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LEGISLATIVE EFFORTS TO INCREASE STATE MANAGEMENT FOR IMPERILED SPECIES SHOULD BE REJECTED

By Stephanie Kurose*

The Federal Endangered Species Act (ESA or “Act”)¹ is our nation’s most successful conservation law. Its purpose is to prevent the extinction of our most at-risk plants and animals, increase their numbers, and effect their full recovery—and eventually their removal from the endangered list. Since its enactment in 1973, the Act has been more than 99% effective at saving species under its protection from extinction, and it has put hundreds more on the road to recovery.² Scientists estimate that at least 227 species would have likely gone extinct without the ESA’s passage.³

Despite this success, legislative efforts by some members of Congress to weaken the ESA have significantly increased recently. Since 2011, 300 attacks have been launched against endangered species and the ESA.⁴ These attacks continue despite the fact that nine out of ten Americans support the Act and want it either strengthened or left unchanged by Congress.⁵

Common among these attacks are calls for increasing state authority to manage threatened and endangered species. The ESA is known as a “law of last resort,” in that it is only triggered *after* a state’s efforts to conserve habitat and protect species has fallen short. It is a necessary backstop that provides species with federal protections, typically after decades of decline and after state management has proven insufficient. Since a majority of states lack legal authority and resources to fill the conservation role played by federal wildlife agencies, legislation that seeks to shift back this authority to the states could spell disaster for species.

Introduced by Sen. Dean Heller (R-Nev.), the “Endangered Species Management Self-Determination Act” would allow governors to take over management of species found only in one state with no requirement that such management be equivalent to ESA protections.⁶ This legislation would severely undermine protections for as many as 1,100 species,⁷ including nearly 500 species in Hawaii alone and at least one species in most states across the country. States would be able to take over management of species perceived to conflict with powerful special interests, provide little to no protection, and the U.S. Fish and Wildlife Service (FWS)—one of the wildlife agencies in charge of implementing the ESA—would be powerless to intercede.

Another disturbing bill is the “State, Tribal, and Local Species Transparency and Recovery Act,”⁸ which seeks to undermine the Act’s “best available science” standard by automatically deeming any and all information submitted by a state, tribal, or county government as the best available science—even if that information is outdated, incorrect,

contradictory, or not supported by peer review. This legislation is completely unnecessary because the ESA already requires the FWS to utilize any data that is considered “best available” in its decision-making.⁹

Currently, the majority of state conservation laws are severely inadequate to achieve the ESA’s conservation and recovery goals.¹⁰ Only eighteen states have laws that protect all animals and plants covered by the federal ESA, with thirty-two states providing less coverage than the federal statute.¹¹ West Virginia and Wyoming do not have any endangered species laws, and seventeen states offer no protections for imperiled plants.¹² And perhaps most concerning is the fact that forty-five states provide very limited or no authority for species recovery planning.¹³ Given that a primary goal of the federal ESA is to recover species to the point that they no longer require the Act’s protection, and the fact that almost every single state currently has no authority for such recovery planning is a clear sign that management for imperiled species should not yet be handed back to those states.

In addition to inadequate state laws, many states do not have, or in some instances are unwilling to provide, the funding needed to manage their threatened and endangered species. Hawaii—a state that has over 500 listed species—will spend only \$3.5 million in 2017 on endangered species, out of the total budget of \$138 million allocated to the Department of Land and Natural Resources.¹⁴ That averages out to less than \$7,000 spent on endangered species. By contrast, each of Hawaii’s twenty-two game species will receive around \$250,000. Funding for Hawaii’s endangered plants and animals mostly comes from the Federal Government via grants under Section 6 of the Endangered Species Act.¹⁵ Thus, the state itself spends almost none of its own funding on listed species.

Oil-producing states, like Wyoming, are often very hostile towards the ESA because they falsely argue it is a threat to economic development. As a result, they do not prioritize the recovery of endangered species. However, a 2015 paper analyzed over 88,000 ESA consultations since 2008 and found that no projects were stopped because of endangered species.¹⁶ Nonetheless, in FY 2016 Wyoming allocated only \$3.2 million—or 5%—of its wildlife budget to the state’s twelve threatened and endangered species. Out of that \$3.2 million, 37% was federally-funded, 4% came from the State General Fund, 57% came from Game

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and Fish license revenues, and 1% came from nongovernmental grants. Thus, Wyoming only spent \$128,000 of its own funding on managing its imperiled species. By contrast, the state spent \$54.8 million on its game species.¹⁷

Without significant reforms to state wildlife conservation laws and a substantial increase in funding for imperiled wildlife, legislation proposals to cede federal authority over imperiled species back to the states will likely undermine conservation and recovery efforts, lead to a greater number

of species declining, and result in fewer species recovered. If states manage their species properly from the onset, it is highly unlikely that the federal government would ever have to step in. The federal ESA is only triggered once a species is at such a critically low level that it would otherwise go extinct if not for the federal protection. Thus, legislation that would cede federal authority to manage threatened and endangered species back to the states should be rejected.



ENDNOTES

¹ Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2012).

² See News Release, U.S. Fish & Wildlife Serv., NOAA Propose Actions to Build on Successes of Endangered Species Act (May 2015), <https://www.fws.gov/news/ShowNews.cfm?ID=7CA2994B-D4A6-1658-411D5635AAB69560>.

³ See generally D. GOBLE, ET AL., *THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE* (2005).

⁴ See *Legislative Attacks on the Endangered Species Act During the Trump Administration*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/campaigns/esa_attacks/trumptable.html (last updated Sept. 8, 2017).

⁵ See B. Tulchin et al., *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, TULCHIN RESEARCH (July 6, 2015), <https://www.defenders.org/publications/Defenders-of-Wildlife-National-ESA-Survey.pdf>.

⁶ S. 935, *Endangered Species Management Self-Determination Act*, 115th Congress (introduced Apr. 25, 2017); H.R. 2134, *Endangered Species Management Self-Determination Act*, 115th Congress (introduced Apr. 25, 2017).

⁷ See *Endangered Species Found Only Within One State (Intrastate species)*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/programs/biodiversity/pdfs/Endangered_species_only_found_in_one_state.pdf (last visited Nov. 8, 2017).

⁸ S. 735, *State, Tribal, and Local Species Transparency and Recovery Act*, 115th Congress (introduced Mar. 27, 2017); H.R. 1724, *State, Tribal, and Local*

Species Transparency and Recovery Act, 115th Congress (introduced Mar. 1, 2017).

⁹ 16 U.S.C. §1533(b)(1)(A) (2012).

¹⁰ See generally, Alejandro E. Camacho, *Conservation Limited: Assessing the Limitations of State Laws and Resources for Endangered Species Protection*, U.C. IRVINE SCH. OF L. CTR. FOR LAND, ENV'T, & NAT. RES. (CLEANR) (Aug. 2017), <http://www.law.uci.edu/academics/centers/cleanr/news-pdfs/cleanr-esa-report-final.pdf>.

¹¹ See *id.* at 3.

¹² *Id.*

¹³ See *id.* at 13.

¹⁴ *Department of Land and Natural Resources Report*, STATE OF HAW. 949 (2017), <https://budget.hawaii.gov/wp-content/uploads/2015/12/23.-Department-of-Land-and-Natural-Resources-FY-17-SUPP.pdf>.

¹⁵ 16 U.S.C. § 1535 (2012).

¹⁶ See generally Jacob W. Malcom & Ya-Wei Li, *Data contradict common perceptions about a controversial provision of the US Endangered Species Act*, 112 PNAS 15844 (2015).

¹⁷ See Wyoming 2016 Statewide Hunting Season Forecast, WYO. GAME & FISH DEP'T, <https://wgfd.wyo.gov/Hunting/Wyoming-Hunting-Forecast#elk> (last visited Nov. 8, 2017).