

**ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672**  
**8750 HOUSE RESOURCES**

1 ability and a summary of, and a request for the sub-  
2 mission of comments on, each draft conservation  
3 plan.

4 “(C) The Secretary shall hold at least 1 hearing  
5 on each draft conservation plan in each State to  
6 which the plan would apply in a location that is as  
7 close as possible to the center of the habitat of the  
8 affected species in such State.

9 “(D) Prior to any decision to adopt a final con-  
10 servation plan, the Secretary shall consider and  
11 weigh carefully all information presented during  
12 each hearing held under subparagraph (C) or re-  
13 ceived in response to a request for comments pub-  
14 lished under subparagraph (B).

15 “(5) PUBLICATION OF FINAL PLAN.—Not later  
16 than 18 months from the date of a determination  
17 that a species is an endangered species or a threat-  
18 ened species, the Secretary shall publish in the Fed-  
19 eral Register a notice of the availability, and a sum-  
20 mary, of a final conservation plan for the species.  
21 The notice shall include a detailed description of—

22 “(A) the reasons for the selection of the  
23 final conservation plan;

24 “(B) the reasons for not selecting each of  
25 the other alternatives included in the draft con-

1            servation plan, including, if any alternative is  
2            selected other than the alternative that would  
3            impose the least total costs on the public and  
4            private sectors, the reasons for such selection;

5            “(C) the effect of the priorities specified in  
6            paragraph (1) on the selection; and

7            “(D) the response of the Secretary to the  
8            information referred to in paragraph (4).

9            “(6) PARTICIPATION BY OTHER PERSONS.—In  
10           developing and implementing conservation plans, the  
11           Secretary may use the services of appropriate public  
12           and private agencies and institutions and other  
13           qualified persons.

14           “(7) PLAN REVISION OR AMENDMENT.—Any re-  
15           vision of or amendment to a conservation plan shall  
16           be made in accordance with the procedures and re-  
17           quirements of subsection (b) and this subsection, ex-  
18           cept that the Secretary by regulation may provide  
19           for other procedures and requirements for any  
20           amendment that does not increase the direct or indi-  
21           rect cost of implementation of the plan or enlarge  
22           the area to which the plan applies.

1 section (c) or if a conservation objective is established  
2 under subsection (b)(3)(C)—

3           “(1) any Federal agency that determines that  
4 the actions of the agency are consistent with the  
5 provisions of the conservation plan or conservation  
6 objective shall be considered to comply with section  
7 7(a)(1) for the affected species;

8           “(2) any agency action that the Federal agency  
9 determines is consistent with the provisions of the  
10 conservation plan or conservation objective shall not  
11 be subject to section 7(a)(2) for the affected species,  
12 except that a Federal agency may initiate consulta-  
13 tion under section 7(a)(2) if the agency desires guid-  
14 ance from the Secretary on the consistency of the  
15 action of the agency with the conservation plan or  
16 conservation objective; and

17           “(3) any action of any person that is consistent  
18 with the provisions of the conservation plan or con-  
19 servation objective shall not constitute a violation  
20 concerning the affected species of any applicable  
21 prohibition under section 9(a), except that a non-  
22 Federal person may initiate consultation under sec-  
23 tion 10(a)(2)—

1           “(A) if the person desires guidance from  
2           the Secretary on the consistency of the action  
3           with the plan or objective; or

4           “(B) in order to determine whether to  
5           apply for a permit under section 10 for any ac-  
6           tion that is inconsistent with the plan or objec-  
7           tive.”.

8           (b) CONSERVATION OBJECTIVE AND CONSERVATION  
9           RULE DEFINED.—Section 3(4) (16 U.S.C. 1532), as re-  
10          designated by section 102(a) of this Act, is amended to  
11          read as follows:

12           “(4) The terms ‘conservation objective’ and  
13          ‘conservation plan’ (except when modified by ‘non-  
14          Federal’) mean a conservation objective and a con-  
15          servation plan, respectively, developed under section  
16          5.”.

17          **SEC. 503. INTERIM MEASURES.**

18          Section 5 (16 U.S.C. 1534), as added by section 501  
19          of this Act and as amended by section 502 of this Act,  
20          is amended by adding at the end the following new sub-  
21          sections:

22          “(e) MANAGEMENT PRIOR TO PUBLICATION OF CON-

1 tion plan, or, if no plan is required pursuant to sub-  
2 section (b)(3)(C), a conservation objective, for the  
3 species—

4 “(A) the prohibitions of section 9(a) shall  
5 apply to any person, except in the case of a tak-  
6 ing of a member of the species that is incidental  
7 to, and not the purpose of, the carrying out of  
8 an otherwise lawful activity which incidental  
9 taking activity may include but is not limited to  
10 the routine operation, maintenance, rehabilita-  
11 tion, replacement, or repair of any structure,  
12 building, road, dam, airport, or any irrigation  
13 or other facility which is in operation prior to  
14 the publication of the determination under sec-  
15 tion 4(b)(6); and

16 “(B) no Federal agency shall be required  
17 to comply with section 7(a)(1) and no consulta-  
18 tion shall be required on any agency action  
19 under section 7(a)(2).

20 “(2) EMERGENCY RULEMAKING PROTEC-  
21 TIONS.—Notwithstanding paragraph (1), sections  
22 7(a) and 9(a) shall apply fully to the listed species  
23 during a period in which an emergency rulemaking  
24 is in effect pursuant to section 4(b)(7) or if the  
25 President declares, and advises the Secretary, that

1       there exists an imminent threat to the existence of  
2       the species. Such declaration of the President ex-  
3       pires upon the deadline for publication of a final  
4       conservation plan for the species pursuant to sub-  
5       section (c)(5) or the publication of a conservation  
6       objective for the species provided in subsection  
7       (b)(3) or if no conservation plan is required pursu-  
8       ant to subsection (b)(3)(C).

9       “(f) SUSPENSION OF CONSERVATION PLAN OR OB-  
10       JECTIVE.—If the Secretary issues an incidental take per-  
11       mit or enters into a cooperative management agreement  
12       under section 6, the Secretary, by publication of notice  
13       in the Federal Register, shall suspend the conservation ob-  
14       jective or conservation plan with respect to the geographic  
15       area or action applicable to the species to which the permit  
16       or agreement applies.

17       “(g) NONDELEGATION OF DUTIES.—The Secretary  
18       may not delegate the authority to make the final decision  
19       to select a conservation objective, issue a conservation  
20       plan, or designate critical habitat under this section.

21       “(h) REVIEW OF CONSERVATION PLANS.—

22               “(1) DEADLINES.—The Secretary shall review

1 conservation plan, and before the end of each 5-  
2 year period thereafter.

3 “(2) REVISIONS.—The Secretary shall revise a  
4 conservation plan or the conservation objective on  
5 which it is based if the Secretary determines—

6 “(A) through a 5-year review under para-  
7 graph (1), that the conservation plan or con-  
8 servation objective does not meet the require-  
9 ments of this section; or

10 “(B) at any time—

11 “(i) that funding is not available for  
12 the implementation of a specific conserva-  
13 tion measure that is integral to the con-  
14 servation plan or that a more cost-effective  
15 alternative exists for a specific conserva-  
16 tion measure that is integral to the con-  
17 servation plan; or

18 “(ii) on the basis of scientific or com-  
19 mercial data that were not available during  
20 the development of the conservation objec-  
21 tive or conservation plan, that the con-  
22 servation objective is not achievable or the  
23 conservation plan will not achieve the con-  
24 servation objective.

1           “(3) NO REOPENING OF CONSULTATIONS.—  
2           Section 7 consultations shall not be reopened as a  
3           result of modifications to a conservation plan under  
4           paragraph (2).”

5 **SEC. 504. CRITICAL HABITAT FOR SPECIES.**

6           (a) **CRITICAL HABITAT DESIGNATION.**—Section 5, as  
7           added by section 501 of this Act and as amended by sec-  
8           tions 502 and 503 of this Act, is amended by adding at  
9           the end the following new subsections:

10          “(i) **CRITICAL HABITAT DESIGNATION.**—

11               “(1) **DESIGNATION.**—The Secretary may, by  
12               regulation and to the extent prudent and determina-  
13               ble—

14                       “(A) designate critical habitat of a species  
15                       determined to be an endangered species or  
16                       threatened species that meets the requirements  
17                       of paragraph (3) utilizing the National  
18                       Biodiversity Reserve established under section  
19                       5A(a) as a first priority; and

20                       “(B) revise a critical habitat designation  
21                       on determining that the critical habitat does  
22                       not meet the requirements of paragraph (3).

1           “(2) DEADLINES FOR DESIGNATION.—Any pro-  
2           posed regulation and any final regulation to des-  
3           ignate critical habitat shall be published not later  
4           than 12 months and 18 months, respectively, after  
5           the date on which the affected species is determined  
6           to be an endangered species or a threatened species.

7           “(3) BASIS FOR DESIGNATION.—The designa-  
8           tion of critical habitat, and any revision of the des-  
9           ignation, shall be made on the basis of the best  
10          available scientific and commercial data after taking  
11          into consideration the economic impact, and any  
12          other relevant impact, of designating any particular  
13          area as critical habitat and of the determination that  
14          the affected species is an endangered species or  
15          threatened species. The Secretary shall exclude any  
16          area from critical habitat—

17                 “(A) which does not meet the definition of  
18                 critical habitat set forth in section 3(7);

19                 “(B) which is not necessary to achieve the  
20                 conservation objective for the affected species  
21                 established pursuant to subsection (b);

22                 “(C) for which the Secretary determines  
23                 that the benefits of the exclusion of the area  
24                 from designation as critical habitat outweigh  
25                 the benefits of designation, unless the Secretary

1 determines, on the basis of the best available  
2 scientific and commercial data, that the failure  
3 to designate the area as critical habitat will re-  
4 sult in the extinction of the affected species; or

5 “(D) in the case of property owned by a  
6 non-Federal person, where the owner thereof  
7 has not given written consent to the designation  
8 or has not been compensated as provided in sec-  
9 tion 19.

10 “(4) PROCEDURE FOR DESIGNATION.—In the  
11 Federal Register notice containing the proposed reg-  
12 ulation to designate critical habitat, the Secretary  
13 shall describe the economic impacts and other rel-  
14 evant impacts that are to be considered, and the  
15 benefits that are to be weighed, under paragraph (3)  
16 in designating an area as critical habitat, along with  
17 maps showing the location of the area to be des-  
18 ignated as critical habitat. The Secretary shall sub-  
19 mit the description, and the documentation support-  
20 ing the description, to the Bureau of Labor Statis-  
21 tics of the Department of Labor. The Commissioner  
22 of Labor Statistics shall submit written comments  
23 during the comment period on the proposed regula-

1 critical habitat is designated for a species. In issuing  
2 any final regulation designating critical habitat, the  
3 Secretary shall respond separately and fully to each  
4 comment.

5 “(5) JUDICIAL REVIEW OF CRITICAL HABITAT  
6 DESIGNATION.—The decision whether to designate  
7 critical habitat shall be subject to a de novo judicial  
8 review with the court determining whether the deci-  
9 sion is supported by a preponderance of the evi-  
10 dence.

11 “(j) JUDICIAL REVIEW OF CONSERVATION OBJEC-  
12 TIVE OR PLAN.—The standard for judicial review of any  
13 decision of the Secretary, or a Federal agency pursuant  
14 to this section shall be whether the decision is arbitrary,  
15 capricious, an abuse of discretion, or otherwise not in ac-  
16 cordance with law.

17 “(k) CONSERVATION PLANS FOR FOREIGN SPE-  
18 CIES.—In developing conservation objectives and con-  
19 servation plans under this section, the Secretary shall, in  
20 regard to foreign species—

21 “(1) act consistently with the Convention; and

22 “(2) cooperate and support the conservation  
23 strategy adopted for that species by any foreign na-  
24 tion in which the species occurs.”.

1 (b) CONFORMING AMENDMENTS.—Section 4(b)(6)  
2 (16 U.S.C. 1533(b)(6)) is amended—

3 (1) in subparagraph (B)(i) by striking “or revi-  
4 sion concerned”;

5 (2) in subparagraph (B)(iii) by striking “or re-  
6 vision concerned, a finding that the revision should  
7 not be made,”; and

8 (3) by striking subparagraph (C).

9 (c) CONFORMING AMENDMENT.—Section 4(b)(8) (16  
10 U.S.C. 1533(b)(8)) is amended by striking “regulation”  
11 the third time it appears and all that follows through the  
12 end of the paragraph and inserting “regulation.”.

13 (d) DEFINITION OF CRITICAL HABITAT.—Section  
14 3(7), as redesignated by section 102(a) of this Act, is  
15 amended to read as follows:

16 “(7)(A) The term ‘critical habitat’ for an en-  
17 dangered species or a threatened species means the  
18 specific areas which are within the geographic area  
19 found to be occupied by a species at the time the  
20 species is determined to be an endangered species or  
21 a threatened species in accordance with section 4  
22 and which contain such physical or biological fea-

1 date the regulation designating the critical  
2 habitat, or any revision of the regulation, is  
3 promulgated; and

4 “(ii) require special management consider-  
5 ations or protection.

6 “(B) Except in those circumstances determined  
7 by the Secretary, critical habitat shall not include  
8 the entire geographical area occupied by the threat-  
9 ened species or endangered species.”.

10 **SEC. 505. RECOGNITION OF CAPTIVE PROPAGATION AS**  
11 **MEANS OF RECOVERY.**

12 Section 5, as added by section 501 of this Act and  
13 as amended by sections 502, 503, and 504 of this Act,  
14 is amended by adding at the end the following new sub-  
15 section:

16 “(1) **RECOGNITION OF CAPTIVE PROPAGATION AS**  
17 **MEANS OF CONSERVATION.—**

18 “(1) **IN GENERAL.—**In carrying out this Act,  
19 the Secretary shall recognize to the maximum extent  
20 practicable, and may utilize, captive propagation as  
21 a means of protecting or conserving an endangered  
22 species or a threatened species.

23 “(2) **CAPTIVE PROPAGATION GRANTS.—**The  
24 Secretary may, subject to appropriations therefor,  
25 provide annual grants to non-Federal persons to

1 fund captive propagation programs for the purpose  
2 of protecting or conserving any species that is deter-  
3 mined under section 4 to be an endangered species  
4 or a threatened species, if the Secretary determines  
5 that such a program contributes to enhancement of  
6 the population of the species.”.

7 **SEC. 506. INTRODUCTION OF SPECIES.**

8 Section 10(j) (16 U.S.C. 1539(j)) is amended—

9 (1) by amending paragraph (2)(B) to read as  
10 follows:

11 “(B) Before authorizing the release of any  
12 population under subparagraph (A), the Sec-  
13 retary shall by regulation identify the popu-  
14 lation and the precise boundaries of the geo-  
15 graphic area for the release and determine, on  
16 the basis of the best available information,  
17 whether the release is in the public interest,  
18 whether or not such population is essential to  
19 the continued existence of an endangered spe-  
20 cies or a threatened species.”;

21 (2) in paragraph (2)(C)—

22 (A) in clause (i) by striking “and” after

1           “(ii) for the purposes of sections 4(d)  
2           and 9(a)(1)(B), any member of an experi-  
3           mental population found outside the geo-  
4           graphic area in which the population is re-  
5           leased shall not be treated as a threatened  
6           species if the member poses a threat to the  
7           welfare of the public; and

8           “(iii) critical habitat shall not be des-  
9           ignated under this Act for any experi-  
10          mental population determined under sub-  
11          paragraph (B) to be not essential to the  
12          continued existence of a species.”;

13          (3) by redesignating paragraph (3) as para-  
14          graph (4); and

15          (4) by inserting after paragraph (2) the follow-  
16          ing new paragraph:

17          “(3) REQUIREMENTS FOR RELEASES.—In au-  
18          thorizing the release of a population under para-  
19          graph (2), the Secretary shall require that—

20                 “(A) to the maximum extent practicable,  
21                 the release occurs only in a unit of the National  
22                 Park System or the National Wildlife Refuge  
23                 System;

24                 “(B) a release outside a unit occurs only in  
25                 an area that has been identified as a candidate

1 site for release of the population in a conserva-  
2 tion plan for the species;

3 “(C) in the case of a release outside a unit,  
4 measures to protect the safety and welfare of  
5 the public and domestic animals and the fund-  
6 ing for the measures are identified in the regu-  
7 lations authorizing the release and are imple-  
8 mented;

9 “(D) the regulations authorizing the re-  
10 lease identify precisely the geographic area for  
11 the release;

12 “(E) a release on non-Federal land occurs  
13 only with the written consent of the owner of  
14 the land; and

15 “(F) the regulations authorizing the re-  
16 lease include measurable reintroduction goals to  
17 restore viable populations only within the spe-  
18 cific geographic area identified for release in  
19 the regulations.”.

20 **SEC. 507. CONSERVING THREATENED SPECIES.**

21 (a) **REGULATIONS.**—Section 4(d) (16 U.S.C.  
22 1533(d)) is amended to read as follows:

23 “(d) **REGULATIONS TO PROTECT THREATENED SPE-**

1 concurrently with the regulation that provides for the list-  
2 ing of the species, such regulations as the Secretary deems  
3 necessary and advisable to provide for the conservation of  
4 such species. Such regulations may apply to the threat-  
5 ened species one or more of the prohibitions under section  
6 9(a)(1), in the case of fish and wildlife, or section 9(a)(2)  
7 in the case of plants, with respect to endangered species.  
8 The prohibition applied to the threatened species shall ad-  
9 dress the specific circumstances of such species and may  
10 not be as restrictive as such prohibition for endangered  
11 species. With respect to the taking of resident species of  
12 fish or wildlife, such regulations shall apply in any State  
13 which has entered into a cooperative agreement pursuant  
14 to section 6(c) only to the extent that such regulations  
15 have also been adopted by such State.”.

16 (b) CONFORMING AMENDMENTS.—Section 4 (16  
17 U.S.C. 1533) is amended—

18 (1) by striking subsection (f); and

19 (2) by redesignating subsections (g), (h), and  
20 (i) in order as subsections (f), (g), and (h).

21 (c) CONSERVATION GUIDELINES.—Section 4 is  
22 amended in subsection (g), as redesignated by subsection  
23 (b)(2) of this section, by amending paragraph (3), as re-  
24 designated by section 304(b)(2) of this Act, to read as  
25 follows:

1           “(3) a system for developing and implementing,  
2           on a priority basis, conservation objectives and con-  
3           servation plans. The Secretary shall provide to the  
4           public notice of, and opportunity to submit written  
5           comments on, any guideline (including any amend-  
6           ment thereto) proposed to be established under this  
7           subsection.”.

## 8                           **TITLE VI—HABITAT** 9                           **PROTECTIONS**

### 10   **SEC. 601. FEDERAL BIOLOGICAL DIVERSITY RESERVE.**

11           Section 5A, as redesignated by section 501 of this  
12   Act, is amended to read as follows:

#### 13   **“SEC. 5A. PROTECTION OF HABITAT.**

14           “(a) **ESTABLISHMENT OF NATIONAL BIOLOGICAL**  
15   **DIVERSITY RESERVE.—**

16           “(1) **IN GENERAL.—**There is hereby established  
17           a National Biological Diversity Reserve (hereinafter  
18           in this Act referred to as the ‘Reserve’). The Reserve  
19           shall be composed of units of Federal and State  
20           lands designated in accordance with paragraph (2)  
21           and managed in accordance with paragraph (3).

22           “(2) **DESIGNATION OF RESERVE UNITS.—(A)**  
23           Not later than 18 months after the date of enact-  
24           ment of the Endangered Species Conservation and  
25           Management Act of 1995, the Secretary of the Inte-

1 rior and the Secretary of Agriculture shall designate  
2 to the Reserve by regulation those units of the na-  
3 tional conservation systems which are within the ju-  
4 risdiction of the Secretary concerned and which the  
5 Secretary determines would contribute to the protec-  
6 tion, maintenance, and enhancement of biological di-  
7 versity in accordance with the provisions of this Act.  
8 The term 'national conservation systems' means  
9 wholly federally owned lands within the National  
10 Park System, the National Wildlife Refuge System,  
11 or the National Wilderness Preservation System,  
12 and wild segments of rivers within the National Wild  
13 and Scenic Rivers System.

14 "(B) The Secretary of the Interior shall—

15 "(i) designate to the Reserve by regulation  
16 a unit of State-owned lands if such unit is nom-  
17 inated for designation by the Governor of the  
18 State and is managed under State law in ac-  
19 cordance with paragraph (3);

20 "(ii) designate to the Reserve by regulation  
21 privately owned land that is nominated for des-  
22 ignation by the owner of the land, and shall re-  
23 move such land from the Reserve if the owner  
24 requests removal;

1           “(iii) remove from the Reserve by regula-  
2           tion any unit designated pursuant to clause (i)  
3           which the Secretary finds is not managed under  
4           State law in accordance with paragraph (3);  
5           and

6           “(iv) remove from the Reserve any State-  
7           owned lands at the request of the Governor of  
8           that State.

9           “(C) Designation of a Reserve unit shall not af-  
10          fect any valid existing permit, right, right-of-way,  
11          access, interest in land, right to use or receive water,  
12          or property right.

13          “(3) MANAGEMENT OF THE RESERVE.—(A)  
14          Each unit of the Reserve shall have as an objective  
15          for the management thereof the preservation, main-  
16          tenance, and enhancement of biological diversity.  
17          Such objective shall be supplementary to any other  
18          objective established for such unit by or pursuant to  
19          any provision of law applicable to such unit. Each  
20          such unit shall be managed in accordance with such  
21          objective to the extent that such objective is not in-  
22          consistent with the purpose for which the unit was

1           “(B) The manager of each Reserve unit should  
2 consistent with paragraph (4) utilize his authority to  
3 use active management and recovery measures, in-  
4 cluding those specified in section 5(b)(2)(A)(vi), and  
5 shall conduct a survey to determine the populations  
6 of species within the Reserve.

7           “(C) Nothing in this Act shall—

8           “(i) alter, establish, or affect the respective  
9 rights of the United States, the States, or any  
10 person with respect to any water or water-relat-  
11 ed right; or

12           “(ii) affect the laws, rules, and regulations  
13 pertaining to hunting, fishing, and other lawful  
14 wildlife harvest under existing State and Fed-  
15 eral laws and Indian treaties.

16           “(D) Within 1 year of the designation of a unit  
17 to the Reserve, the manager of such unit shall com-  
18 plete, and the Secretary concerned shall make avail-  
19 able to the public by notice in the Federal Register,  
20 an inventory of the species composing the biological  
21 diversity within such unit.

22           “(4) OTHER FEDERAL LANDS.—Nothing in this  
23 Act shall be construed as limiting the authority of  
24 the Secretary of the Interior or the Secretary of Ag-  
25 riculture to take such actions as are necessary and

1 authorized by other law to protect, maintain, and  
2 enhance biological diversity on other Federal lands  
3 not designated to the Reserve except that, before  
4 taking any such action, the Secretary concerned  
5 shall make a finding based on the best available sci-  
6 entific and commercial data, that the biological di-  
7 versity for which such action is proposed is not pro-  
8 tected, maintained, or enhanced in whole or substan-  
9 tial part on any unit of the Reserve. Such finding  
10 shall be published, along with the reasons therefor in  
11 the Federal Register.”

12 **SEC. 602. LAND ACQUISITION.**

13 Section 5A, as redesignated by section 501 of this  
14 Act and as amended by section 601 of this Act, is amend-  
15 ed by adding at the end the following new subsection:

16 “(b) LAND ACQUISITION.—

17 “(1) PROGRAM.—The Secretary, and the Sec-  
18 retary of Agriculture with respect to the National  
19 Forest System, shall establish and implement a pro-  
20 gram to conserve fish, wildlife, and plants, including  
21 those which are determined to be endangered species  
22 or threatened species pursuant to section 4. To  
23 carry out such a program, the appropriate Sec-  
24 retary—

1           “(A) shall utilize the land acquisition and  
2           other authority under the Fish and Wildlife Act  
3           of 1956 (16 U.S.C. 742a et seq.), the Fish and  
4           Wildlife Coordination Act (16 U.S.C. 661 et  
5           seq.), and the Migratory Bird Conservation Act  
6           (16 U.S.C. 715 et seq.), as appropriate; and

7           “(B) is authorized to acquire by purchase,  
8           lease, donation, or otherwise, lands, waters, or  
9           interest therein, including short- or long-term  
10          conservation easements, and such authority  
11          shall be in addition to any other land acquisi-  
12          tion authority vested in that Secretary.

13          “(2) AVAILABILITY OF FUNDS FOR ACQUI-  
14          TION OF LANDS, WATER, ETC.—Funds made avail-  
15          able pursuant to the Land and Water Conservation  
16          Fund Act of 1965 (16 U.S.C. 4601-4 et seq.) may  
17          be used for the purpose of acquiring or leasing  
18          lands, waters, or interests therein under subsection  
19          (a) of this section.”.

20   **SEC. 603. PROPERTY EXCHANGES.**

21          Section 5A, as redesignated by section 501 of this  
22   Act and as amended by sections 601 and 602 of this Act,  
23   is amended by adding at the end the following new sub-  
24   sections:

25          “(c) EXCHANGES.—

1           “(1) IN GENERAL.—In accordance with sub-  
2           section (a), the Secretary of the Interior and the  
3           Secretary of Agriculture shall encourage exchanges  
4           of lands, waters, or interests in land or water within  
5           the jurisdiction of each Secretary (other than units  
6           of the National Park System and units of the Na-  
7           tional Wilderness Preservation System) for lands,  
8           waters, or interests in land or water that are not in  
9           Federal ownership and that are affected by this Act.

10           “(2) TIMING OF EXCHANGES.—An exchange  
11           under this subsection may be made if the Secretary  
12           of the Interior or the Secretary of Agriculture deter-  
13           mines, without a formal appraisal, that the lands to  
14           be exchanged are of approximately equal value.

15           “(3) ENVIRONMENTAL ASSESSMENT.—An envi-  
16           ronmental assessment shall be the only document  
17           under section 102(2) of the National Environmental  
18           Policy Act of 1976 (16 U.S.C. 4332(2)) that shall  
19           be prepared with respect to any exchange under this  
20           subsection.

21           “(4) EXPEDITIOUS EXCHANGE DECISIONS.—An  
22           exchange under this subsection shall be processed as

1 cally provide information to the non-Federal land-  
2 owner on the status of the exchange.

3 “(5) APPLICABLE LAW.—The Secretary of the  
4 Interior and the Secretary of Agriculture shall proc-  
5 ess exchanges under this subsection in accordance  
6 with applicable laws that are consistent with this  
7 subsection.

8 “(d) VALUATION.—Any land, water, or interest in  
9 land or water to be acquired by the Secretary or the Sec-  
10 retary of Agriculture by purchase, exchange, donation, or  
11 otherwise under this section shall be valued as if the land,  
12 water, or interest in land or water were not subject to any  
13 restriction on use under this Act imposed after the date  
14 of acquisition by the current owner of the land, water, or  
15 interest in land or water.

16 “(e) \_\_\_\_\_.—For any land or water acquired by the  
17 Secretary or the Secretary of Agriculture by purchase, ex-  
18 change, lease, donation or otherwise under this section,  
19 the Secretary or Secretary of Agriculture shall ensure that  
20 such purchase, exchange, lease, donation, or other transfer  
21 shall not supersede, abrogate, or otherwise impair existing  
22 easements, rights-of-way, fencing, water sources, water de-  
23 livery lines or ditches, and current uses of adjacent land.”.

1 **TITLE VII—STATE AUTHORITY**  
2 **TO PROTECT ENDANGERED**  
3 **AND THREATENED SPECIES**

4 **SEC. 701. STATE AUTHORITY.**

5 (a) **IN GENERAL.**—Section 6 (16 U.S.C. 1535) is  
6 amended by striking subsection (c) and all that follows  
7 through subsection (f) and inserting the following:

8 “(c) **STATE AUTHORITY TO PROTECT ENDANGERED**  
9 **AND THREATENED SPECIES.**—

10 “(1) **DELEGATION OF AUTHORITY.**—In further-  
11 ance of the purposes of this Act, the Secretary may  
12 delegate to a State which establishes and maintains  
13 an adequate program for the conservation of endan-  
14 gered species and threatened species the authority  
15 contained in this Act with respect to species of fish,  
16 wildlife, and plants that are residents in the State.  
17 Within 120 days after the Secretary receives a cer-  
18 tified copy of such a proposed State program, the  
19 Secretary shall make a determination whether such  
20 program will be adequate to provide protections to  
21 endangered species and threatened species in such  
22 State. In order for a State program to be deter-  
23 mined to be an adequate program for the conserva-

1 the Secretary must find that under the State pro-  
2 gram—

3 “(A)(i) authority resides in the State agen-  
4 cy to conserve resident species of fish or wildlife  
5 determined by the State agency or the Sec-  
6 retary to be endangered species or threatened  
7 species;

8 “(ii) the State agency has established ac-  
9 ceptable conservation programs, consistent with  
10 the purposes and policies of this Act, for all  
11 resident species of fish or wildlife in the State  
12 which are deemed by the Secretary to be endan-  
13 gered species or threatened species or for those  
14 species or taxonomic groups of species which  
15 the State proposes to cover under its program,  
16 and has furnished a copy of such plan and pro-  
17 gram together with all pertinent details, infor-  
18 mation, requested to the Secretary;

19 “(iii) the State agency is authorized to  
20 conduct investigations to determine the status  
21 and requirements for survival of resident spe-  
22 cies of fish and wildlife;

23 “(iv) an agency of the State is authorized  
24 to establish programs, including the acquisition  
25 of land or aquatic habitat or interests therein,

1 for the conservation of resident endangered spe-  
2 cies or threatened species of fish or wildlife;

3 “(v) provision is made for public participa-  
4 tion in designating resident species of fish or  
5 wildlife as endangered species or threatened  
6 species; and

7 “(vi) the State agency has initiated or en-  
8 couraged voluntary or incentive based programs  
9 to further the conservation objectives for the  
10 species; or

11 “(B)(i) the requirements set forth in  
12 clauses (iii), (iv), and (v) of subparagraph (A)  
13 are complied with, and

14 “(ii) plans are included under which imme-  
15 diate attention will be given to those resident  
16 species of fish and wildlife which are deter-  
17 mined by the Secretary or the State agency to  
18 be endangered species or threatened species and  
19 which the Secretary and the State agency agree  
20 are most urgently in need of conservation pro-  
21 grams.

22 “(2) PROHIBITIONS NOT AFFECTED.—A delega-

1 pursuant to section 4(d) or section 9(a)(1) with re-  
2 spect to the taking of any resident endangered spe-  
3 cies or threatened species in the State.

4 “(d) ALLOCATION OF FUNDS.—

5 “(1) FINANCIAL ASSISTANCE.—The Secretary  
6 may provide financial assistance to any State,  
7 through its respective State agency, which has re-  
8 ceived delegation pursuant to subsection (c) of this  
9 section to assist in development of programs for the  
10 conservation of endangered species and threatened  
11 species or to assist in monitoring the status of can-  
12 didate species pursuant to subparagraph (C) of sec-  
13 tion 4(b)(3) and recovered species pursuant to sec-  
14 tion 4(f). The Secretary shall allocate each annual  
15 appropriation made in accordance with subsection (i)  
16 to such States based on consideration of—

17 “(A) the international commitments of the  
18 United States to protect endangered species or  
19 threatened species;

20 “(B) the readiness of a State to proceed  
21 with a conservation program consistent with the  
22 objectives and purposes of this Act;

23 “(C) the number of endangered species  
24 and threatened species within a State;

1           “(D) the potential for restoring endan-  
2           gered species and threatened species within a  
3           State;

4           “(E) the relative urgency to initiate a pro-  
5           gram to restore and protect an endangered spe-  
6           cies or threatened species in terms of survival  
7           of the species;

8           “(F) the importance of monitoring the sta-  
9           tus of candidate species within a State to pre-  
10          vent a significant risk to the well-being of any  
11          such species; and

12          “(G) the importance of monitoring the sta-  
13          tus of recovered species within a State to assure  
14          that such species do not return to the point at  
15          which the measures provided pursuant to this  
16          Act are again necessary.

17          So much of the annual appropriation made in ac-  
18          cordance with subsection (i) allocated for obligation  
19          to any State for any fiscal year as remains unobli-  
20          gated at the close thereof may be made available to  
21          that State until the close of the succeeding fiscal  
22          year. Any amount allocated to any State which is

1 for expenditure by the Secretary in conducting pro-  
2 grams under this section.

3 “(2) CONTENTS OF DELEGATION AGREE-  
4 MENT.—Such delegation shall provide for—

5 “(A) the actions to be taken by the Sec-  
6 retary and the States;

7 “(B) the benefits that are expected to be  
8 derived in connection with the conservation of  
9 endangered species or threatened species;

10 “(C) the estimated cost of these actions;  
11 and

12 “(D) the share of such costs to be borne  
13 by the Federal Government and by the States;  
14 except that—

15 “(i) the Federal share of such pro-  
16 gram costs shall not exceed 75 percent of  
17 the estimated program cost stated in the  
18 agreement; and

19 “(ii) the Federal share may be in-  
20 creased to 90 percent whenever two or  
21 more States having a common interest in  
22 one or more endangered species or threat-  
23 ened species, the conservation of which  
24 may be enhanced by cooperation of such

1 States, enter jointly into an agreement  
2 with the Secretary.

3 The Secretary may, in the Secretary's discretion,  
4 and under such rules and regulations as he may pre-  
5 scribe, advance funds to the State for financing the  
6 United States pro rata share agreed upon in the co-  
7 operative agreement. For the purposes of this sec-  
8 tion, the non-Federal share may, in the discretion of  
9 the Secretary, be in the form of money or real prop-  
10 erty, the value of which will be determined by the  
11 Secretary, whose decision shall be final.

12 "(3) COMPLIANCE WITH PROCEDURES.—In im-  
13 plementing this Act under authority delegated to a  
14 State by the Secretary, the State shall comply with  
15 all requirements, prohibitions, and procedures set  
16 forth by this Act.

17 "(e) REVIEW OF STATE PROGRAMS.—Any action  
18 taken by the Secretary under this section shall be subject  
19 to his periodic review at no greater than intervals of 5  
20 years.

21 "(f) CONFLICTS BETWEEN FEDERAL AND STATE  
22 LAWS.—Any State law or regulation which applies with

1           “(1) permit what is prohibited by this Act or by  
2 any regulation which implements this Act, or

3           “(2) prohibit what is authorized pursuant to an  
4 exemption or permit provided for in this Act or in  
5 any regulation which implements this Act. This Act  
6 shall not otherwise be construed to void any State  
7 law or regulation which is intended to conserve mi-  
8 gratory, resident, or introduced fish or wildlife, or to  
9 permit or prohibit sale of such fish or wildlife. Any  
10 State law or regulation respecting the taking of an  
11 endangered species or threatened species may be  
12 more restrictive than the exemptions or permits pro-  
13 vided for in this Act or in any regulation which im-  
14 plements this Act.”.

15           (b) CONFORMING AMENDMENT.—Section 6(g)(2)(A)  
16 (16 U.S.C. 1535(g)(2)(A)) is amended to read as follows:

17           “(A) to which the Secretary has delegated au-  
18 thority under subsection (c); or”.

19 **SEC. 702. STATE PROGRAMS AFFECTED BY THE CONVEN-**  
20 **TION.**

21           Section 8A (16 U.S.C. 1537a), as amended by section  
22 207(b) of this Act, is amended by adding at the end the  
23 following new subsection:

24           “(h) ISSUANCE OF PERMITS FOR EXPORT.—

1           “(1) COMPLIANCE WITH STATE RECOMMENDA-  
2           TION.—In any instance in which a State has a pro-  
3           gram for management of a native species which is  
4           the subject of a request for an export permit under  
5           the Convention, the Secretary shall act in accord-  
6           ance with the recommendation of the State unless  
7           the Secretary makes a finding and publishes a notice  
8           in the Federal Register that scientific evidence justi-  
9           fies a conclusion contrary to the advice of the State.

10           “(2) APPEAL.—The State which is the subject  
11           to such a finding, or any person in that State di-  
12           rectly affected because of inability to obtain a per-  
13           mit, may appeal the finding to an Administrative  
14           Law Judge or a court. The burden shall be on the  
15           Secretary to show that the evidence supports a find-  
16           ing contrary to the recommendation of the State.”.

17           **TITLE VIII—FUNDING OF**  
18           **CONSERVATION MEASURES**

19           **SEC. 801. AUTHORIZING INCREASED APPROPRIATIONS.**

20           Section 15 (16 U.S.C. 1542) is amended to read as  
21           follows:

22           **“SEC. 15. AUTHORIZATION OF APPROPRIATIONS.**

1 sections (b) through (e), there are authorized to be appro-  
2 priated—

3           “(1) to the Department of the Interior to carry  
4 out the duties of the Secretary of the Interior under  
5 this Act \$110,000,000 for fiscal year 1996,  
6 \$120,000,000 for fiscal year 1997, \$130,000,000 for  
7 fiscal year 1998, \$140,000,000 for fiscal year 1999,  
8 \$150,000,000 for fiscal year 2000, and  
9 \$160,000,000 for fiscal year 2001;

10           “(2) to the Department of Commerce to carry  
11 out the duties of the Secretary of Commerce under  
12 this Act \$15,000,000 for fiscal year 1996,  
13 \$20,000,000 for fiscal year 1997, \$25,000,000 for  
14 fiscal year 1998, \$30,000,000 for fiscal year 1999,  
15 \$35,000,000 for fiscal year 2000, and \$40,000,000  
16 for fiscal year 2001; and

17           “(3) to the Department of Agriculture to carry  
18 out the duties of the Secretary of Agriculture under  
19 this Act \$4,000,000 for each of fiscal years 1996  
20 through 2001.

21           “(b) COOPERATIVE MANAGEMENT AGREEMENTS.—  
22 There are authorized to be appropriated to the Depart-  
23 ment of the Interior to carry out section 6(b),  
24 \$20,000,000 for each of fiscal years 1996 through 2001,  
25 to remain available until expended.

1       “(c) CONVENTION IMPLEMENTATION.—There are au-  
2 thORIZED to be appropriated to the Department of the Inte-  
3 rior to carry out section 8A(e) \$1,000,000 for each of fis-  
4 cal years 1996 through 2001, to remain available until ex-  
5 pended.

6       “(d) NON-FEDERAL CONSERVATION PLANNING.—  
7 There are authorized to be appropriated to the Depart-  
8 ment of the Interior to carry out section 10(a)(2)(F)  
9 \$20,000,000 for each of fiscal years 1996 through 2001,  
10 to remain available until expended.

11       “(e) HABITAT CONSERVATION GRANTS.—There are  
12 authorized to be appropriated to the Department of the  
13 Interior to provide habitat conservation grants under sec-  
14 tion 6(b)(14) \$20,000,000 for each of fiscal years 1996  
15 though 2001, to remain available until expended.”.

16 **SEC. 802. FUNDING OF FEDERAL MANDATES.**

17       Section 16 is amended to read as follows:

18 **“SEC. 16. FEDERAL COST-SHARING REQUIREMENTS FOR**  
19 **CONSERVATION OBLIGATIONS.**

20       “(a) DIRECT COSTS DEFINED.—In this section, the  
21 term ‘direct costs’ means—

22               “(1) expenditures on labor, material, facilities,

1           “(2) increased purchase power costs and lost  
2 revenues caused by changes in the operation of a hy-  
3 dropower system from which the non-Federal person  
4 or Federal power marketing administration markets  
5 power to meet a specific conservation measure; and

6           “(3) other reimbursable costs specifically identi-  
7 fied by the Secretary as directly related to the per-  
8 formance of a specific conservation measure.

9           “(b) COST-SHARING.—

10           “(1) CONSERVATION PLANS.—For any non-  
11 Federal person or Federal power marketing adminis-  
12 tration, the Secretary shall pay 50 percent of any di-  
13 rect costs that result from the compliance by the  
14 person or administration mandated by a conserva-  
15 tion plan issued under section 5 or any conservation  
16 measure that provides protection to a listed species  
17 under a plan developed under the Pacific Northwest  
18 Electric Power Planning and Conservation Act (16  
19 U.S.C. 839 et seq.) including a plan that provides  
20 protection to a larger population unit of the same  
21 listed species.

22           “(2) CONSULTATION REQUIREMENTS.—For any  
23 non-Federal person or Federal power marketing ad-  
24 ministration, the Secretary shall pay 50 percent of  
25 direct costs that result solely from requirements im-

1 posed by the Secretary on the person or marketing  
2 administration under section 7.

3 “(3) INCIDENTAL TAKE PERMITS.—For any  
4 non-Federal person issued an incidental take permit  
5 under section 10, the Secretary shall pay to such  
6 person 50 percent of the direct costs of preparing  
7 the application for the permit and implementing the  
8 terms and conditions of the permit.

9 “(4) COOPERATIVE MANAGEMENT AGREE-  
10 MENTS.—The Secretary shall pay 50 percent of the  
11 direct costs of preparing and implementing the  
12 terms and conditions of a cooperative management  
13 agreement incurred by a party to the agreement and  
14 any costs incurred by any other non-Federal person  
15 or Federal power marketing administration subject  
16 to the terms of such agreement.

17 “(c) METHOD OF COST-SHARING.—

18 “(1) IN GENERAL.—Except as provided in para-  
19 graph (2), the Secretary may make a contribution  
20 required under subsection (b) by—

21 “(A) providing a habitat reserve grant  
22 under section 6(b)(14);

1           “(C) providing appropriated funds.

2           “(2) COST-SHARE PAYMENT FOR FEDERAL  
3 POWER MARKETING ADMINISTRATIONS AND OTHER  
4 STATE OR LOCAL GOVERNMENTAL ENTITIES.—The  
5 Secretary shall make a contribution under sub-  
6 section (b) to a Federal power marketing adminis-  
7 tration or any other State or local governmental en-  
8 tity by providing appropriated funds directly to the  
9 administration or governmental entity.

10           “(3) APPROPRIATED FUNDS.—To the maximum  
11 extent practicable, any appropriated funds paid by  
12 the Secretary under paragraphs (1) and (2) shall be  
13 paid directly (in lieu of reimbursement) to the party,  
14 person, or administration.

15           “(4) LOANS.—The Secretary may not consider  
16 a loan to the party to the cost-share as a contribu-  
17 tion or portion of a contribution under subsection  
18 (b).

19           “(5) RECOVERED COSTS.—The Secretary may  
20 not claim as a portion of the Federal share under  
21 subsection (b) any costs to the Federal Government  
22 that are recovered through rates for the sale or  
23 transmission of power or water.

24           “(6) EFFECT OF FEDERAL NONPAYMENT.—If  
25 the Secretary fails to make the contribution required

1 under subsection (b), the application of the applica-  
2 ble provision of the conservation plan, requirement  
3 under section 7, term under the incidental take per-  
4 mit, or provision of the cooperative management  
5 agreement shall be suspended until such time as the  
6 full contribution is made. If the suspended provision  
7 or requirement includes a conservation easement or  
8 other instrument restricting title to the property of  
9 the non-Federal person, nonpayment of the full con-  
10 tribution shall result in the nullification of the pre-  
11 viously granted restriction on title.

12 “(7) IN-KIND CONTRIBUTIONS.—A non-Federal  
13 person or Federal power marketing administration  
14 may include in-kind contributions in calculating the  
15 appropriate share of the costs of the person or ad-  
16 ministration under this section.

17 “(8) COSTS PAID BY THE SECRETARY.—Com-  
18 pensation from the Federal Government under sec-  
19 tion 19 may not cover costs incurred by a non-Fed-  
20 eral person that were otherwise paid by the Sec-  
21 retary under subsection (b).

22 “(d) EXISTING COST-SHARING AGREEMENTS.—Any

1 main in effect unless the non-Federal person requests that  
2 the cost-sharing percentage be reconsidered.

3 “(e) ADJUSTMENTS TO COST-SHARING PERCENT-  
4 AGE.—At the request of the non-Federal person, the Sec-  
5 retary may adjust the percentage of the Federal contribu-  
6 tion to a higher share.”.

7 **SEC. 803. ENDANGERED SPECIES AND THREATENED SPE-**  
8 **CIES CONSERVATION TRUST FUND.**

9 Section 13 is amended to read as follows:

10 **“SEC. 13. ENDANGERED SPECIES AND THREATENED SPE-**  
11 **CIES CONSERVATION TRUST FUND.**

12 “(a) ESTABLISHMENT.—There is established in the  
13 general fund of the Treasury a separate account which  
14 shall be known as the ‘Endangered Species and Threat-  
15 ened Species Conservation Trust Fund’ (in this section re-  
16 ferred to as the ‘Fund’).

17 “(b) CONTENTS.—The Fund shall consist of the fol-  
18 lowing:

19 “(1) Amounts received as gifts, bequests, and  
20 devises under subsection (d).

21 “(2) Other amounts appropriated to or other-  
22 wise deposited in the Fund.

23 “(c) USE.—Amounts in the fund shall be available  
24 to the Secretary, subject to appropriations, for the follow-  
25 ing:

1           “(1) Payment of compensation under section  
2           19.

3           “(2) Habitat conservation grants under section  
4           6(b)(11).

5           “(3) Payment of cost sharing under section 16.

6           “(d) GIFTS, BEQUESTS, AND DEVISES.—

7           “(1) IN GENERAL.—The Secretary may accept,  
8           use, and dispose of gifts, bequests, or devises of  
9           services or property, both real and personal, for the  
10          purpose of carrying out this Act.

11          “(2) DEPOSIT INTO FUND.—Gifts, bequests, or  
12          devises of money, and proceeds from sales of other  
13          property received as gifts, bequests, or devises, shall  
14          be deposited in the Fund and shall be available for  
15          disbursement upon order of the Secretary.

16          “(3) TREATMENT.—For purposes of Federal in-  
17          come, estate, and gift taxes, property accepted under  
18          this subsection shall be considered as a gift, bequest,  
19          or devise to the United States.”.

20           **TITLE IX—MISCELLANEOUS**  
21           **PROVISIONS**

22           **SEC. 901. AMENDMENTS TO DEFINITIONS.**

1 (1) by adding after paragraph (16) (as added  
2 by section 401(e)(1) of this Act) the following new  
3 paragraph:

4 “(17) The term ‘non-Federal person’ means a  
5 person other than an officer, employee, agent, de-  
6 partment, or instrumentality of the Federal Govern-  
7 ment or a foreign government, acting in the official  
8 capacity of the person.”; and

9 (2) by amending paragraph (3) (as redesign-  
10 nated by section 102(a)(1) of this Act) to read as  
11 follows:

12 “(3) The term ‘commercial activity’ means all  
13 activities of industry and trade, including, but not  
14 limited to, the buying or selling of commodities and  
15 activities conducted for the purpose of facilitating  
16 such buying and selling, except that it does not in-  
17 clude exhibition of commodities or species by exhibi-  
18 tors licensed under the Animal Welfare Act (7  
19 U.S.C. 2131 et seq.), museums, or similar cultural  
20 or historical organizations.”.

21 **SEC. 902. REVIEW OF SPECIES OF NATIONAL INTEREST.**

22 No later than 60 days after the date of the enactment  
23 of this Act, the Secretary (as that term is defined in sec-  
24 tion 3 of the Endangered Species Act of 1973, as amended  
25 by this Act) shall identify those species which are listed

1 under section 4 of that Act as a result of being determined  
2 to be a population segment. No later than one year after  
3 the date of the enactment of this Act, the Secretary shall  
4 review and determine whether or not it is in the national  
5 interest to continue to list each such population segment.  
6 Those population segments which the Secretary rec-  
7 ommends for continued listing in the national interest  
8 shall be submitted to the Congress for approval. Any pop-  
9 ulation segment which is not determined to be in the na-  
10 tional interest shall be delisted within 60 days after that  
11 determination.

12 **SEC. 903. PREPARATION OF CONSERVATION PLANS FOR**  
13 **SPECIES LISTED BEFORE ENACTMENT OF**  
14 **THIS ACT.**

15 (a) LISTED SPECIES WITHOUT RECOVERY PLANS.—

16 (1) PRIORITY FOR DEVELOPMENT OF CON-  
17 SERVATION PLANS.—Not later than 30 days after  
18 the date of enactment of this Act, the Secretary (as  
19 defined in section 3 of the Endangered Species Act  
20 of 1973, as amended by this Act) shall publish a list  
21 of all species that were determined to be endangered  
22 species or threatened species under section 4 of the

1 date of enactment of this Act) divided equally into  
2 three tiers of priority for preparation of conservation  
3 objectives and conservation plans therefor pursuant  
4 to section 5 of the Act. Any species which is listed  
5 as an endangered species or threatened species in  
6 more than one State shall be placed in the first tier  
7 of priority.

8 (2) SCHEDULE FOR ADOPTION OF PLANS.—The  
9 Secretary shall publish pursuant to section 5 of the  
10 Endangered Species Act of 1973 a conservation ob-  
11 jective, draft conservation plan, and final conserva-  
12 tion plan (except when a conservation objective is  
13 published pursuant to section 5(b)(3)(C) of such  
14 Act) for each species within each tier of priority  
15 identified pursuant to paragraph (1) within the fol-  
16 lowing periods after the date of enactment of this  
17 Act:

18 (A) Conservation objective: First tier, 120  
19 days; second tier, 12 months; and third tier, 24  
20 months.

21 (B) Draft conservation plan: First tier, 6  
22 months; second tier, 18 months; and third tier,  
23 30 months.

1 (C) Final conservation plan: First tier, 12  
2 months; second tier, 24 months; and third tier,  
3 36 months.

4 (b) LISTED SPECIES WITH RECOVERY PLANS.—

5 (1) PRIORITY FOR REVISION OF EXISTING  
6 PLANS.—Except as provided in paragraph (3), a  
7 final recovery plan issued under section 4(f) of the  
8 Endangered Species Act of 1973 (16 U.S.C.  
9 1533(f)) (as in effect on the day before the date of  
10 enactment of this Act) shall continue in effect until  
11 the expiration of the deadline for revision thereof es-  
12 tablished under this paragraph. Within 90 days after  
13 the date of enactment of this Act, the Secretary  
14 shall publish a list of all species that were deter-  
15 mined to be endangered species or threatened spe-  
16 cies under section 4 of such Act (16 U.S.C. 1533)  
17 and for which final recovery plans were issued under  
18 section 4(f) of such Act (16 U.S.C. 1533(f)) (as in  
19 effect on the day before the date of enactment of  
20 this Act) divided equally into three tiers of priority  
21 for preparation of conservation objectives pursuant  
22 to section 5(b) of such Act and revisions of the re-

1 species or threatened species in more than one State  
2 shall be placed in the first tier of priority.

3 (2) SCHEDULE FOR REVISION OF PLANS.—The  
4 Secretary shall publish pursuant to section 5 of the  
5 Endangered Species Act of 1973 a conservation ob-  
6 jective, draft revision of the existing recovery plan,  
7 and final revision of the existing recovery plan (ex-  
8 cept when a conservation objective is published pur-  
9 suant to section 5(b)(3)(C) of such Act) for each  
10 species within each tier of priority identified pursu-  
11 ant to paragraph (1) within the following periods  
12 after the date of enactment of this Act:

13 (A) Conservation objective: First tier, 180  
14 days; second tier, 18 months; and third tier, 30  
15 months.

16 (B) Draft revised recovery plan: First tier,  
17 12 months; second tier, 24 months; and third  
18 tier, 36 months.

19 (C) Final revised recovery plan: First tier,  
20 18 months; second tier, 30 months; and third  
21 tier, 42 months.

22 (3) SPECIES FOR WHICH NO CONSERVATION  
23 PLAN IS REQUIRED.—If the Secretary publishes a  
24 conservation objective for which no conservation plan  
25 is required pursuant to section 5(b)(3)(C) of the En-

1       dangered Species Act of 1973 for any species subject  
2       to this subsection, the final recovery plan applicable  
3       to the species shall be rescinded.

4       (c) PROHIBITION ON ADDITIONAL REQUIRE-  
5       MENTS.—The Secretary or any other Federal agency may  
6       not require any increase in any measurable criterion con-  
7       tained in, or any site specific management action in addi-  
8       tion to those provided in, a final recovery plan issued  
9       under section 4(f) of the Endangered Species Act of 1973  
10      (16 U.S.C. 1533(f)) (as in effect on the day before the  
11      date of enactment of this Act) until such time as a con-  
12      servation plan, or, pursuant to section 5(b)(3)(C) of such  
13      Act, a conservation objective, has been published under  
14      section 5 of such Act.

15      (d) EXISTING BIOLOGICAL OPINIONS.—In conjunc-  
16      tion with the issuance of a conservation plan, or, pursuant  
17      to section 5(b)(3)(C) of the Endangered Species Act of  
18      1973, a conservation objective under subsection (a) or (b),  
19      the Secretary (as defined in section 3 of such Act (16  
20      U.S.C. 1532)) shall review and reissue, in accordance with  
21      section 7 of such Act, any written opinion of the Secretary  
22      that relates to the affected species and was issued after  
23      January 1, 1995, under section 7(b)(3) of such Act (16

1 SEC. 904. CONFORMING AMENDMENT TO TABLE OF CON-  
2 TENTS.

3 The table of contents at the end of the first section  
4 is amended to read as follows:

5 "TABLE OF CONTENTS

- "Sec. 2. Findings, purposes, and policy.
- "Sec. 3. Definitions.
- "Sec. 4. Determination of endangered species and threatened species.
- "Sec. 5. Species conservation plans.
- "Sec. 5A. Protection of habitat.
- "Sec. 6. Cooperation with non-Federal persons.
- "Sec. 7. Interagency cooperation.
- "Sec. 8. International cooperation.
- "Sec. 8A. Convention implementation.
- "Sec. 9. Prohibited acts.
- "Sec. 10. Exceptions.
- "Sec. 11. Penalties and enforcement.
- "Sec. 12. Endangered plants.
- "Sec. 13. Endangered Species and Threatened Species Conservation Trust Fund.
- "Sec. 14. Notice of hearings.
- "Sec. 15. Authorization of appropriations.
- "Sec. 16. Federal cost-sharing requirements for conservation obligations.
- "Sec. 17. Marine Mammal Protection Act of 1972.
- "Sec. 18. Annual cost analysis by the Fish and Wildlife Service.
- "Sec. 19. Right to compensation.
- "Sec. 20. Recognizing net benefits to aquatic species."

# ALASKA STATE SENATE AND HOUSE

## ISSUE PAPER

### ENDANGERED SPECIES ACT REAUTHORIZATION

1995

Updated: 4/19/95

#### Major Points of Contention

##### 1. Definition of Species

According to the Endangered Species Act (ESA), the term species means "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."

The present definition of "species" encourages court challenges for listing every semi-isolated population or stock. While the species or subspecies may be, in fact, healthy, the present definition presses for the listing of every existing population segment.

The National Marine Fisheries Service has adopted a formal policy establishing its definition or interpretation of the ESA relating to "distinct populations". This policy is presented in a supporting paper authored by Robin S. Waples which states:

A population will be considered "distinct" (and hence a "species") for purposes of the ESA if it represents an evolutionarily significant unit (ESU) of the biological species. A population must satisfy two criteria to be considered an ESU:

- 1) It must be substantially reproductively isolated from other conspecific population units, and
- 2) It must represent an important component in the evolutionary legacy of the species.

The U.S. Fish and Wildlife Service (FWS) has not adopted a clarification policy for implementation of the ESA. Because of the growing tendency of the FWS to list population segments and its inability to enunciate a standardized interpretive policy, there has been some support for modifying the ESA to formalize the "distinct population" interpretation adopted by NMFS.

One of the primary purposes of the ESA was to "minimize the losses of genetic variations" where "potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed." Another motive involved halting the "irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear." It is not clear that it is necessary to preserve every distinct population segment to accomplish these goals.

Failure to limit ESA protection to genetically distinct and biologically significant units will result in increasing pressure and litigation to strain the application of the ESA as a land use act to preserve old growth forests, prevent grazing and other development. Limiting ESA protection to genetic heritage addressed by Congress will permit land use conflicts to be addressed on their own merits including an ecosystem/biodiversity analysis.

### **Alaska Legislative Position**

We recommend that Congress drop the term "distinct population segment" from the definition.

We recommend that Congress provide a precise definition of the term "species" to be utilized in implementing the Act.

Alaska recommends that the FWS and NMFS cooperate in developing and applying a consistent interpretation of the "species" definition. We recommend that the existing policy adopted by NMFS be used as a starting point.

## **2. Listing Process**

During the last convention of CITES (Convention on International Trade in Endangered Species of Wild Flora and Fauna), a major international effort was made to begin the process of establishing quantitative criteria for listing of species on the appendices. The same scientific effort needs to be implemented for the ESA. It was agreed at CITES that one criteria will not fit all species of plants and animals but it can be structured to fit over 90% of the species with strict criteria for exceptions being included.

Recent agency abuses in the acceptance of petitions for listing points out the need for quantitative criteria for listing. At least, some standards other than "substantial evidence" needs to be incorporated in the Act. The petitioner should be required to demonstrate that the species being petitioned for listing meets some minimum criteria.

Because of continued political manipulation of the listing process, it has become necessary to establish a peer review process for listing. A peer review process should be required which reviews the standards for listing, including criteria, priority and qualifications.

### **Alaska Legislative Position**

Alaska should support a provision in the Act establishing a time-frame for the development of quantitative criteria for listing of species.

The "substantial evidence" requirement for petitioners must be more specific. We recommend that the evidence must show that the species has met some minimum requirements for listing.

A peer review process for listing should be incorporated into the Act.

### **3. Clearer Distinction Between Endangered and Threatened Listing**

An endangered species is defined as "any species which is in danger of extinction throughout all or a significant portion of its range."

A threatened species is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

Although the act provides management flexibility to clearly distinguish endangered from threatened species, the agencies have generally treated them identically. It is our contention that this inflexibility destroys a major purpose of the Act which is to identify species prior to listing as endangered and institute less stringent programs designed to promote recovery rather than listing as endangered. Logic would argue in favor of maximum cooperation in developing recovery programs for threatened species before the species reaches a more restrictive listing under the Act.

Because the agencies have not more clearly separated endangered and threatened listings, the general tendency from the private sector and many resource agencies is to fight any listing until the species' status is far below the threshold which should require special research and management attention.

### **Alaska Legislative Position**

Clarification and more flexible interpretation of the taking provisions would more specifically delineate between endangered and threatened species.

It is clear that both agencies have considerable flexibility in distinguishing between the two listings. Lacking more distinct policies separating recovery and management programs for endangered and threatened species, the ESA should be amended to more clearly separate the purposes and restrictions associated with each listing.

Of major concern is the need to continue to allow regulated "taking" of threatened species which is consistent with recovery plans and acceptable conservation practices.

#### **4. Role of States**

The ESA indicates that encouraging the states to "develop and maintain conservation programs which meet national and international standards is a key to meeting the nation's international commitments and to better safeguarding, for the benefit of all citizens, the nation's heritage in fish, wildlife, and plants."

To-date, states have been active participants in the implementation of the ESA but, generally, not partners. Many states have their own ESA that are, in some cases, more effective in listing, recovering, and delisting species. If the states are to be effective, however, the Federal agencies must place more emphasis on developing cooperative recovery plans that maximize the flexibility of the Act to accommodate State interests. Public acceptability and support is the key to the ultimate success of the endangered species program. Early identification of species in potential trouble, use of experimental populations to gain public support, utilization of State public relations programs to reduce incidental take of listed species, use of State-corporate fund raising programs to target species recovery and the development of innovative techniques designed to reduce mortalities or harmful harassment are all mechanisms which can be used to make the combined Federal-State effort more effective.

#### **Alaska Legislative Position**

The ESA will continue to be exclusively a confrontational conservation law unless the emphasis of the administering agencies shifts from one of Federal control to one of Federal/State/private cooperation. Better cooperative agreements with the states and the private sector plus more flexible management options, especially in dealing with threatened species, would make the ESA more effective.

At present, most of this can be accomplished under the existing statute with minor amendments to clarify taking. Unless there is a philosophical shift in direction within the Federal agencies, these types of positive actions are not likely and will require specific amendments to force implementation.

If the ESA is amended in this area it would be advantageous to require mandatory consultation rather than "as appropriate" in all phases of the implementation process.

#### **5. Adequate Funding**

The states have consistently claimed that inadequate section 6 monies are appropriated annually to meet the minimum goals of the ESA. Recoveries are consistently delayed due to inadequate funds to implement recovery plans.

A major complaint is that funds that are available are being conveniently diverted to politically high profile species rather than species most biologically in need of attention.

Another major source of irritation is that the lack of an efficient delisting process forces agencies to spend critically needed funds on species that have technically met recovery thresholds.

The 1988 GAO report severely criticized the Federal agencies for not adhering to their prioritization process for identifying funding targets.

### **Alaska Legislative Position**

The program funding prioritization process of each agency should be adhered to with adequate public input. Less emphasis should be placed on politically popular species and more on species needing priority attention. This could be accomplished through effective policy construction and implementation or an amendment to ESA requiring prioritized expenditures unless otherwise specified in the annual appropriations.

Specific amendments to the ESA are not required, however, to provide a prioritization process. Funding for Section 6 of the ESA will require reauthorization and adequate appropriation, however.

Alaska supports additional funds being appropriated to Section 6 projects for cooperative work with the states.

### **6. Delisting and Reclassification Processes**

Section 4(f)(1)(B)(ii) requires that each recovery plan include "objective measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list." Unfortunately, the agencies have a tendency to ignore the population objectives adopted in the recovery plans.

Current practices within FWS are to frequently delay delisting despite the fact that population objectives have been met. This circumvents the prioritization process and discourages participation in the recovery process.

At present the listing process is supposed to be based on the biological status of the species involved. Although the recovery plans include population objectives, they most frequently do not include automatic delisting thresholds.

Reclassification criteria are not presently required in the ESA recovery plans. Consideration may be given to requiring inclusion of reclassification criteria along with measurable criteria for delisting in the ESA.

### **Alaska Legislative Position**

The Federal agencies have continually demonstrated a political reluctance to delist species. Since population objectives are built into the recovery plans, specific thresholds

for delisting should be required. Conceptually, the threshold would automatically trigger the delisting process.

Alaska is in favor of the delisting process being a biological decision rather than a political one.

It should be required that specific reclassification criteria be included in the recovery plans.

## **7. Take Provisions**

Under the ESA, the term take means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

One of the most controversial aspects of the ESA relates to the taking of threatened or endangered species. There are significant differences between FWS and NMFS as to the interpretation of the ESA and their policies for implementation. While both agencies generally prohibit the taking of endangered species, FWS has prohibited the taking of threatened species, while NMFS has been more lenient in allowing taking of threatened species, especially under incidental take provisions.

Court interpretations of authorized taking of threatened species has complicated recovery programs and discouraged cooperation from affected states. Most recently, courts have interpreted the "extraordinary case" limitation of the ESA to apply to threatened as well as endangered species.

We are concerned that the present definition of take is being interpreted to include many nonlethal acts that simply represent encounters with listed species, such as visual encounters of most marine mammals from vessels. The purpose of the ESA is to "conserve" listed species and their ecosystems. Mere encounters do not contravene these objectives. Though we concur that encounters that incite life threatening responses should be prohibited, casual or non-life-threatening encounters may in fact be beneficial to the species by promoting better understanding and acceptance of the program by the public. In some cases, nonlethal harassment may be beneficial to the listed species, such as use of underwater sounds to keep marine mammals away from potentially life-threatening areas or areas with conflicts with other listed species. Certainly, significant public support can be solicited and maintained if some discretion is used in allowing the use of nonlethal harassment techniques. It might be advantageous to describe lethal taking and non-lethal encounters separately in the law.

### **Alaska Legislative Position**

The definition of "take" should be modified to eliminate "harass" from the definition. Limitations on harassment should be treated separately to allow for controlled harassment which does not pose any permanent physical danger to the animal or population.

The ESA should allow for managed taking of some species. The "extraordinary case" limitation should apply only to endangered species. The current judicially based definition of "extraordinary case" should not be applied to threatened species when populations are expanding or the species is expanding into areas where they have been absent but are now creating unmanageable social and ecological pressures.

Not allowing the taking of threatened species has made the process so rigid that the states have lost all flexibility to use taking as an aspect of their recovery management program. The ESA should be amended to clarify this aspect of the overall program.

## **8. Incidental Take Provisions**

Under section 7 of the ESA, incidental take permits may be granted for Federal activities that are "not likely to jeopardize the continued existence" of any listed species. Under section 10, incidental take permits may be issued for non-Federal activities when "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." However, there appears to be no reason for State governments to be classified with private and other nongovernmental applicants instead of with our counterpart Federal agencies in this permitting process.

For example, it has been noted that, though phrased differently in each section, the exemption standards are effective equivalents. Indeed, State agencies are, in nearly all cases, the only responsible management agency for the listed species and would thereby be best able to evaluate and provide information on whether a limited taking resulting from a State activity would be likely to jeopardize the continued existence of the listed species. Finally, unlike private applicants, states are, along with the Federal government, accountable to their citizen constituents.

### **Alaska Legislative Position**

We are concerned that the flexibility and the mandate is clearly present in Sections 7 and 10 for the secretary to allow "reasonable and timely" incidental take of listed species. It seems most appropriate that the procedure for the State to receive incidental take permits be allowed under Section 7. Section 7(A)(1) needs to be amended to apply to not only Federal agencies but to State agencies as well.

Alaska must examine whether or not it is desirable to have incidental take provisions centralized under one statute. Of particular concern are the implementation problems developed as a result of incidental take regulations under the Marine Mammal Protection Act and the Endangered Species Act.

One possible amendment option would be:

No incidental take permit is needed for threatened species as long as take is "in accordance with provisions of other conservation laws and not likely to cause the

species to become endangered within the foreseeable future throughout all or a significant portion of its range."

#### **9. Use of Experimental Population**

Under the ESA, the Secretary may allow for the release of an endangered species as a wholly separated population for experimental purposes. The experimental population is to be treated for administrative purposes as a threatened species and critical habitat shall not be designated.

Some states have argued that a more lenient use of the experimental population option of the Act would encourage states to expand efforts to reestablish some extirpated populations if the rigid standards of an endangered species were not applied. More public support could be solicited if provisions could be adopted which allow for removal of problem animals and if natural expansion of experimental populations didn't jeopardize other established uses and practices.

To make this effective, however, FWS policy of not allowing taking of threatened species would have to be modified.

#### **Alaska Legislative Position**

The ESA does not have to be amended to provide for broader interpretations of experimental population applications. However, FWS has continued to take a very restrictive approach to the positive uses of experimental populations. Specific amendments to the Act allowing greater use of experimental populations should be considered.

#### **10. Critical Habitat Designation Objective, Purpose and Need for Clarification**

There is uncertainty as to the effect of the critical habitat designation, especially on private and State lands. For instance, from the standpoint of the State of Alaska, the designation of entire ranges of some salmon as critical habitat could have serious and unnecessary impacts. Overlaying and preemptive planning, zoning and permitting authorities could have major economic impacts. This is especially true if all portions of a species habitat are treated identically regardless of the relative value or importance of each area.

The ESA reads, "except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."

The Act presently requires the designation of critical habitat when recovery plans are adopted. The agencies have consistently ignored this requirement.

## **Alaska Legislative Position**

Congress needs to provide a more succinct and consolidated interpretation of the "critical habitat" provisions of the ESA.

We recommend that the law be amended to identify precise circumstances or criteria under which the Secretary can expand critical habitat designation to the entire range previously occupied by the species. As it is now, this decision is left to the whim of the respective Secretary.

By amendment, we would like to see critical habitat of anadromous fish limited to spawning areas or other designated habitats where all or a substantial portion of the species is subject to significant mortalities.

### **11. Consideration of Economic Impacts**

Some critics of the ESA suggest that economic impacts should be more seriously considered in the initial process of listing as either threatened or endangered. At present, the decision to list or not list a species or population as threatened or endangered is supposed to be based exclusively on its biological status. Economic consideration can only be considered in the development of a recovery plan or in the designation of critical habitat.

## **Alaska Legislative Position**

It is doubtful that any coalition will be able to muster the strength to substantially alter the strict biological basis for listing and delisting species. However, economic considerations could be injected into the process of determining whether a species is listed as threatened versus endangered.

Consideration should be given to simplifying the mechanisms necessary for "God Squad" intervention.

Greater weight should be sought toward evaluating the economic impacts of decisions during the recovery plan development and implementation phases.

### **12. Citizen Suits**

The ESA requires a 60 day notice period before a citizen suit can be brought to enjoin an action threatening a listed species.

This requirement can place the citizen or state in a "catch 22" where the 60 day notice requirement allows for a proposed agency action to be accomplished before the action can be legally challenged in court. This specifically occurred in Alaska where a 60 day notice of intent to sue over a NMFS biological opinion concerning incidental taking of chinook during the summer season essentially placed us at a point beyond the season where any litigation

would be essentially moot. On any action required annually like a biological opinion for incidental taking, there is no effective relief under the current law.

### **Alaska Legislative Position**

States and citizens should be allowed to sue with less than a 60 day notice period if the notice requirement places either the citizen or the state in a position where it is impossible to attain relief through the courts due to the annual time requirements.

### **13. Private Property Rights**

A recent court decision on taking of private property rights by Federal or State agency actions may lead to attempts to clarify the intent of the ESA. It is unclear what impact the ESA has at present on private property rights.

### **Alaska Legislative Position**

Some form of private property rights will probably be considered. Some private property rights amendment will be supported by the Legislature.

### **14. Creation of Prelisting Category**

There are some distinct advantages to establishing some method of identifying species before they reach the biological status requiring listing as either threatened or endangered. The major concern is that this proposal is being utilized to expand the ESA to include an even lower threshold for protective listing under the Act.

### **Alaska Legislative Position**

Alaska opposes the establishment of a prelisting category, at this time, as it would only extend the ESA even further than it does now. Use of the threatened listing should first be made to work properly.

### **15. Recovery Burden**

The listing and recovery plan development process for Columbia River chinook has raised several practical issues involved with the implementation of the ESA. It may be beneficial to modify the ESA to require special emphasis in recovery plans which place the major burden of recovery on those interests which have contributed most heavily to the decline of the listed species.

### **Alaska Legislative Position**

Alaska supports an amendment requiring the burden of recovery being placed proportionally on those activities responsible for the decline of the species.

#### **16. Deviations from Adopted Recovery Plans**

The practical implementation of officially adopted recovery plans is apparently subject to considerable administrative discretion. It may be desirable to require that recovery plans be adhered to by the agency and/or any modifications or agency deviations from the plan be subject to the same publication and public notification requirements as the original plan.

### **Alaska Legislative Position**

Deviations from adopted recovery plans should be discouraged but not prohibited. Alaska is proposing that more flexibility be inserted into the process. Prohibiting some agency discretion in modification of recovery plans may not be desirable.

#### **17. Integration of ESA with International Agreements & Treaties**

At present, the integration of ESA requirements with International Agreements such as the Convention on International Trade of Endangered Species of Wild Flora and Fauna (CITES) or the Pacific Salmon Treaty (PST) are often inconsistent.

At present, implementation procedures for the ESA do not require the integration of ESA objectives with those associated with equally important International Treaties. It may be beneficial to require that the development of recovery plans be coordinated with international agreement structures so that recovery objectives are closely meshed with those of the international agreements. This type of requirement should not detract from long term recovery efforts but assure that reasonable time frames and intra-governmental allocations and other decisions are consistent and reasonably applied. Without some basic integration requirements, ESA mandates may unnecessarily disadvantage international negotiations by the United States.

### **Alaska Legislative Position**

The ESA should require the integration of species recovery plans with international agreements that have over-lapping goals and objectives.

#### **18. Reauthorization Time-frame**

The question will be whether or not to reauthorize the act for three or five years.

### **Alaska Legislative Position**

If the ESA is properly amended, we would agree to a five year reauthorization. With the controversies now revolving around the Pacific salmon issues, it is probably not advantageous to the State to have a long-term reauthorization period unless our concerns are addressed by formal policy changes or amendments to the ESA.

#### **19. Exempt Federal Advisory Committee Act**

Strict interpretations of the Federal Advisory Committee Act (FACA) by the Federal agencies have significantly reduced the effective role of the States in many important federal programs, including the Endangered Species Act. It is imperative that the states be exempted from the Federal Advisory Committee Act in the implementation of the ESA if the purpose is to foster cooperative programs to effect recovery of listed species or species at risk.

Under present interpretations of the FACA by most federal agencies, states are treated as another member of the public rather than as cooperating sovereign governmental agencies.

This frequently precludes the type of continuous interchange and consultation which is needed to effectively address the growing problems associated with ecosystem management, biodiversity, endangered species, etc. As a result, states are not effective partners.

### **Alaska Legislative Position**

The state supports either an amendment to the Federal Advisory Committee Act exempting states from the provisions of the Act or, in this case, exempting the ESA from the provisions of the FACA.

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HJR 58

Title: Relating to the Endangered Species Act

Dept. Affected Legislature

BRU: ALL

Sponsor: Representative Green

Components: ALL

Requestor: House Resources Committee

Serial # \_\_\_\_\_

**EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)**

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants, Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
----------------	------------	------------	------------	------------	------------	------------

<b>REVENUE</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
----------------	------------	------------	------------	------------	------------	------------

**FUNDING: (THOUSANDS OF DOLLARS)**

General Fund	0.0	0.0	0.0	0.0	0.0	0.0
Federal Fund	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS :**

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

**ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)**

see attached analysis

Prepared by: Jeffrey Logan, Legis Ass't

Date: 19-FEB-96

House Resources Committee

Phone: 465-6547

*Jeffrey Logan*

Phone:

# Alaska State Legislature

WHITE PAGES ROOM  
CAPITOL BUILDING  
JUNEAU, ALASKA 99801-1500  
(907) 462-4900  
(907) 462-4110 FAX

OFFICE ADDRESS:  
270 WEST 4TH AVENUE  
SITKA, ALASKA 99781  
(907) 226-0300  
(907) 226-0324 FAX



CHIEF CLERK  
OFFICE OF THE CLERK  
1000 EAST 10TH AVENUE  
JUNEAU, ALASKA 99801-1500  
(907) 462-4900  
(907) 462-4110 FAX

CHIEF OF BUREAU  
BUREAU OF LEGISLATIVE COUNSEL  
1000 EAST 10TH AVENUE  
JUNEAU, ALASKA 99801-1500  
(907) 462-4900  
(907) 462-4110 FAX

Representative Joe Green

District 10

## Sponsor Statement

### **HJR 58 - Reauthorization of the Endangered Species Act**

HJR 58 supports the efforts of our Congressional delegation, and other states, in reforming the Endangered Species Act (ESA).

The ESA was passed by Congress in 1973 and has been amended several times. Congress has attempted to reauthorize the ESA since 1992. In 1995 Congressman Don Young and 94 cosponsors introduced H.R. 2275 to reform the ESA.

H.R. 2275 amends the ESA in three major areas: 1) consideration of economic impacts of practices that protect species; 2) limit governmental actions to violate private property rights and diminish private property values; 3) improving the scientific integrity upon which listing decisions are based.

Alaska has more to lose in this debate than most states because of our resource-based economy. Examples of the ESA invoked to halt economic activity include a lawsuit filed by Greenpeace to shut down the eastern Gulf of Alaska pollock fishery, and proposals by the U.S. Forest Service to list the Alexander Archipelago Wolf and the Queen Charlotte Goshawk as threatened.

While there may be sections of the bill that Alaskans would like to see amended, we believe H.R. 2275 is a good starting point to begin the dialogue on ESA reform. We believe HJR 58 will be a tool to help our congressional delegation protect Alaska's economy.

**TESTIMONY**

**ALASKA STATE SENATE PRESIDENT DRUE PEARCE**

**AND**

**ALASKA STATE HOUSE SPEAKER GAIL PHILLIPS**

**BEFORE THE**

**UNITED STATES HOUSE COMMITTEE ON RESOURCES**

**ENDANGERED SPECIES ACT TASK FORCE**

**REGARDING**

**REAUTHORIZATION OF THE ENDANGERED SPECIES ACT**

**APRIL 24, 1995**

Mr. Chairman and members of the Endangered Species Act task force, I want to thank you for this opportunity to testify on one of this country's most powerful conservation laws - the Endangered Species Act. For the record, my name is Drue Pearce, President of the Alaska State Senate. I will be presenting joint testimony on behalf of the Alaska State Senate and for House Speaker Gail Phillips and the Alaska State House.

I fully understand that it is unusual for the leadership of two state legislative bodies to appear before US Senate or House committees to present joint testimony on pending federal issues. The fact that we are here illustrates the importance that we place on the task before you which is the reauthorization and, hopefully, the fine tuning of the Endangered Species Act (ESA).

Since my time is limited, I would ask that our entire testimony and the attached Issue Paper be submitted for the record and use of the task force. We have spent considerable time preparing our comments and offer our assistance in any way possible to support you in this endeavor.

First, Mr. Chairman, I want to make it clear that my reason for being here is not to advocate the dismantling of the ESA. Our reasons for testifying are that we believe the Act is broken, it is not meeting the original intent of Congress and the agencies given

the responsibility for implementing the Act have abused their authorities and have used the Act to further unrelated agency objectives.

Congress, as well as state legislatures, frequently avoid trying to legislate minute details into complicated laws because of the difficulties in anticipating all possible legitimate exceptions which should be considered, the complexities of the issues or the politics associated with those minute decisions. In good faith, we extend authority to the agencies to develop regulations which provide the detail necessary to implement the laws while adhering to the basic intent of the original legislation. The ESA has, quite frankly, suffered from this lack of consideration for detail in the law.

It is unfathomable that Congress intended for the ESA to be used as the legal corner stone of all biodiversity and environmental planning within the federal government. It is also hard to believe that Congress intended for the law to be used as a legal bludgeon or blockade against all legitimate resource development in our country.

From Alaska's perspective, we can point to some definite successes associated with the federal ESA and the state's own Endangered Species Act. Alaska's bald eagles have been used to successfully reestablish populations of our national bird into areas where they have virtually disappeared due primarily to the indiscriminate uses of DDT. Similarly, peregrine falcon populations, both in Alaska and in the contiguous United States have recovered dramatically due to good conservation programs, cooperation between the states and the federal government and the contributions of many private sources throughout the country. The Aleutian Canada goose, a ground nesting goose in the Aleutian islands, are on the road to recovery following the removal of very effective predator foxes and the reintroduction of the species back to its former range. Here again, good cooperation between the citizens of our state, the state agencies and the federal agencies made it all possible. In virtually all of the successes you have seen one key ingredient – cooperation and old fashioned partnerships.

Unfortunately, for every success of the ESA, your task force will find numerous examples of governmental abuse of authorities.

Over the last several years, we have witnessed a significant change for the worse in federal/state cooperation and the creation of true partnerships. The ESA has been effectively used by the federal agencies as a weapon and not a tool of conservation. It is also important to add that the federal courts are equally responsible for the hostility towards the ESA. Rigid interpretations of the law by the federal courts have tied both the hands of the federal and state agencies in trying to craft reasonable solutions to very complex problems. The combination of agency and court interpretations of the law have served to create a conservation program that is phenomenally expensive and practically ineffective. If you want to measure the success of this program, ask how many species have been delisted.

I would like to offer a summary of some specific experiences we have had with the implementation of the ESA and use these to illustrate why we are convinced that the Act needs improving.

## Salmon

In 1991, the American Fisheries Society, a professional society of fisheries scientists, published a report that identified 106 Pacific Northwest salmon stocks that were extinct. The report went on to document 214 stocks in the Pacific Northwest that were at risk of extinction or of special concern. That same year, the National Marine Fisheries Service listed Snake River sockeye salmon as endangered under the Endangered Species Act. In 1992, they listed Snake River spring/summer chinook salmon and Snake River fall chinook salmon as threatened. Due to a continuous inflow of petitions since that time to list other salmon stocks under the Endangered Species Act, the National Marine Fisheries Service undertook a comprehensive evaluation of all five species of salmon and steelhead between the Canadian border and Mexico. Many other stocks of salmon will undoubtedly be listed by the time this evaluation is complete.

One might assume on the basis of this information that Pacific salmon species are in serious trouble and may be at threat of extinction. But, let us step back for a moment and look at the big picture. Currently, the North American production of Pacific Salmon is in excess of 200 million fish. Typically, the harvest in Alaska represents about eighty percent of the total, with harvests from Canada representing about fifteen percent and harvests from the Pacific Northwest states representing about five percent.

In Alaska there are no stocks of salmon listed as threatened or endangered. During this same period, Alaska salmon stocks have increased to record levels of production, with an all time record commercial harvest of 194 million salmon in 1994. Spawning escapement levels are healthy as well. Additionally, hundreds of millions of Pacific salmon are caught on the Asian side of the Pacific. World production of Pacific salmon is at an all time high.

So, you may be wondering why are Alaskans concerned over the application of the Endangered Species Act to salmon? One of the reasons is that Alaskans have suffered greatly under the Act as it is being applied, or more appropriately misapplied, to Snake River fall chinook salmon with no measureable benefit to these fish. We also foresee application of this act under current law as needlessly devastating the lives of Alaskans throughout the entire state.

The Snake River is located in Idaho, thousands of miles from Alaska. Never-the-less, provisions within the Act itself coupled with wholly inappropriate discretionary decisions by the National Marine Fisheries Service have needlessly impacted thousands of Alaskan sport and commercial fishermen as well as associated businesses. Following are specific examples of problems Alaskans have with the act as it is being applied to Snake River fall chinook:

- The act has been misapplied to a "stock" of salmon. The fundamental concept behind the Endangered Species Act was to protect a "species" from extinction.

Inappropriately, however, federal law now defines "species" to include "distinct population segments" of species.

What is a distinct population segment of a species? In the case of salmon, which return with great fidelity to their river of origin, the fish in each river or tributary stream can represent a distinct population segment of a species. In Alaska, we have over 20 thousand salmon streams, each of which is inhabited by one to five species of salmon.

Application of the Act to distinct population segments is simply contrary to common sense. At the periphery of a species range, population segments are constantly in a threatened and endangered state. If this were not the case, every species would be found every place on earth. No amount of good intentions, manpower, or money is sufficient to protect every distinct population segment of a species from naturally expanding or contracting. Trying to do so is an attempt to defy the laws of nature.

- **The burden of recovery of Snake River fall chinook has been allocated arbitrarily and capriciously rather than on a scientific, economic, or practical basis.** Sport and commercial fishermen in Southeast Alaska are victims of the act and federal interpretations that have failed to focus recovery efforts on those factors causing the decline of Snake River fall chinook.

Construction of 4 dams on the Columbia River below the Snake River and 12 dams on the mainstem Snake River substantially reduced Snake River salmon distribution and abundance. Ninety-five percent of the human induced mortality is associated with these dams.

Five percent of the mortality is associated with fisheries conducted in the US and Canada. Only about one-quarter of one percent of the mortality is inferred to be associated with fisheries conducted in Alaska that are targeting healthy runs of Alaskan salmon. On average, there is about one Snake River fall chinook mixed in with every 5 thousand other chinook, and millions of coho, chum, pink, and sockeye salmon.

Furthermore, of every four Snake River fall chinook salmon that may be incidentally caught in Alaska, only about one would ever survive to lay eggs due to intervening fisheries in Canada, Washington, and Oregon or the dams on the Columbia and Snake Rivers.

The National Marine Fisheries Service has not taken these factors into account in apportioning the recovery burden. Their efforts to recover this stock are clearly not efficient and will not be effective. In terms of effectively recovering a stock, it would be appropriate for the federal government to begin by apportioning the recovery burden for a listed species proportionally to the cause for the listing. For instance, if dams on the Columbia River and Snake River are responsible for ninety-five

percent of the mortality, they should be responsible for a similar portion of the recovery burden.

- **State/Federal cooperation, while clearly called for within the act, is being ignored in application of the Endangered Species Act for Snake River chinook salmon in Alaska.** Alaska commercial troll fishermen were forced to reduce their fishing season in 1993 to comply with the Endangered Species Act and thereby lost access to many healthy stocks of all five species of salmon. In 1994, the sport and commercial troll chinook salmon quota was reduced by 23 thousand fish. For 1995, officials of the National Marine Fisheries Service have indicated likely reductions of fifty percent for the Southeast Alaska sport and commercial chinook quota. Yet, there has not been one public hearing on this issue held in Alaska in 1993 or 1994. According to the Proposed Recovery Plan for Snake River Salmon, issued by the National Marine Fisheries Service in March, 1995, eight hearings are scheduled for Idaho, Oregon, and Washington States this spring. According to the plan, no hearings were scheduled for Alaska. We have heard, informally, that as an afterthought, two hearings may take place in Alaska after the eight other hearings are held.

The act also calls for development of cooperative agreements with states. In fact, the act specifies requirements, that if met, will result in acceptance of the agreement within 120 days of its receipt. Alaska sent a signed agreement which was received by the National Marine Fisheries Service on February 14, 1994. Fourteen months have elapsed and we are still waiting.

Alaskans are bewildered and angry. Alaskans are left with no explanation for irrational restrictions placed on their fisheries. We are irritated with the failure to conduct any public hearings in Alaska in 1993, 1994, and according to the proposed recovery plan, in 1995. These facts, coupled with illegal delays in responding to attempts to develop a cooperative agreement, lead us to the inescapable conclusion that the federal government is quite willing to needlessly impose debilitating measures on our state but very unwilling to accept local input or allow cooperative efforts or partnerships.

This situation is very problematical for Alaskans and reminds us of the federal attitude during the time that Alaska was a territory. Prior to statehood, the federal government was responsible for salmon management in Alaska. They failed to provide sound management practices needed to sustain Alaskan salmon fisheries. Over-fishing was a major factor in a serious decline of the Alaska salmon fishery that occurred between 1940 and statehood, 1959.

Further, the federal government failed to provide the financial resources needed to manage and research salmon stocks and fisheries such that depressed stocks could be rehabilitated. Salmon stocks and the fishing industry were in such bad shape that President Eisenhower declared Alaska a federal disaster area in 1953.

At the time of statehood, in 1959, statewide harvests totaled only about 25 million salmon, the lowest annual harvest since 1900—a level equivalent to less than twenty percent of current sustainable production. It took almost twenty years of salmon management by the State of Alaska under sound management principles with improved funding for research and management to rebuild salmon runs from the dismal remnants inherited at statehood to the healthy levels experienced today.

The Endangered Species Act should be amended to require mandatory consultation with affected parties in all phases of the implementation process.

- **Citizen suits to remedy misapplication of the act by the federal government are often effectively precluded.** The Endangered Species Act requires a sixty day notice period before a citizen suit can be brought to enjoin an action. In 1994, the National Marine Fisheries Service did not present Alaska with the incidental take permit required to conduct our fishery until June 30. The fishery begins July 1, with the primary availability of fish and the vast majority of the harvest being taken during the month of July. The requirement to file a sixty day notice of intent to sue over provisions of the incidental take permit placed Alaskans at a point beyond the season where any litigation would be essentially moot. On any action required annually, such as issuance of an incidental take permit, there is no effective relief under the current law.

### **Alexander Archipelago Wolves & Vancouver Island Goshawks**

The Alexander Archipelago wolf occupies many of the islands in southeast Alaska and the adjacent mainland. There are six major drainages connecting the interior of British Columbia and coastal southeast Alaska. There is little doubt that scientifically this population is not reproductively or genetically isolated.

The Alexander Archipelago wolf was petitioned for listing under the ESA because the petitioners were concerned about degradation of habitat for Sitka blacktail deer, about excessive hunting mortality due to increased access by logging roads and about inbreeding. The purpose of this petition was clearly an attempt to stop logging activities on those islands within the range of this species.

The Alaska Department of Fish and Game, the agency directly responsible for the management of this big game animal, opposed the petition and the listing of this species under the ESA. The Alaska Department of Fish and Game data indicates that this species has probably survived on these islands since the last ice age. The present population is not threatened and in some cases is expanding. There is no data to indicate that this population of wolves are threatened or even a species of particular concern to the scientific world. Harvest records have consistently shown that the wolf population is healthy and well managed.

The U.S. Fish and Wildlife Service did not reject the petition, however. Instead, the Service continued with the mandatory one year review despite the fact that the

petitioners failed to provide substantial evidence supporting their petition. The Service eventually concluded that the species did not warrant listing under the ESA.

The Vancouver Island goshawk also occupies the islands of southeast Alaska. In the case of the goshawk, however, it is on the very fringe of its range with extremely low densities compared to other populations of this continent wide raptor.

This species was petitioned for listing under the ESA. The justification was primarily linked to the effects of logging on this species primary habitat—old growth forest. There was no evidence to indicate that the species was declining in numbers or that the species was threatened with extinction throughout any portion of its range. The assumption was that logging was going to decrease their numbers.

Again the Alaska Department of Fish and Game, the agency actively conducting research on the species, opposed the petition and questioned whether this population of goshawks even qualified under the Act.

The U.S. Fish and Wildlife Service chose to accept the petition on the goshawk and conducted another year long review of the status of this species. Recently, the regional director for the Service announced that the agency would probably conclude that the Vancouver Island goshawk did not warrant listing under the Act either. Their final decision is due in the next month or so.

The question is why do we make an issue of this process. Let me explain. While the U.S. Fish and Wildlife Service was conducting the year long review, considerable pressure was placed on the U.S. Forest Service to significantly alter its logging plans in the region to avoid the two species being listed under the ESA. As a result of this pressure and for fear of the effects on Forest Service management prerogatives if the species were listed, the Forest Service withdrew over 300,000 acres from its logging plans. The impact of these timber withdrawals on the economies of southeast Alaska have been significant.

The point we are making here is critical. The Forest Service is required to provide for species diversity in its planning process. The Forest Service has Congressional mandated requirements related to forest resource management. The Forest Service also has a complex forest planning process which bends over backwards to include all relevant data submitted by individuals, state agencies or sister federal agencies. It is through this process that the U.S. Fish and Wildlife Service should submit its information concerning species status or concerns for incorporation into the final planning documents. It is also appropriate and desirable for the agencies to develop cooperative planning and research efforts to maximize the use of limited federal funds.

It is not appropriate, however, for the Fish and Wildlife Service to use the petition process as a form of environmental blackmail to force a sister agency to adopt specific modifications in their land management plans. It is our position that a species either qualifies for listing or it does not. If it truly qualifies for listing as a threatened species, whether we like it or not, the U.S. Fish and Wildlife Service is given certain authorities

by Congress which includes considerable direct input on other federal agency land management options. We contend that the U.S. Fish and Wildlife Service was perfectly aware that these two species in these two areas did not qualify for listing but successfully used the threat of listing as leverage against the U.S. Forest Service. We truly believe this was never the intent of Congress.

As you can see in our attached Issue Paper on the Reauthorization of the Endangered Species Act, we propose several changes which will correct this type of problem. We propose that the Act be changed primarily to direct its emphasis to "species". We are opposed to the federal agencies being given the latitude to list "distinct populations" depending on their own political agendas.

We propose that quantifiable criteria for listing be established scientifically for either listing as threatened or endangered.

We recommend that Congress reemphasize the intent to provide a clearer distinction between the listing as threatened and endangered. The agencies should be utilizing the threatened listing as a category which identifies a species in a precipitous and unnatural decline but which can allow for management flexibility during the recovery stages. The agencies have for all practical purposes combined the two listing because it makes their lives simpler and it fits an anti-use agenda being adopted by many of the federal conservation agencies.

We also propose that the Federal Advisory Committee Act be amended to exclude state agencies. We contend that Congress never intended for governmental organizations with statutory or regulatory authority to be included under the Act. The Act is presently being interpreted by the agencies and the courts to treat state agencies exactly the same as any private citizen. It is our belief that the agency involved in the research and management of the two species mentioned above should have been directly involved in the listing decisions. They were excluded, however, except for the opportunity to submit data for review by the Fish and Wildlife Service.

We are also proposing that Congress establish a mandatory peer review within the listing process. Had that been in place during the petitioning and review of the above species, it is our belief that the petition would never have been accepted.

### **Steller Sea Lions**

The Steller sea lion populations in portions of their range in the Gulf of Alaska and Bering Sea have been declining for the last twenty years. Those declines have been well documented and are most notable from Prince William Sound westward and including populations along the Aleutian Chain. Some of the declines have been precipitous in the last decade. At the same time, portions of the Steller sea lion populations have remained relatively stable, especially those in the eastern Gulf of Alaska.

As a result of these declines, the National Marine Fisheries Service has listed the Steller sea lion as threatened, developed a recovery plan and has proposed that the species be listed as endangered. What is causing the declines? Are these normal population fluctuations? Why are some segments of this species remaining stable and others have decreased dramatically? No one knows the answers to these questions it appears and especially the National Marine Fisheries Service – the agency responsible for not only the species involved but the bulk of the commercial fishing industry likely to be impacted if drastic experimental measures are taken to reverse this trend. The economic impacts on our state could be catastrophic.

Our point in using the sea lion as an example here is to illustrate the broad problem being experienced by the states in dealing with federal control and preemption. The Marine Mammal Protection Act passed in 1972 and, as a result, one of the worlds most progressive marine mammals research and management programs initiated by the State of Alaska in 1959 was for all practical purposes eliminated. The National Marine Fisheries Service was given the responsibility for the protection and management of Steller sea lions and other species.

Since the passage of the Marine Mammal Protection Act, the federal government has spent literally millions of dollars producing nothing to help the sea lion. The only reliable data available to document and quantify the decline of this species was produced by the Alaska Department of Fish and Game by a patched together but high quality research program dedicated to producing critical information needed to protect the interests of Alaskan citizens. One has to question the process of prioritization within this large federal agency.

From our perspective, there is some argument to be made that this species would have been better off today had it remained under state management. At least, there would have been some direct incentive for the state to initiate the research work necessary to correct or explain the cause for this species' decline.

This case also serves to illustrate what is in our opinion a growing fiscal policy within the federal agencies responsible for administering the ESA. Listing of species are not avoided because the actual listing process guarantees increased funding by Congress. Whether it is true or not, the perception is that the agencies purposely ignore some species because they cannot get adequate funding from Congress until they have actual listed the species under the ESA. If this is true, it is not good testimony to the conservation ethics of our federal agencies.

## Conclusion

On December 21, 1994, Governor Fife Symington of Arizona called for repeal of the Endangered Species Act. Governor Symington said, "It has been a failed and costly experiment." Governor Symington also stated:

**"It is clear, however, that the Endangered Species Act has become a fierce and cruel weapon being used by environmental extremists with no regard for the adverse impacts this causes to individuals and whole communities or even to the species they purport to protect. It has been perverted by the cumulative impact of judicial interpretations. It has become a vehicle for attack on private property rights. And it ignores the rightful role of state land and wildlife agencies to address wildlife and habitat problems in a reasonable and systematic way."**

**"In the meantime, it has become abundantly clear that the ESA in its present form will continue to be used frivolously and maliciously by extremists to pursue their objectives regardless of the economic and environmental chaos this creates for others and for our resources."**

**Governor Symington has reached almost the identical conclusion that we have reached. Unless some of the major revisions being suggested are incorporated in the reauthorization of the Endangered Species Act to make it more workable, we would have to also advocate letting the ESA sunset.**

**As stated at the beginning of this testimony, however, that is not our purpose for being here. In our written testimony and attached Issue Paper, we have made constructive suggestions for ways to improve the ESA. Our suggestions will make the Act more effective by encouraging greater participation by the states and the public, providing for recovery and delisting, and discouraging political listings at the expense of biologically justified listings.**

**Maintaining biological diversity must be a goal for us all not just a selective political mission for the U.S. Fish and Wildlife Service or National Marine Fisheries Service. We wish to express our sincere interests in assisting this task force and Congress in any way we can as you proceed through this reauthorization process.**

**Thank you Mr. Chairman for providing us the opportunity to testify. We wish you and the task force well in the important job before you.**



STATE OF ARIZONA  
EXECUTIVE OFFICE

FIFE SYMINGTON  
Governor

December 21, 1994

The Honorable John McCain  
United States Senator  
1839 South Alma School Road, Suite 375  
Mesa, AZ 85210

Re: Endangered Species Act

Dear John,

The recent election results send many messages to those of us who serve in government. Chief among these lessons is that the citizens want to exercise greater control over their lives and fortunes. They want government to back off, and to be an instrument of citizen initiative. Unfortunately, the roots of this intrusion upon individual rights are deeply ingrained in our entire structure of government.

I am writing to you about a matter of growing concern to me and to many Arizona citizens. I refer to the extent and manner the Endangered Species Act is being applied to Arizona lands and the severe negative impact it is having on segments of our citizens — particularly in rural Arizona — and to the future management of the natural resources in this state.

Let me make it clear from the outset that I am as concerned as anyone about protecting plants and animals where threats exist. It is clear, however, that the Endangered Species Act has become a fierce and cruel weapon being used by environmental extremists with no regard for the adverse impacts this causes to individuals and whole communities or even to the species they purport to protect. It has been perverted by the cumulative impact of judicial interpretations. It has recently become a vehicle for attack on private property rights. And it ignores the rightful role of state land and wildlife agencies to address wildlife and habitat problems in a reasonable and systematic way.

I speak for a growing number of Arizonans who are now beginning to understand the implications of the ESA and how it is being used to destroy jobs, towns, and the threat it poses to the sustainability of our natural resources. I have attached a list of pending environmental lawsuits that directly affect the State of Arizona and its citizens. Although the list is long, it does not include numerous administrative appeals used by activists to stall timber sales, to actually prevent management reforms, and to eventually force companies out of business.

The Honorable John McCain

December 21, 1994

Page Two

The State of Arizona has tried, within the means available to it, to offset the negative actions of the extremists. We have helped to organize and sponsor at least two major conferences aimed at educating citizens to the issues. We have attempted intervention in lawsuits we believe to be malicious to our citizens and to our resources. We will continue these efforts in the future.

In the meantime, it has become abundantly clear that the ESA in its present form will continue to be used frivolously and maliciously by extremists to pursue their objectives regardless of the economic and environmental chaos this creates for others and for our resources. Listing of the Mexican Spotted Owl and the rash of appeals and complaints by environmental groups have brought forest management, and the management tool of forest-based industries, to a halt in Arizona. The Payson and Flagstaff sawmills have closed permanently; the sawmill at Fredonia will shut down this spring; and the sawmill at Eager is operating at greatly reduced capacity. The Precision Pine mill at Heber is still operating, but for how long?

Because the pulp mill at Snowflake could not depend on chips from sawmills or pulpwood from the national forests, Stone Container has announced conversion of the plant to 100% recycled paper. This represents the loss of a management option for harvesting small trees which are grossly over-abundant in all southwestern forests. These developments are not only devastating to individuals and communities, they are destroying our ability to manage forests in a sustainable way for the well-being of our citizens and for the protection of all species of plant and animals.

Environmentalists have sued to have the Northern Goshawk listed and have served the required 60-day notice that unless the process for considering numerous other species is started, they will file additional lawsuits. It is obvious they wish to stop all activities in the affected area, and to date they have been extremely successful. The logical extension of these actions is that our forests will be devastated by disease or fire, and all the species who make their homes there will suffer.

As an elected federal representative for Arizona citizens, only you can represent the needs of our state in this crisis. I will do everything in my power to support you, but you must take the lead in repealing the ESA and replacing it with a system that delegates this responsibility to states who have the expertise and the sensitivity to ensure that species and habitat protections will be carried out responsibly. The current cooperation of extremist environmental groups and allied judges on the federal bench has been both a practical and constitutional failure.

The Honorable John McCain

December 21, 1994

Page Three

The ESA has ultimately failed in its objective because of its focus on single species, as opposed to dealing with more comprehensive concerns of habitat health for the multitude of species, including humans. Based upon the experiences suffered under the Act over the course of the last 25 years, I have concluded that the Act is probably beyond repair. It has been a failed and costly experiment. While hundreds of species have been listed, only five have been delisted for reasons mostly unrelated to provisions in the Act, while at least six species have become extinct under the shield of its protection. It should be allowed to sunset. Its ambitions to protect individual species should be absorbed within the broader authorities of state and federal land management agencies to plan and provide for the sustainable use of our state and federal public lands.

Reauthorization of the Endangered Species Act is pending in both the House and Senate. I urge you to repeal it, in order that efforts to protect species, habitats, commerce, state authorities, and property rights may be allowed to succeed in a unifying way at the state level. I pledge any and all assistance that I can give to help you accomplish this urgent task.

Sincerely,



Fife Symington  
GOVERNOR

FS:slb

enclosure

cc The Honorable Ed Pastor  
The Honorable Bob Stump  
The Honorable Jon Kyl  
The Honorable Jim Kolbe  
Congressman-Elect John Shadegg  
Congressman-Elect Matt Salmon  
Congressman-Elect J.D. Hayworth

---

# H.R.2275

SPONSOR: Rep Young, D. , (introduced 09/07/95)

---

## DIGEST

(AS INTRODUCED)

### TABLE OF CONTENTS:

- Title I: Private Property Rights and Voluntary Incentives for Private Property Owners
- Title II: Improving Ability to Comply with the Endangered Species Act of 1973
- Title III: Improving Scientific Integrity of Listing Decisions and Procedures
- Title IV: Recognizing Other Federal Action, Laws, and Missions
- Title V: Better Management and Conservation of Listed Species
- Title VI: Habitat Protections
- Title VII: State Authority to Protect Endangered and Threatened Species
- Title VIII: Funding of Conservation Measures
- Title IX: Miscellaneous Provisions

Endangered Species Conservation and Management Act of 1995 - Amends the Endangered Species Act of 1973 (the Act) to revise: (1) the findings and purposes of the Act to include consideration of economic impacts and property owners' rights while encouraging practices that protect species; and (2) the policy of the Act to prohibit the Federal Government from using or limiting the use of privately owned property when such action diminishes the value of such property without payment of fair market value to the owner of private property.

**Title I: Private Property Rights and Voluntary Incentives for Private Property Owners** - Amends the Act to prohibit the Government from taking an agency action affecting privately or non-federally owned property under the Act which results in diminishment of value of any portion of that property by 20 percent or more unless compensation is offered in accordance with this title.

Requires the Federal agency that takes an action that exceeds that amount to compensate the private property owner for the otherwise lawful use or limitation on such use in the amount of the diminution in value of the portion of that property resulting from such use or limitation. Specifies that, if the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the agency shall buy that portion and pay fair market value based on the value of the property before the use or limitation was imposed. Directs that compensation paid reflect the duration of the use or limitation necessary to achieve the purposes of the Act.

Sets forth provisions regarding: (1) procedures for written requests for compensation by the owner; (2) agency negotiations with that owner to reach agreement; (3) choice of remedies; (4) arbitration; (5) civil actions (an owner who prevails in a civil action against the agency shall be entitled to the amount of compensation awarded plus reasonable attorney's fees and other litigation costs); (6) source of payments; (7) availability of appropriations (any U.S. obligation to make such a payment shall be subject to the availability of appropriations); and (8) duty of notice to owners of agency actions limiting the use of private property and of procedures for obtaining compensation.

(Sec. 102) Requires the Secretary of the Interior (Secretary), in carrying out the program authorized by the Act, to cooperate to the maximum extent practicable with the States and other non-Federal persons, including consultation before acquiring any land or water, or interest therein, for the purpose of conserving any endangered or threatened species.

Authorizes the Secretary to enter into a cooperative management agreement with any State or local government or non-Federal person for the management of a species listed as endangered or threatened, to be listed, or which is a candidate for listing, or for the management or acquisition of an area which provides habitat for a species, subject to specified limitations.

Sets forth provisions regarding: (1) environmental assessments; (2) the effect of listing a species; and (3) violations of such agreements.

(Sec. 103) Authorizes the Secretary to provide grants to certain non-Federal persons for the purpose of conserving, preserving, or improving habitat for any species that is determined to be an endangered or threatened species upon determining that: (1) the property for which the grant is provided contains habitat that significantly contributes to the protection of the population of the species and has been managed for species protection for a sufficient period of time to significantly contribute to the protection of the species population; and (2) the management of the habitat advances the interest of species protection.

(Sec. 104) Directs the Secretary to initiate a program to provide technical advice and assistance to non-Federal persons who wish to participate in achieving the conservation objective for a species for which a conservation goal has been adopted.

(Sec. 105) Specifies that nothing in the Act shall be construed to supersede, abrogate, or otherwise impair any right or authority of a State to allocate or administer quantities of water.

**Title II: Improving Ability to Comply With the Endangered Species Act of 1973** - Amends the Act to provide that an activity of a non-Federal person is not a taking of a species if the activity: (1) is consistent with the provisions of a final conservation plan or conservation objective; (2) complies with the terms and conditions of an incidental take permit or a cooperative management agreement; (3) addresses a critical, imminent threat to public health or safety or a catastrophic natural event, or is mandated by any Federal, State, or local government agency for public health or safety purposes; or (4) is incidental to, and not the purpose of, carrying out an otherwise lawful activity that in an area of the territorial sea or exclusive economic zone that is not designated as critical habitat and the affected species is not a species of fish.

Makes enforcement provisions and provisions regarding rewards and incidental expenses paid by the Secretary or the Secretary of the Treasury applicable specifically to endangered or threatened species of fish and wildlife (current law doesn't specify endangered or threatened species).

Specifies that no interpretation, policy, guideline, finding, or other informal determination may be relied upon by the Secretary in the implementation and enforcement of the Act unless such determination has been the subject of a proposed rule, subject to specified requirements. Places the burden on the Secretary to show that a specimen belongs to a species which is determined to be an endangered or threatened species.

Authorizes civil suits by persons who have suffered or are threatened with economic or other injury resulting from actions by Federal officials with respect to enforcement of the Act under specified circumstances.

(Sec. 202) Defines, for purposes of the Act: (1) "take" to mean to harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in that conduct; and (2) "harm" to mean to take a direct action against any member of an endangered species of fish or wildlife that actually injures or kills a member of the species.

(Sec. 203) Authorizes non-Federal persons to initiate consultation with the Secretary on any prospective activity: (1) to determine if the activity is consistent with a conservation plan or objective; or (2) if the person determines that the activity is inconsistent, to determine whether the activity is likely to jeopardize the continued existence of an endangered or threatened species or to destroy or adversely modify the designated critical habitat of the species in a manner that is likely to jeopardize the continued existence of the species.

(Sec. 204) Sets forth or revises provisions regarding: (1) incidental take permit requirements; (2) general, research, and educational permits; (3) maintenance of aquatic habitats for listed species; (4) compliance with international requirements and treaties; and (5) incentives for protection of marine species.

**Title III: Improving Scientific Integrity of Listing Decisions and Procedures** - Revises provisions of the Act regarding determinations that a species is endangered or threatened to direct the Secretary to make such determinations based on specified factors, including: (1) the present or threatened loss of its habitat; and (2) the inadequacy of existing Federal, State, and local government regulatory mechanisms.

Requires the Secretary to make such determinations solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species and after soliciting and fully considering the best scientific and commercial data available concerning the status of a species from any affected State or any interested non-Federal person, taking into account other specified factors.

Sets forth or revises provisions regarding: (1) consideration of State recommendations; (2) listing of foreign species; (3) soliciting scientific information; (4) emergency listings; (5) use of the best scientific and commercial data; (6) identifying data used for decisions; (7) judicial review; (8) peer review; (9) making data public; (10) improving the petition and designation processes; (11) greater State involvement; (12) monitoring the status of species; and (13) petitions to delist species.

**Title IV: Recognizing Other Federal Action, Laws, and Missions** - Amends the Act to direct: (1) the Secretary to review other programs administered by the Secretary and utilize such programs in furtherance of the purposes of the Act; and (2) each Federal agency to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any habitat that is designated by the Secretary as critical habitat of the species in a manner that is likely to jeopardize the continued existence of the species.

Sets forth provisions regarding: (1) involvement of applicants for Federal approvals; (2) conferring on candidate species; (3) limitations on modifications to land management; (4) resolving conflicts between Federal agencies; (5) procedures for consultation; and (6) activities prior to completion of consultation.

(Sec. 402) Sets forth provisions regarding exemptions from consultation and conferencing requirements. Specifies that an agency action shall not constitute a taking of a species prohibited by the Act or any regulation thereunder if the action is consistent with those provided for in a final conservation plan or a conservation objective under this Act, or a cooperative management agreement or an incidental take permit.

(Sec. 403) Eliminates the Endangered Species Committee and related provisions.

**Title V: Better Management and Conservation of Listed Species** - Amends the Act to direct the Secretary to publish a conservation objective and a conservation plan for each species determined to be an endangered or threatened species.

Requires the Secretary: (1) within 30 days after the listing determination, to appoint an assessment and planning team (which shall report to the Secretary within 180 days the assessment of specified biological, economic, and intergovernmental factors with respect to

the listed species); and (2) within 210 days, to review the report to establish a conservation objective for the species and publish in the Federal Register the conservation objective, along with a statement of findings on which the objective was established.

(Sec. 502) Directs the Secretary, in the development and implementation of a conservation plan, to accord specified priorities, including to: (1) the development of an integrated plan for two or more endangered or threatened species that are likely to benefit from an integrated conservation plan; and (2) nonregulatory, incentive-based conservation measures and commercial activities that provide a net benefit to the conservation of the species.

Sets forth provisions regarding: (1) publication of a draft plans; (2) contents of such plan; (3) plan preparation procedures; (4) publication of a final plan; (5) participation by other persons; (6) plan revision or amendment; and (7) lack of further procedures or requirements for actions consistent with the conservation plan.

(Sec. 503) Delineates procedures regarding: (1) management prior to publication of a conservation plan; (2) emergency rulemaking protections; (3) suspension of conservation plans or objectives; (4) non-delegation of duties; and (5) review of conservation plans.

(Sec. 504) Authorizes the Secretary to: (1) designate critical habitat of a species determined to be an endangered or threatened species that meets specified requirements utilizing the National Biodiversity Reserve (see Title VI) as a first priority; and (2) revise a critical habitat designation on determining that such habitat does not meet such requirements.

Sets forth provisions regarding: (1) deadlines for designation; (2) basis for designation (directs the Secretary to exclude any area from critical habitat which does not meet the definition as set forth in this Act, which is not necessary to achieve the conservation objective for the affected species, for which the Secretary determines that the benefits of exclusion outweigh the benefits of designation (with exceptions), and in the case of property owned by a non-Federal person, where the owner has not given written consent to the designation or has not been compensated); (3) procedure for designation; and (4) judicial review of the critical habitat designation.

Sets forth provisions regarding: (1) the standard for judicial review of decisions regarding conservation objectives or plans; (2) conservation plans for foreign species; and (3) the definition of critical habitat.

(Sec. 505) Authorizes the Secretary to: (1) utilize captive propagation as a means of protecting or conserving an endangered or threatened species; and (2) provide annual grants to non-Federal persons to fund captive propagation programs if the Secretary determines that such a program contributes to enhancement of the population of such a species.

(Sec. 506) Revises provisions regarding experimental populations to require the Secretary, before authorizing the release of a population of endangered or threatened species outside the current range of such species, to identify the precise boundaries of the geographic area for the release and determine whether the release is in the public interest. Provides that: (1) any member of an experimental population found outside the geographic area in which the population is released shall not be treated as a threatened species if the member poses a threat to the welfare of the public; and (2) critical habitat shall not be designated under the Act for any experimental population determined to be not essential to the continued existence of a species.

Sets forth requirements for releases of such populations, including that the Secretary require that: (1) to the maximum extent practicable, the release occurs only in a unit of the National Park System or the National Wildlife Refuge System; (2) the regulations authorizing the release identify precisely the geographic area for the release; and (3) a release on non-Federal land occurs only with the written consent of the owner of the land.

(Sec. 507) Revises provisions regarding regulations to protect threatened species to direct the Secretary to issue, concurrently with the regulation that provides for the listing of the

species, such regulations as the Secretary deems necessary and advisable to provide for the conservation of such species. Specifies that prohibitions applied to the threatened species shall address the specific circumstances of such species and may not be as restrictive as such prohibition for endangered species.

Requires conservation guidelines to include a system for developing and implementing, on a priority basis, conservation objectives and conservation plans. Directs the Secretary to provide to the public notice of, and opportunity to submit written comments on, any guideline proposed to be established.

**Title VI: Habitat Protections** - Establishes a National Biological Diversity Reserve, composed of units of Federal and State lands designated and managed in accordance with this title.

Directs the Secretary and the Secretary of Agriculture to designate to the Reserve by regulation those units of the national conservation systems which are within the jurisdiction of the Secretary concerned and which the Secretary determines would contribute to the protection, maintenance, and enhancement of biological diversity.

Directs the Secretary to: (1) designate to the Reserve a unit of State-owned lands if such unit is nominated for designation by the Governor of the State and is managed under State law in accordance with this title; (2) designate to the Reserve privately owned land that is nominated for designation by the owner of the land, and remove such land from the Reserve if the owner requests removal; (3) remove from the Reserve a unit designated which the Secretary finds is not managed under State law in accordance with this title; and (4) remove from the Reserve any State-owned lands at the request of the Governor of that State.

Requires: (1) each unit of the Reserve to have as an objective for the management thereof the preservation, maintenance, and enhancement of biological diversity; and (2) within one year of the designation of a unit to the Reserve, the manager of such unit to complete, and the Secretary concerned to make available to the public by notice in the Federal Register, an inventory of the species composing the biological diversity within such unit.

(Sec. 602) Directs the Secretary, and the Secretary of Agriculture with respect to the National Forest System, to establish and implement a program to conserve fish, wildlife, and plants, including those which are determined to be endangered or threatened species. Provides that, to carry out such program, the appropriate Secretary: (1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act, and the Migratory Bird Conservation Act, as appropriate; and (2) is authorized to acquire lands, waters, or interests therein (lands).

(Sec. 603) Directs the Secretary and the Secretary of Agriculture to encourage exchanges of lands within the jurisdiction of each Secretary (other than units of the National Park System and the National Wilderness Preservation System) for lands that are not in Federal ownership and that are affected by this Act. Sets forth provisions regarding the timing of exchanges, environmental assessment, expeditious exchange decisions, applicable law, and valuation of lands acquired.

**Title VII: State Authority to Protect Endangered and Threatened Species** - Authorizes the Secretary to delegate to a State which establishes and maintains an adequate program for the conservation of endangered and threatened species the authority contained in this Act with respect to species of fish, wildlife, and plants that are residents in the State. Requires the Secretary, within 120 days after receiving a certified copy of a proposed State program, to determine whether such program will be adequate to provide protections to endangered and threatened species in such State, based on specified guidelines. Sets forth provisions regarding: (1) Federal financial assistance to a State which has received such delegation; (2) contents of a delegation agreement; (3) State compliance with this Act; (4) review of State programs; and (5) conflicts between Federal and State laws.

(Sec. 702) Directs the Secretary, in any instance in which a State has a program for management of a native species which is the subject of a request for an export permit under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, to act in accordance with the recommendation of the State unless the Secretary makes a finding and publishes a notice in the Federal Register that scientific evidence justifies a conclusion contrary to the advice of the State.

Authorizes the State which is subject to such a finding, or any person in that State directly affected because of inability to obtain a permit, to appeal the finding to an administrative law judge or a court. Places the burden on the Secretary to show that the evidence supports a finding contrary to the recommendation of the State.

**Title VIII: Funding of Conservation Measures** - Authorizes appropriations to the Departments of the Interior, Commerce, and Agriculture through FY 2001 to carry out the Act, including for cooperative management agreements, Convention implementation, non-Federal conservation planning, and habitat conservation grants.

(Sec. 802) Directs the Secretary, for any non-Federal person or Federal power marketing administration, to pay half of any direct costs that result from the compliance by the person or administration mandated by a conservation plan or measure that provides protection to a listed species under a plan developed under the Pacific Northwest Electric Power Planning and Conservation Act, including a plan that provides protection to a larger population unit of the same listed species.

Sets forth provisions regarding consultation requirements, incidental take permits, cooperative management agreements, method of cost-sharing, existing cost-sharing agreements, and adjustments to the cost-sharing percentage.

(Sec. 803) Establishes in the Treasury an Endangered Species and Threatened Species Conservation Trust Fund.

**Title IX: Miscellaneous Provisions** - Defines or redefines the terms: (1) "non-Federal person"; and (2) "commercial activity."

(Sec. 902) Directs the Secretary to: (1) identify those species which are listed under the Act as a result of being determined to be a population segment; and (2) review and determine whether or not it is in the national interest to continue to list each such segment. Requires those segments which the Secretary recommends for continued listing to be submitted to the Congress for approval, and that any segment not determined to be in the national interest to be delisted.

(Sec. 903) Requires the Secretary to publish a list of all species that were determined to be endangered or threatened species for which no final recovery plans were issued, divided equally into three tiers of priority for preparation of conservation objectives and plans (with any species listed as an endangered or threatened species in more than one State being placed in the first tier of priority).

Directs the Secretary to publish a conservation objective, draft conservation plan, and final conservation plan for each species within each tier of priority according to a specified timetable.

Sets forth provisions regarding: (1) priority for revision of existing plans (for listed species with recovery plans); (2) a schedule for revision of plans; (3) species for which no conservation plan is required; (4) a prohibition on additional requirements; and (5) existing biological opinions.

FEB 19 1996

**Alaska Forest Association, Inc.**

111 STEDMAN SUITE 200  
KETCHIKAN, ALASKA 99901-8599  
Phone 907-225-8114  
FAX 907-226-5920

**Testimony of Jack E. Phelps, Executive Director  
In Support of HJR 58  
Offered to the House Resources Committee  
February 19, 1996**

Mr. Chairman:

My name is Jack Phelps, and I am Executive Director of the Alaska Forest Association. The Association represents the forest products industry in Alaska, with more than 250 member companies across the state.

Thank you for introducing HJR 58 supporting the re-authorization of the Endangered Species Act and supporting Congressman Young's effort to bring some balance to this important Act. As you correctly state in your sponsor statement, Alaska has a great deal to lose if the Endangered Species Act is not administered in a fair and balanced manner. The forest products industry, together with the other extractive industries in Alaska, is very concerned about the growing misapplication of the ESA, especially in the western states.

HJR 58 says that "the State of Alaska supports the basic concept embodied in the Act to prevent the extinction of species." The Alaska Forest Association echoes that position. However, we believe it is also important to protect humans and their interests in this world, and that when those interests conflict, some trade-offs may have to occur. We do not, for example, believe that it is acceptable for whole communities to be put out of work merely to provide absolute protection to a particular species in a particular place. In other words, the "distinct population segment" concept should be carefully reviewed.

The Association also believes that the Endangered Species Act should not be used as a means of taking private property without just compensation; a principle embodied in our United States Constitution. This country and this state were founded on the principle that no person should be deprived of life, liberty or the use of private property without due process of law. The authors of our state constitution considered this principle so important that they incorporated it into Article I, Section 7 of the state constitution. It is vital to the health of the forest products industry, not only in Alaska but across the country, that this principle be consistently applied in the implementation of the Endangered Species Act. To that end, I urge you and Congressman Young to continue your efforts to restore some sense of fairness to the national effort to protect endangered animals.

Thank you for the opportunity to testify today on this important matter. I would be happy to answer any questions you or the committee may have.