Wildlife Issues Are Local – So Why Isn't ESA Implementation?

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In the forty-four years since President Nixon signed the Endangered Species Act (ESA), states have become increasingly frustrated by the lack of meaningful opportunities for involvement in the Act's implementation. This frustration has led to a national discussion on ESA reform, a Republican priority supported by the bipartisan Western Governors' Association and others. The frustration stems from being relegated to a post-listing back seat, despite state primacy in the management of imperiled species prior to a listing as threatened or endangered under the ESA. This frustration is well placed, as this is not the role Congress intended states to play when it passed the ESA in 1973. Instead, under the long-forgotten section 6(g)(2) of the ESA, Congress provided states with the authority to oversee the implementation of the ESA post-listing. This Article advocates for the utilization of this never-implemented authority to achieve non-legislative ESA reform. In reaching that conclusion, this Article provides a uniquely comprehensive review of the legislative and regulatory history of the ESA, providing a clear demonstration of Congress's intent to create a cooperative federalism regime under the ESA and the regulatory agencies' refusal to carry that intent forward.

Introduction 682
I. History of State/Federal Wildlife Conservation 684
A. Initial State Primacy 684
B. An Increasing Federal Role 684

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C. The Beginnings of a Comprehensive Federal Wildlife Program 687
II. Legislative History of the ESA 689
A. The House Bill – H.R. 37 691
1. The States' Role under H.R. 37 as Introduced 691
2. House Committee Debates and Amendments 692
B. The Senate Bill – S. 1983 694
1. The States' Role under S. 1983 as Introduced 694
2. Senate Committee Debates and Amendments 695
C. Conference Reconciliation and Presidential Approval 697
III. The Erosion of the States' Cooperative Role 701
A. 1975 Regulatory Interpretation of Section 6 701
B. Section 6 ESA Amendments, 1976-1978 702
C. The 1979 Regulatory Interpretation of Section 6 703
D. Section 6 ESA Amendments, 1980-1982 704
E. Section 6 ESA Amendments – 1988 705
F. 1994 Section 6(a) Policy 706
G. 2016 Section 6(a) Policy 707
IV. Judicial Interpretation of Section 6 708
A. Confusion over the Extent of the ESA's Preemption in 1992 708
B. Alaska's Section 6(a) Claim 710
V. Wildlife Issues Are Local – So Why Isn't ESA Implementation? 711
A. The Strained Relationship between State Wildlife Agencies and Their Federal Partners 711
B. Can and Should States Play a More Meaningful ESA Role? 713
VI. Solutions to Increase State Involvement 719
A. Previously Made Suggestions to Increase State Involvement in Species Conservation 720
B. An Alternative Solution 722
1. Section 6(g)(2) Policy or Regulations 722
2. Section 6(a) Revised Policy or Regulations 724
Conclusion 725

INTRODUCTION

In the forty-four years since President Nixon signed the Endangered Species Act of 1973 (ESA)[1], there has been ongoing debate about the role of the states in the conservation of threatened and endangered species. State lawmakers, as the traditional managers of all fish and wildlife within their borders, have been frustrated by the lack of opportunities for state involvement in the implementation of the ESA. This frustration has led to a national

1. Endangered Species Act (ESA), 16 U.S.C. § 1531 (2012).

discussion on the need for reform, a Republican priority in the new administration that is gaining attention.[2]

This federal/state power struggle was a cornerstone of the ESA debate in 1973. Section 6 of the ESA, titled "Cooperation with States," provided that states would retain some authority to implement the Act.[3] As the legislative history reveals, Congress intended states to be a cooperative partner in ESA implementation and, under section 6(g)(2), for states to retain the authority to regulate the "taking" of most threatened and endangered species.[4] However, narrow regulatory interpretation of section 6(g)(2) by the agencies implementing the ESA—the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively "the Services")—prevented Congress's intent from being fully realized. The result is that states, under the ESA, have largely been relegated to the role of information providers as opposed to true implementation partners.

ESA reform remains a perennial issue, and one that seems to be gaining intensity. In the 114th Congress alone, there were over 250 amendments, bills, and riders that attempted to strip away provisions of the ESA.[5] In particular, Western governors have expressed concern with a lack of cooperation between the federal government and the states and overreach by the federal government into the species management roles reserved for the states.[6]

This Article suggests that rather than reform the ESA, the federal government should instead implement the Services' regulations in such a way as to give states a more meaningful role in endangered species conservation, as Congress intended in 1973. Before reaching that conclusion, this Article examines the history of the state and federal wildlife management authority and provides a detailed analysis of the legislative history of the ESA as a demonstration of Congress's original intent. The Article then provides a chronological history of the promulgation of the Services' regulations that narrowed the interpretation of the states' role, as well as the case law that supported the Services' interpretation. Finally, the Article discusses the benefits of an elevated state role in ESA implementation, and concludes by discussing proposed regulatory measures to broaden the Services' narrow interpretation of the states' role as a collaborative partner in ESA implementation.

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2. *See* Corbin Hiar, *Barrasso Hopes to Sell Democrats on Reform*, E&E DAILY (Feb. 13, 2017), https://www.eenews.net/eedaily/stories/1060049930/search?keyword=Barrasso+Hopes+to+Sell+Democrats+on+Reform; *see generally* WESTERN GOVERNORS' ASS'N, SPECIAL REPORT: SPECIES CONSERVATION AND ENDANGERED SPECIES ACT INITIATIVE (2016), http://westgov.org/images/editor/ESA_Report_2016_Exec_Summary_for_Web.pdf.

3. *See* ESA, 16 U.S.C. § 1535.

4. *Id.* [3]§ 1535(g)(2).

5. Cassandra Carmichael, *The Endangered Species Act: Uncertainty Under Trump*, THE HILL (Jan. 27, 2017, 10:40 AM), http://thehill.com/blogs/congress-blog/energy-environment/316464-the-endangered-species-act-uncertainty-under-trump.

6. *See* WESTERN GOVERNORS' ASS'N, *supra* note 2, at 4.

I. HISTORY OF STATE/FEDERAL WILDLIFE CONSERVATION

In analyzing the scope of state and federal collaboration intended under the ESA and considering new opportunities for increased state participation, it is important to consider the historical relationship between the states and the federal government related to wildlife management and its transition over time. An understanding of the historical relationship, and its transition, is illuminative of the present in that it helps to give context to the underlying tensions that exist today between the federal government and the states relative to the authority over wildlife management. Below is a brief overview of the history of state and federal wildlife management in the United States.

A. Initial State Primacy

As successors to the Crown, the States maintained jurisdiction over fish and game within their borders.[7] By contrast, the federal government's role in wildlife management was minimal until the twentieth century.

Early federal wildlife statutes in the nineteenth century relegated the federal government's role in wildlife management to taking action to conserve species and habitat in areas that lay outside of state jurisdiction.[8] Historically, state responsibility for wildlife management has been exercised in a manner designed to protect the interests of hunters and fishermen, rather than outright protection of wildlife. In the landmark 1896 case *Geer v. State of Connecticut*, the United States Supreme Court upheld the power of states to regulate hunting and fishing within their borders.[9] The Court applied what has become known as the state wildlife ownership doctrine, which stated that "[t]he wild game within a state belongs to the people in their collective sovereign capacity."[10]

B. An Increasing Federal Role

Despite the *Geer* Court's articulation of the state wildlife ownership doctrine at the end of the nineteenth century, the twentieth century brought with it a rapid shift toward increased federal government control in the field of

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7. DAVID A. ADAMS, RENEWABLE RESOURCE POLICY: THE LEGAL-INSTITUTIONAL FOUNDATIONS 47 (1993).

8. Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 467 (1999). Some of the first federal laws pertaining to wildlife included the 1868 prohibition of killing certain fur-bearing animals in the territory of Alaska, *id*. (referencing the Act of July 27, 1868, ch. 273, § 6, 15 Stat. 240, 241 (repealed 1944)), the creation of the Office of the U.S. Commissioner of Fish and Fisheries to conserve fisheries along the coasts and navigable waterways in 1871, *id*. (referencing the Act of February 9, 1871, §§ 1–2, 16 Stat. 593, 594 (repealed 1976)), and the passage of the Forest Reserve Act in 1891 which authorized the President to establish national forest reserves for the protection of wildlife, timber, and water. *Id*. (referencing the Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (repealed 1976)). Outside of these few federal intrusions, state governments retained the primary responsibility for managing wildlife.

9. *See* Geer v. Connecticut, 161 U.S. 519, 535 (1896).

10. *Id*. at 529.

wildlife management. In 1900, just four years after *Geer*, growing concern over the ability of states to adequately conserve wildlife populations—particularly those of birds—led to the passage of the Lacey Act, referred to by the FWS as "the first federal law protecting wildlife."[11]

Early in the twentieth century, the executive branch was also actively involved in federal wildlife preservation efforts. In 1903, President Theodore Roosevelt created one of the first national wildlife refuges, Florida's Pelican Island, and through his expansion of the U.S. forest reserves, he continued to implement indirect federal protection of species and their habitat within states.[12]

In 1913, Congress took a bolder approach to asserting its right to manage interstate wildlife by passing the Migratory Bird Act, which preempted state wildlife laws related to the hunting and protection of migratory birds.[13] Challenges to the constitutionality of the Act were quickly filed in federal district courts in Arkansas and Kansas.[14] In both cases, federal district court judges cited to the *Geer* state wildlife ownership doctrine and struck down the 1913 Act as unconstitutional, specifically finding that neither the general welfare clause nor the commerce clause provided sufficient authority to preempt state plenary power over wildlife.[15]

Abandoning the unsuccessful constitutional arguments, and recognizing the scope of the international migratory bird species extinction problem, the federal government opted to test the authority of the Constitution's treaty clause as the cornerstone for federal regulation of migratory species. On August 16, 1916, the United States signed the Migratory Bird Treaty with Great Britain (on behalf of Canada) to protect migratory birds.[16] Congress ratified the treaty

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11. *Lacey Act*, U.S. FISH & WILDLIFE SERV., www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html (last visited Feb. 13, 2017).

12. Petersen, *supra* note 8, at 468.

13. Weeks-McLean Act of 1913, ch. 145, 37 Stat. 828, 847 (repealed in 1918). Passed as part of the Appropriations Act for the Department of Agriculture, the 1913 Act declared that:

> [a]ll wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

Id.

14. *See* United States v. McCullagh, 221 F. 288 (D. Kan. 1915); United States v. Shauver, 214 F. 154 (E.D. Ark. 1914).

15. *See McCullagh*, 221 F. at 296; *Shauver*, 214 F. at 160–61. The federal government appealed the *Shauver* decision to the United States Supreme Court where it was argued twice. MICHAEL J. BEAN & MELANIE J. ROWLAND, EVOLUTION OF NATIONAL WILDLIFE LAW 17 (3d ed. 1997). While awaiting a decision, the federal government, apparently fearful the Court would not rule in its favor, scrambled to find an alternative solution to provide federal protection for migratory birds. *Id.* at 17–18.

16. Convention for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702.

in 1918 with the passage of the Migratory Bird Treaty Act (MBTA).[17] The treaty committed both the United States and Great Britain to conserving bird species that migrate between the United States and Canada in order to reverse the trending decline of migratory species.[18]

In 1919, just one year after the passage of the MBTA, the State of Missouri challenged the Migratory Bird Treaty and the MBTA as an unconstitutional interference with the rights reserved to the states by the Tenth Amendment.[19] In *Missouri v. Holland*, the Supreme Court ultimately affirmed the MBTA's constitutionality and rejected Missouri's argument that the state ownership doctrine precluded federal regulation.[20] The Court held that while a state may regulate wild birds within its borders, that power was not exclusive, nor was it sufficient for the federal government to rely upon the states to protect migratory birds.[21] The Court further stated that "[w]e see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States."[22]

The Court's decision in *Missouri v. Holland* was a major turning point in the balance of power between the state and the federal government's regulation of wildlife. *Holland* "forcefully rejected the contention that the doctrine of state ownership of wildlife barred federal wildlife regulation" and laid the pathway for an expansion of federal power into the management of wildlife.[23]

Nevertheless, Congress refrained from establishing a comprehensive federal program to conserve threatened and endangered wildlife until the late 1960s, instead opting to protect groups of species, such as bald eagles, or

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17. Migratory Bird Treaty Act (MBTA), ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–12 (2012)). The primary threat to migratory birds at the time of the passage of the MBTA was "unrestrained shooting for commerce and sport." BEAN & ROWLAND, *supra* note 15, at 64. Thus, the focus of the MBTA was to prohibit the "taking" or the killing of migratory birds, particularly through hunting. *Id.* The Migratory Bird Treaty was later signed by Mexico in 1936, Japan in 1972, and the Soviet Union in 1976. *Id.*

18. BEAN & ROWLAND, *supra* note 15, at 63–64.

19. *See* United States v. Samples, 258 F. 479 (W.D. Mo. 1919), *aff'd sub nom.* Missouri v. Holland, 252 U.S. 416 (1920). Missouri argued that the acts taken pursuant to the MBTA were an invasion of the sovereign right of the State under the state wildlife ownership doctrine. *Id*. at 481.

20. *Holland*, 252 U.S. at 435.

21. *Id.* at 434–35. The full text of the Court's final paragraph reads as follows:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and the statute must be upheld.

Id. at 435.

22. *Id.* at 435.

23. BEAN & ROWLAND, *supra* note 15, at 19–20.

regulate specific types of action such as dam construction.[24] The 1960s environmental movement brought a heightened national awareness of the scope of the species extinction problem, ultimately leading to the creation of a federal comprehensive program to conserve the nation's wildlife.

C. The Beginnings of a Comprehensive Federal Wildlife Program

The federal government's initial informal step toward the creation of a comprehensive wildlife program began in 1964, when the Department of the Interior's Bureau of Sport Fisheries and Wildlife (later renamed the U.S. Fish and Wildlife Service) created a committee of nine biologists, called the Committee on Rare and Endangered Species.[25] The Committee's most significant action was the publication of the "redbook," a federal list of species known to be threatened with extinction.[26] At the date of the redbook's first publication in 1964, sixty-three wildlife species were "listed" as threatened.[27]

The passage of the Endangered Species Preservation Act of 1966 (ESPA) "marked the formal beginning of the federal effort to [comprehensively] protect endangered species."[28] The ESPA, which applied only to species native to the United States, directed the Departments of Interior, Agriculture, and Defense to protect species only "insofar as is practicable and consistent with the primary purposes of such bureaus, agencies, and services, [and to] preserve the habitats of such threatened species on lands under their jurisdiction."[29] Upon signing the ESPA, President Johnson remarked that the event was "a milestone in the history of conservation."[30]

Under the ESPA, states retained management authority over threatened species.[31] The ESPA directed the Secretary of the Interior to prepare a list of endangered species, to consult with states prior to listing endangered species, and to "cooperate to the maximum extent practicable with the several States in carrying out the program."[32] The ESPA did not place a restriction on the taking of any species, restrict interstate commerce in endangered species, or place any significant requirements on federal agencies to protect the habitat of endangered species. The ESPA did, however, consolidate and expand the

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24. *See id.* at 93, 109, 405.

25. Charles C. Mann & Mark L. Plummer, *The Butterfly Problem*, ATLANTIC MONTHLY, Jan. 1992, at 47.

26. *Id.*

27. *Id.*

28. BEAN & ROWLAND, *supra* note 15, at 194.

29. *Id.* (citing Endangered Species Preservation Act (ESPA), Pub. L. No. 89-669, § 1(b), 80 Stat. 926, 926 (1966)).

30. Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 18 (1994) (quoting *President Signs 7 Conservation Bills*, N.Y. TIMES, Oct. 16, 1966, at 40).

31. *See* BEAN & ROWLAND, *supra* note 15, at 195.

32. *Id.* (citing the ESPA § 3(a)).

authority of the Secretary of Interior to manage the National Wildlife Refuge System.[33]

Due to the vagueness and lack of regulatory restrictions on take, interstate commerce, and habitat protection, many felt that the ESPA did not go far enough.[34] In 1969, the 91st Congress took action to remedy some of the deficiencies in the ESPA by enacting the Endangered Species Conservation Act of 1969 (ESCA).[35]

Under the ESCA, states retained primary authority over regulating the taking of threatened and endangered wildlife species within their borders, with the exception of migratory birds and bald and golden eagles.[36] The federal government's role was relegated to protecting habitats on federal lands, policing the export and import of endangered species, and regulating interstate commerce activities that violated state or foreign laws.[37]

Many, including President Nixon and the Department of the Interior, felt the ESCA still did not provide sufficient species protection or management tools.[38] The Department of the Interior reported that it was likely that 100 species of fish and wildlife were presently threatened with extinction in the United States.[39] Pollution was identified as the top cause of wildlife decline, followed by habitat destruction and pressures from trade.[40] While the ESCA addressed trade, it failed to address the threats from pollution and habitat destruction.[41]

Authors Michael Bean and Melanie Rowland highlight three primary failures of the ESCA.[42] First, the Act "did not prohibit taking of endangered species, instead leaving undisturbed the states' traditional authority to regulate taking of resident wildlife."[43] Second, while the Act "obligated some federal agencies to avoid adverse impacts of proposed federal activities on endangered

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33. *See id.* at 288.

34. *See id.* at 195–96.

35. Endangered Species Conservation Act (ESCA), Pub. L. No. 91-135, 83 Stat. 275 (1969). The ESCA expanded upon the 1966 ESPA by establishing a list of fish and wildlife threatened with extinction, prohibiting the import of any such species, and making it unlawful to buy or sell animals taken in violation of any state or foreign law. H.R. REP. NO. 93-412, at 140 (1973). Another significant aspect of the ESCA of 1969 was its focus on international conservation of wildlife. BEAN & ROWLAND, *supra* note 15, at 197. The ESCA included direction to the Secretary of the Interior in conjunction with the Secretary of State, to assist in the coordination of an international effort to conserve wildlife. *Id.* Specifically, the Secretary was directed to "seek the convening of an international ministerial meeting," which would result in a "binding international convention on the conservation of endangered species." *Id.* at 198 (citing ESCA § 5(b)). This effort would result in the Convention on International Trade in Endangered Species and Wild Fauna and Flora (CITES). *Id.*

36. *See* BEAN & ROWLAND, *supra* note 15, at 197 n.20.

37. *See id.* at 196–98.

38. *Id.* at 198.

39. *See* H.R. REP. NO. 93-412, at 141.

40. *See id.*

41. *See id.*

42. *See* BEAN & ROWLAND, *supra* note 15, at 199.

43. *Id.*

species and their habitats, the obligation was limited to a few designated agencies and was hedged by considerations of what was 'practical and consistent with the primary purpose' of those agencies."[44] Finally, a wider variety of species were being threatened with endangerment and therefore an amendment was needed to protect all species of animals and plants, including vertebrates, mollusks, and crustaceans.[45] As a result of the dissatisfaction with the ESCA, discussions of a new, more comprehensive bill began to develop.

On one hand, as the initial sole regulators of wildlife, states acutely felt the encroachment of the federal authority over wildlife management. On the other hand, under the states' authority, species were continuing to decline at alarming rates. At the end of the 1960s, it became clear that a solution that balanced the protection of threatened and endangered species while at the same time preserving the traditional state authority over wildlife management was necessary.

II. LEGISLATIVE HISTORY OF THE ESA

Frustrated by the ineffectiveness of the ESPA and the ESCA, President Nixon firmly declared the need for an overarching federal law to protect threatened and endangered species. On February 8, 1972, he issued an environmental message to the nation.[46] In that message, he stated that "[w]e have already found . . . that even the most recent act to protect endangered species, which dates only from 1969, simply does not provide the kind of management tools needed to act early enough to save a vanishing species."[47] President Nixon went on to propose the Endangered Species Conservation Act of 1972, and his administration introduced bills in both the House and the Senate.[48]

Congress spent a considerable amount of time in 1972 debating the proposed endangered species act bills. Testimony taken in 1972 focused on the declining wellbeing of many species and the need for strong federal legislation to protect them. At the time, the Department of the Interior called for the ability to list and delist animals as threatened or endangered so that it could afford immediate protection to species that faced extinction in the foreseeable

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44. *Id.*

45. *See id.*

46. President Richard Nixon, President's Message to Congress Outlining the 1972 Environmental Program (Feb. 8, 1972).

47. *Id.*

48. Memorandum from David L. Bernhardt, Solicitor, Dep't of the Interior, to Dir., U.S. Fish & Wildlife Serv., at A-2 (Mar. 16, 2007), http://www.biologicaldiversity.org/campaigns/cleaning_up_the_bush_legacy/pdfs/Solicitors_memorandum.pdf. In addition to the Nixon administration's bills, a few related endangered species conservation bills were also introduced in the Senate and the House. *See id.* (citing H.R. 1311, 92nd Cong. (1972), H.R. 13081, 92nd Cong. (1972), S. 3199, 92nd Cong. (1972), and S. 3818, 92nd Cong. (1972)).

future.[49] Testimony also supported protecting states' efforts to protect endangered species; some argued that state management programs were beneficial to endangered species and ought to be "protected and not undercut by Federal legislation."[50] Ultimately, an endangered species act was not passed in 1972.

In 1973, Congress resumed the effort of the past year, and the enactment of a revised endangered species protection act quickly became a priority. Representative John Dingle of Michigan wasted no time and introduced H.R. 37, a proposed endangered species act bill, on January 3, 1973.[51] In the Senate, Senator Harrison Williams of New Jersey introduced his version of the endangered species act, S. 1983, on July 1, 1973.[52] In addition to these two main bills, a handful of similar bills were introduced in the House throughout the winter and spring of 1973.[53]

The preemption of traditional state authority to manage wildlife was one of the most contested aspects of the endangered species act debates in 1973. The two main bills, H.R. 37 and S. 1983, offered different approaches for the role of the states in threatened and endangered species management. H.R. 37 charged the federal government with establishing and overseeing a national endangered species program with some cooperation with state fish and wildlife agencies.[54] By contrast, S. 1983 gave states with active endangered species programs the authority to manage threatened species within their borders, reserving federal preemption as a stopgap for states that did not have an active program.[55]

H.R. 37 and S. 1983 were reconciled by a Joint Conference Committee and the conference report was unanimously accepted by the Senate on December 19, 1973 and by the House the following day on a vote of 345-4.[56] President Nixon signed the Endangered Species Act of 1973 into law on December 28, 1973.[57] Below is an in-depth review of the legislative history of

49. *See* CONG. RESEARCH SERV., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 2 (1982), http://www.eswr.com/docs/lh/leghist_intro_1_7.pdf.

50. *Id.*

51. H.R. 37, 93d Cong. (1973). Representative Dingle's bill included twenty-four co-sponsors. *Id.*

52. S. 1983, 93d Cong. (1973). Senator Williams's bill included five Democratic co-sponsors and three Republican co-sponsors. *Id.*

53. The additional bills that were introduced were H.R. 3310, H.R. 3795, H.R. 3696, H.R. 4758 (a reoffering of the Nixon administration's 1972 H.R. 13081), and H.R. 913.

54. *See generally* H.R. 37.

55. *See* Robert P. Davison, *The Evolution of Federalism under Section 6 of the Endangered Species Act*, *in* THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT 89, 90 (2011).

56. 119 CONG. REC. 42,535, 42,915–16 (1973).

57. *See* President Richard Nixon, Statement on Signing the Endangered Species Act of 1973 (Dec. 28, 1973).

the two bills, focusing on the discussions and debates around the appropriate role of the states in conservation of threatened and endangered species.[58]

A. The House Bill – H.R. 37

As introduced, H.R. 37 proposed a comprehensive federal system for the protection of endangered species. The major provisions included: federal authority to prohibit the take of endangered species nationwide, extended protection to animals which may become endangered (threatened), removal of the distinction between native and worldwide endangered species, and joint administration of the endangered species act program by the Departments of Interior and Commerce.[59] During his introductory remarks on H.R. 37 to the House, Representative Dingle proclaimed the bill to be "one of the most important pieces of legislation in the new Congress . . . [and] [f]urther action on the existing law is necessary if we are to conserve, protect, and propagate our threatened fish and wildlife resources which I feel are diminishing too rapidly."[60]

1. The States' Role under H.R. 37 as Introduced

While preempting the previous sole authority of states to regulate threatened and endangered species within their borders, H.R. 37 did call for cooperation between state and federal governments and authorized the re-delegation of authority to regulate the taking of threatened and endangered species to the states so long as the state maintained an adequate program. With regard to cooperation, section 6(a) required the Secretary, "[i]n carrying out the program authorized by this Act, . . . [to] cooperate to the maximum extent practical with the several States."[61] Section 6(c) allowed states to regain some of their previously held authority by authorizing the federal government to:

> delegate to a State the authority to regulate the taking by any person of endangered species or subspecies of resident fish and wildlife when he determines that such State maintains an adequate and active program consistent with the policies and purposes of this Act, to manage and protect such endangered species in accordance with criteria issued by the Secretary.[62]

Section 6(e) went on to make it clear that the states were still free to "enact legislation more restrictive than the provisions of this Act for the protection and conservation of fish and wildlife."[63] This section, however, was

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58. *See generally* Steve Davies, *Legislative History of the Endangered Species Act*, ENDANGERED SPECIES & WETLANDS REP., http://www.eswr.com/lh/ (last updated Jan. 21, 2015).

59. *See* H.R. REP. NO. 93-412, at 141 (1973).

60. 119 CONG. REC. 922 (1973).

61. H.R. 37, 93d Cong. § 6(a) (1973).

62. *Id.* § 6(c).

63. *Id.* § 6(e).

silent as to whether all state law that was less restrictive than the Act was preempted. Section 6(f) directed the Secretary to "undertake an investigation and study regarding the functions and responsibilities which the States should have with respect to the management and protection of endangered species of fish and wildlife."[64] The Secretary was to report the results of the investigation to Congress in one year, and his report was to include recommendations "regarding the extent to, and manner in, which the Federal Government should assist the States in establishing and implementing management and protection programs for endangered species."[65]

2. House Committee Debates and Amendments

H.R. 37 was assigned to the House Merchant Marine and Fisheries Committee where it was subject to rigorous debate.[66] The most significant debate during the hearings focused on what roles the federal and state governments should play in endangered species management.[67] According to the Committee's report that accompanied the revised H.R. 37, the Committee members felt that "there is fairly general agreement on the nature of the problem [as to how much involvement states should have], but there was no clear agreement as to the best course to follow."[68] Expanding upon that point, the Committee report further elaborated that:

> Any bill which is designed to deal with the complicated issues involved in protection of endangered species must do so in light of at least two competing considerations: first, protection of endangered species is not a matter that can be handled in the absence of coherent national and international polices: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded. Second, however, the states are far better equipped to handle the problems of day-to-day management and enforcement of laws and regulations for the protection of endangered species than is the Federal government. It is true, and indeed desirable, that there are more fish and game enforcement agents in the state system than there are in the Federal government. Any reasonable and responsible program designed to protect these species must necessarily take account of this fact.[69]

64. *Id.* § 6(f).
65. *Id.*
66. *See* H.R. REP. NO. 93-412, at 140 (1973). The Committee's hearings were held on the heels of an international discussion on the conservation of wildlife, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). *See id.* at 142. A provision of the CITES agreement required the Convention's signatories to promulgate laws to enforce the treaty's provisions. Therefore, CITES became a point of justification for the passage of amended endangered species act legislation. *See id.* at 143.
67. *See id.* at 145.
68. *Id.*
69. *Id.* at 146.

In amending the bill, the Committee apparently placed more weight on the first factor, as the revised bill:

> place[d] the essential responsibility for establishment of the lists of endangered species, and amendment of these lists, in the Secretary. At the same time it is expected and required that there be a good faith consultation between the Secretary and the states, as well as with other interested and knowledgeable parties.[70]

Notably, the Committee deleted the language in section 6(c) that would have allowed the Secretary to delegate implementation authority to the states to regulate take.[71] The Committee language inserted in its place authorized the Secretary to "enter into cooperative agreements to provide financial assistance to States, through their respective fish and wildlife agencies, which maintain or establish adequate and active programs to manage and protect endangered and threatened species."[72]

It is challenging to reconcile the amended language in section 6(c), which seems to limit states to that of a federal grant recipient, with the language contained in the Committee's report accompanying the bill, which describes a much more involved role for states. While the Committee report states that "[w]here a cooperative agreement has been put into effect, the bill allows concurrent jurisdiction over the species affected in both the state and Federal judicial systems,"[73] the language in the amended bill suggests a state's sole purpose for entering into a cooperative agreement is to be eligible for federal financial assistance. It seems the Committee's intention was to ensure a cooperative relationship between federal and state wildlife managers that was stronger than the language it chose to use in the actual bill.

The Committee did retain the language in section 6(a). Again, the language contained in the Committee's report indicates an intention for a more robust application of the subsection than the actual text reveals. While section 6(a) requires that the "Secretary shall cooperate to the maximum extent practicable with the several States"[74] the Committee's interpretation of that section in the report is that "[t]his subsection requires the Secretary to consult with the affected States in carrying out any program authorized under the Act."[75] The Committee's omission of "to the maximum extent practicable" in its interpretation suggests that it intended this section to require more significant cooperation with the states than the text in the bill required.

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70. *Id.*
71. *See* H.R. 37, 93d Cong. § 6(c) (1973) (as considered by the House, Sept. 18, 1973).
72. *Id.*
73. H.R. REP. NO. 93-412, at 146.
74. H.R. 37, 93d Cong. § 6(a).
75. H.R. REP. NO. 93-412, at 152.

B. The Senate Bill – S. 1983

While the House got the jump on introducing and debating endangered species act legislation in 1973, the Senate was not far behind them and took expeditious action on its version. Senator Williams introduced S. 1983 on June 12.[76] The bill was referred to the Senate Committee on Commerce where it was amended and reintroduced to the Senate a mere two weeks later with a recommendation that it pass.[77] The major provisions of S. 1983 as introduced included the listing of species as either endangered or likely to become endangered, consultation with an advisory Committee on the list of species, authorization to the Secretaries of Commerce and Interior to use certain existing legislation for land acquisition, criminal and civil penalties for violations, implementation of the international convention on endangered species, the "management of endangered and threatened species by the States under State plans that are approved by the Secretary[,] and provision for financial aid to State wildlife management agencies which enter into cooperative or management agreements with the Secretary."[78]

Similar to the original draft of H.R. 37, S. 1983 as introduced offered states the ability to retain authority over the protection of threatened and endangered species. Unlike H.R. 37, however, S. 1983 retained that provision through Committee amendments.[79]

1. The States' Role under S. 1983 as Introduced

Like H.R. 37, S. 1983 initially preempted the state's previously exclusive authority to regulate threatened and endangered species within their borders, but provided for a re-delegation of authority to states whose programs qualified. As introduced, section 6 of S. 1983, also entitled "Cooperation with the States," was identical to the corresponding section contained in H.R. 37.[80] Section 6(a) required "cooperat[ion] to the maximum extent practicable," and section 6(c) allowed for the delegation to a state the "authority to regulate the taking by any person of endangered species" provided the state has an "adequate and active program."[81] Again, consistent with H.R. 37, section 6(e) allowed states to enact more restrictive provisions to protect and conserve wildlife, and section 6(f) required the Department of the Interior to study the functions and responsibilities that states should have with respect to

76. S. 1983, 93d Cong. (as introduced June 12, 1973).
77. S. REP. NO. 93-307, at 1 (1973).
78. *Id.*
79. *Id.* at 3, 8.
80. S. 1983, 93d Cong. § 6 (as introduced June 12, 1973).
81. *Id.*

management and protection of endangered species and to report back to Congress within one year.[82]

2. Senate Committee Debates and Amendments

After a busy two-week review and mark-up, the Committee reported S. 1983 back to the full Senate on July, 1 1973.[83] The Committee made a major change regarding the role of states under the ESA by removing the state re-delegation of authority language from section 6(c) and creating a new section 16 that specifically addressed state authority.[84]

The Committee undertook a major overhaul of section 6. After the Committee's amendments, section 6(c) was re-titled "Financial Assistance" and was described in the Committee's report as a "mechanism[] through which the Federal government and the governments of the States can work fruitfully together toward the mutually accepted goal of protection of endangered and threatened species."[85] Gone from this section was the authority to delegate to the states the regulation of take of endangered species. In its place was an authorization to the federal government to enter into cooperative agreements in order to provide financial assistance to the states. Section 6(c) now provided the federal government with the authority "to enter into . . . cooperative agreement[s] . . . to provide financial assistance to a State which establishes and maintains an adequate and active program for the management, conservation, protection, and restoration of endangered and threatened species."[86] As amended, section 6(c) included a list of requirements that a state program must fulfill before receiving financial assistance.[87]

The new section 16 added by the Committee spoke to the applicability of the legislation to the states. Under section 16(a), states were encouraged to "establish a plan for endangered and threatened species in accordance with this Act."[88] A plan was consistent with the Act if it met or exceeded the requirements set forth in the revised section 6(c) and "represent[ed] an effective response to the Nation's need to conserve, protect, restore, and propagate endangered and threatened species of fish or wildlife."[89] Once the federal government received a state plan, section 16(b) required the Secretary to determine whether the plan was acceptable within ninety days.[90] Section 16(c) required periodic reviews of state performances.[91] According to Senator John

82. *Id.*
83. *Id.* (as reported by S. Comm. on Commerce, July 1, 1973).
84. *Id.* § 6(c), 16.
85. S. REP. NO. 93-307, at 8 (1973).
86. S. 1983, 93d Cong. § 6(c) (as reported by S. Comm. on Commerce, July 1, 1973).
87. *Id.*
88. *Id.* § 16(a).
89. *Id.*
90. *Id.* § 16(b).
91. *Id.* § 16(c).

Tunney of California, who managed the Senate consideration of S. 1983, "[s]tates with active endangered species programs are given full discretion to manage threatened species which reside within their boundaries" under section 16.[92]

The Senate debated the Committee's amended S. 1983 on July 24, 1973.[93] Senator Tunney spoke first in support of his position that the "bill provides the necessary national protection to severely endangered species while encouraging the States to utilize all of their resources toward the furtherance of the purposes of this act."[94] He went on to emphasize that "[s]tate participation is necessary for the protection of endangered and threatened species. This bill provides them the authority and additional funds with which to provide that protection."[95] Later in his remarks, Senator Tunney clarified that S. 1983 would provide states whose plans were approved by the Secretary with "the power to permit the taking of threatened species."[96]

Alaskan Senator Ted Stevens next took the floor in support of S. 1983. He offered that sections 6 and 16 "provide the backbone of the act," as this bill would "assist those States not yet involved to implement such programs that will, if the States do not, provide for Federal preemption."[97] Senator Stevens went on to ask for consent to have printed in the record the text of the Alaska, Illinois, and Texas state endangered species laws as examples of state government efforts to preserve habitat and species.[98] He stated that while "the Federal government has a definite role in this area to insure that minimum standards are set," it also has a role "to assist the States in their responsibility for managing resident species."[99] Citing Dr. Ralph MacMullen, the president of the International Association of Game, Fish, and Conservation Commissioners, Senator Stevens indicated that in Michigan there are only 2 federal enforcement officers, while there are 400 state conservation officers that perform the actual "legwork" of species conservation.[100] The Michigan example demonstrated his point that states are a vital component of wildlife management. As an example of what he hoped to avoid, he cited the Marine Mammal Protection Act, under which the federal government preempted relevant state laws but failed to provide funding for the Act's implementation, leaving no entity to enforce the protection of marine animals.[101] By not following the same path as the Marine Mammals Protection Act, Senator Stevens explained that "the Endangered

92. 119 CONG. REC. 25,669 (1973).
93. *Id.* at 25,662.
94. *Id.* at 25,670.
95. *Id.*
96. *Id.* at 25,679.
97. *Id.* at 25,670.
98. 119 CONG. REC. 25,669, 25,670-73 (1973).
99. *Id.* at 25,673.
100. *See id.*
101. *See id.*

Species Act of 1973 provides for a larger role for States . . . [which is] why there has been less opposition to it."[102]

At the conclusion of the debate, the Senate voted 92-0, with 8 not voting, in support of S. 1983.[103]

C. Conference Reconciliation and Presidential Approval

Because H.R. 37 and S. 1983 were not identical, Congress called a Joint Conference Committee to reconcile the two versions of the bill. The compromised bill had to reconcile the reality that a national wildlife conservation strategy was badly needed while also recognizing that state wildlife agencies had more expertise and far more resources to handle the day-to-day activities associated with species conservation.[104]

Leading into the Joint Conference Committee, H.R. 37 under section 6 and S. 1983 under section 16 contained the following sections:

H.R. 37 Section 6[105]	**S. 1983 Section 6**[106]	**S. 1983 Section 16**[107]
(a) Cooperation with States. The Secretary shall cooperate to the maximum extent practicable with the States.	(a) General. The Secretary shall cooperate to the maximum extent practicable with the States.	(a) State Plan. States may establish a plan for endangered and threatened species in accordance with section 6(c), the state plan should be submitted to the Secretary.
(b) Management Agreements. The Secretary may enter agreements with any State regarding the administration and management of species conservation areas.	(b) Management Agreements. The Secretary may enter agreements with any State regarding the administration and management of species conservation areas.	(b) Determination by Secretary. After receiving a plan, the Secretary has ninety days to review the state plan. If approved, the state plan will go into effect.
(c) Cooperative Agreements for Purposes of Financial Assistance. The Secretary is authorized to enter into cooperative agreements to provide fiscal assistance to states with adequate and active programs to manage	(c) Financial Assistance. The Secretary is authorized to enter into cooperative agreements to provide fiscal assistance to states with adequate and active programs to manage and protect endangered	(c) Periodic Review. The Secretary shall periodically review the state plan to determine if it is still in accordance with the Act.

102. *Id.*
103. *Id.* at 25,694.
104. *See* Davison, *supra* note 55, at 89.
105. H.R. 37, 93d Cong. § 6 (1973).
106. S. 1983, 93d Cong. § 6 (1973).
107. *Id.* § 16.

and protect endangered and threated species.	and threated species.	
(d) Allocation of Funds. Funds made available to the Secretary for allocation to the states under cooperative agreements.	(d) Allocation of Funds. Funds made available to the Secretary for allocation to the states under cooperative agreements.	(d) No State Plan. If a state does not have an accepted state plan, the provisions of this Act will be applicable in their entirety within the state.
(e) Periodic Review. Any action taken by the Secretary under this section shall be subject to his period review at no greater than annual intervals.	(e) Periodic Review. The Secretary must periodically review State conservation plans to ensure they remain adequate and active.	(e) Procedure. Before making a determination under this section, the Secretary shall publish a notice in the Federal Register.
(f) Conflicts Between Federal and State Law. A state law or regulation may be more restrictive than the Act, but not less restrictive.	(f) State Action Permitted. The Act is not intended to supersede or limit the power of a state to enact legislation or regulation more restrictive than or consistent with the Act.	(f) Effective Date. This section will become effective upon the date of enactment of this Act.

The Committee issued its report, containing the reconciled bill, to both chambers on December 19, 1973.[108] In the report, the Committee emphasized the need to maintain a good working relationship with the states and offered this statement:

> It should be noted that the successful development of an endangered species program will ultimately depend upon a good working arrangement between the federal agencies, which have broad policy perspective and authority, and the state agencies, which have the physical facilities and the personnel to see that state and federal endangered species polices are properly executed.[109]

The Committee's compromises included a major reconciliation of the state authority/cooperation sections in both bills, including the deletion of S. 1983's section 16 and the merger of its provisions into a revised section 6(c).[110] In the reconciliation bill, states with approved "cooperative agreements" were provided authority to implement the Act provided the state plan was consistent with the Act's requirements.[111] Under section 6(c), now titled "Cooperative Agreements," the Secretary was authorized "to enter into a cooperative agreement in accordance with this section with any State which establishes and

108. H.R. REP. No. 93-740, at 426 (1973).
109. *Id.* at 451.
110. *See id.* at 450–51.
111. *See id.* at 433.

maintains an adequate and active program for the conservation of endangered species and threatened species."[112] For a state program to be accepted, it had to be deemed adequate and active, and reviewed annually to ensure that the state program was consistent with the Act, that it provided protection for all federally listed species, that the state had the authority to conduct investigations and to protect habitat, and that the public was able to participate in the state species designation process.[113] If the Secretary approved a state program (he had 120 days to decide), then both parties would enter into a cooperative agreement for the "purpose of assisting in implementation of the State program."[114]

The text is unfortunately silent as to the specific meaning of "implementation of a State program." The remaining provisions of section 6, however, provide some insight into the drafters' intent. Section 6(g), which included provisions moved from S. 1983's section 16, required a transition period that provided states time to prepare and submit cooperative agreements.[115] During the transition period, states retained the primary authority to protect threatened and endangered species.[116] After the transition period, the primary authority would be transferred to the federal government, at which point states could seek to retake authority under a section 6(c) cooperative agreement.[117] Section 6(g) provides that the federal "taking" prohibitions in sections 9(a)(1)(B) and 4(d) of the ESA do not apply to any resident endangered or threated species within any state that has a section 6(c) cooperative agreement.[118] Effectively, this provision provides states with the authority to regulate take of all non-CITES species. This provision, however, is somewhat narrower than the language in S. 1983's section 16(d), which provided states with authority over "the management and taking" of resident species.[119] The reconciled bill did retain the language in section 6(a) that required the Secretary to "cooperate to the maximum extent practicable with the States."[120]

A confusing aspect of the final text of the ESA is the inclusion of preemption language in section 6(f) alongside the grant of authority to states in section 6(g). On one hand, states were provided the ability to regulate the taking of non-CITES threatened and endangered species in section 6(g), but on the other hand, all state laws or regulations that were less restrictive than the

112. *Id.*
113. *See id.*
114. *Id.*
115. *See id.* at 434–35.
116. *See id.*
117. *See id.*
118. *See id.* This provision did not apply to species listed in Appendix 1 to the Convention (CITES) or species covered in any other treaty or federal law. *Id.*
119. S. 1983, 93d Cong. § 16(d) (1973).
120. H.R. REP. NO. 93-740, at 432.

ESA were preempted by section 6(f).[121] "Section 6(g) and section 6(f) are irreconcilable at best and antagonistic at worst."[122]

Speaking to the reconciliation of the different approaches to the role of the states in the House and Senate versions of the ESA, Senator Stevens offered this recount of the legislative history:

> Initially, the House bill placed basic responsibility for establishing and administering the endangered species program in the Federal Government, and provided for the development of cooperative programs with concerned agencies. The Senate accepted this and added a new section 16 onto the bill to shift basic responsibility back to the States. The conferees approved a section giving the States the fundamental roles regarding resident species for up to 15 months, or 120 days after the relevant State legislature has adjourned. This, it is hoped, will encourage the States to develop their own strong programs.[123]

In the House, Representative George Goodling offered his take on the legislative history of the debate on the role of the states:

> While the House placed the fundamental responsibility for establishing and overseeing programs for the protection of endangered and threatened species in the Federal Government, the other body has substantially amended the legislation to shift the basic responsibility for endangered species programs to the States. The conference committee retained language giving the States an opportunity to participate in the protection of endangered and threatened species in cooperation with the Federal Government. The conference committee bill provides a transition period of up to 15 months following enactment during which time the prohibitions of this act will be held in abeyance pending the adoption by States and approval by the Secretary of cooperative management agreements. Where cooperative agreements have been entered into, they will control. We are confident that the States will take advantage of this opportunity to avoid Federal preemption.[124]

While the 1973 ESA may have left states with less retained authority than they may have hoped, the legislative history of the Act does demonstrate a commitment by both bodies of Congress to provide states with an avenue to cooperatively implement the ESA, if not cooperatively manage. As indicated in the statements of both Senator Stevens and Representative Gooding, there was legislative intent in both chambers to allow states to avoid federal preemption if they could develop their own program for species management. The following are the key takeaways about the role for state wildlife management from Congress's 1973 ESA debates:

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121. *See id.* at 434–35.
122. Davison, *supra* note 55, at 93.
123. H.R. REP. NO. 93-740, at 472.
124. *Id.* at 476.

- The ESA preemption of state authority of the "taking" of species was not total. Instead, those states that wished to retain the ability to regulate the take of non-CITES species could do so through a cooperative agreement with the federal government and by maintaining an adequate and active program and petitioning the federal government.

- The final version of the ESA provides states with an opportunity to avoid federal preemption under section 6(g) if they have a cooperative agreement.

- The retention of state authority to implement the ESA was one of its main selling points and a key reason for its overwhelming support.

- Both the House and Senate recognized that state cooperation in the actual implementation of the ESA was critical.

III. THE EROSION OF THE STATES' COOPERATIVE ROLE

With clear congressional intent for states to play a strong cooperative implementation role, why was that intention not carried forward? The following Part discusses the erosion of the intended state cooperative role through regulatory interpretations and statutory amendments.

A. 1975 Regulatory Interpretation of Section 6

In October of 1975, at the end of the section (g) fifteen-month transition period that provided states with sufficient time to develop their own state species conservation program, the FWS issued regulations to implement section 6.[125] While the title of the regulations is "Conservation of Endangered and Threatened Species of Fish, Wildlife and Plants—Cooperation with the States," the stated purpose of the regulations is to formalize governing financial assistance from the federal government to the states.[126] Despite the broad title, the narrow purpose of the rule was a missed opportunity to offer guidance on the states' cooperative implementation role.

While the regulations do provide the Secretary with authorization to cooperate with any state that has an adequate and active program for the conservation of threatened and endangered species, it never specifies what that cooperation might include.[127] The regulations also provide the Secretary with

125. *See* Conservation of Endangered and Threatened Species of Fish, Wildlife, and Plants—Cooperation with the States, 40 Fed. Reg. 47,509 (Oct. 9, 1975).

126. Conservation of Endangered and Threatened Species of Fish, Wildlife, and Plants, 40 Fed. Reg. 18,447 (proposed Apr. 28, 1975) (to be codified at 50 C.F.R. pt. 81).

127. Conservation of Endangered and Threatened Species of Fish, Wildlife, and Plants—Cooperation with the States, 40 Fed. Reg. at 47,509–10.

the authority to enter into a cooperative agreement with states that have an adequate and active program, but the cooperative agreement is only offered for the purpose of individual projects as opposed to transferring authority back to the states to cooperatively implement the ESA.[128] Missing from the regulation is any mention of ESA section 6(g)'s grant of authority to the states to regulate the taking of non-CITES species, section 6(c)'s 120-day deadline to review a state-submitted program, and section 6(a)'s requirement that the Secretary "cooperate to the maximum extent practicable" with the states.[129]

State cooperative agreements were also mentioned in the FWS's section 9 regulations promulgated in 1975 for threatened species and in 1976 for endangered species, but only in reference to the ability of state personnel to take threatened wildlife in the course of research or conservation programs if their state had signed a cooperative agreement.[130] The Department of the Interior took the position that cooperative agreements were designed to relieve state employees or agents from "take" violations and to serve as a mechanism for federal grant distribution.[131] Neither of these regulations mentioned section 6(a)'s requirement to cooperate to the maximum extent practicable or the intent expressed in 6(g) that states should regulate the take of domestic threatened and endangered species within the boundaries of their states, which is notable given the rigorous debate on this issue by Congress just two years before.[132]

The effect of the silence in both the 1975 and 1976 regulations on the role of the ESA's section 6(g) has been described as a narrowing of the interpretation of section 6(g).[133] This narrow interpretation has persisted. In practice, the Services have treated section 6 as a means to provide project-specific funding as opposed to a provision that grants states authority to implement the ESA within their borders.[134] Is this narrowed interpretation consistent with the role Congress envisioned for states when it passed the ESA in 1973?

B. Section 6 ESA Amendments, 1976-1978

If Congress was concerned with the agencies' failure to carry forward its intent to provide the state with additional authority under section 6(g), that concern was not raised during debate on the 1976 amendments to the ESA. Congress did not voice concern over the lack of regulatory implementation of

128. *See id.*

129. *See id.*; *see also* ESA, 16 U.S.C. § 1535(g) (2012).

130. *See* State Cooperative Agreements, 41 Fed. Reg. 19,224 (May 11, 1976); Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975).

131. *See* State Cooperative Agreements, 41 Fed. Reg. at 19,224–25.

132. *See id.* at 19,224; Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. at 44,412.

133. *See* Davison, *supra* note 55, at 95.

134. *See id.*

section 6(g) when it amended section 6 in either the 1977 or 1978 amendments to the ESA.

The 1977 amendments dealt only with section (6)(c), relaxing the requirements for states to enter into cooperative agreements and requiring that states develop a plan to give immediate attention to federally listed resident species of fish and wildlife.[135] Under the amendments to section 6(c), states were provided with two cooperative agreement options.[136] The first option was for states with programs designed to conserve all resident species of fish and wildlife that the Secretary determined to be endangered or threatened.[137] The second option was for states with programs that only protected certain categories of listed species, such as vertebrates, rather than all federally listed species.[138] The text of Public Law 95-212 clarified that the amendment was not intended to "affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species."[139] Simply stated, this language conveys that the amendment was not intended to intervene with a state's authority to regulate the take of threatened and endangered species within its boundaries (the authority granted to the states under section 6(g)). It does not seem likely that Congress intended to amend the authorization granted to states in section 6(g) to regulate the take of non-CITES threatened and endangered species. Congress again amended section 6(c) during the 1978 ESA amendments.[140] The 1978 amendments expanded section 6(c) to cover not only fish and wildlife, but also plants.[141]

C. The 1979 Regulatory Interpretation of Section 6

The FWS published a revised regulation concerning state cooperative agreements on May 31, 1979.[142] The regulation addressed the alternative paths to cooperative agreements contained in the 1977 amendment (full species coverage or partial species coverage) and the addition of plants in the 1978 amendment.[143] These regulations are notable because they allowed states with conservation programs that addressed a limited number or a genre of listed threatened and endangered species to become eligible to enter into a limited-authorities cooperative agreement for those species covered by its program.[144]

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135. *See* CONG. RESEARCH SERV., *supra* note 49, at 601–02.
136. *See id.* at 602.
137. *See id.* at 601.
138. *See id.* at 602.
139. *Id.* at 604.
140. *See* State Cooperation Agreements Relating to Endangered and Threatened Species of Fish and Wildlife, 44 Fed. Reg. 31,578 (proposed May 31, 1979) (to be codified at 50 C.F.R. pts. 17, 81).
141. *See id.*
142. *Id.*
143. *See id.* at 31,578–79.
144. See *id.* at 31,579.

The final rule also required that the state and federal government reach agreement on listed species "most urgently in need of conservation programs."[145]

The 1979 regulations continued to allow state employees or agents a limited ability to take endangered or threatened species, but only of those species covered under the cooperative agreement.[146] Critically, the regulations again failed to address the states' ESA section 6(g) authority over take of non-CITES species, or section 6(a)'s requirement to cooperate to the maximum extent practicable. Instead the regulations reiterated the Services' position that the purpose of a cooperative agreement was to exempt state employees or agents from take violations of covered species and serve as a mechanism to pass through federal grants. Surprisingly, this continued narrowing of state authority under the ESA went unchallenged by the states and in fact was apparently widely supported. In the preamble to the final regulation, the Services indicated that thirty-five of the thirty-eight comments received "expressed unequivocal support for the proposal or offered no substantive comment at that time."[147] By 1980, thirty-three states had established their own endangered species programs and had signed cooperative agreements with the Services, and another six were expected to follow suit.[148]

D. Section 6 ESA Amendments, 1980-1982

Pleased with the progress the Services and the states were making under section 6 cooperative agreements, Congress amended the ESA in 1980 to extend the authorization of $12 million for fiscal years 1981 and 1982. Notably, the House Merchant Marine and Fisheries Committee report described the Committee's understanding of section 6 as allowing the "return of the management of endangered species to the individual State, along with Federal financial assistance, once the State . . . adopted an endangered species program which [was] consistent with, and not weaker than, the Federal program."[149]

Nevertheless, despite this reiterated position that section 6 should provide a mechanism for returning management authority to the states, Congress "seemed satisfied with the respective federal and state roles that had been adopted since 1973."[150] Since the passage of the ESA in 1973, there is no evidence in the legislative history indicating concern with the Department of

145. *Id.* at 31,580.

146. *See* State Cooperation Agreements Relating to Endangered and Threatened Species of Fish and Wildlife, 44 Fed. Reg. 31,578, 31,579 (proposed May 31, 1979) (to be codified at 50 C.F.R. pts. 17, 81).

147. *Id.*

148. Davison, *supra* note 55, at 98–99.

149. H.R. REP. NO. 96-896, at 1466 (1980).

150. Davison, *supra* note 55, at 99.

the Interior's "interpretation of the role of the states in ESA implementation."[151]

After an attempt by President Reagan's Department of the Interior to zero out funding for section 6 in 1982, Congress reauthorized section 6 funding and modified the state/federal matching ratio in favor of the states from two-to-one to three-to-one.[152] Voicing concern over the Interior's attempt to zero out funding, the House Merchant Marine and Fisheries Committee "note[d] with disapproval efforts to abolish this aspect of the endangered species program. The Act's legislative history unmistakably shows that Congress intended that a cooperative, federal-state relationship be initiated and sustained. Effort by the States to restore endangered species have been met with marked success."[153]

The FWS amended its section 6 regulations in 1984 to reflect the 1982 amendments to the ESA and to require state audits every two years.[154] The section 6 regulations stand as is, unamended, since 1984.

E. Section 6 ESA Amendments – 1988

By 1987, forty-six states and three territories had signed cooperative agreements with the federal government. Despite the states' willingness to sign cooperative agreements, the limited effect of the agreements simply allowed states to receive federal funding and reduced state employees' liability for taking a listed species. In its report on the 1988 ESA amendments, the Senate Environment and Public Works Committee voiced its concern that "the current Federal/State cooperative efforts to protect endangered species . . . are inadequate and . . . in danger of disintegrating altogether."[155] The Committee further noted that the amount of grant funding currently available to states under section 6 had not changed since 1977. At the same time, there were twice as many listed species and four times as many states participating under cooperative agreements. [156] In 1977, section 6 funding provided about $200,000 a year to the twenty-one states that had cooperative agreements, but in 1987, these states spent only $57,000 on each of the seventy-six agreements.[157] The program was in additional trouble because the Department of the Interior sought to eliminate section 6 funding in five of its seven budget requests.[158] States were "reducing their requests for grant funds, curtailing their conservation activities, and in some cases . . . eliminating their requests,"

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151. *Id.*

152. *See id.* The 1982 Amendments to the ESA included major amendments to other sections of the ESA, but section 6 was only amended to change the state/federal ratios mentioned in the text.

153. H.R. REP. NO. 97-567 (1982).

154. Audits for Grant Programs, 49 Fed. Reg. 30,073 (July 26, 1984) (codified at 50 C.F.R. pts. 80, 81, 82, 83, 225, and 401).

155. S. REP. NO. 100-240 (1988).

156. *Id.*

157. Davison, *supra* note 55, at 100.

158. *Id.*

because of the small sums of money they were receiving and the uncertainty around the availability of continued funds.[159]

With this concern in the foreground, Congress amended section 6 of the ESA in 1988 for the final time.[160] In the amendments, Congress added the requirement that the Secretary monitor the status of all candidate and newly recovered species.[161] Wanting to involve the states as partners in this monitoring requirement, Congress amended section 6(d), "Allocation of Funds," to provide the Secretary with authority to provide financial assistance to states with a cooperative agreement in place of assistance in monitoring the status of candidate and recovered species.[162] To fund this new financial assistance program, Congress created in section 6(i) a "cooperative endangered species conservation fund" with funding from the Sport Fishing Restoration Account.[163]

Even with the creation of the Cooperative Endangered Species Conservation Fund, "the disparity between section 6 needs and funding ha[d] continued to grow."[164] For example, in 1990 there were 596 listed species and $5.7 million appropriated to states under section 6, however, in 2009 there were 1320 listed species and $10 million in state funds (with a significant reduction in buying power given the rate of inflation).[165]

Despite Congress's intent to elevate the states' stature as a partner under the 1988 ESA amendments, the amendments left states in a seemingly worse position. Not only were states denied the ability to utilize cooperative agreements to exercise the authority to regulate "take," granted to them under section 6(g), but now they carried an additional, largely unfunded mandate to monitor candidate and recovered species.

F. 1994 Section 6(a) Policy

In 1994, the Services issued an interagency policy clarifying the agencies' interpretation of section 6(a)'s requirement to "cooperate to the maximum extent practicable with the States."[166] The document asserted that it is the policy of the Services to utilize the expertise of the States in prelisting conservation, listing, critical habitat designation, reclassification, and recovery, and to inform the states of any federal agency action likely to adversely affect species or their habitat within the state.[167] The general theme of the policy is to

159. *Id.* at 100–01.
160. Pub. L. No. 100-478, 102 Stat. 2306 (1988).
161. *Id.*
162. *Id.*
163. *Id.*
164. Davison, *supra* note 55, at 101.
165. *Id.*
166. Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34,274 (July 1, 1994).
167. *Id.*

"[u]tilize the expertise and solicit the information of the State agencies" and to inform the states when key actions are being taken.[168] It seems the policy was intended to clarify the communication channels between the Services and the states, instead of providing states with a meaningful opportunity to "cooperate to the maximum extent practicable" and to allow the Services to participate as a partner in the implementation of the ESA. The 1994 policy did not include a reference to section 6(g), notable since section 6(g) speaks directly to providing the states an opportunity to participate in the implementation of the ESA.

G. 2016 Section 6(a) Policy

In February 2016, the Services issued a new section 6(a) policy, revising and replacing the 1994 policy.[169] According to the Services, the revised policy "reaffirms the commitment for engagement and collaboration between the Services and State fish and wildlife agencies on many aspects of ESA implementation" and addresses "the suite of ESA conservation tools not available or in common use when the policy was originally developed in 1994."[170] These tools include Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements.[171] The changes to the policy are summarized to "include more proactive conservation of imperiled species before they require protections of the ESA, expanded opportunities for engagement on listing and recovery activities, and improved planning with State agencies across a species' range."[172] While the Services should be applauded for this lofty goal, the policy fails to actually put those lofty words to action.

Structured in a similar manner to the 1994 policy, the revised policy also requires that the Services "use the expertise and solicit information from State agencies" during prelisting conservation, listing, critical habitat designations, reclassification and recovery, and requires the Services to inform the state with regard to any action likely to adversely affect species or their habitat within the state.[173] Indeed the major revision to the policy is the inclusion of the suite of conservation tools mentioned above. The effect of the policy document is the same—it is a description of the appropriate communication channels between the Services and the states. The policy fails to offer the states a meaningful partnership in ESA implementation, and it fails to fulfill the requirement that the Services "cooperate to the maximum extent practicable."

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168. *Id.*

169. *Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/endangered/laws-policies/policy-state-agencies.html (last updated Feb. 18, 2016).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

In summary, under the 1994 and 2016 "Interagency Policy Regarding the Role of State Agencies in ESA Activities," the Services continued their historically narrow interpretation of a state's role under the ESA despite the congressional intent to return the management of endangered species to the individual states.

IV. JUDICIAL INTERPRETATION OF SECTION 6

While there is not a lot of case law on section 6, the case law that does exist mirrors the Services' policy and regulatory interpretation of a narrow role for states, as opposed to the broader role intended by Congress.

A. Confusion over the Extent of the ESA's Preemption in 1992

As discussed above, as a result of the compromise reached by the Joint Conference Committee when drafting the ESA in 1973, section 6 contains preemption language in section 6(f) and section 6(g) that is not only confusing but also irreconcilable. Section 6(f) of the ESA authorizes state laws or regulations that are more restrictive than the exemptions and permits provided for in the Act, and therefore preempts all state laws and regulations that are less restrictive.[174] However, section (6)(g) states that in a cooperative agreement state, the ESA taking provisions "shall not apply with respect to the taking of any resident endangered species or threatened species . . . except to the extent that the taking of any such species is contrary to the law of such State."[175]

The language in sections 6(f) and 6(g) is incompatible. On one hand, section 6(f) states clearly that the ESA preempts any less restrictive state law.[176] On the other hand, section 6(g) states that if a state has signed a cooperative agreement then the laws and regulation of the state would apply to takings, not the ESA.[177] Several cases have addressed this incompatibility.

In the 1992 case of *Swan View Coalition, Inc. v. Turner*, the United States District Court of Montana held that the clear language of section 6(f) meant that the ESA's definition of "take" controlled over the State of Montana's less restrictive definition.[178] In *Swan View Coalition*, the environmental plaintiff, Swan View Coalition, argued that the Forest Service's operation and maintenance of excessive open road densities on the Flathead National Forest in Montana was a take of the threatened grizzly bear and the endangered gray wolf.[179] The defendant-intervener, Intermountain Forest Industry Association, argued that, pursuant to section 6(g), the Montana definition of take should

174. ESA, 16 U.S.C. § 1535(f) (2012).
175. *Id.* § 1535(g).
176. *Id.* § 1535(f).
177. *Id.* § 1535(g).
178. 824 F. Supp. 923, 938 (D. Mont. 1992).
179. *Id.*

prevail over the definition contained in the ESA because Montana was party to a full-authority cooperative agreement under section 6(c).[180] While the District Court of Montana indicated that Intermountain had raised a compelling argument, the court ultimately held that "based on the clear language of [section] 6(f) of the ESA combined with the overwhelming priority Congress has given to the preservation of threatened and endangered species, the court must conclude that the less restrictive takings provisions under Montana law are preempted by the ESA."[181] In reaching its conclusion in this case, the court recognized Congress's priority to preserve species, but did not address Congress's other priority of providing a meaningful role for states in the implementation of the ESA as evidenced in section 6(g).

Also in 1992, the United States District Court of the Eastern District of California in *United States v. Glenn-Colusa Irrigation District* reached a decision similar to that in *Swan View Coalition*, concluding the ESA's definition of take controlled over the State of California's definition.[182] In *Glenn-Colusa*, the NMFS sought an injunction against the Glenn-Colusa Irrigation District prohibiting the take of fingerling salmon in the course of pumping water from the Sacramento River.[183] The Irrigation District argued that the definition of take in the ESA should be interpreted to incorporate the California state definition.[184] The Irrigation District argued "that Congress intended to integrate the federal and state law protecting endangered species, and therefore the state law definition of taking should be applied."[185] Quickly dismissing the claim, the court found that, "to the extent that California's law on taking is less protective than the Endangered Species Act, it is preempted."[186] The decision did not reference specific sections within section 6 of the ESA, and therefore we cannot determine whether the court considered the language in section 6(g) in making its decision.

Both cases found that the preemption language in section 6(f) trumps the takings exceptions provided in section 6(g). These decisions effectively require that a state's definition of "take" mirror that of the ESA. Was this the intent of Congress? If so, why did Congress include section 6(g), which states that the ESA take provision shall not apply in states that have entered into full cooperative agreements with the federal government? The holdings in these two cases effectively preclude the implementation of section 6(g).[187]

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180. *Id.*
181. *Id.*
182. United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126, 1134 (E.D. Cal. 1992).
183. *Id.* at 1128.
184. *Id.* at 1134.
185. *Id.*
186. *Id.*
187. Bean and Rowland offer an opposing view; they indicate that *Swan View Coalition* and *Glenn-Colusa* are "probably [] correct, although the language of the Act's various provisions seems irreconcilable." BEAN & ROWLAND, *supra* note 15, at 270. In reaching this conclusion, they point to the

B. Alaska's Section 6(a) Claim

The State of Alaska has recently developed and asserted a creative section 6(a) argument in its litigation over the critical habitat designation for the threatened polar bear.[188] Alaska claims that the Service's failure to satisfy ESA section 6(a)'s requirement to "cooperate to the maximum extent practicable" is arbitrary and capricious and not in accordance with the law under the Administrative Procedure Act (APA) section 706(2)(A).[189]

Alaska first raised this argument in *Alaska Oil & Gas Association v. Salazar*.[190] The State of Alaska, the Alaska Oil and Gas Association, the Arctic Slope Regional Corporation, and others sued the FWS over the designation of 187,157 squares miles of critical polar bear habitat in Alaska.[191] Alaska claimed that the Service failed to consult and coordinate with Alaska during the critical habitat designation process in violation of ESA section 6(a).[192] According to Alaska, the Service's failure to consult with the state rendered its polar bear critical habitat decision arbitrary and capricious, not in accordance with the law under APA section 706(2)(A), and without observance of procedure required by law under section 707(2)(D).[193]

United States District Court Judge for the District of Alaska, Ralph Beistline, initially decided the case in January 2013; however, the case was ultimately appealed to the Ninth Circuit and overturned in 2016 (for reasons that did not involve the section 6(a) claim).[194] With regard to the section 6(a) claim, Judge Beistline held that the Service did cooperate with Alaska to the maximum extent practicable, and therefore dismissed Alaska's claim.[195] In reaching his decision, he noted that "the Service has defined the ambiguous phrase 'maximum extent practicable' to mean using the expertise and soliciting the information of state agencies in preparing proposed and final rules to designate critical habitat."[196] The Service's definition he referred to came from the 1994 section 6(a) interagency policy. Erroneously referring to the policy

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fact that "the requirements to enter into section 6(c) cooperative agreements have been relaxed significantly over that time." *Id.* They also point to the fact that the Services have routinely required that states entering into cooperative agreements acknowledge that "to the extent their laws are less restrictive than the federal Act, they are preempted." *Id.* But again, the Services' interpretation of the intended role of the states under the ESA has historically been narrower than Congress intended.

188. Plaintiff State of Alaska's Reply Memorandum in Support of its Summary Judgment Motion at 12, Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974 (D. Alaska 2013) (No. 11-CV-00025-RRB), 2012 WL 1562931.

189. *Id.*

190. *Id.*

191. Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974, 984 (D. Alaska 2013), *rev'd and remanded sub nom.* Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016).

192. Plaintiff State of Alaska's Reply Memorandum, *supra* note 188, at 12.

193. *Id.*

194. *Alaska Oil & Gas Ass'n*, 916 F. Supp. at 997.

195. *Id.*

196. *Id.*

document as a "regulation," Judge Beistline provided deference to the Service's interpretation "of its own regulations" and therefore accepted the Service's definition.[197] Based upon the Service's definition he found "ample support in the record" that the Service fulfilled its statutory duty to cooperate with the State to the maximum extent practicable.[198] The support in the record included the fact that the Service held public meetings at Alaska's request, consulted with Alaska through the Service's contractor, and alerted Alaska of every opportunity to participate in the critical habitat designation process.[199] In conclusion, Judge Beistline found that the Service had complied with the "*relatively non-demanding maximum-extent-practicable interpretation*."[200]

Alaska's attempt to raise its newly developed section 6(a) claim was ultimately unsuccessful in this case. Judge Beistline's confusion of the 1994 section 6(a) interagency policy as a regulation and his subsequent deference to the Service's definition,[201] however, does suggest that if the claim were to be raised in subsequent cases, the outcome might be different.

V. WILDLIFE ISSUES ARE LOCAL – SO WHY ISN'T ESA IMPLEMENTATION?

Scholars have suggested that "biodiversity issues, like all politics, are local."[202] If that is the case, is it not better to have local regulation and enforcement that can take into account those local biodiversity nuances? In the context of the ESA, is it not therefore better to have local and state governments more directly involved in the implementation the Act? Was that not what Congress intended by maintaining in section 6(g) that states have the authority to regulate the "take" of non-CITES species within the boundaries of their state, and the requirement in section 6(a) to cooperate with the states to the greatest extent practicable?

A. The Strained Relationship between State Wildlife Agencies and Their Federal Partners

In 2014, the Association of Fish and Wildlife Agencies (AFWA) issued a report on state wildlife agency perspective of the strained relationship between the state wildlife agencies and their federal partners.[203] AFWA surveyed state wildlife agency leadership and discovered a widespread frustration with the

197. *Id.*
198. *Id.*
199. *Id.*
200. Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974, 997 (D. Alaska 2013) (emphasis added).
201. *Id.*
202. Jean O. Melious, *Enforcing the Endangered Species Act Against the States*, 25 WM. & MARY ENVTL. L. & POL'Y 604, 609 (2001).
203. ASS'N OF FISH & WILDLIFE AGENCIES, WILDLIFE MANAGEMENT AUTHORITY: THE STATE AGENCIES' PERSPECTIVE (2014), http://www.fishwildlife.org/files/AFWATaskForce_State_Authorities_v3-5-14.pdf.

interface between federal and state efforts to conserve wildlife, particularly with regard to ESA application.[204] The state wildlife agency leadership survey respondents noted that they believe states are not seen by the federal agencies as partners in carrying out the ESA, but instead the input provided by state wildlife experts is given equal weight to the general public's input.[205]

Ribbon seal litigation reflects the relegation of expert state input to the level of general public input by the federal agencies.[206] During the species status review of the ribbon seal, the State of Alaska asked to participate on the NMFS's Biological Review Team, which was completing the review.[207] Despite the State of Alaska's expertise as both the historical and current manager of the bearded seal, and indications in the administrative record that the NMFS struggled to find qualified individuals to serve on the Review Team, the NMFS never responded to the State's request.[208] When an expert from the State of Alaska was allowed to participate in the bearded seal status review and proposed rule listing the bearded seal as a threatened species, the State of Alaska claimed that the serious flaws the state expert identified were ignored or discounted.[209]

Professor Kalyani Robbins also addressed this strained relationship in a 2013 article pointing to the inefficiencies of the ESA process as the greatest problem with the ESA's current structure of authority.[210] Citing state wildlife managers, she notes that the ESA retains numerous impediments to properly maximizing state involvement.[211] Those impediments include implementation by state and federal agencies with differing policies to follow, the need for states to obtain incidental "take" permits for every state wildlife manager who may harm a listed species, citizen suit litigation against the federal agencies that can impact state ESA efforts, negative PR that can result from state managers implementing a federal program instead of a state program, and the federalization of species that were already state listed.[212]

Despite the current strained relationship between the state wildlife regulators and their federal partners, the scarcity of resources and the costs incurred by the federal government in listing species and defending those listings in court is making it more advantageous for the Services to incorporate

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204. *Id.* at 2.
205. *Id.* at 8.
206. *See* Center for Biological Diversity v. Lubchenco, 758 F. Supp. 2d 945 (N.D. Cal. 2010).
207. Plaintiff State of Alaska's Memorandum in Support of its Motion for Summary Judgment at 10, Alaska Oil & Gas Ass'n v. Pritzker, 2014 WL 3726121 (D. Alaska 2014) (No. 13-CV-00018-RRB).
208. *Id.*
209. *Id.* at 11.
210. Kalyanni Robbins, *Cooperating with Wildlife: The Past, Present, and Future of Wildlife Federalism*, 43 ENVTL. L.REP. (Envtl. Law Inst.) 10,501, 10,508 (2013).
211. *Id.* at 10,505.
212. *Id.*

more state expertise and resources into the implementation of the ESA. But can and should the states assume that bigger role?

B. Can and Should States Play a More Meaningful ESA Role?

In their policy paper entitled "Endangered Species Act and Federalism: Effective Species Conservation through Greater State Commitment," Kaush Arha and Barton Thompson have provided seven potential benefits and associated concerns with an enhanced state role in species conservation.[213] Those seven benefits and associated concerns are discussed below.

1. Benefit	**1. Concern**
Broad trustee and police power over fish, wildlife, and plants within state boundaries and involved in local habitat conservation efforts.	Requisite jurisdictional authority, institutional structure, and resources to conserve all animal and plant species.

The framework that state wildlife agencies utilize to manage their resources has been termed the North American Model of Wildlife Conservation.[214] Under this model, state wildlife agencies are the trustees of the publicly owned wildlife resource, and therefore have a duty to manage wildlife for the citizens.[215] States have established fish and game commissions and departments to manage wildlife in accordance with their public trust duty.[216]

Nevertheless, state fish and game commissions and departments are creatures of state legislatures, and not all state legislatures have provided their wildlife managers with the jurisdictional authority or the institutional structure to adequately conserve all animal and plant species.[217] This concern, however, is already accounted for in section 6(g) of the ESA. In order for a state to be

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213. *See* Kaush Arha & Barton H. Thompson, *Endangered Species Act and Federalism: Effective Species Conservation Through Greater State Commitment* 13 (Stanford Woods Inst. for Env't 2005), https://woods.stanford.edu/sites/default/files/files/Endangered-Species-Act-Policy-Paper-20050224.pdf. In 2005, the Stanford Woods Institute for the Environment asked a select number of ESA experts to consider how states can play a more active role in protecting endangered species. *See id.* at 3. These experts authored papers on specific topics relevant to the ESA and federalism, and developed them into straw policy proposals that were then featured at a National Forum convened by Stanford. The purpose of the National Forum was to discuss "specific policies and regulations to further state commitment and responsibility in species conservation." *Id.* After the conference, two publications were released. These included a book representing the papers prepared for the forum edited by Kaush Arha and Barton Thompson entitled *Endangered Species Act Federalism: Effective Conservation Through Greater State Commitment*. *Id.*

214. ASS'N OF FISH & WILDLIFE AGENCIES, *supra* note 203, at 4.

215. *Id.* at 5.

216. *Id.*

217. *See* Arha & Thompson, *supra* note 213, at 13.

granted the authority to implement the ESA within its borders, it must have an approved section 6(c) cooperative agreement in place.[218] In order for a cooperative agreement to be accepted under section 6(c), a state must demonstrate that it has established and maintains "an adequate and active program for the conservation of endangered species and threatened species."[219]

2. Benefit	**2. Concern**
Greater coherence and wider scope in jurisdictional reach, e.g., California Resources Agency versus FWS and NOAA Fisheries.	Requisite financial and other resources to conserve all imperiled species in the state.

States are in a good position to take on an expanded role in the implementation of the ESA due to their comprehensive management role. State approaches to wildlife management have grown more sophisticated over the years.[220] While historically states were focused on the enforcement of hunting and fishing regulations, they have increasingly integrated principles of biology and ecology into their management of wildlife.[221] States are transitioning their role from that of an enforcer to that of a steward. Today, state wildlife agencies do much more than simply manage game species for sportsmen. Beyond regulating hunting and fishing, state agencies manage nongame species, conduct habitat improvement projects, protect and increase populations of threatened and endangered species, consult with the federal agencies on landscape level projects on federal land and management against invasive species, provide educational programs, work to secure hunting and fishing access for sportsmen, investigate and pay landowners for wildlife damage, and manage to prevent disease transmission between wildlife and domestic animals.[222] As a result of this transition from hunting and fishing regulators to species and habitat conservation managers, states are now better positioned to fulfill the role of a partner under the ESA, as opposed to merely an entity the Services should consult.

Additionally, states have more on-the-ground personnel, better resources, more knowledge and understanding of local ecosystems, and better relationships with private landowners and other stakeholders.[223] As an

218. ESA, 16 U.S.C. § 1535(g)(2)(a) (2012).

219. *Id.* § 1535(c)(1).

220. Arha & Thompson, *supra* note 213, at 9.

221. *Id.* Arha and Thompson offer the theory that but for the administration of the ESA by the FWS, state agencies would not have transitioned from "game management agencies" into their more modern "wildlife agencies" addressing the conservation needs of all species including nongame. *Id*. at 8.

222. David Willms & Anne Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding It, Preserving It, and Funding Its Future*, 14 WYO. L. REV. 659, 660 (2014).

223. *See* Arha & Thompson, *supra* note 213, at 11.

example, in Wyoming, the state wildlife agency, the Wyoming Game and Fish Department, has 114 field biologists and 66 wardens, compared to 22 FWS employees.[224] The discrepancy in employee power illustrates the strong need for close collaboration between state and federal wildlife officials.

Under the North American Model for Wildlife Conservation, however, states depend on hunters and anglers to fund wildlife conservation through the purchase of hunting and fishing licenses.[225] This historic funding model leaves states vulnerable to funding challenges, particularly because wildlife agencies must now fund new programs and have increased responsibilities.[226] Additionally, every year fewer people hunt and fish, resulting in reduced funds under this user-pay funding model.[227]

Despite the declines, the combined annual spending by state wildlife agencies to fund wildlife conservation exceeds $4 billion, making it the largest conservation organization in the United States.[228] Further, state wildlife agencies field more than 8000 officers to the enforcement of wildlife law across the nation, with the FWS employing fewer than 650 federal officers.[229] In spite of the funding challenges, states are in a strong position to take on an expanded ESA role.

3. Benefit	**3. Concern**
Extensive ecological information and expertise on state flora and fauna.	Ability to consistently advocate for and conserve imperiled species in the face of local political opposition.

An increased state role under the ESA is likely beneficial to endangered and threatened species. In her 2001 article entitled "Enforcing the Endangered Species Act Against the States," Professor Jean Melious summarized her perspective on the value of an increased state role in ESA implementation, noting that "states have legitimate interests in their natural resources, and state resources and local knowledge are crucial to the effort to preserve endangered and threatened species."[230] Further, "national species protection goals are unlikely to be achieved without strong state involvement, including the ability of states to experiment with alternative regulatory approaches."[231] States contribute to the content of the ESA's mandates through their many roles in

224. Letter from Glenn Pauley, Coordinator, Wyoming Game and Fish Planning, to Temple Stoellinger, Assistant Professor of Law, University of Wyoming School of Law (on file with author).
225. Willms & Alexander, *supra* note 222, at 660.
226. *Id.*
227. *Id.* at 660–61.
228. ASS'N OF FISH & WILDLIFE AGENCIES, *supra* note 203, at 30.
229. *Id.*
230. Melious, *supra* note 202, at 634–35.
231. *Id*. at 635.

biodiversity protections, including as proprietors, resource managers, permit authorities under other federal environmental laws, and content providers to inform ESA decisions.[232]

The concern is that states are more susceptible to bending to political pressure from those who oppose unpopular species conservation decisions (as many species conservation decisions are unpopular).[233] While this may be true, the processes in place within section 6 of the ESA could be utilized as a check against inconsistent application of conservation restrictions. As noted above, section 6(g) requires that states have an approved section 6(c) cooperative agreement and to receive a cooperative agreement a state must "establish[] and *maintain*[]" an adequate and active conservation program.[234] Therefore, if a state failed to maintain an adequate program, the cooperative agreement could be revoked.

4. Benefit	**4. Concern**
Extensive contacts and working relationships with private landowners in the state.	How to address species conservation that requires interstate coordination.

State relationships with private landowners in particular put them at an advantage when it comes to proactively conserving species.[235] These relationships, which are built on earned trust from repeated interactions, enable states to design conservation strategies on public and private land.[236] These strategies are sensitive not only to the ecological landscape but also the political one.[237] States are also better positioned to work with local governments in creating and implementing species conservation efforts given their legislative and often fiduciary connection. When states and local governments partner in the implementation of a conservation effort, the result is often increased public support for those measures.

The concern is that states are not able to adequately address species conservation that requires interstate coordination.[238] There has been an increase in interstate species conservation coordination recently, triggered by multi-state efforts to preclude the ESA listing of multi-state sensitive species such as the lesser prairie chicken and the greater sage grouse discussed below. The Western Governors' Association, the association that represents the governors of nineteen western states and three U.S. flag islands, has recently taken the

232. *Id.* at 609–18.
233. *See* Arha & Thompson, *supra* note 213, at 13.
234. ESA, 16 U.S.C. § 1535(c)(1), (g)(2)(a) (2012) (emphasis added).
235. Arha & Thompson, *supra* note 213, at 12.
236. *Id*.
237. *See id*.
238. *See id*. at 13.

lead on this effort with the launch of a species conservation and ESA initiative.[239] Under this initiative, western states are examining the effectiveness of the ESA and working together to develop strategies to preclude species listing, including multi-state and landscape level conservation and ecosystem management efforts.[240] Hopefully this initiative will result in improved strategies for interstate species conservation coordination.

5. Benefit	**5. Concern**
Ability to tailor species conservation programs to the social, political, and economic terrain of the state with gains in effectiveness and efficiency.	Whether federal oversight of state conservation efforts can be effective, or said another way, whether clear responsibilities can be articulated and assigned between state and federal partners, and whether respective parties can be held accountable for their part.

Because states remain the primary public institution for wildlife conservation, they possess "accumulated experience, knowledge, and contacts."[241] These attributes, as well as the somewhat less cumbersome legislative and regulatory processes at the state level, put them in a better position to tailor species conservation programs around the needs of their state.

As noted by Arha and Thompson, "[g]iven the familiarity of state institutions with [the] ecological, economic, and social landscape of the state[,] they are better positioned than the transient representatives of the federal government to design and implement species conservation programs with better effect[s] and at less cost."[242]

If states were given an enhanced role in species conservation, and thus had the ability to tailor species conservation programs around the needs and political and economic realities of a particular state, some fear it would be hard to maintain federal oversight of such tailored state programs.[243]

The 2012 grant of authority by the FWS to the Florida Fish and Wildlife Conservation Commission to issue some ESA section 10 take permits is an example of states tailoring ESA conservation to the needs of the state, while the federal FWS retains oversight.[244] When the FWS and the Florida Fish and Wildlife Conservation Commission revised their section 6(c) cooperative agreement in 2012, they included a provision that allows the Commission to

239. WESTERN GOVERNORS' ASS'N, *supra* note 2.
240. *Id.* at 7.
241. Arha & Thompson, *supra* note 213, at 12.
242. *Id.*
243. *Id.* at 13.
244. Cooperative Agreement between the United States Department of Interior Fish and Wildlife Service and Florida Fish and Wildlife Conservation Commission for the Conservation of Endangered and Threatened Fish and Wildlife (May 2012), https://www.fws.gov/northflorida/Guidance-Docs/FWC_Section_6/20120514_ca_FWS_FWC_2012_S6_CA_signed_web.pdf.

issue incidental take permits for certain ESA listed species within bounds of a permitting guidance document.[245] Through this agreement, Florida was able to tailor its species conservation efforts and to gain efficiencies by avoiding duplicative permitting processes while the FWS was able to delegate a program to a state with greater resources and expertise while maintaining oversight of the program.[246]

6. Benefit	**6. Concern**
Creative laboratories to develop and implement innovative species conservation programs.	Ability of state conservation programs to withstand legal challenges under the ESA.

Using the cautionary lesson of the 1990 spotted owl listing that greatly affected the timber industry in the Pacific Northwest, "[r]ather than waiting for the ESA 'train wreck' to hit, . . . states have attempted to take a proactive role by developing a plan to protect species before they are listed."[247] In so doing, states are becoming laboratories to develop innovative species conservation programs. Examples of creative species conservation programs include the conservation efforts to protect the lesser prairie chicken and the greater sage grouse prior to federal listing designation.[248] In both instances, because of the large, multi-state range of both species, the effects of the ESA's statutory requirements on either species would have resulted in significant negative economic consequences to the states.[249] Facing these consequences, policy makers and stakeholder leaders in both cases came together to craft unique solutions to conserve the declining species.[250]

A concern expressed is that state conservation programs may not be able to withstand legal challenges under the ESA. While not directly on point, it does appear (at least initially) that the state conservation efforts in both the

245. *Id.*

246. *Id.* In an Environmental Assessment analyzing the impact of the cooperative agreement, the FWS noted that Florida "maintains one of the most prominent state fish and wildlife conservation programs in the Nation," and the state's management and research activities were supported by hundreds of expert scientists and land management staff with an annual budget of more than $18 million. Environmental Assessment Endangered Species Action Section 6 Cooperative Agreement Between the Florida Fish and Wildlife Conservation Commission and U.S. Fish and Wildlife Service, at 2 (June 2011), https://www.fws.gov/northflorida/Guidance-Docs/FWC_Section_6/20111229_ea_FWS-FWC_2012_S6_CA_EA.pdf. Prior to the agreement, the Commission had required an additional state species take permit. *Id*. at 3. The issuance of additional state take permits lead to duplicative permitting and occasional inconsistencies in the recommendations and management practices. *Id.*

247. Melious, *supra* note 202, at 615.

248. Temple Stoellinger, *Energy Development and Endangered Species Act Protection in the Western US*, *in* DELIVERING ENERGY LAW AND POLICY IN THE EU AND THE US (2011).

249. *Id.*

250. *Id.*

lesser prairie chicken and the greater sage grouse examples helped to bolster the federal agencies' defense against legal challenges.[251]

7. Benefit	7. Concern
Enhance public acceptance of ESA and species conservation efforts.	Administrative costs borne by FWS and NOAA Fisheries.

This benefit relies upon an assumption that the public will better accept species conservation decisions if they are made by state agencies they are more familiar with, as opposed to a distant federal bureaucracy. As noted above, states have more on-the-ground personnel, better resources, more knowledge and understanding of local ecosystems, and better relationships with private landowners and other stakeholders, making it likely the public would have more tolerance for ESA decisions made by state officials.

It could be true that the state agencies would take the credit for making positive conservation decisions while the federal agencies would be left holding the administrative oversight burden. States currently expend significant resources to conserve species both prior to and post listing, however, so this argument could likewise be applied against the federal government.[252]

In conclusion, despite a few challenges, states are in a strong position to take on a greater role under the ESA with federal oversight.

VI. SOLUTIONS TO INCREASE STATE INVOLVEMENT

While there may be value in greater state involvement in the implementation of the ESA, the question remains: how to best facilitate a greater state role? One of the major considerations is how to provide states with a greater role without diluting the protections and the effect of the ESA. Inevitably, states vary not only in their approach to species conservation, but also in their ability, level of funding support, and authority.[253] Tools used to grant states a greater role will need to account for that variability and either accept it or require uniformity in the implementation of the expanded authority.

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251. *Id.*

252. Willms & Alexander, *supra* note 222, at 682. As an example of state expenditures to conserve ESA listed species, in FY2014 the state of Wyoming spent $1.79 million to conserve this single species. WYO. GAME & FISH DEP'T, 2014 ANNUAL REPORT, at A-10, https://wgfd.wyo.gov/WGFD/media/content/PDF/About%20Us/Commission/WGFD_ANNUALREPORT_2014.pdf.

253. *See* Arha & Thompson, *supra* note 213, at 13. For example, Arha and Thompson note that several states have not asserted their jurisdiction over all vertebrates, invertebrates, and plant species in their states. *Id.* at 13.

A. Previously Made Suggestions to Increase State Involvement in Species Conservation

In their policy paper summarizing the key takeaways of a 2005 Stanford University Woods Institute National Forum on ESA and Federalism, Kaush Arah and Barton Thompson suggest the promulgation of three interrelated regulatory actions to increase state involvement in species conservation.[254] The three regulatory actions are as follows:

(1) Through agency regulation, require a default threatened listing (endangered only in exceptional circumstances) and provide states with the primary management authority over threatened species through a signed agreement that includes pre-determined thresholds for up-listing.

(2) Provide willing states with the opportunity to take the lead in recovery of threatened and endangered species.

(3) Expand the states' ESA role by requiring that section 6 agreements detail specific roles and duties for the state, including the opportunity to issue section 10 "take" permits.[255]

Under the first proposed action, Arha and Thompson suggest that the agencies rely upon the authority conveyed by ESA sections 4(d) and 6 to pass a new regulation that requires a default listing of "threatened" (except where extinction is imminent) and offers states the primary authority over conservation and recovery of threatened species.[256] That authority would be provided through a written agreement that spells out the required ecological criteria to measure conservation effectiveness.[257] The agreement would include predetermined thresholds that would trigger an endangered listing.[258] States would also be provided adequate federal funding commensurate with their responsibilities.[259] Under this proposal, if a species continues to decline, indicating state efforts have been ineffective, the federal government will step in and resume greater responsibility.[260] In a nutshell, this proposed regulation would offer states the primary role over species facing lower threats while the federal government would maintain its role over more imperiled species.[261]

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254. *See id*. at 16.
255. *Id*. at 16.
256. *Id.* at 17.
257. *Id.*
258. *See id.* at 17.
259. *See* Arha & Thompson, *supra* note 213, at 17.
260. *Id.* at 18.
261. *See id.*

Arha and Thompson indicate that this proposal would motivate on-the-ground state conservation action in order to stave off the threat of increased federal involvement if the species continues to decline.[262] The specific mechanism to accomplish this proposal is the promulgation of a new 4(d) "take" rule for all approved state management plans. Once the rule is in place, those approved state programs will then provide a basis for a cooperative agreement under section 6(c)(1). Once a cooperative agreement is in place, states could then be given the authority to issue incidental "take" statements.

The second proposed action Arha and Thompson suggest is to provide states with the authority and funding to lead all species recovery efforts.[263] Under this proposal, states would submit recovery plans to the Services for approval that contain specific management actions directed to recovering the species, implementation procedures, and ecological benchmarks.[264] Arha and Thompson also suggest that, if a state is overseeing a species' recovery, it should be provided the opportunity to participate in section 7 consultations, be required to concur with the issuance of any permit for the species, and be required to concur with the promulgation of any special regulation under sections 4(d) or 10(j) for that particular species with the state.[265] To accomplish the goal of species recovery, Arha and Thompson suggest that states be provided authority to enter into conservation agreements with private landowners, grant Safe Harbor Agreements and enter into Habitat Conservation Plans, issue section 10 incidental "take" permits, designate "recovery habitat," and enter into section 7 consultation agreements with federal agencies.[266] Finally, they suggest that section 6 cooperative grant allocations be used to fund state recovery efforts.[267]

The third proposal Arha and Thompson offer is to tap into the unexplored collaborative opportunities provided for in ESA section 6 by encouraging states to take the lead in species conservation.[268] Specifically, they propose bolstering section 6 cooperative agreements to articulate stronger partnerships.[269] They suggest that section 6 agreements detail specific roles and duties for both the state and the Services and that the state roles could or should be expanded to include additional responsibilities up to the issuance of section 10 "take" permits, provided their state species conservation programs are "functionally equivalent" to the federal requirements.[270] Arha and Thompson again call for an increase in funding to support state efforts to implement the conservation

262. *Id.*
263. *Id.* at 31.
264. *Id.*
265. *See* Arha & Thompson, *supra* note 213, at 34-35.
266. *Id.* at 35–36.
267. *Id.* at 36.
268. *Id.*
269. *See id.* at 38.
270. *See id.* at 41.

agreements.[271] This particular suggestion was implemented in Florida in 2012 as noted above.[272] In 2012, the FWS and the Florida Fish and Wildlife Commission entered into a revised section 6(c) cooperative agreement under which the Commission was granted with the authority to issue federal incidental take permits in specific situations while following detailed guidance.[273] However, the FWS has not entered into a similar agreement with any other state since leaving itself open to criticisms of inconsistent application and favoritism.[274]

B. An Alternative Solution

The problem with all three of Arha and Thompson's suggestions is that they are asking for less authority on behalf of the states than is already included in the existing language in the ESA under section 6(g). The language in section 6(g) is clear, and Congress's legislative intent is clear; section 6(g) was intended to provide states with active and adequate programs and an avenue to implement the ESA within their state. Instead of creating new paths for states to participate in the ESA, we should simply utilize the authority already given to the states under section 6(g). Alternatively, if states choose not to take on the burden of implementing a 6(g) program, then full cooperation under section 6(a)'s mandate that the Secretary "cooperate to the maximum extent practicable" with the states is a solution.[275]

1. Section 6(g)(2) Policy or Regulations

The simplest solution to fulfill Congress's original intent to have states play a key role in ESA implementation is for the Services to issue a guidance document or promulgate regulations expressing their intent to utilize section 6(g)(2) and to provide a detailed process for how they will do so.

Section 6(g)(2) specifically states that neither the threatened species protective regulations (section 4(d)), nor the take prohibition of a species within the United States or the territorial seas (section 9 (a)(1)(B)), shall apply to the taking of species within a state that is a party to a cooperative agreement with the Secretary.[276] In other words, if a state is a party to a cooperative agreement with the Secretary, then the promulgated regulations and the prohibition against the take of a species would not apply within the boundary of the state.[277] Those

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271. *See* Arha & Thompson, *supra* note 213, at 42.

272. Cooperative Agreement between the United States Department of Interior Fish and Wildlife Service and Florida Fish and Wildlife Conservation Commission, *supra* note 244.

273. *Id.*

274. *See generally* ASS'N OF FISH & WILDLIFE AGENCIES, *supra* note 203, at 5 (documenting the "widespread frustration" between the state and federal agencies in their joint efforts to protect wildlife).

275. ESA, 16 U.S.C. § 1535(a) (2012).

276. *Id.* § 1535(g)(2).

277. *See id*.

two requirements are often considered the most restrictive provisions of the ESA. Instead of federal primacy over the management of the taking of species, Congress provided for state primacy and management so long as a cooperative agreement was in place.[278]

To date, however, the intent of Congress as expressed in section 6(g)(2) has not been fully realized. As discussed earlier in this Article, instead of carrying forward Congress's intent to promote state primacy over the regulation of the take of listed species, the Services narrowed the role of states in ESA activities through guidance documents published in 1994 and in 2016.[279] While both documents reference section 6(a)'s requirement that the Services "cooperate to the maximum extent practicable," neither document includes a single reference to section 6(g)'s apparent grant of primacy over the take of listed species to the states; thus, these documents severely limit the role of states in implementing the ESA.

To broaden the state role in ESA implementation as Congress intended, the Services should either prepare and issue a revised guidance document or promulgate a new regulation specifically addressing section 6(g)(2). The authority for the Services to issue a section 6(g) guidance document is derived from the ESA itself.[280] The authority of the FWS to promulgate a regulation is a little less straightforward. Section (6) does contain a grant of rulemaking authority to the Services in section 6(h), but that authority is to "promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States."[281] An argument could be made that a section 6(g)(2) regulation does have a connection to "financial assistance to the states," because a state must have entered into a cooperative agreement in order to be granted authority to oversee the take program, and because once a cooperative agreement is in place, the state is eligible to receive financial assistance from the Secretary. Alternatively, the Services could rely on their inherent authority under the ESA to promulgate regulations to fulfill Congress's intent.

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278. *See id.* Functionally, once the Services decided to utilize section 6(g) and allow states to implement the ESA, section 6(c) cooperative agreements would need to be revised as the details of a state would implement the ESA would be detailed in the section 6(c) cooperative agreements as is required under section 6(g)(2)(a).

279. *See* Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34,275 (July 1, 1994); *Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities*, *supra* note 169.

280. *See supra* note 166 (both the 1994 and 2016 section 6(a) guidance documents listed the ESA as the guidance documents' authority source).

281. ESA, 16 U.S.C. § 1535(h).

2. Section 6(a) Revised Policy or Regulations

Not all states may want to take on the burden of implementing the ESA under section 6(g); nevertheless, those states should still be provided with an opportunity to play a meaningful role in the ESA. That meaningful role can and should be fulfilled through greater cooperation with the Services under the authority of section 6(a)'s mandate that the Secretary cooperate with the states to the "maximum extent practicable." That section 6(a) mandate, however, has been diluted through service policy, and its original intent needs to be restored.

While the Services issued an initial policy in 1994 and a revised policy in 2016, that policy does not fully implement the intent Congress conveyed in section 6(a). Section 6(a) contains a powerful mandate. It requires that "[i]n carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States."[282]

Instead of setting forth the Services' intent to "cooperate to the maximum extent practicable," the policy merely restates the cooperation requirements already stated in section 6, with the addition of opportunities to cooperate in the implementation of new ESA conservation tools (Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements).[283] This is a missed opportunity. The Services could issue a revised policy that more firmly states Congress's intent to maximize cooperation.

A more substantive option would be to issue a state cooperation regulation that specifically outlines when and how cooperation will occur. Defining the cooperative relationship between the Services and the states in a regulation affords the prescribed roles for each party with a sense of permanency, importance, consistency in application, and an enforcement opportunity if the regulations are not being followed. Currently, the Services' policy guidance is implemented with wide discretion across the states and with a wide range of effects. The implementation of a section 6(a) cooperation regulation would provide all states an equal opportunity to "cooperate to the maximum extent practical" with the Services.

In developing this regulation, the Services should use the Council of Environmental Quality's cooperating agency regulations as a guide.[284] Those regulations provide guidance to federal agencies on how to comply with the requirement in the National Environmental Policy Act (NEPA) that federal agencies preparing NEPA analyses do so "in cooperation with State and local governments."[285] The requirement in the ESA that the Services cooperate with

282. *Id.* § 1535(a).
283. *See id.*
284. *See* 40 C.F.R. § 1508.5 (2016).
285. Memorandum from James Connaughton to Heads of Federal Agencies on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan.

the states "to the maximum extent practicable" is a much stronger mandate from Congress than the cooperation language it included in NEPA, yet, unlike in the NEPA context, no regulations exist prescribing how that cooperation should occur.

CONCLUSION

When Congress passed the ESA of 1973, it did so on the understanding that federal preemption of the protection of threatened and endangered species would not be total. Instead, Congress intended that states with approved conservation programs that entered into cooperative agreements with the Services would oversee the protection of threatened and listed species within the boundaries of their states. As a result of a narrow interpretation by the Services, this intent has never been realized. In the face of continued pressure to reform the ESA and frustration over a lack of meaningful cooperation with state wildlife agencies, an opportunity now exists to broaden the Services' narrow interpretation and to give states the role Congress intended for them.

30, 2002), https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf (citing 42 U.S.C. § 4331(a) (2012)).