

WOODS INSTITUTE FOR ENVIRONMENT

STANFORD LAW SCHOOL

POLICY PAPER

**Endangered Species Act and Federalism:
Effective Species Conservation through Greater State Commitment**

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PREFACE

The Congress in 1973 enacted a law, the Endangered Species Act (ESA), with the avowed purpose to conserve imperiled species and the ecosystems on which these species depend on. In enacting ESA, the Congress proclaimed that the loss of a fish, wildlife, or plant species subtracted from the aesthetic, moral, and utilitarian values of the nation and its people. In particular, the Congress declared that it was by “*encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national . . . standards is a key to . . . better safeguarding, for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and plants.*”

Since 1973 we as a nation have endeavored to make ESA an effective tool for species conservation. The path of species conservation remains long and arduous. Today the consequences of untempered economic growth and development on species viability and ecosystem integrity remain as pressing if not more so than those recognized by the Congress in 1973 and resulting conservation challenges abound. The way to adequately address the present conservation challenges of species conservation is by sustained collaborative partnership between state and federal governments based on pooling their respective resources including authority and funds. However, cooperative federalism in the administration of ESA has heretofore been elusive. The purpose of this Policy Paper is to present policy actions that **improve species conservation in the United States by developing effective and workable proposals for increased state conservation efforts in coordination with federal efforts and consistent with federal responsibilities.** In so doing the Paper puts forth a collective body of thought to assist in the fulfillment of Congress’s prescient declaration in 1973 to encourage states through federal assistance and a system of incentives to develop conservation programs that meet, and perhaps exceed, national standards in preserving our national heritage in species richness and the resilience of our natural ecosystems.

Enhanced state role in species conservation, for the purpose of this policy paper, is not treated as a virtuous end in of itself. Rather, greater state commitment presents an important avenue to achieve effective species conservation in an efficient manner. To that end the policy

paper recommends a set of specific regulatory and institutional measures to encourage and enable increased state commitment and responsibility in conserving our imperiled species. The overwhelming purpose in awarding greater responsibility to states in administering ESA is to more effectively and efficiently achieve national goals for species conservation. This can be attained by either achieving better protection and recovery of imperiled species than available today or by obtaining the present level of protection and recovery at a reduced cost to the society. In either case it should be unequivocally proclaimed that enhanced state role in species conservation constitutes not an end but rather a means to an end defined as more effective and efficient species conservation in America. If the means fail to meet the stated end then they should be reconsidered and reconfigured.

The Policy Paper represents the culmination of a comprehensive four-stage examination of the issues pertaining to ESA and federalism. The first stage involved a select group of experienced professionals preparing papers on specific topics relevant to ESA and federalism. The second stage comprised of developing a series of straw policy proposals, based on the papers prepared on the topic, to strengthen state and federal collaboration for species conservation. The third stage entailed a National Forum convened at Stanford University to deliberate specific policies and regulations to further state commitment and responsibility in species conservation. The Stanford Forum was attended by forty leading national practitioners and scholars of the Act. The fourth stage involves the preparation and publication of two documents: i) a definitive policy document, “*ESA & Federalism: Effective Species Conservation Through Greater State Commitment*,” summarizing the aggregate thought at the Forum in a manner useful to policy makers and conservation leaders; and ii) a book, “*ESA & Federalism: Analyzing Evolving State Roles in Species Conservation*,” representing the papers prepared for the Forum.

The purpose of the Forum was to discuss pressing federalism issues affecting the administration of the Endangered Species Act and to produce a practical policy-relevant document that put forth creative and sound strategies for effective administration of the Act within the federal structure of our government. The Stanford Forum was divided into six sessions, each focusing on a particular aspect of the ESA and federalism. At the start of each session, one participant presented a straw proposal and another participant commented on it. This approach was adhered to in order to stimulate constructive and disciplined discussions. The

participants were invited to present their thoughts on whether straw proposals addressed the major issues, how could they be improved, and what other ideas might be better? The Forum deliberations were greatly aided by the caliber and commitment of the participants. This Policy Paper presents the collective thought of the Forum participants including the support and concerns raised in the context of a specific policy proposal. However, in the end, the sole responsibility for the text of the document and the errors therein rest entirely with the authors.

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INTRODUCTION

An appraisal of the Endangered Species Act of 1973, over the last 30 years, demonstrates a pressing need for state and federal wildlife agencies to collaborate in achieving effective species conservation. The federal regulatory agencies such as Fish & Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) need the assistance of state wildlife agencies to monitor and report on sensitive species, to implement recovery strategies, and to address local private land conservation issues. The history of ESA administration, however, provides a checkered chronicle of cooperation between state and federal agencies with the working relationship between the two further strained over the course of the last decade and a half. The areas of disagreement and discontent between the state and federal agencies relate primarily to sharing of costs and authority concerning species conservation.

Notwithstanding the oft-strained relationship between state and federal wildlife agencies, each has played a formative role in shaping the future course of the other vis-à-vis species conservation. The administration of ESA by FWS has prodded the transition of the state agencies from game management agencies to wildlife agencies addressing conservation needs of all wildlife species including the imperiled non-game species. Whereas the realities of implementing species conservation measures on the ground have persuaded the FWS to develop new regulatory policies that allow for enhanced state roles in species conservation efforts viz. Habitat Conservation Plans (HCP), Safe Harbor Agreements (SHA), Candidate Conservation Agreements with Assurances (CCAA), and Policy for Evaluating Conservation Effectiveness (PECE).

The lessons from the past and the present progress in federal policies and regulations provide a fitting stage to deliberate how best to strengthen collaboration between state and federal agencies for species conservation. It is important to note that all of the progressive rules and regulations developed by the Departments of Interior and Commerce over the last decade and a half, with the exception of HCP¹, were done without any statutory amendment to the Act.

¹ A healthy debate exists among the experts whether a statutory amendment indeed was necessary for the implementation of Habitat Conservation Plan and could it not be developed as a regulatory construct instead.

Nonetheless, the ESA, same as most federal statutes, stands to gain from a constructive amendment that clarifies and strengthens the Act's language. Congressional action notwithstanding, the present statutory language of the Act provides immense untapped potential to improve the administration of the ESA to more effectively conserve our imperiled species.

The Policy Paper is organized in four parts. The first part evaluates the benefits and concerns associated with enhanced state responsibility in species conservation. The second part recommends three related regulatory actions to enhance state commitment and responsibility for species conservation. The third part suggests institutional measures to strengthen state and federal collaboration in species conservation and facilitate enhanced state commitment. The fourth part recommends steps to better utilize existing resources and identify additional sources of funds to enable states to accept greater responsibility for species conservation.

Enhanced State Responsibility for Species Conservation: Potential Benefits and Concerns

The primary benefit for enhanced state responsibility in species conservation derives from sheer institutional presence and strength on the land where conservation action is needed. The major concern regarding enhanced state role in species conservation arises from the lack of trust in state's ability and motivations to protect and conserve all imperiled flora and fauna found in the state.

Brief Background

Historically states have managed resident populations of fish and wildlife species. Most state wildlife agencies were established to protect, propagate, and manage game populations within the state. In the beginning most state wildlife agencies focused their attention at enforcing the hunting seasons and stocking game animals including fish. Over the last seventy years the evolution of state wildlife agencies has been characterized by increasing integration of the principles biology and ecology in wildlife management. In particular, since 1960s state wildlife agencies have devoted special care to habitat preservation and enhancement on both private and public lands. The conservation programs of the federal Farm Bill beginning in 1985 have been

instrumental in furthering habitat improvement projects on private lands. A more recent corollary to this trend has been the broadening of state agencies mandate to conserve and manage not just game species but all animal and plant species found in the state. The latter trend has been greatly facilitated and hastened by the presence of the Endangered Species Act. The evolution of state wildlife agencies as an institution has greatly benefited from the financial and political support from the hunter-conservation community. On the other hand, perhaps for the lack of a well defined constituency and dedicated financial support, jurisdictional authority and willingness of state agencies has been relatively parsimonious in conserving non-game and plant species.

The U.S. Fish & Wildlife Service (FWS) has been the primary federal regulatory agency responsible for enforcing federal wildlife laws of the nation. The National Marine Fisheries Service, now referred to as NOAA Fisheries, has served a similar role in enforcing federal laws to protect marine mammals and fisheries. Historically FWS, in addition to enforcing national wildlife laws has coordinated management of migratory wildlife populations, disbursed federal aid to states, managed national wildlife refuges and fish hatcheries, and till 1960s administered an aggressive predator control program. Similarly, the traditional role of NOAA Fisheries has been to enforce federal marine laws and coordinate with Regional Fishery Councils and state wildlife agencies in setting harvest quotas for industry and recreational fisheries. The institutional structure and history of the two Services for the large part has been to regulate federal laws and coordinate management of migratory wildlife and marine species. Both these activities have been carried out with strong active cooperation on the ground by state agencies.

In light of the history of the state and federal wildlife agencies it is peculiar that the administration of the ESA has been marked by lack of consistent and sustained cooperation between state and federal agencies. This discordance can perhaps partly be explained by the rift in culture between the state and federal entities accentuated by federal reliance on regulatory authority rather than incentives to administer the ESA. The rift in culture for the large part arose from the enlightened federal action to protect all imperiled animal and plant species while states were still overwhelmingly occupied with game management. Not only did the Services put all animal species on the same plane but they exercised their authority to intervene and pre-empt state management where it was found lacking e.g. grizzly conservation in the Northern Rockies.

The first three decades of the ESA are characterized by the Services, in absence of adequate appropriations, relied overwhelmingly on the threat of regulatory action to implement the Act. Today the culture of state and federal agencies is once again converging with a growing clamor for building true state and federal partnership in species conservation. However, the path to that partnership is shrouded in lingering distrust and lack of coherent and comprehensive policy actions or commitment by both sides.

States as Reservoirs of Ecological Knowledge & Management Resources

The comparative institutional strengths of the state and federal wildlife agencies are well illustrated by Figures 1 and 2. Figure 1 describes the number of state and federal personnel dedicated to wildlife conservation in Wyoming as represented by the Wyoming Game & Fish Department and FWS. Figure 2 describes a similar comparison among the state and federal personnel dedicated to wildlife conservation in California among the California Fish & Game Department, FWS, and NOAA Fisheries. The stark facts evident in these two figures belie the need for close collaboration and greater commitment by states towards species conservation. This need is reflected in the simple undisputed fact that states are better positioned in resources, knowledge and understanding of local ecological and social terrain when it comes to species conservation in the state than the federal government. In Wyoming, the state wildlife agency has 173 field biologists and wardens working, compared to 24 FWS employees, directly on wildlife matters in the state. Most of the more specific benefits described below emanate from this basic reality.

Figure 1. State and Federal Personnel Devoted to Wildlife Conservation in Wyoming - 2005.

	Wyoming Game & Fish Dept.	U.S. Fish & Wildlife Service
# of Game Wardens / Law Enforcement Agents	80	4
# of Biologists*	93	20
Total Wardens & Biologists	173	24
Total Budget for FY 2004	48,400,000	

* does not include state or federal biologists stationed at state or federal wildlife refuges or fish hatcheries as there job entails managing that parcel of land rather than working with entities outside the confines of the hatchery or wildlife refuge.

Figure 2. State and Federal Personnel Devoted to Wildlife Conservation in California - 2005.

	California Fish & Game Dept.	U.S. Fish & Wildlife Service	NOAA Fisheries

# of Game Wardens / Law Enforcement Agents	350	20	14
# of Biologists*	886	168**	52
Total Wardens & Biologists	1,236	188	66
Total Budget for FY 2004	283,158,000	32,500,000***	29,920,000

* does not include state or federal biologists stationed at state or federal wildlife refuges or fish hatcheries as there job entails managing that parcel of land rather than working with entities outside the confines of the hatchery or wildlife refuge.

** the number refers to FWS biologists in both California & Nevada

*** represents only the appropriated funds to Sacramento Office of FWS.

Potential Benefits & Concerns

The major benefits for enhanced state role in species conservation stem from the accumulated experience, knowledge, and contacts of state wildlife agencies as the primary public institution responsible for wildlife conservation in the nation through the twentieth century. See Figure 3. Given the familiarity of state institutions with the ecological, economic, and social landscape of the state they are better positioned than the transient representatives of the federal government to design and implement species conservation programs with better effect and at less cost. In particular the states demonstrate a potential competitive advantage at determining the ecological status of a given species and working with local landowners in implementing the needed conservation programs. The relationships between state personnel and private landowners are built on trust earned by repeated interactions over scores of years and as such not easily replicated or substituted. The ability of states to tailor the species conservation efforts to the state's ecological and political terrain allows it to experiment and innovate with different conservation strategies. In particular, states are adept at reframing species conservation in a broader framework that resonates with the public e.g. Oregon chose to explain its salmon conservation efforts in the broader context of watershed health. Similarly states are better positioned to work with local governments in creating local structures to affect species conservation. By so doing states are best positioned to make significant gains in both efficiency and effectiveness of species conservation efforts and most importantly substantially contribute to public acceptance of those measures.

Figure 3. Potential Benefits and Concerns Associated with Enhanced State Role in Species Conservation.

<u>Potential Benefits</u>	<u>Potential Concerns</u>
» broad trustee & police power over fish, wildlife, and plants within state boundaries and involved in local habitat conservation efforts	» requisite jurisdictional authority, institutional structure, and resources to conserve all animal and plant species ² .
» greater coherence & wider scope in jurisdictional reach e.g. California Resources Agency versus FWS and NOAA Fisheries	» requisite financial and other resources to conserve all imperiled species in the state
» extensive ecological information & expertise on state flora & fauna	» ability to consistently advocate for and conserve imperiled species in the face of local political opposition
» extensive contacts & working relationship with private landowners in the state	» how to address species conservation that require inter-state coordination
» ability to tailor species conservation program to the social, political, & economic terrain of the state with gains in effectiveness & efficiency	» whether federal oversight of state conservation efforts be effective i.e. can clear responsibilities be articulated and assigned between state & federal partners and respective parties held accountable for their part
» creative laboratories to develop & implement innovate species conservation programs	» ability of state conservation programs to withstand legal challenges under ESA
» enhance public acceptance of ESA & species conservation efforts	» administrative costs borne by FWS and NOAA Fisheries

Most of the concerns derive from the lack of state effort in conserving species other than game species prior to the enactment of ESA. Skepticism of states ability and motivations for accepting an enhanced role in administering ESA still linger. The concerns related to greater state role in species conservation can be grouped in three broad categories viz. ability of states to conserve all imperiled species, motivation of states to conserve all imperiled species, and logistics of state-federal collaboration where state have a heightened role in species conservation.

² It is a matter of concern that not all states have yet assigned jurisdiction to a state agency to conserve and manage all vertebrates, invertebrates, and plants within the state. Similarly, not all states have a state endangered species act. There are 44 states with a state Endangered Species Act for the protection of animals. Of those 44 states that have a state endangered species act about 32 states extend the protection to plants as well. However, among the 32 states that extend protection to plants in 16 states the lead state agency responsible for plant conservation is different from that assigned the responsibility for conserving animals. The protections assigned to animals and plants under various state Endangered Species Acts differ widely. The six states that do not have state ESA for animals include – Alabama, Arkansas, Arizona, Utah, West Virginia, and Wyoming.

The first category of concerns relate to whether the states have the requisite jurisdictional authority, institutional structure, and resources to conserve all animal and plant species within the state. The second category of concerns relate to state's motivations or sincerity in taking on the responsibility to protect all animal and plant species in the state. Particularly in the light of past history there is considerable concern whether state wildlife agencies will be able to consistently advocate for and conserve imperiled species in the face of political opposition within the state. The third category of concerns relates to the logistics of how to manage state-federal collaboration in the administration of ESA and in particular what means would be used to ensure effective federal oversight of state conservation efforts. An additional strong concern relates generally to the tremendous variance in state wildlife agencies abilities and aspirations to accept greater responsibility for species conservation. One scholar at the Forum likened it to herding 50 different cats of varying color, size, shape, and temperament.

In Balance

The benefits from greater state involvement in species conservation can be achieved in a manner that addresses the concerns associated with this action. Today, no individual steeped in the intricacies of ESA administration would disagree that greater state involvement in species conservation is a worthy goal. The present debate concerns how to accomplish this task without diluting the protections and the effect of ESA. One of the major concerns relates to the tremendous variability in states' abilities and aspirations to implement effective species conservation programs. It is true that several states have not asserted their jurisdictions over all vertebrates, invertebrates, and plant species within their state. However, the practical import of this fact needs to be assessed in comparison to the protections afforded to invertebrate and plants species under the federal ESA as it is administered. Nonetheless, the legitimate concern arising from the variable abilities and aspirations of different states merits federal policies and regulations to be appropriately tailored in order to reward the willing states and encourage others to follow suit. The administration of Clean Water Act and Clean Air Act holds useful lessons in achieving this task. The concerns related to the genuine motivations of the states to ask for greater role requires that federal agencies design and implement a robust, but not cumbersome, system of federal oversight to evaluate the conservation effectiveness of state efforts. The logistical concerns are best addressed by learning from the existing state-federal cooperative

efforts in species conservation, waterfowl conservation and management, and enforcement of federal wildlife laws. In any eventuality it is important to note that the potential benefits, concerns, and obstacles should be borne in mind when evaluating specific policy actions to promote and structure greater state involvement in species conservation.

Conversely, it is probable that in the absence of greater state involvement species conservation and recovery efforts will continue to be stunted by the limited resources available to FWS and NOAA-Fisheries. Time and resources will continue to be diverted to jurisdictional skirmishes between state and federal agencies. As such, in all likelihood, state governments and landowners will continue to show antipathy towards the ESA impeding efforts at species conservation.

The great success of game management in America occurred due to the leadership and commitment from state wildlife agencies. It is probable that game management overseen primarily by federal wildlife agencies with reluctant or hostile state partners would have looked substantially different. Conversely it is probable to conclude that state game agencies without the federal ESA and the strong role of FWS and NOAA Fisheries in administering the Act would have continued to relegate non-game species to a lower priority. The history of American wildlife conservation and the institutional presence and strength of state wildlife agencies indicate that to reach the full potential of our species conservation efforts states agencies need to take the lead, as they did in game management, buttressed by federal laws and resources. Our challenge is to devise the appropriate regulatory and governance structure to make this happen. The following text puts forth specific policy actions to that effect.

In going forward the new policy actions should adhere to the following general principles:

- to develop and ***emphasize the non-regulatory component of the ESA*** under the shadow of law by offering strong incentives to state and private parties to develop effective conservation programs;
- to ***build trust*** between state and federal agencies by accentuating complimentary and not competitive features of their respective roles and responsibilities e.g. assisting

states to develop early intervention programs to complement the “emergency room” procedure of the ESA;

- to make available necessary *funds and resources* at state and federal level to facilitate and sustain state-federal partnership to plan and implement species conservation efforts;
- to emphasize *flexibility* in federal programs and regulations to account for the tremendous variations in states abilities and aspirations in species conservation; and
- to aid and encourage states to develop state regulations and programs to conserve species as part of *broader human health and resource conservation efforts*.

Above all the policy actions should be directed to foster trust and offer needed funds to the states to strengthen institutional capacity in executing effective species conservation programs with a predilection for multiple-species eco-region approach.

REGULATORY ACTIONS

This part of the Paper puts forth three related regulatory actions to invite and assist willing states to accept greater responsibility in species conservation. The related actions are presented in a manner where each can be implemented to some degree independently of each other but would have great synergistic value if executed in a wholesome package. The first regulatory action calls for a paradigmatic review of species conservation across a continuum with a clear distinction between threatened and endangered species and the willing states assigned the lead in conserving the former. The second action argues that willing states be invited to take the lead in recovery of threatened and endangered species by extending to them requisite authority and resources to complete the task. The third action sounds a call-to-arms to fully develop section 6 of ESA to its legislatively intended potential as a potent force to forge strong and sustained state-federal partnership in conserving our nation’s imperiled species.

Develop Threatened Category Extensively & Purposefully to Engage States in Species Conservation³

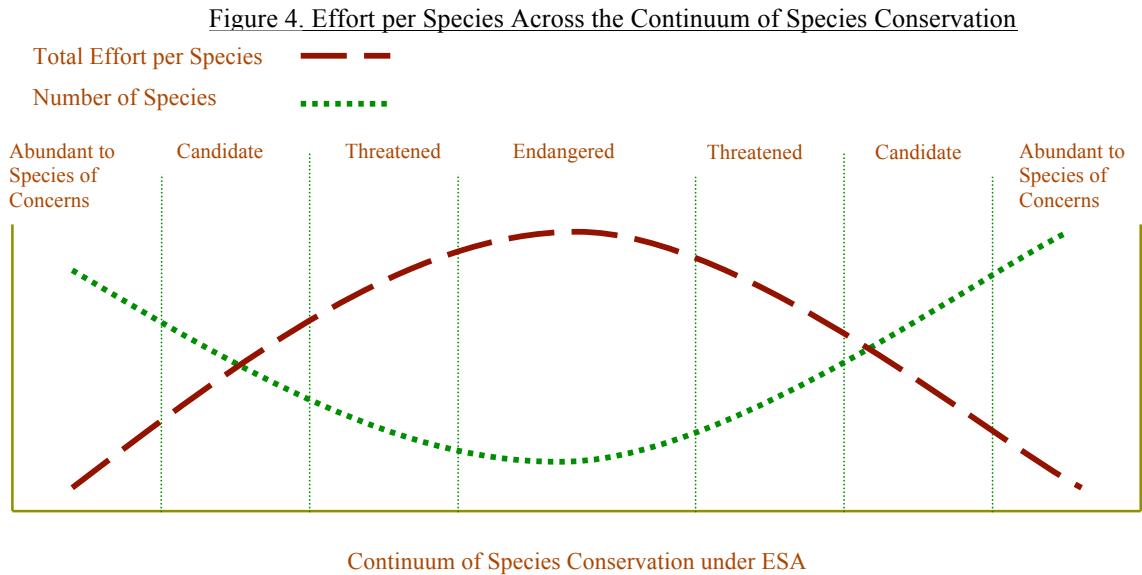
The species as a default should be initially listed as threatened except in exceptional circumstances where its extinction is imminent. The threatened status should be based solely on ecological status of the species and be offered as an empowering tool to willing states whereby they receive additional authority and funds to effectuate necessary conservation actions. The states should be offered the primary authority for conservation and recovery of threatened species based on an agreement between the state agency and the appropriate Service that spells out the ecological criteria to measure conservation effectiveness within a specified time period. This would entail mutually pre-determined ecological and temporal thresholds which would trigger an endangered listing if the ecological status of the species worsened or be declared recovered if it improves. Most importantly, states should receive adequate federal funding commensurate with the responsibility to conserve threatened species. The goal is to encourage states to volunteer for greater leadership in species conservation. Agency regulations and policies in the context of ESA §§ 4(d) and 6 can accomplish most of this task. Congressional action can substantially streamline the process, clarify the distinction between threatened and endangered categories, and strongly reassert collaborative conservation between state and federal entities.

Brief Background

In determining relative state and federal responsibilities and roles in species conservation, important insights can be gained by analyzing the continuum of species conservation and observing how ESA functions under this framework. The continuum of species conservation refers to a symmetrical representation of a specific species journey from being abundant to declining in number and range to where its very existence is in danger to recover to a stage where its viability as a species is no longer threatened. There are more species that are abundant than those we have deemed to be threatened or endangered. We put more effort, and rightly so, in conserving the imperiled species deemed to be threatened or endangered such as a red-cockaded woodpecker than a more abundant species such as a cardinal. See Figure 4. Over the

³ Steven P. Quarles, of Crowell & Moring LLP extensively contributed in developing this specific policy recommendation.

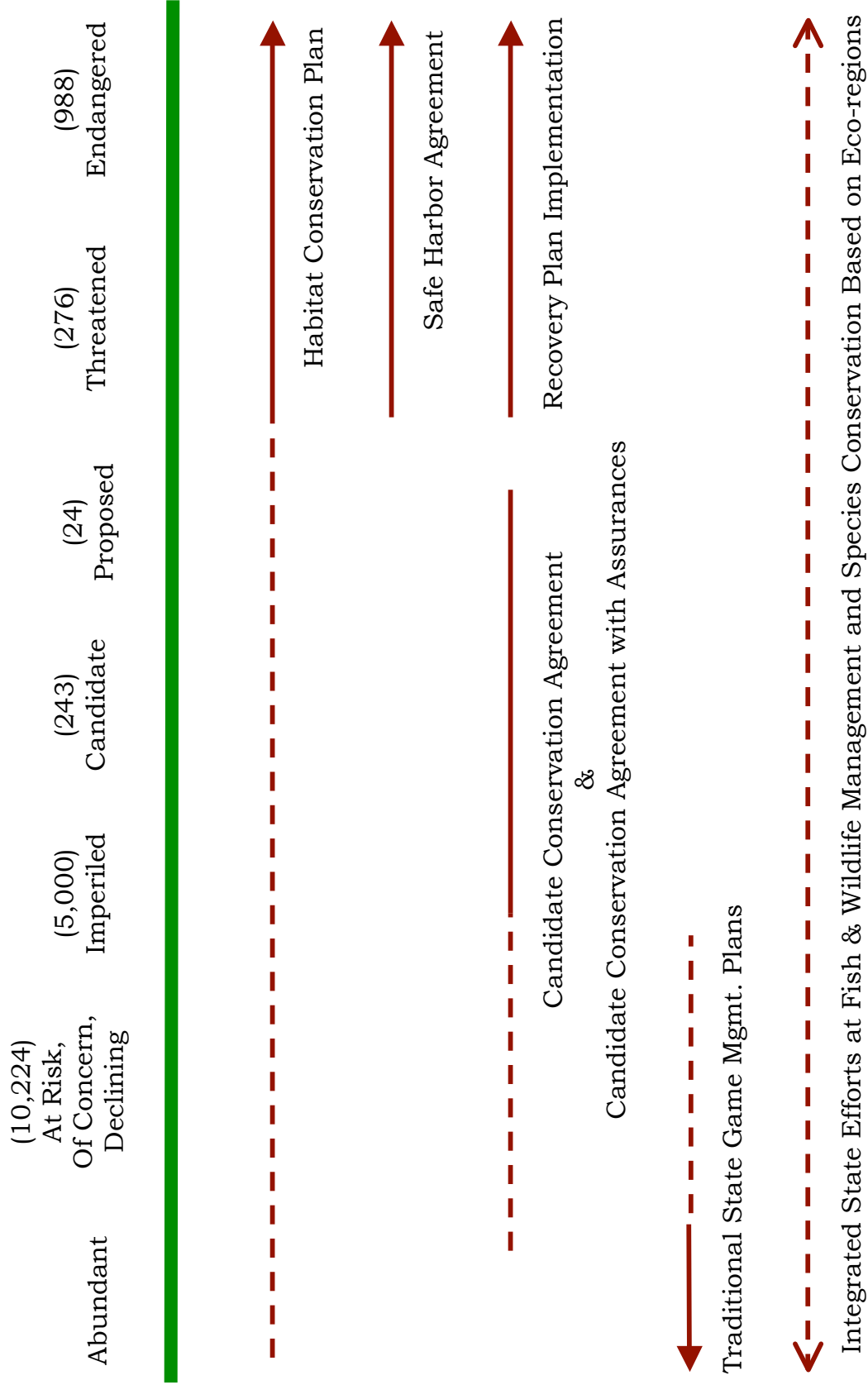
course of last two decades we have developed several progressive state and federal programs to conserve species at various stages along the continuum. Figure 5 illustrates the range of conservation tools available across the continuum of species conservation.



An effective conservation regime drawing upon the institutional strengths of state and federal wildlife agencies can be designed based on the relative threats faced by a particular species and taking into account the institutional strengths of state and federal agencies involved. Such a system would draw upon the institutional strengths of state agencies in implementing management programs on the ground and that of federal agencies in providing regulatory protections needed above and beyond the on-ground management programs to influence human behavior and land use practices where appropriate. In other words the Services would calibrate the federal response to the risk faced by the species and use that calibration to supplement state conservation efforts. As a species becomes subject to greater and greater threat – indicating that state efforts thus far have been ineffective - the federal government should assume a greater oversight responsibility. As conservation efforts reduce that threat – indicating that state efforts are effective - the federal government’s oversight should decrease. States would play the primary role with species facing relatively lower threats, but the federal government could permit states to play significant roles in the implementation of conservation efforts even in the case of species at the greatest risk.

This new paradigm of species conservation across the continuum would initially emphasize on-ground conservation action motivate by incentives backed by increasingly credible threat of prohibitions. The results of the incentive based approach should be measured against previously agreed on performance measures. If a species ecological status indicates steady deterioration then strong prohibitions should follow with immediate impact.

Figure 5. Conservation Tools Across the Continuum of Species Conservation



How Does ESA Fit the Continuum of Species Conservation Today

The present administration of ESA aligns with the continuum of species conservation in an ad-hoc, rigid, and stultified manner. It stands to gain from a more nuanced understanding of the available state and federal resources and incorporating this realization into the their respective roles along the continuum. The rough association that exists today between the known biological status of the species, level of protection designated to the species under ESA and commensurate state and federal authorities in conserving that species⁴ is displayed in Figure 6⁵.

Figure 6. Species Status, ESA Designation & Jurisdictional Responsibility Across the Continuum of Species Conservation

<i>ASCENDING CONTINUUM</i>			
SPECIES STATUS	ESA DESIGNATION	FEDERAL AUTHORITY	STATE
Abundant	None	None under ESA	
Of Concern	No formal designation required under ESA statute or regulation, however NOAA-Fisheries lists them in its Federal Register notice	None under ESA, however some informal procedure to report	
Petitioned	A temporary formal designation under ESA set in motion by third party action to list a species as threatened or endangered ESA § 4(b)(3)(A)	None under ESA; however it represents first procedural step in the process to determine whether the species is threatened or endangered	
Warranted but Precluded	A formal designation under ESA of variable duration. Petitioned species are found to warrant a threatened or endangered designation but are precluded due to more pressing priorities ESA § 4(b)(3)(B)(iii) and (C)(iii)	None under ESA other than procedural responsibilities of monitoring and review of species status.	
Candidate	A regulatory construct including 2 major categories of species: i) petitioned species classified as warranted but precluded, & ii) species proposed by the Services for a threatened or endangered designation. (50 C.F.R. § 424.02; 40 Fed. Reg. 7596 (Feb. 28, 1996) (FWS); 69 Fed. Reg. 19975 (April 15, 2004) (NOAA-Fisheries))	None under ESA other than it allows the Services to enter into CCA or CCAA with willing partners	
Proposed	A temporary, formal designation under	None under ESA other than some advisory	

⁴ The table largely describes the associations that exist for animal species. Plant species are subjected to different federal and state responsibilities under ESA that is not entirely captured by the table. Also not considered are circumstances, procedures, etc. that may alter the mix of federal and state responsibilities but cut across the associations; e.g., endangered or threatened species with or without critical habitat, endangered or threatened with or without recovery plans, species located on or off federal lands, and species with or without special protections under state laws modeled after or divergent from the ESA.

⁵ Fig 5 in large measures represents the associations that exist today with the exception of the category of candidate on the descending continuum that presently does not exist but should.

	ESA initiated by Service decision or via 3rd party petitions (ESA § 4(b)(3)(B)(ii);	(conferencing) & procedural (2 nd step in listing process) responsibility	
Threatened	A formal designation under, and defined in, ESA. (ESA §§ 4(a), (b)(6)(A), and (c)(1), and 3(21)	Primary authority the execution of which varies case-by-case. The Services may extend all the protections commensurate to an endangered species or develop tailored rules under § 4(d) of ESA	Residual responsibility limited to what the Services may choose to assign
Endangered	A formal designation under, and defined in, ESA. (ESA §§ 4(a), (b)(6)(A), and (c)(1), and 3(6)	Primarily authority with structured statutory & regulatory protections and procedures resulting in relatively restricted discretion in assigning responsibility to the states.	Residual responsibility limited to what the Services may choose to assign

DESCENDING CONTINUUM

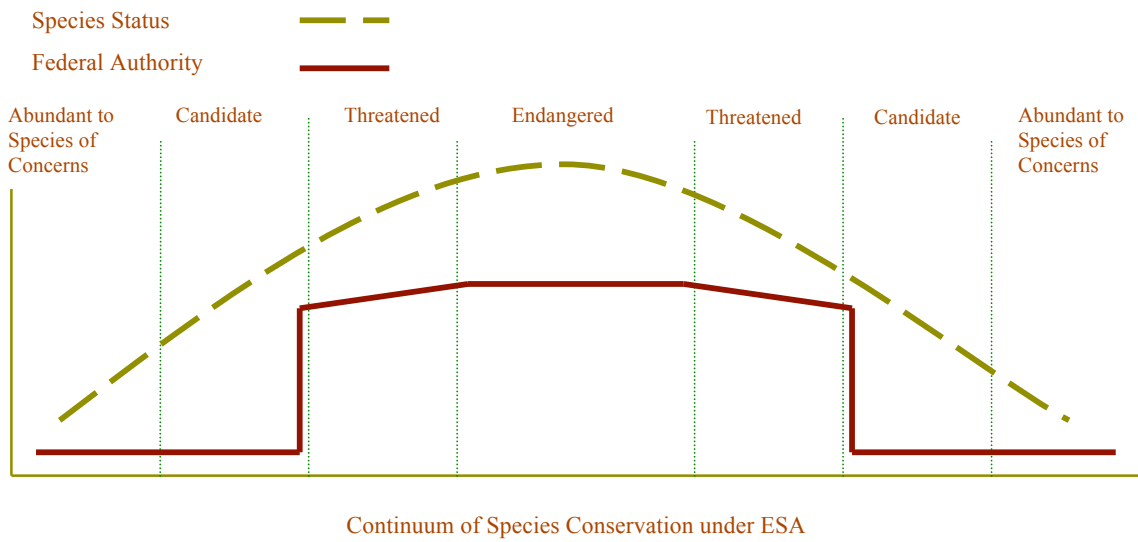
Threatened due to recovery from endangered status	A formal designation under, and defined in, ESA. (ESA § 4(c)(2)(B)(ii);	Primary authority the execution of which varies case-by-case. The Services may extend all the protections commensurate to an endangered species or develop tailored rules under § 4(d) of ESA	Residual responsibility limited to what the Services may choose to assign
Candidate for delisting (all biological recovery criteria are met)	None	Primary authority till adequate regulatory mechanisms are developed but all management responsibility assigned to states	Residual responsibility limited to what the Services may choose to assign
Recovered	A formal designation under ESA. (ESA § 4(c)(2)(B)(i) and (g);	None under ESA other than procedural requirement to monitor for 5 years	Exclusive

Note: this table represents an edited version of a table developed by Steven P. Quarles, Crowell & Moring LLP in preparation for the Stanford Forum on ESA & Federalism.

In analyzing the relationship between the species status, ESA designation of that species and related state and federal authority two important factors are to be noted. First, there is a dissonance between the path followed by the species at risk⁶ and the jurisdictional authority to conserve that species. See Figure 7. The lack of any meaningful involvement by federal agencies prior to listing of a species and the stark shift from state to federal jurisdiction once a species is listed reflects an administrative artifice discordant with the conservation needs of a species or the relative institutional advantages of state and federal agencies. Second, the stark dichotomy in federal and state management responsibilities is neither inevitable nor fixed under ESA. There is no language in ESA that forbids strong state role in species conservation along the entire continuum. Furthermore, given the resource and personnel limitations of the Services it would be prudent to configure an administrative structure to implement the ESA that facilitates robust state engagement in the conservation of endangered and threatened species under vigilant federal oversight.

⁶ It is important to note that the species status in Figure 5 represents the official evaluation of that species and not necessarily the true biological state of the species. For example there may be species that are threatened with extinction but have not been petitioned for listing by third party or proposed for the same by the Services. Conversely, there are species that have met all the biological criteria for recovery but have not been delisted because procedural delays including lack of adequate regulatory mechanisms in place.

Figure 7. Species Status and Federal Authority under ESA as Administered



Need for Creative and Robust Use of Threatened Category to Engage States

Threatened category should be creatively galvanized to invite and facilitate vigorous state engagement in ESA implementation. Presently the threatened category is grossly underused. This condition is due to both law and practice. In practice, of the total (1264) species listed in the U.S. about 78 percent (988) are listed as endangered and only 22 (276) percent listed as threatened. Moreover, often endangered species are delisted without passing through a threatened category. The law, both the Act and its implementing regulations, equally contributes to the atrophic state of the threatened species classification. First, the statutory definitions of “endangered species” and “threatened species” are imprecise and malleable to the extent that all qualifying species except those at extreme peril of immediate extinction could fit in either classification. ESA §§ 3(6) and (21). Second, ESA requires that the same five statutory factors be considered for placement of a species in either classification. ESA §§ 4(a)(1)(A)-(E). Third, ESA applies the same standards in considering the effects of federal agency actions on both endangered species and threatened species. ESA § 7(a)(2). Finally, under ESA § 4(d) (which authorizes the application of any of the statutory prohibitions for endangered species to threatened species by rulemaking), FWS has produced a single blanket rule that imposes all the endangered species prohibitions, including the alpha “take” prohibition, to all threatened species

(absent seldom employed special rulemakings addressing specific threatened species). 16 U.S.C. § 1533(d); 50 C.F.R. § 1731(a).

With little difference in the degree of protection afforded to endangered and threatened species, the need to maintain both classifications virtually disappears. Given the overworked personnel and resources of the Services by the time a species is brought to the attention of the Services and goes through the administrative procedures it is in such dire straits that it often is appropriately deemed endangered. Conversely, the procedural and political battles to downgrade and delist a species are so onerous that often the species linger in the endangered category till it is found to no longer need federal protection. In addition, the endangered status is preferred by some due to the arguably greater visibility it offers to the species causing greater funds and personnel to be directed to its welfare.

This calls for a paradigmatic shift from how threatened category has heretofore been viewed and applied. The threatened category should be developed as a tool to encourage and empower states with requisite authority and funds to recover species. Such an action would reflect a nuanced and calibrated federal action to strengthen and supplement state effort and not replicate or replace it. Conversely, an endangered designation would reflect the inadequacy of conservation efforts to date and require federal government to take active leadership of the conservation efforts. A robust threatened category would signal clear distinction with predictable effect among candidate, threatened, and endangered status of a species. The clear demarcation among the different status would more closely parallel ecological condition of the species and relative abilities of state and federal governments to conserve it. Timely progression of a species through different regulatory categories carries an administrative cost. Thus, the new paradigm suggested here could only function if dedicated resources are committed to its success. Else it would only add to the bureaucracy involved, devoid of any positive effect, in species conservation. However, additional resources will be well spent in harmonizing distinguishable regulatory categories with biological risk and institutional strengths of state and federal entities to convey a more timely and accurate picture of progress or lack thereof in species conservation under the ESA.

As a policy all imperiled species should be first listed as threatened before they are listed endangered. Of course there has to exist a legitimate option to directly list a species as endangered if it is in imminent danger of extinction⁷. The criteria for listing threatened and endangered species should allocate different levels of emphasis across the five factors enumerated in § 4 (a)(1)(b). One way of achieving this may be that a species is listed threatened as soon as biological factors stated in § 4 are met and it is listed endangered when biological status of the species worsens and the existing state conservation measures are found to be inadequate. A default policy of listing all species as threatened to begin with may see species listed earlier than they are today. However, a threatened listing under the new paradigm may serve as an incentive for states as it would be accompanied with additional authority and funds. As such it would bolster state conservation agencies abilities to confront opposing interests in the state and incorporate species conservation in other broad state human health and conservation initiatives.

The states should be in the forefront of providing the needed information to evaluate whether a species condition has worsened to the level where it faces a threat of extinction, thus should be listed as threatened. Furthermore, willing states should be allowed all possible leeway under federal oversight to develop and implement a recovery program for a threatened species. Specific ecological criteria should be jointly developed between state and federal agencies to measure improvement or deterioration in a species ecological status. If the species shows improvement it may maintain its threatened status and be finally taken off the list when appropriate pre-determined benchmarks are met. If the species deteriorates below a pre-determined benchmark than the species should be promptly listed as endangered and full measure of regulatory protections should be implemented for the welfare of that species. The states may continue to play a strong role in recovery of endangered species but under a much stricter federal oversight and regulatory structure.

One of the major criticisms of ESA points to the abysmally few number of species that have been recovered. But this criticism does not present the whole story. In particular it fails to

⁷ Imminent danger of extinction could be defined by the Congress or the Services taking into account the gravity of harm and the probability of it occurring. An example would be when only a handful of specimen of a particular species exist and the viability of population is in serious doubt.

convey the arrest and reversal in the downward trend of several listed species. The present rigid and unimaginative administration of ESA fails to convey the incremental improvement in species status. One way of achieving this is by achieving a symmetry within categories in both the listing and delisting side of species conservation under ESA. This sort of action is needed for three important reasons. First, to convey to the American public the improvement in a status of a listed species as represented by its official status as a proof that the Act is working. Second, to provide a psychological and moral boost to the state, federal, and private wildlife professionals that have diligently worked at recovering the species. Their efforts need to be recognized and rewarded so they may be reinvigorated - not disheartened - from addressing the conservation of another imperiled species. Third, the quicker the recovering or recovered species are identified as such the faster the scarce resources of state and federal agencies can be better utilized in addressing the conservation concerns of species heretofore neglected but in immediate and severe threat of extinction. The recovery plan and strategies for individual species should designate intermediate recovery or status improvement standards. In addition, a category of Candidate species for delisting should be created to provide an additional category to indicate improved status of the species. This category is further discussed below. The broad framework of enhancing the state role in species conservation through a robust interpretation of the threatened category is described in Figure 8 & 9.

Figure 8. Robust Threatened Category to Enable Greater State Commitment to Species Conservation

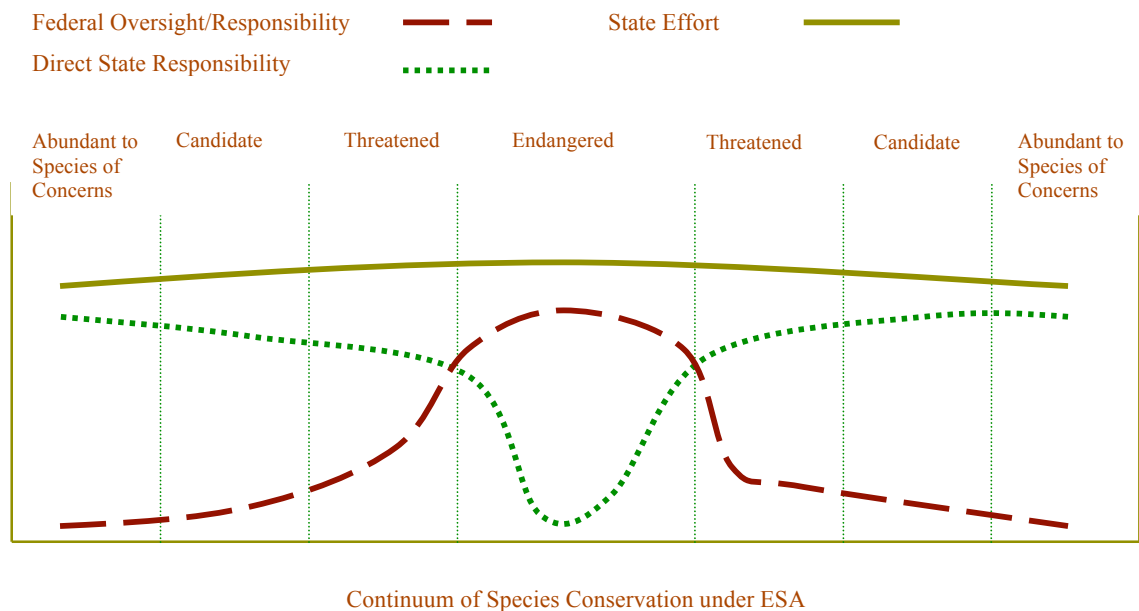


Figure 9. Recommended Jurisdictional Responsibility Across the Continuum of Species Conservation as Conveyed by Species Status.

ASCENDING CONTINUUM

SPECIES STATUS	ESA DESIGNATION	FEDERAL AUTHORITY	STATE AUTHORITY
Abundant	None	None under ESA	Exclusive
Of Concern	Agency Policy - States report to Services	None under ESA,	Exclusive
Petitioned	A temporary formal designation under ESA set in motion by third party action to list a species as threatened or endangered ESA § 4(b)(3)(A)	None under ESA;	Exclusive
Warranted but Precluded	Significantly reduces in use or abolished	None under ESA other than monitoring and review of species status.	Exclusive
Candidate	A regulatory construct is maintained	None under ESA other than it allows the Services to enter into CCA or CCAA with willing partners	Exclusive
Proposed	A temporary, formal designation prior to listing	None under ESA	Exclusive
Threatened	A formal default designation for all species. The willing states assigned the lead in conserving that species. States and Service jointly determine ecological parameters which would trigger a endangered status	Use of § 4(d) special rules and § 6 cooperative agreements to provide needed authority and funds to states to implement their conservation plans	Primary responsibility for conserving threatened species
Endangered	A formal designation for a species in immediate dangers of extinction or a threatened species whose condition has worsened and state conservation measures have been found to be inadequate	Primarily authority with structured statutory & regulatory protections and procedures resulting in relatively restricted discretion in assigning responsibility to the states.	Secondary responsibility limited to what the Services may choose to assign

DESCENDING CONTINUUM

Threatened due to recovery from endangered status	A formal designation assigned as soon as pre-determined ecological criteria indicating significant improvement are met	Use of § 4(d) special rules and § 6 cooperative agreements to provide needed authority and funds to states to implement their conservation plans	Primary responsibility for conserving threatened species
Candidate for delisting (all biological recovery criteria are met)	A regulatory construct assigned as soon as pre-determined ecological criteria for recovery are met.	Residual authority till adequate regulatory mechanisms are developed but all management responsibility assigned to states	Primary responsibility
Recovered	A formal designation under ESA. as soon as pre-determined ecological criteria and adequate regulatory mechanisms are in place	None under ESA other than procedural requirement to monitor for 5 years	Exclusive

ESA §§ 4(d) & 6 Present Apt Vehicles to Engage States in Conserving Threatened Species

The ESA contains abundant authority for the Services to extend a primary role to the states in conserving and recovering threatened species. The Act provides two possible vehicles to tailor the “take” prohibition to correspond and not override the constraints and enforcement

measures provided by the state conservation program for the threatened species. The first entails the promulgation of a new umbrella ESA § 4(d) “take” rule for all approved state management programs or a separate ESA § 4(d) “take” rule for each approved program⁸. The second involves treating the state conservation program for threatened species as an ESA § 6 state cooperative agreements for “species in urgent need of [state] conservation programs.” The latter would also include the issuance of incidental take statements under ESA § 7(a)(2) consultations once the Services have approved the cooperative agreements.⁹

The Services could also accord significant authority to states concerning federal agency actions by promulgating a so-called “counterpart rule” separate from the Services’ general rules for ESA § 7(a)(2) consultations on federal agency actions. 50 C.F.R. Part 402 (counterpart rule authorization: § 402.04). Such a counterpart rule would establish a special consultation procedure for Services’ approvals of the state threatened species management programs. The procedure could provide for a single programmatic consultation on each state conservation program for threatened species, with a non-jeopardy biological opinion that relieves future federal agency actions from separate consultations if the relevant federal agencies and the states agree that the actions comply, or are consistent with, the state conservation program.

The federal oversight of the state conservation programs for threatened species should be maintained vigilantly by way of annual reviews available to the public. In order to smooth the administrative process default rules may be put in place in advance and are triggered by the species biological status. This would ensure predictability and notice to all involved whether the species would remain threatened or receive endangered status or be taken declared recovered.

⁸ The ESA § 4(d) PROTECTIVE REGULATIONS. – Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish and wildlife, or section (9)(a)(2) in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish and wildlife, such, regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

⁹ Under the non-full authorities agreement provision of ESA § 6(c)(1), agreements may be made for “plans ... under which immediate attention will be given to those resident species ... which are determined by the [Service] or the State agency to be endangered or threatened and which the [Service] and the State agency agree are most urgently in need of conservation programs.” 16 U.S.C. §1535(c)(1) text in (ii) after (E).

Transparent progress and predictability along the continuum of species conservation is highly desirable.

A similar approach can and should be used in reverse during the delisting process. Based on recovery goals being met an endangered species should be downlisted to threatened with state taking a stronger role still in its conservation. A species that has met its biological criteria for recovery but there remain procedural issues such as adequate regulatory mechanism should be downgraded from a threatened species to a candidate species for delisting. A candidate species for delisting will preserve the jurisdictional status quo till the formal decision and as such reflect symmetry in the candidate category both for listing and delisting purposes. In the former case the primary authority remains with the state till the species is listed while in the latter the primary authority remains with the Services till the species is delisted. This new process will instill a sense of demonstrable progress achieved in the national efforts at conserving species. With a strong state management program in place for a threatened species, the process of delisting by establishing that the “measures provided by [the ESA] are no longer necessary” would be greatly facilitated. 16 U.S.C. § 1533(g)(1).

The approach described above need not be altered to apply to threatened species that inhabit multiple states. As threatened species are defined in the ESA in terms of all or significant portions of their ranges, each state could prepare a threatened species management program for the species range “portion” within its borders. The entire species would remain “listed” but would be subject to several state conservation programs. Moreover, the state boundaries represent the appropriate unit where to assess progress along the continuum both in biological condition and the regulatory status of the species. The rate of progress would vary among states. One’s states successful conservation efforts should not be punished for lack of progress elsewhere e.g. Wisconsin boasting a recovered wolf population should not bear the burden for lack of progress elsewhere¹⁰.

It would be a folly to embark on implementing the above mentioned regulatory action without the dedicated funds needed to see it through. State recovery programs for listed species

¹⁰ It is often argued that species recovery should be assessed across its range and not by states. However, most of management is based on political boundaries and certainly the biological range does not cross national boundaries in their assessment.

should be given priority under ESA § 6 grant monies. The funding needs are discussed in detail in the resources section of this document.

In Balance

The new paradigm of a robust threatened category represents a system that emphasizes early intervention and empowerment of state institutions in close proximity to the species habitat to effectuate more effective and efficient conservation. The expectation embodied in this approach is that, so long as these listings continue, the states will be encouraged to provide greater conservation services for these species (shunning the “now it’s a federal program” mindset) by the possibilities of: (i) avoiding the otherwise automatic imposition of federal prescriptions in the name of protecting the species; (ii) retaining and shaping a forceful state role in species conservation in the state; and (iii) receiving otherwise unavailable favorable regulatory assurances and federal funding. Given the scarcity, for foreseeable future, of federal resources available for on-ground conservation of listed species, if this approach enables greater state commitment in ESA implementation it would greatly enhance the aggregate conservation services for ESA-protected species.

In addition to increased conservation efforts for listed species, the approach may encourage, or remove a measure of opposition to, the early listing of species before their conditions become dire and it may activate the now moribund “downlisting” process. States may be more accepting of a threatened status if it came with additional federal resources and regulatory assurance. Similarly the states would actively work towards meeting recovery goals if there was a predictable system in place that acknowledged progress and rendered commensurate regulatory relief.

Moreover, it is important to note that the greater role for states in implementing the ESA could be fostered by new procedures that do not require statutory change. If there is statutory change in the Act then it would be beneficial to clarify the prevailing ambiguity in the standards that qualify a species to be threatened as opposed to endangered.

Encourage States to Lead Species Recovery through Greater Authority and Funds

At present there is close to universal agreement that most pressing and pertinent area of ESA reform entails species recovery. Enhanced state role in species conservation is most advantageous to recovering species. States agencies are best positioned in the field with appropriate resources, knowledge and understanding of local terrain to design and execute recovery efforts. State leadership in recovery efforts should be actively encouraged by federal policies and regulations consisting of additional funds and discretionary authority. The recovery plan should be approved by the Services and represent a management not a research document directed at affirmative action. Importantly the recovery plan should state whenever possible precise demonstrable ecological benchmarks that indicate progress in conservation efforts to eventual recovery of the species. Most importantly recovery of imperiled species should be conducted in a manner that fosters trust between state and federal agencies by delegating necessary funds and discretionary authority to the states to see the effort through.

Brief Background

The raison d'être of ESA is not passive protection of imperiled species by prohibitions but rather to alight vigorous action to recover and conserve species from their imperiled state. It is in fulfilling this core mission of ESA – recovery of species – where strong state involvement is most advantageous. There is a shared view among parties involved with ESA administration that recovery efforts can be substantially improved both in design of recovery plans and actions to achieve recovery. This part of the Paper puts forth policy to achieve effective species recovery through enhanced state responsibility.

Our national efforts to recover threatened and endangered species can be better served by addressing two broad areas of improvement. First, the effectiveness of the present recovery efforts is lessened due to a lack of clarity and consistency in recovery planning and implementation. Second, recovery efforts are further hampered by the discordance that arises when states accept the responsibility to lead species recovery in the field without commensurate decision-making authority and appropriate federal oversight. Clear guidance in recovery planning and implementation can greatly facilitate states to accept greater responsibility in recovering imperiled species.

Clear Guidelines for Planning and Execution of Species Recovery Efforts are Needed

To address the first area of improvement, the FWS & NOAA Fisheries should clearly articulate and define the major recovery phases. First, the content and framework of a Recovery Plan should be clearly enunciated to include specific management actions directed to recovering the species. There is often value in gathering more information about a listed species and adapting the management to the new understanding of the species ecological needs. However, a Recovery Plan should be first and foremost a management document with feedback loops as new information arises and not a research proposal. This is particularly important when faced with limited resources in funds, personnel, and time. Importantly, the Recovery Plan should, as far as ecologically determinable, precisely define the recovery target in explicit language. Second, precise and straightforward procedures to implement a Recovery Plan should be developed. This should include a clear definition of the responsibilities of the Recovery Coordinator; a firm procedure and schedule to implement, monitor, and modify the Recovery Plan; and a range of regulatory measures which may be applied in different combinations given the direction and rate of species recovery. Actions taken to implement recovery plans should be freed, to the extent possible, from other procedural requirements such as § 7 consultations, in order to speed implementation. Third, prompt action should follow a species' recovery. When a species' recovery meets the pre-determined recovery target, the protective status of the species should be immediately shifted to a subsidiary level with associated easing of land use or other restrictions. Specific geographical regions may be delisted ahead of other regions based on credible ecological information and post-delisting conservation commitments by the states. Vigilant federal oversight of species status should continue for five years past recovery with an option to elevate the protected status of the species with immediate effect in the face of a declining population.

In particular, ecologically determinable species recovery target should be expressly stated and strictly adhered to. Recovery targets when expressly stated and achieved represent a powerful and tangible representation of success in our national efforts to conserve species. This practice will also contribute greatly to building trust between state and federal agencies committed to recovery of species. Ill defined and moving recovery targets are the bane of sustained partnership built on credibility and trust. It is akin to asking an individual to train for

the Olympic marathon and when he wins the race instead of receiving medal he is told that the finish line was not quite in the right place and further deliberations are needed. This is hardly the tact to follow if you are interested in encouraging individuals to train and win marathons.

Several states are still waiting to receive the medals for the respective marathon in recovering species.

Encourage States to Lead Recovery Efforts by Offering them Appropriate Authority & Funds

The state role in recovery efforts can be substantially enhanced and structured leading to more effective species conservation¹¹. In order to make the recovery of listed species more effective by assigning greater recovery-related responsibilities to the states, the following policy steps, in order of complexity, should be undertaken. See Figure 10. In doing so it should be emphasized that different states would aspire to different levels of responsibilities, thus policy actions should account for this variability by being aptly flexible.

Figure 10. Range of State Roles in Species Recovery Efforts

State Role / Responsibility in Recovery	Procedure	Authority	Funding
Participate in Recovery Planning & Implementation	As of Right	Agency Policy	§ 6 grants
Lead Recovery Planning & Revision	As a Right	Agency Policy	§ 6 grants
Lead in Recovery Implementation			§ 6 grants
i) General provisions	i) Mutually approved Plan and satisfactory performance based on periodic review	i) Federal Regulations	
» Concurrence on §§4(d), 10(j) rules & § 10 permits			
» Cooperative Agreements with third parties			
ii) Threatened Species - lead in recovery	ii) Mutually approved Plan and satisfactory performance based on periodic review	ii) Federal Regulations	
iii) Endangered Species	iii) Case by case – based on state resources and expertise and effectiveness of past efforts	iii) Federal Regulations	

The first set of recommendations includes actions that are already in practice but would benefit from a broad administrative policy by the Services that would add predictability and

¹¹ It is important to note that at present a majority of states either have the lead responsibility in recovering a species listed under the federal ESA or share it with federal agencies. See Larry Niles & Kris Korth - - in ESA at 30.

uniformity to the present practice. First, any state that wants to serve on a recovery team for a species that occurs in the state should be allowed to do so as a matter of right. Second, any state that wants to take the lead in developing or revising a recovery plan for a species that occurs entirely or primarily within the state should be permitted to do so as a matter of right, subject to a satisfactory agreement on timing between the state and the relevant Service e.g. Karner Blue Butterfly recovery plan & implementation in Wisconsin. Third, any state that wants to take the lead in overseeing the implementation of a recovery plan within the state should be encouraged to do so, subject to satisfactory performance of such role based upon periodic review. In effect, under the latter proposal a state (or one of its employees) would take on the responsibilities of a “recovery coordinator” within that state or even the region¹² e.g. Delmarva Fox Squirrel recovery lead by Maryland in the Delmarva region. The first two points derive from the fact that often states agencies represent the best reservoirs of ecological information in the state. Hence, their participation would significantly improve the recovery planning discussions and the resulting plan. The Recovery Plan is not a statutory requirement, nonetheless it plays an important role as it represents the best scientific information available on the species and sets the course to recovery. It is imperative that state be on board early in the process to share information and set recovery goals. Moreover early state involvement will facilitate state’s ability to integrate recovery efforts as part of a broad natural resource effort and identify needed funds and resources. The third points builds on state’s familiarity with local social, ecological, and political fabric in designing appropriate recovery strategies. State involvement in species recovery planning enhances the likelihood of states taking the lead in implementing the plan.

The second set of recommendations relate to empowering the states that have accepted the responsibility of leading the recovery of an imperiled species within their state. In particular if a state has taken the lead in overseeing the implementation of a recovery plan within that state, then the state should:

- i. have the opportunity to participate in the Section 7 consultation process for any federal action in the state affecting the species covered by the plan with necessary adjustment of the time frames applicable to the consultation process;

¹² A state which contains an overwhelming portion of the range of a listed species may well be the appropriate entity to take the lead in recovery efforts for that species even if parts of the species entire range includes some neighboring states.

- ii. be required to concur in the issuance of any permit for the species covered by the plan if such permit applies to actions in the state;
- iii. be required to concur in the promulgation of any special regulations pursuant to Sections 4(d) or 10(j) for such species within such state.

The second set of recommendations would benefit from clear Congressional direction encouraging the federal agencies to follow through.

The third set of recommendations concern enabling states to use their recovery efforts in a robust manner to work with key public and private parties to effectuate recovery on ground. Here a state agency that has entered into a cooperative agreement under Section 6 should be allowed to submit for the Secretary's review and approval a conservation agreement between the state and one or more other parties covering geographic areas and species specified in the conservation agreement. The Secretary shall approve the agreement if he determines that it furthers the conservation of the species covered by the agreement by effectuating measures called for in the recovery plans for such species. If the Secretary's approval for actions covered by the agreement in effect waives otherwise applicable ESA permit requirements the said action would likely require Congressional sanction.

The fourth set of recommendations builds on the preceding regulatory recommendation by reasserting that willing states should be encouraged to bear the lead responsibility for all conservation efforts including recovery for threatened species. Federal regulation and policy should articulate the scope of delegated authority to competent and willing states that accept full responsibility for recovering threatened species. The scope of the delegated authority to states for recovery of threatened species may extend to include the states':

- i) ability to extend reasonable assurances to private landowners cooperating in species conservation;
- ii) ability to enter into Safe Harbor Agreements with public and private entities in the state;
- iii) ability to enter into Habitat Conservation Plans with public and private entities in the state and be able to issue § 10 Incidental Take Permits to public and private entities in the state to protect and recover a threatened species;

- iv) ability to designate, when required, habitat needed to achieve recovery – “recovery habitat”;
- v) ability to enter into § 7 consultations with federal agencies in the state to protect and recover a threatened species and ensure regulatory consistency for private landowners engaged in assisting with the recovery¹³; and

Conversely, the criteria and scope of delegated authority to states for recovery of endangered species should be significantly more limited than that for threatened species. States may still be given the primary role in recovery efforts of an endangered species but should be subject to considerably tighter federal oversight.

It is a folly to expect states to accept substantially greater responsibility in recovering species without the benefit of federal funds to enact the recovery efforts on ground. To that end grants to the states pursuant to section 6 of ESA should be available in support of any of the state functions described above. Furthermore, section 6 cooperative grant allocations should be commensurate with the level of recovery-related responsibilities accepted by the state.

Develop ESA § 6 as a Powerful Force to Facilitate Cooperative Federalism in Species Conservation

Section 6 of ESA offers ample untapped opportunity to foster strong and sustained state-federal partnership in conserving our nation’s species. This opportunity should be availed of with due haste. The scope of § 6 cooperative agreements is limited only by the imagination and initiative of state and federal parties involved. In particular, a robust interpretation of § 6 offers the appropriate vehicle to empower the willing states and encourage others to follow their lead in species conservation. Section 6 Cooperative Agreements can be tailored to each state’s particular abilities and aspirations concerning species conservation. A robust § 6 Cooperative Agreement has the potential to offer substantial incentives to the states and its private landowners by easing take provisions in lieu of robust performance standards with an imperative for sustained improvement in species status. The recommendations of the previous two subsections viz. enhanced state role for conserving threatened species and in recovery of all listed

¹³ It should be noted that state wildlife agencies have historically consulted with federal land management agencies on management issues related to game populations.

species can be realized by virtue of a § 6 Cooperative Agreement. It would be futile to develop more robust § 6 Cooperative Agreements without parallel efforts to make available requisite funds to implement the Agreements. States should be the harbingers of innovation and initiative in crafting the new breed of § 6 Cooperative Agreements. The federal government should embrace and encourage this trend.

The ESA Section 6 presents an underutilized statutory directive to facilitate collaborative species conservation by state and federal agencies. The often confounding structure of § 6 should neither be an excuse nor an insurmountable hurdle in promoting the section's inherent statutory sanction of close cooperation between state and federal efforts to conserve our nation's imperiled species. On the contrary, given the clear statutory intent for § 6, the muddled nature of statutory language present infinite possibilities to foster state-federal partnership to advance species conservation in our nation. The federal government should, with due haste, develop regulations that carry out the full force of the congressional intent and statutory language embodied in § 6 and foster its growth into a comprehensive medium enabling state and federal collaboration in species conservation. States as creative laboratories should be the harbingers of innovation and initiative in designing robust Cooperative Agreements under § 6. The federal government should embrace and encourage state efforts to that end. This part of the paper presents specific policy actions to develop § 6 of ESA as a powerful force to facilitate cooperative federalism in species conservation.

Brief Background

When ESA was passed in 1973, Congress stated that "*the successful development of an endangered species program will ultimately depend upon a good working arrangement between the Federal agencies, which have broad policy perspective and authority, and the State agencies, which have the physical facilities and the personnel to see that State and Federal endangered species policies are properly executed.*" Section 6 requires the U.S. Fish and Wildlife Service and NOAA-Fisheries to cooperate to the maximum extent practicable with the states in carrying out the goals of the Act. It is time that this paper ideal is put into practice.

Cooperative agreements between the Services and the states under § 6 of ESA are the means by which the Services certify that states have established and maintain adequate and

active programs for the conservation of listed species. For states that have entered into cooperative agreements, the grant program established under § 6 provides funds to state fish and wildlife agencies who wish to cooperate in efforts to recover listed species and to monitor the status of both candidate species and recently recovered, delisted species. However, the desired level of specificity concerning state and federal roles and a sense of partnership is lacking in the current crop of Cooperative Agreements, with few exceptions. The present agreements are best described as a formality for states to receive federal funds. Itinerant efforts to bolster § 6 based state-federal partnership such as the Services' 1994 National Policy have been largely aspirational.

Going Forward

In going forward, the scope, structure, and funding of section 6 agreements needs to be substantially bolstered. The primacy in Cooperative Agreements of conservation programs over projects should be unequivocally reasserted. Species conservation is best addressed at programmatic level where considerable synergy is gained by multi-species eco-region efforts or broad natural resource initiatives such as firm management or watershed health. A robust interpretation of section 6 is called for to enhance state and federal conservation of endangered and threatened species by establishing a stronger partnership between the Services and state fish and wildlife agencies to prevent the ecological need to list species, to conserve & recover species on private and other non-federal lands, and to carry out related activities under the ESA. In doing so it should be borne in mind that states have varying abilities and aspirations necessitating a flexible approach that empowers the bold and willing and encourage the others.

Individual Cooperative Agreements under Section 6 should be bolstered to reflect true partnership that precisely identifies the respective roles of state and federal wildlife agencies and ensure close collaboration and coordination between the two. Substantial detail and weight should be directed to the provisions of § 6(d)(2), which call for Cooperative Agreements to set forth 1) the actions to be taken by the Services and the state agencies; 2) the benefits that are expected to be derived in connection with the actions to conserve endangered or threatened species; 3) the estimated cost of these actions; and 4) the share of such costs to be borne by the federal government and by the states. In doing so the Services should be primarily directed by

the welfare of the imperiled species given the institutional strength of respective state, federal, and private parties.

Scope and Structure of Section 6 Cooperative Agreements

More robust and effective Cooperative Agreements may take one of two forms as indicated by bold initiatives of Arizona and Idaho. In the first scenario the state may agree to accept responsibility for virtually all tasks related to species conservation under the ESA. A recent agreement between the Arizona Game & Fish Department and the U.S. Fish & Wildlife Service presents one such model reflecting this broad role for states. Under this model, the FWS agrees to offer the state agency an opportunity to participate in developing and implementing each recommendation formulated and each action undertaken within the specific FWS Region pursuant to the authorities of the ESA. This includes candidate species assessments, prelisting recovery activities, petition management, listing (including reclassification), critical habitat designation, special rules for candidate and listed wildlife, five-year status reviews, recovery plan development and implementation, monitoring of de-listed wildlife species, land and water acquisition and management, section 7 consultation, law enforcement, habitat conservation planning, and management of experimental populations. As part of its section 6(c) requirement to maintain an adequate and active program for conservation of endangered and threatened wildlife, the state agency agrees to develop species-specific or ecosystem-specific conservation strategies for all species of wildlife that are listed, proposed for listing, candidates for listing, or that might benefit from proactive efforts in order to preclude the need for listing.

In the second scenario, the state might choose to accept more select responsibilities under ESA. A recent Cooperative Agreement between State of Idaho and FWS and NOAA Fisheries presents an example of a more select and tailored section 6 agreement. Here the Cooperative Agreement identifies actions for which the state agency and the appropriate Service agree that the state would assume the lead responsibility in one or more of the tasks along the continuum of species conservation under ESA. See Figure 11.

Figure 11. Range of Tasks that can be Assigned to States under § 6 Cooperative Agreements

- » Monitoring the status of candidate species; the development, administration, and oversight of Candidate Conservation Agreements with Assurances (CCAAs); and other pre-listing conservation activities and responsibilities

- » Conducting population status inventories and geographic distribution surveys to facilitate review of which species should be advanced to the official proposed stage for listing consideration
- » Developing or providing professional reviews of recovery plans and oversight of plan implementation
- » Developing, administering, and providing oversight of section 4(d) rules allowing for management flexibility of threatened species
- » Developing, administering, and providing oversight of Safe Harbor Agreements (SHAs), Habitat Conservation Plans (HCPs), and other nonfederal conservation activities and responsibilities
- » Designing and developing monitoring programs on recovered species

Substantial responsibilities in addition to those described in figure 8 can be offered to the willing states as part of a Cooperative Agreement. For instance, a state could assume responsibility for permitting exceptions to take under § 10 of the ESA. Sections 6(g)(2) and 9(a)(1)B, in conjunction with state take regulations, could allow interested states operating under a Cooperative Agreement to be granted authority to issue § 10 permits for enhancement of survival (CCAAs and SHAs) and minimization and mitigation of incidental take (HCPs). A state could choose to assume such responsibility for the entire state for specific species, for only a specific geographic area within the state for a combination of species, or for any combinations thereof. Similarly, §§ 6(g)(2) and 4(d) could be used to allow states to assume the responsibility for promulgation of 4(d) rules for take of threatened species within the state, either in entirety or on a case-by-case basis.

Whenever practical the existence and specific terms of a Cooperative Agreement between a state agency and the appropriate Service should be used to facilitate the development of statewide HCPs, SHAs, and CCAAs. Often a comprehensive § 6 Cooperative Agreement will encompass the incentives and regulatory assurances associated with these programs and as such significantly streamline the process. Issuance of an umbrella incidental take or enhancement of survival authority for resident ESA-listed species would ensure that these species remain under the jurisdiction of the state fish and wildlife agency, typically the entity most knowledgeable about the species, its status, and its existence in the state. This would result in reduced bureaucratic burdens to landowners for complying with regulatory procedures. The industry's participation in local conservation efforts would be encouraged by the presence of a robust § 6 Cooperative Agreements as a sign of federal blessing of state efforts. Furthermore,

comprehensive § 6 Cooperative Agreements would greatly enable states to integrate species conservation with broad state human health and resource initiatives.

The Requirements & Performance of § 6 Agreements should be Correlated with the Ecological Status of the Species

A robust interpretation of Section 6 can play a valuable role in balancing the regulatory and non-regulatory aspects of the ESA. Section 9 of the Act embodies a rigid and conservative application of the precautionary principle. Whereas sections 7 and 10 provide tools to conserve species when enough is known about their life histories and ecological needs. In the present application of the ESA the important niche for encouraging voluntary efforts at species conservation based on a performance standard is found want for takers. A robust § 6 can fill this niche and by so doing improving the performance of the ESA by balancing its regulatory and non-regulatory elements. As such the appropriate standard for § 6 Cooperative Agreements should be based on performance of state conservation efforts with an imperative for demonstrable improvement. The “functionally equivalent” criteria used in the application of the Clean Water Act holds valuable lessons in developing the same for § 6 Cooperative Agreements under the ESA.

The appropriate standard to measure the states ability to carry out the task should be related to mutually agreed conservation goals agreed upon by the state and federal agencies as part of the Cooperative Agreement. Some argue against delegation of specific tasks such as section 10 permits to the states as part of Cooperative Agreements unless the state-led conservation strategy is as restrictive as ESA and its associated regulations. In particular, they demand that the state have as robust a take prohibition as the ESA. However, here the emphasis is best placed on performance rather than technology measures i.e. the appropriate standard should be whether state conservation efforts are effective rather than whether the state has all the regulatory muscle on its books as the federal ESA provides. The federal ESA prohibitions though very robust are rarely used in practice. Their value lies in the threat of their use. This threat continues to exist in spite of the Cooperative Agreements as and when ensuing state conservation efforts are found wanting. Furthermore, forcing states to develop stringent state regulations for species conservation robs them of their comparative advantage to put forth flexible conservation strategies in the shadow of federal regulatory action under the ESA.

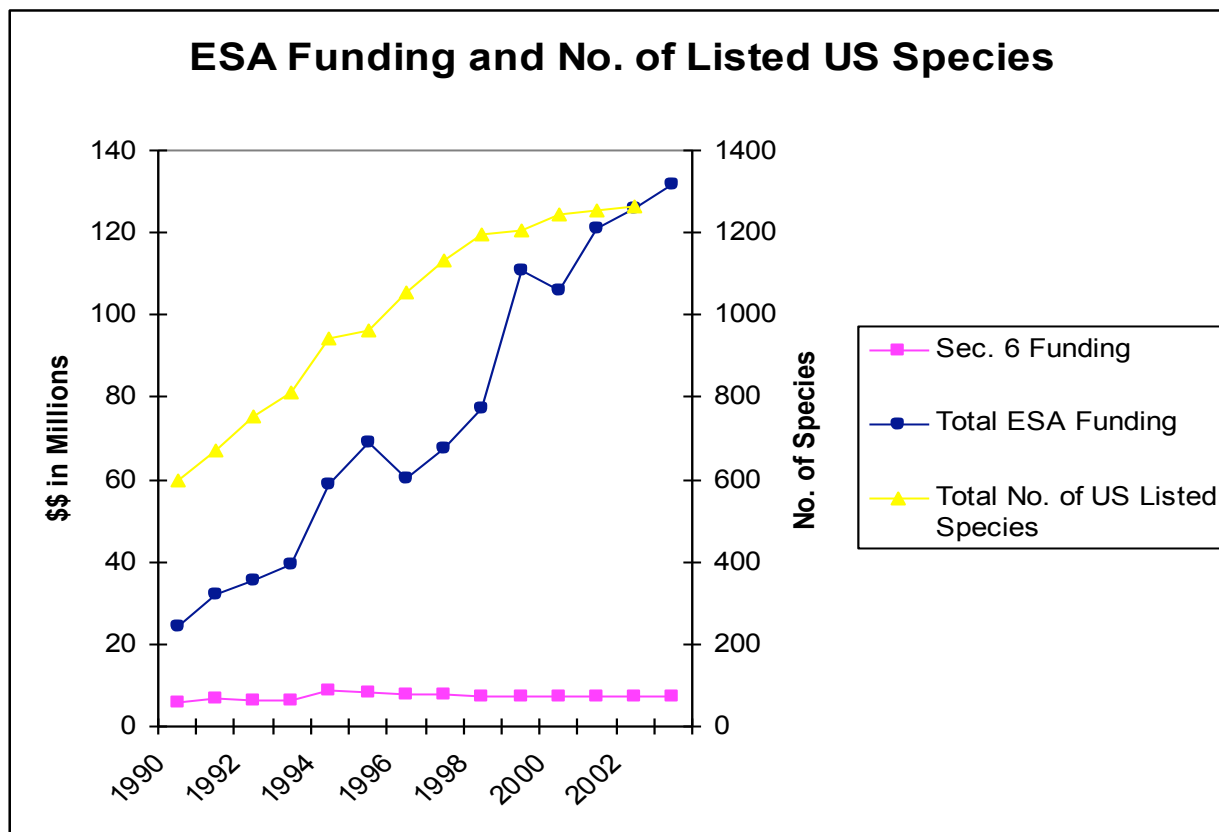
Therefore, the standard for reviewing state Cooperative Agreements should appropriately be demonstrable improvement in species biological status.

Funding from § Cooperative Endangered Species Conservation Fund is Grossly Deficient

It is a fanciful exercise full of folly to develop a robust § 6 Cooperative Agreements without commensurate shoring of funds available to implement the Agreements. State wildlife agencies are not being provided adequate and stable funding from the § 6 Cooperative Endangered Species Conservation Fund (Fund) to fulfill state roles in the conservation of endangered and threatened species. To appreciate the magnitude of this deficiency one has to appreciate that in fiscal year 1977 there were 194 US species listed under ESA and \$4.3 million was appropriated for state grants under § 6. By the end of 2002, there were 1263 listed US species, more than six times the number in 1977, yet the \$7.52 million provided that year to the states had only a third of the buying power of the funds provided 25 years earlier. Figure 12 illustrates the funding trend under § 6 in nominal dollars. It is imperative that action be taken to restore adequate funds to states to enable them to accept greater responsibility for species conservation.

In particular, the Fund should be restored to its original intended purpose of providing adequate and stable funding to states to fulfill their responsibilities under the ESA. This would enable the full realization of the state activities and responsibilities identified above. The spate of specialized grants that have flourished over the last decade and half such as HCP planning assistance and HCP implementation and recovery land acquisitions authorized under the Fund should be consolidated. Separate grants for HCP planning and land acquisition, if needed, are more appropriately placed under § 15 of the ESA. Section 6(i) should be amended to provide that amounts deposited to the Cooperative Endangered Species Conservation Fund will be made available to the states without further appropriation action to make it possible for state fish and wildlife agencies to carry out activities and responsibilities identified above. Further, the § 6 regulations should be revised to allow funds to be allocated for state program actions and responsibilities under Cooperative Agreements rather than for specific projects, as currently provided. And finally state fish and wildlife agencies should be exempted from the Federal Advisory Committee Act (FACA) and limitations on pre-decisional coordination and consultation.

Figure 12. Growth in ESA Funding Compared to Number of Listed US Species



Source: Bob Davison of Wildlife Management Institute prepared this graph in the preparation of the Stanford Forum on ESA & Federalism.

In summation, section 6 of ESA needs to be resurrected from its present avatar of a emaciated tool for dispensing paltry federal funds to a fertile source of innovative and effective strategies for species conservation. The emphasis in § 6 Cooperative Agreements should be on programmatic state efforts to conserve host of species rather than projects of limited scope. Robust § 6 Cooperative Agreements should strive for the considerable synergy to be gained by multi-species eco-region conservation approaches integrated with broad state human health and resource conservation initiatives. States should step up in designing the contours of the a § 6 Cooperative Agreements that would make avail of their comparative advantages in species conservation and the federal government should embrace and encourage this phenomenon by making it happen. Much of the policy actions needed to bolster § 6 can be achieved by regulations and policy guidelines. In so doing Services would be fulfilling the clear congressional intent for writing § 6 of the ESA.

INSTITUTIONAL MEASURES

State Species Conservation Committees to Foster Cooperative Federalism under ESA

Brief Background

Any meaningful and sustained state and federal partnership for species conservation requires constant correspondence and collaboration to steer through the administrative and political maze of ESA. In particular, in light of last two decades state and federal agencies need to consciously build a strong working relationship based on mutual trust and understanding. This can be best achieved with frequent interactions among the state and federal principals in a structured environment. This section outlines the framework for a State Species Conservation Committees (SSC) to foster cooperative federalism under ESA by facilitating trust building among the key parties involved.

Need

Effective species conservation increasingly requires close collaboration among state and federal agencies and a broad range of stakeholders. State and federal agencies have met this need in various ways. For individual species such as the grizzly bear, Florida panther, etc., there are interagency committees to coordinate and direct species conservation and recovery. The level of coordination and controversy varies from species to species. Some states have created new offices among the Governor's staff or in the office of an executive of a state natural resources agency e.g. the Idaho Office of Species Conservation.

It is impractical and unwise to establish separate inter-agency policy level committees, in addition to science-based species recovery teams, devoted to the conservation and recovery for every species of concern. As the need for coordination across state and federal agencies in species conservation continues to grow due to the complexity and reach of species recovery efforts, a standing state committee coordinating conservation of all species of concern within the state may be of great value. In most states, establishing a State Species Conservation Committee (SCC) would help to better define and structure existing informal channels to coordinate species conservation among the various agencies.

Purpose & Value

An effective SCC could substantially enhance species conservation by coordinating state and federal action and increase the potential for states to receive greater resources and decision-making authority in species conservation. An SCC might also provide federal agencies more effective oversight. Most importantly a SSC would provide a valuable medium for principals of state and federal agencies to regularly interact in a structured and transparent manner to devise and execute effective species conservation efforts. Frequent interaction among state and federal principals would go a long way in addressing the major themes identified in the beginning viz. building trust among state and federal, developing non-regulatory elements of the ESA by emphasizing complementary state-federal strategies, designing flexible conservation strategies that account for unique assets of state and federal entities involved, enhance the source and application of funds for species conservation, and enable species conservation efforts to be integrated with broader human health and resource conservation efforts. Moreover, a coordinating committee at the state level would greatly facilitate the delivery of regulatory actions suggested earlier i.e. allowing states a lead role in conserving threatened species, encouraging states to lead species recovery efforts, and to foster sustained state-federal partnership in specie conservation through a robust § 6 Cooperative Agreement.

An SCC, as opposed to a committee dedicated to the recovery of a single species, would by its nature gravitate toward conserving cohorts of species in particular ecotypes (e.g., sage-steppe, short-grass prairie, etc.). The controversy and complexity that surrounds species conservation often arises from its focus on habitat conservation. Complexities concerning habitat conservation stem not only from competing land and water uses, but also from the fact that multiple species exist in a habitat and, when decisions are made for one to the exclusion of others, unintended consequences may result. A standing committee dedicated to approaching species conservation in a collective manner would allow for more integrated habitat conservation planning and account for the needs of multiple species dependent on that particular habitat. Thus, by its very construct the SCC is predisposed to encouraging multi-species eco-region conservation efforts that are integrated in broad state human health and resource conservation initiatives.

The two goals of an SCC should be i) coordination; and ii) information-sharing concerning species recovery within a state. Coordination across multi-faceted conservation efforts related to multiple candidate, listed, and other species of concern within a state would be best done among the state and federal agency personnel that have the authority to make decisions (viz., chief line officers or their assigned deputies). Some previous efforts have suffered when a federal biologist is negotiating with state agency executives or vice-versa. This results in an asymmetry in the contextual perspective and motivations of the two parties. One of the primary benefits of an SCC would be to provide a forum for principals to coordinate their conservation efforts and set the tenor for species conservation within the state. An understanding among the principals regarding the broad framework of species conservation in the state or across states if appropriate would provide a valuable framework facilitating close collaboration among state and federal field personnel. Further, an SCC also would provide a valuable medium to coordinate with other similarly situated committees in conserving species that range across state boundaries.

Desired Characteristics

A viable SCC model should satisfy the needs of the major stakeholders. The major stakeholders and the associated attributes of an effective SCC are described in figure 13.

Figure 13. Stakeholder Interests Served by a State Species Conservation Committee

Stakeholder	Interests Served by State Species Conservation Committee
State Agencies	<ul style="list-style-type: none"> i) Coordinate among relevant state and federal agencies resulting in effective species conservation and recovery ii) Facilitate delegation of decision-making authority and resources to the states iii) Facilitate a conservation approach directed to multiple species across a landscape or eco-region iv) Facilitate coordination with other states in conserving species that range across state borders
Federal Agencies	<ul style="list-style-type: none"> i) Coordinate among relevant state and federal agencies resulting in effective species conservation and recovery ii) Facilitate effective federal oversight of state species conservation efforts iii) Harness state and tribal authority and commitment to persuade local government bodies within the state to assist in species conservation and recovery iv) Provide added legal weight to agency decisions in pursuing a certain course of action to conserve and recover a species of concern
Landowners & Local Land Use	<ul style="list-style-type: none"> i) Consistent and predictable rules and guidelines for cooperation with state and federal agencies in species conservation ii) Appropriate assurances for collaborating with state and federal agencies in

Authorities	species conservation iii) Accessibility to major decision-makers on species conservation within the state and resulting diminution of bureaucratic red tape iv) A forum through which land use and landowner concerns and recommendations on how best to persuade local authorities and landowners to assist with species conservation can be presented
Tribal Nations	i) Coordinate among relevant state and federal agencies resulting in effective species conservation and recovery ii) Facilitate delegation of decision-making authority and resources to the states iii) Facilitate a conservation approach directed to multiple species across a landscape or eco-region
Environmental & Industry Groups	i) Provide a forum for environmental and industry groups to present their concerns and recommendations on how best to achieve species conservation goals within their states or regional area ii) Provide accessibility to major decision-makers on species conservation within the state iii) Facilitate effective oversight of state species conservation efforts
General Public	i) Coordination among relevant state and federal agencies resulting in effective species conservation and recovery ii) Credible and consistent information on the nature and progress of species conservation within the state

Each state should choose to structure its SCC in a manner most suitable to achieve effective species conservation goals within the state. Depending on the prevalent land use and landownership pattern, different states might choose to organize their SCCs differently. Each SCC may consider a two-tiered membership structure. One tier would include permanent accountable members which would involve, at a minimum, state and federal fish and wildlife agencies and, in most cases, all relevant state and federal agencies. The other tier would include ad-hoc stakeholder members such as local governments, environmental and industry groups, etc. that are called to participate in committee deliberations when a specific conservation topic required their input and participation.

The SCCs, which would operate at the policy and program-direction levels, would also need to engage scientific and legal experts in the state for relevant advice. The SCC might form two lists of scientists and legal experts, respectively, to assist the state in its species conservation efforts and draw from these lists as the situation requires.

States might define different charges and scopes for their respective SCC. It might be prudent for state and federal wildlife agencies to start with a narrow charge and scope and then expand it incrementally over time. Potentially SCCs could be an effective means of sharing jurisdictional authority between state and federal agencies in practically every phase of species conservation under the ESA. SCCs might coordinate decisions related to the appropriate protective status to assign a species of concern; the planning and implementation of recovery strategies for threatened and endangered species including HCPs, SHAs, CCAAs, and limited § 7 consultations; and the determination, management, and monitoring of recovered populations. The scope and effect of an SCC might be enunciated in a State Conservation Agreement between state and federal wildlife agencies under the auspices of § 6 Cooperative Agreement. Whatever the scope of an SCC, the committee should be required to publish periodic reports informing all interested members of the public on the progress of state species conservation efforts.

States Control their Destiny in Species Conservation

One of the state agencies, perhaps the state wildlife agency, is best situated to support the administration of SCCs. State wildlife agencies can play a leadership role on SCCs by presenting the best available information on species of concern and recommending prudent conservation measures to address the challenges facing the species. An SCC would offer an opportunity to state wildlife agencies to present their findings and suggested courses of action for species conservation to all concerned agencies and address their concerns in a collective manner. States with comprehensive state conservation plans would be at an advantage in persuading SCC members to adopt their suggested courses of action. State conservation plans endorsed by an SCC would present a powerful tool for the states to demand and receive greater decision-making authority and resources to effectuate species conservation. States by virtue of their SCCs may aspire to claim joint rule-making authority between state and federal fish and wildlife agencies.

Concerns

Two perceived hurdles to establishing an SCC relate to fear of increased bureaucracy and reluctance of state and federal agencies to subject their management to external scrutiny. Increasingly complex and overlapping species conservation efforts generate bigger bureaucracy by virtue of the greater need for coordination. The important question is whether an SCC would present a proper vehicle to steer the bureaucratic trend to effectively meet species conservation goals. A poorly run and structured SCC would most likely add to the redundant bureaucracy

associated with species conservation. However, an efficiently administered SCC could greatly reduce bureaucracy by enhancing coordination and consistency in species conservation within the state.

Any concern by state and federal agencies that SCCs would subject part of their management to external scrutiny is both misplaced and near-sighted. First, state and federal agency actions related to species conservation are increasingly scrutinized by both civil society and media. Second, as long as species conservation efforts within a state show adequate progress, external scrutiny should not be bothersome. Furthermore, no agency relinquishes its regulatory mandate by participating in an SCC; both state and federal agencies would retain their authorities under the respective state and federal laws.

In addition, there are concerns voiced whether the principals would or can attend on a regular basis given the excessive demands on their time. A functioning and effective SCC would represent an effective and wise use of a principal's time. An SCC with its broad scope and membership offers significant gains in economies of scale and synergy among various ongoing state and federal conservation efforts. As such principal's attendance at SCC would be compensatory and not additive to his other duties. In addition, the presence of principals would contribute to accountability among state-federal parties and lend credibility to commitments made. Nevertheless, any SCC should be ever vigilant that it adds value and not bureaucratic process to species conservation efforts and that the Committee facilitates problem solving based on best information available and not political posturing.

In Balance

In summation, entities such as SCC offer institutional mechanisms to supplement regulatory and resource enhancing policy actions. In fact, SCC provides the delivery mechanisms for the other policy actions. In so doing it addresses the broad issues identified in the early parts of the Paper in particular trust building and variability among state abilities and aspirations for species conservation. The primary benefit of an effective SCC would be to substantially increase the efficiency and effectiveness of species conservation efforts within a state or across states if applicable. The SCC provides an attractive opportunity for willing and able states to take the lead and chart the course of species conservation by harnessing needed

resources and discretionary authority. Progressive states could use an SCC as a vehicle to coordinate with relevant state and federal agencies to enact prudent and pragmatic species conservation efforts and be rewarded for it by greater funds and decision-making authority. The FWS and NOAA-Fisheries would find SCCs an effective medium to implement on-the-ground species conservation and recovery. In addition, the legal weight of their decisions pertaining to species conservation would be substantially bolstered as they would be backed by several state and federal resources management agencies. One of the most beneficial features of an SCC would be its institutional predisposition to multiple-species eco-region conservation approaches. One of the biggest benefits of an SCC might be to facilitate maturation of state wildlife agencies in addressing conservation needs of all wildlife and plant species within a state.

An SCC could be created by either an MOU between the Secretaries of Interior and/or Commerce and State Governors or under the aegis of a § 6 Cooperative Agreement. The desired elements and scope of an SCC might be developed through agency guidelines. Federal guidelines might prioritize federal grants and provide greater discretionary authority to the states that have an effective SCC in place.

RESOURCES

Brief Background

It is imperative that states have resources commensurate with their commitment to species conservation goals. Most state game and fish agencies were created to manage the game populations within the state. Historically their revenue structure was overwhelmingly, if not solely, dependent on sale of hunting and fishing licenses and federal excise taxes on hunting and fishing equipment. The last two decades have witnessed burgeoning efforts by state game and fish agencies to broaden their scope to conserve all terrestrial and aquatic wildlife species in the state. However, this growth has been constricted due to a paucity of dedicated funds devoted to species conservation like those directed to the management of game populations. Perhaps the single most important factor enabling states to take greater responsibility in meeting national species conservation goals would be additional dedicated state and federal resources to carry out the task. The American model of game management has demonstrated unparalleled success over

the last century in fostering healthy game populations throughout the fifty states. Our ability to expand this model, with additional dedicated resources, to include all terrestrial and aquatic wildlife species will leave the most effective and lasting legacy in species conservation.

Assured and dedicated funds at state and federal levels constitute the most important foundation on which to build sustained state-federal partnership in achieving our nation's species conservation goals. The present culture, structure, and tone of the ESA edifice is afflicted with the malaise of grossly inadequate funds to carry out the required tasks. The major ill of the present ESA administration viz. disproportionate reliance on regulatory tools at the expense of collaborative incentive-based conservation derives from the paucity of available funds. This fact puts the ESA in stark contrast with the initial implementation of other seminal federal environmental statutes such as the Clean Water Act and the Clean Air Act. Any purposeful action to encourage states to take a greater role in species conservation should work on parallel tracks of increased authority and funding. It is not an exaggeration to state that more authority without commensurate funding would be significantly less effective than vice-versa.

Need

State and federal resources need to be substantially augmented to enable states to accept greater responsibility in species conservation. It is both prudent and pragmatic to augment state and federal resources for species conservation in an incremental manner commensurate with their responsibilities and performance. Resources available to states for species conservation can be improved by both enhancing the use of existing funds and adding additional funding sources. The impact of existing funds can be enhanced by both increasing the funds available and by more effective use of available funds. States are well positioned to be effective in conserving species of concern before they get listed as threatened and endangered. It is at precisely this juncture that the state need for resources is highest and the availability of funds the lowest.

The most glaring need is for assured dedicated core funds at the state and federal levels to build capacity among respective agencies to develop strategic long-term programmatic strategies for species conservation. Annual appropriations and competitive grants are not conducive to multi-year strategic conservation efforts because of inherent financial uncertainty. Further, a core fund is necessary for the states to provide them with the needed leverage to fully avail of

competitive grants requiring matching funds. Any balanced policy actions directed at bolstering resources for species conservation should first strengthen core state and federal funding and then supplement it with annual appropriations and competitive grants based on performance and special needs.

Develop Strategic Core Funding for Species Conservation

At the federal level the most appropriate and opportune place to bolster strategic funding is by substantially increasing traditional § 6 funding. This should be done with due haste and if need be by consolidating non-traditional § 6 grants. In recent fiscal years, § 6 traditional funding has been grossly inadequate and disproportionate to the cost borne by states in conserving listed species. The amount of funding provided under the program severely lags behind the increase in the number of listed species. In 1977, states received \$4.2 million under § 6 cooperative agreements to assist in conservation and recovery of 194 listed species. By 2002, the number of listed species (1,263) had grown more than six-fold, yet the states received just \$7.52 million under § 6. Section 6 offers the main medium to encourage states in assuming leadership role in species conservation aided by more authority and funds. Therefore, it is imperative that § 6 funds be ameliorated substantially to effectuate comprehensive and robust § 6 Cooperative Agreements. In particular, NOAA Fisheries in its annual appropriations should be assigned a budget category for § 6 funds comparable to the one available for the FWS appropriations.

In addition, assured dedicated federal funding can be provided on the lines of Pittman-Robertson or Dingal-Johnson Acts for non-game species. Game management by state wildlife agencies is aided by Pittman-Robertson and Dingal-Johnson funds. A similar national federal aid package should be developed to support state species conservation programs. In addition, Outer Continental Shelf revenues may provide an additional source of dedicated funds.

States can also take significant actions to develop a source of assured core funds within their own jurisdictions. A few states enjoy the benefit of a portion of state revenues being dedicated to species conservation – e.g., a percentage of state general sales tax (MO and AR); lottery or other gaming funds (AZ); state real estate transfer taxes (FL); and state sales tax revenue on hunting and fishing equipment (VA). It is hoped that the state legislatures in creating new sources for strategic state funds for species conservation do not cut the traditional

state wildlife agency budgets or the net result may be for naught. States with strategic funds dedicated to species conservation enjoy tremendous advantage in their ability to attract and employ matching federal and private funds in their conservation efforts. The spread of such measures in other states can be facilitated if federal funds assign priority to states with dedicated funding for species conservation.

Develop Supplemental Discretionary Funding for Species Conservation

The development of core funds at the federal and state levels for species conservation should be supplemented through annual appropriations or competitive grants based on special need and performance. At the federal level this can be achieved by increasing State Wildlife Grants dispensed by Departments of Interior and Commerce. About \$80 million per year has been appropriated since FY2001 under this program, which distributes funds to the states by a formula utilizing land area and human population. States' documented needs are much greater than the present allocation. An incremental increase to \$350 million per year would address much of the states' need for species conservation during the early intervention phase¹⁴.

Similarly, FWS presently administers several programs with modest allocations such as the Landowner Incentive Program; Private Stewardship Program; Partners for Wildlife; etc. See Figure 14. These programs lack continuing legislative authorization and instead are simply authorized in the Interior Appropriations bill every year when funds are available. Permanent congressional authorization of these programs, where it doesn't exist, could engender longevity, although funding for these programs may still be subject to discretionary appropriations;

Figure 14. Federal Grants Programs Available to States for FY 2004

Grant Prog. FY04 Funds	Purpose	Species Benefited	Applicants	Competition	Financial Match Req.
Conservation Grants \$ 7.4 million	Implementation of conservation projects	Federally listed threatened & endangered species and species at risk	State & territories that have entered into § 6 agreements with FWS	Formula	25% match for single entity or 10% match when more than one state involved
Recovery Land	Acquisition of habitat in	Federally listed	State & territories that	National competition	25% match for single

¹⁴ Based on recommendations from IAFWA.

Acquisition \$ 13.5 million	support of approved recovery goals or objectives	threatened & endangered species	have entered into § 6 agreements with FWS		entity or 10% match when more than one state involved
Habitat Conservation Planning Assistance \$ 8.6 million	Support development of HCPs	All species covered by HCP including federal and state listed species	State & territories that have entered into § 6 agreements with FWS	National competition	25% match for single entity or 10% match when more than one state involved
HCP Land Acquisition \$ 49.3 million	Acquisition of land associated with HCP	All species covered by HCP including federal and state listed species	State & territories that have entered into § 6 agreements with FWS	National competition	25% match for single entity or 10% match when more than one state involved

In addition, species conservation measures can be substantially strengthened in relevant federal omnibus federal bills. The Farm Bill conservation programs such as WHIP, CREP, etc should give due weight to species conservation efforts. States such as Nebraska are already using Farm Bill measures to conserve landscape habitat types. Such measures will be further strengthened if species conservation is articulated and used as one of the goals in dispersing the conservation funds under the Farm Bill. Similarly, other federal measures such as a Federal Transportation Bill should be explored for funds to assist states in their species conservation efforts.

At the state level there exist tremendous opportunities to integrate species conservation efforts in broader human health and resource conservation initiatives to make avail of associated discretionary funding. For example in states experiencing significant urban growth there exist opportunities to tap into the infrastructure industry to fund and support conservation of species that would be affected by the growth. In California, the developers substantially contribute to the California's Natural Communities Conservation Program and in implementation of the HCPs. Several imperiled species are indicators of watershed health and water quality, an issue that resonates with most publics. States and local governments can make use of innovative funding mechanisms by integrating species conservation with watershed health and integrity. A state's ability to do so is greatly facilitated if it has a core fund that it can leverage. Also the

presence of an institution such as State Species Conservation Committee will greatly assist in identifying such opportunities and facilitate their execution.

Prioritize Scarce Resources

In addition, to enhancing strategic and discretionary funding for species conservation existing resources should be used more efficiently. To that end state and federal fish and wildlife agencies should prioritize scarce resources available under the ESA to the conservation and recovery of species in most need and that have a high likelihood of recovery. That is how we treat injured humans in a crowded Emergency Room with scarce resources. One way of prioritizing the allocation of resources might be by species status in the following order:

- a. Endangered Species
- b. Threatened Species
- c. Candidate Species
- d. Species of Concern and Recovered Species
- e. Common Species

Within each category, species with mid to high probability of recovery should be granted priority. Similarly, within each category, the highest priority should be assigned to conservation efforts that include benefits to multiple species. If species that have recovered (at least in part of their range) require additional resources, they should be obtained from sources other than those available under ESA.

Strategically Coordinate Spending from Existing Programs

Both state and federal entities can with appropriate assurances and incentives better utilize opportunities to use funds from existing state and federal programs for species conservation. Some states already fund a part of their species conservation efforts from their traditional funding sources. Similarly, Farm Bill programs present several significant opportunities to implement them in the state in ways that also favor imperiled species e.g. Nebraska's efforts to use CRP and CREP in a strategic way to conserve the integrity of state's eco-regions and the species therein. Moreover, often a particular species or eco-region conservation approach can serve several interests other than species preservation and as such is able to pool resources from varying sources. For example, the Sage Grouse Conservation Project saw several state fish and wildlife agencies and federal agencies (BLM, USFWS, USFS, USGS, NRCS, etc.) direct funds largely from existing budgets in an effort to meet the conservation

challenge. Similar to the Sage Grouse Conservation Project, traditional funds for state fish and wildlife agencies could be combined with set-aside Farm Bill Conservation Program funds to fuel focused efforts conserving imperiled species. The presence of a State Species Conservation Committee would significantly facilitate this coordinated application of funds to occur.

In summation, the most important policy action leading to effective species conservation through greater state involvement calls for additional resources made available to the states. First and foremost dedicated core funds to allow for strategic species conservation efforts are needed at both state and federal levels. This core funding should be supplemented by funds from more discretionary sources based on special need and performance. State and local government should vigorously pursue local avenues to integrate species conservation with broad human health and resource conservation initiatives to gain public support and funding for their efforts. Few, if any states, would accept additional authority and responsibility for species conservation in absence of a commensurate jump in funding required to fulfill their responsibilities.

SUMMATION

The congressional intent to foster cooperative federalism in administering the ESA has heretofore remained a neglected goal. At present there is great interest in the Congress, the Administration, and in state houses across the nation to develop policies and regulations that foster a collaborative approach to species conservation. However, the administration of the ESA is riddled with innate and peculiar complexity. Consequently easily discernible resolutions to frequently fractious working relationship between state and federal governments are difficult to locate. The purpose of this Policy Paper is to shine a light through the maze of ESA administration and put forth a related set of policy actions that encourage close collaboration between state and federal agencies in achieving effective and efficient species conservation.

The set of recommended policy actions are best appreciated in the present context where conservation challenges abound as several states in the union continue to experience rapid growth of urban areas and extractive industries. The Congressional spending given the present deficit is constrained and species conservation represents a low priority in federal and state appropriations. However, in the face of these conservation challenges the ESA has been

successful in arresting the decline of several imperiled species and reversing their downward trend. Red-cockaded woodpeckers alight the eastern pine forests with their bounded flight from the Carolinas to eastern Texas. Grizzly bears and gray wolves roam the Greater Yellowstone Area in numbers approaching their historical densities. The Karner blue butterfly flutters across the fields of Wisconsin and the Pacific and Atlantic salmon populations indicate encouraging trends. State and federal agencies and partners have developed innovative strategies to alleviate the threats to species in danger and recover their populations. There are important lessons to be learned from these success stories. Alas, these success stories are few and several species still remain in peril. There is a pressing need in the present environment to develop and execute policy actions that harness the collective knowledge, expertise, resources, and wisdom of state and federal agencies to effectuate species conservation to the extent possible given our scarce resources. It is a disservice to the nation and the species in peril if valuable resources are spent in idolatry process based jurisdictional disputes between state and federal agencies.

The set of regulatory policy actions and institutional measures recommended in this paper are geared to encourage state leadership in species conservation aided by greater authority and funds. The goal of these policy actions is to facilitate voluntary leadership of states in species conservation. States as has been previously noted vary significantly in their abilities and aspirations in accepting greater role in species conservation. The suggested policy actions and institutional measures account for this variability in rewarding the willing states with greater authority and funds and encouraging others to follow suit. There are several demonstrable examples of motivated states accomplishing laudable results in species conservation e.g. Karner blue butterfly conservation in Wisconsin. Most of the state involvement and accomplishment in species conservation has occurred because the species listing had a significant impact on the land use decision within the state and not because of federal incentives to engage in species conservation. This deficiency needs to be remedied. The regulatory actions presented in this Paper do just that. The suggested policies call for a series of actions including a robust threatened category to engage states, allowing states to lead species recovery efforts, and developing § 6 Cooperative Agreements to their intended effect with the objective of empowering states with additional authority and resources. There is a high likelihood that with the enactment of these policy actions more states would be willing to engage in species conservation to the betterment of the imperiled species.

States would accept greater role in species conservation if they found it as an empowering and not a frustrating experience. A greater state role in species conservation accompanied with commensurate authority and resources would be welcomed by a majority of states. Federal agencies should encourage a heightened state role in species conservation if state involvement results in effective early intervention negating the need to list a species of concern and in more effective and efficient recovery of listed species. The greatest hurdle to state and federal acceptance of an enhanced state role is lack of trust among the parties. There is no quick fix to this deficiency. Nonetheless strategic and well designed regulatory actions and institutional measures can generate an environment that puts a premium on trust building. The creation of State Species Conservation Committee holds the highest potential to further trust and understanding among state and federal parties.

The analogy with game management is very instructive. The clearly accepted complementary roles of state and federal agencies in managing game populations in the nation represent a management model with remarkable resiliency and success. The applicable tenets of that model should be extended to species conservation. The big difference between the two management models concern authority and funding. The states manage their game populations according to state regulations and receive their revenues from sale of hunting and fishing licenses. In absence of direct user fees associated with most imperiled species different funding mechanism need to be developed to persuade state agencies to focus attention at non-game species. However, there is a healthy trend towards that direction due to the high profile of the ESA and wide acceptance of the philosophy that all animal species deserve to be preserved. The field is fertile to recruit state agencies to be champions of species conservation if appropriate federal regulatory construct can be established to extend appropriate incentives in by way of authority and funds to the states.

In implementing the regulatory actions recommended here it should be emphasized that they are but means to end and not an end in themselves. There is good reason based on a thorough review of state and federal efforts in species conservation to expect that a greater state involvement in species conservation would result in more effective and efficient species conservation. However, good empirical and theoretical basis aside, the proof lies in the

metaphorical pudding of more effective species conservation. Periodic public assessment and reviews are essential to test whether state actions result in demonstrable improvement in species ecological status. If the state efforts under the recommended set of policy actions are found wanting then the implementing policies and regulations should be reconsidered and reconfigured.

The history of the ESA is replete with instances where novel ideas with demonstrable success on the ground have been incorporated in the regulatory construct of the Act e.g. HCP and SHA. The language of the Act with its predilection for generalized statements and lack of coherence provides a fertile ground for innovative minds to develop and execute new programs and policies that serve the intent of the Act. Similarly, most of the recommended policy actions in this Paper can be tried on the ground to assess their effectiveness before they are scripted in regulations. Some of the policy actions are based on demonstrable success on the ground and these should be formalized in regulations with due haste to allow their wide application. The Act also stands to gain from prudent Congressional amendments that clarify the ambiguities present in the Act such as definition of threatened and the proper scope and effect of § 6. The most significant single action that Congress can take is to provide stable dedicated source of funding to states to develop and execute their species conservation programs.