recovery plan

objectives should include early attention for species having the best likelihood of biological recovery in a timely manner, species that have a potentially large economic impact, species that are close to extinction, and species that serve a critical ecological function. The goal should be to develop the draft recovery plan within one year after a species has been listed.

4. The Secretary should have the discretion to preclude the designation of critical habitat if the Secretary determines it is either undeterminable or it is not necessary for the protection of the listed species. If it is to be designated, then the Act should provide for the designation of critical habitat during development of recovery plans and provide incentives for such designation for clusters or related groups of species.

5. The recovery planning process under the ESA should require all appropriate state and federal agencies to develop one or more specific agreements to implement a recovery plan. Upon approval of an implementation agreement by each of the appropriate state and federal agencies, the agreement should be legally binding and incorporated into the recovery plan. An incentive should be created for federal agencies to approve implementation agreements by providing an easier, quicker section 7 process. Such implementation agreements should--

- -- expedite and provide assurances concerning the outcome of interagency consultations under section 7 and habitat conservation planning under section 10 of the ESA;
- -- ensure that actions taken pursuant to the agreement meet or exceed the requirements of the ESA; and
- -- should require that each appropriate agency that signs an agreement comply with its terms.

6. Recovery plans developed by the states utilizing the processes outlined in this paper and providing for public review and comment, should be construed as having satisfied the NEPA requirements for implementing actions.

7. There should be a mandatory status review of recovery programs at least every three years. If intermediate reviews reveal that the recovery plan criteria need revision, then the Secretary or states should revise the plan. If the recovery criteria have not been met, then the recovery team shall specify what has been and has not been accomplished under the recovery plan and indicate what else needs to be done.

8. State recovery planning and HCP's, exercised in conformance with the standards and guidelines developed coincidently with listing, must be considered by all federal agencies taking any action subject to Section 7 consultation. To the maximum extent practicable, federal agencies must have the responsibility of coordinating their management programs to cooperate with and ensure implementation of state programs for recovery of species.

9. To the maximum extent feasible, priority shall be given to the utilization of existing public lands for the conservation of species, insofar as conservation measures are compatible with the primary public purposes of such lands.

E. Delisting of Species

1. Due to the inherent pressures on the Secretary to emphasize listing and recovery actions, the Congress should express its intent that down and delisting is considered of equal importance and resources be allocated accordingly. There should be rapid down or delisting of species or populations within a state or an ecosystem when the criteria have been met that are presented in a recovery plan or conservation agreement or have been established otherwise by the Secretary in conjunction with the affected state. Down and delisting actions should not be subject to the current process required for listing, delisting and changes in status of a species.

2. Delisting or down listing of a recovered populations should be encouraged if a listed distinct vertebrate population has reached recovery plan goals but another distinct vertebrate population has not.

III. INCREASE CERTAINTY AND ASSISTANCE FOR LANDOWNERS AND WATER USERS

The policy in the Act concerning private and other non federal landowners (owners of real property) should be as follows: The Secretary will thoroughly assess the economic consequences of each implementation step of the Act -- recovery plans, federal agency consultations, HCP's/Conservation Management Agreements (CMA's), etc. The benefits of the ESA are national in scope and the Secretary will explore ways in which those costs will be borne by the society as a whole and not solely by the individual landowner, non federal landowners and federal land users. Incentives and regulatory certainty should be provided to landowners who implement habitat or species conservation efforts.

A. Policy Issues[4]

1. All affected jurisdictional agencies and parties, including non federal landowners, should be

[4] The protection of water in the west is an enormous issue for all the governors. Many governors believe that state water law and interstate compacts must be respected while designing recovery goals and actions. Other governors disagree. They recognize that state water laws may not adequately have considered endangered species and see the need for an overriding level of protection of the public's fish and wildlife resources.

given an opportunity through the recovery planning, HCP and critical habitat designation processes to have their concerns, interests and ability to contribute to the success of these processes considered and given close attention in the final plan.

2. Implementation of the Act, in some cases, has created significant economic impacts. Federal assistance should be used to mitigate these economic impacts whenever possible. Priority should be given to those means of promoting the recovery of species that also would assist in reducing social or economic impacts.

B. Landowner Assistance

1. Financial and technical assistance should be provided to states, counties, tribes and municipalities to foster development of flexible conservation plans that allow for reasonable development and use of private property (including water rights). Development and use should be consistent with the conservation plan and should not significantly impact listed species.

2. Incentives should be provided to non-federal landowners to assist in the recovery of listed species and the conservation of candidate species as well as technical and financial support for such activities. Linkage to the conservation provisions of other Acts, such as Conservation Reserve Program(CRP) and Wetlands Reserve Program (WRP) sections of the farm bill, should be enhanced.

3. The Secretary and appropriate state agencies should be specifically authorized to enter into voluntary prelisting agreements and expedited HCP's with cooperating landowners and water users to provide assurances that further conservation measures would not be required of the landowners should a species subsequently be listed. Landowners and water users who have satisfactorily demonstrated that they will protect candidate species or the significant habitat types within the area covered by a prelisting agreement or HCP should be assured that they will not be subjected to additional obligations to protect species if the candidate species or additional specific species not covered by the agreement but dependent upon the same protected habitat type are subsequently listed under the ESA.

4. The federal agencies should develop and employ an inexpensive, expedited HCP process. This expedited HCP process should include a simplified NEPA review process.

C. Relief for Landowners and Water Users

1. The responsible state and federal agencies should be authorized to initiate procedures in the recovery planning process whereby landowners and water users whose impacts on a species are insignificant should receive for categorical protection from Section 9's taking provisions and

section 7 jeopardy opinions. Those landowners and water users who do not receive categorical exclusion but have demonstrated adequate protection measures to maintain or preserve species or habitat should be eligible for programs developed by the Secretary for incentives to encourage those efforts, including regulatory relief and certainty (through expedited HCP's, etc.) and other means by which the land and water uses proposed by that landowner are allowed to proceed. Should the landowner or water user significantly alter land or water use practices then the relief or exemption can be reconsidered.

2. Regulatory incentives should be provided to landowners who voluntarily agree to manage or enhance habitat for species on their lands by excluding them from restrictions if they later need to bring their land back to its previous condition.

D. Non Federal Landowner and Water User Incentives

Incentive programs for land and habitat stewardship already exist at many jurisdictional levels (federal, state, local). Resource managers need, however, to more effectively match landowners who willingly enhance the habitat for listed species with workable financial incentives programs. Existing programs include but are certainly not limited to:

- conservation/soil and water quality provisions of the federal Farm Bill (CRP, WRP, Forest Stewardship Incentives Program, etc.);
- state and local land preservation programs, including associated tax relief;
- environmental easements administered by government, private or quasi public land trusts; and
- existing tax credits/incentives such as Minnesota's wetland and prairie tax credit.

Cooperation with non-federal land owners and water users is essential to the success of the Act, therefore, early involvement of and regulatory certainty for landowners and water users must be a policy of the Act. The identification of the full range of incentives programs that might be available to assist landowners and water users in good habitat stewardship should be developed. The stewardship incentives found in other federal programs like the Conservation Reserve Program, in laws governing inheritance taxes and in non-government programs should be catalogued, enhanced and coordinated. Additional areas that deserve further investigation include:

1. Inheritance laws -- A revision of the existing laws to discourage the practice of dividing up large ranches/farms to avoid inheritance taxes and thereby fragmenting the habitat.

2. Mitigation credits, trading/mitigation banking -- This idea must be debated more thoroughly to ensure appropriate use and application but it could have limited application in conserving ESA

habitats.

3. Federal cost sharing for specific habitat management, restoration and protection, and species recovery work -- This would have to be authorized under a program similar to the forest stewardship.

4. Incentives under other federal laws -- Incentives to public land ranchers under the Taylor Grazing Act might include: reduced grazing fees for conservation of a species habitat, priority for range improvement funds to improve a species habitat, extended permit tenure, etc.