HAUB SCHOOL OF ENVIRONMENT AND NATURAL RESOURCES

RESEARCH BRIEF
SUMMARY OF FACULTY SCHOLARSHIP

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

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Illustration by June Glasson, 2018 Ruckelshaus Institute Communications Fellow

Sage grouse narrowly missed an endangered species listing in 2016 thanks to conservation leadership from the states.

Why this analysis was needed

In the decades since President Nixon signed the Endangered Species Act (ESA), states have become increasingly frustrated by their exclusion from the act's implementation. Though states manage imperiled species prior to a threatened or endangered listing under the ESA, once a listing occurs states lose their management responsibilities to the federal government. The frustration this causes is well placed, as this is not the role Congress intended states to play when it passed the ESA in 1973. This frustration has led to a national discussion on ESA reform, a Republican priority supported by the bipartisan Western Governors' Association and others.

This article advocates for giving more authority and a more meaningful role to states not via reform of the act, but through application of the long-forgotten section 6(g)(2) of the ESA. Section 6(g)(2) gives states authority to oversee ESA implementation after a species has been listed, but it has never been implemented.

States and the ESA

The 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. As the legislative history reveals, Congress intended states to be a cooperative partner in ESA implementation and, under section 6(g)(2), to retain authority to regulate the "taking" of most threatened and endangered species.

Specifically, under section 6(g)(2), if the state is party to a cooperative agreement with the Interior Secretary, take of resident endangered or threatened species is not prohibited. Instead, states maintaining an "adequate and active program" under the terms of their cooperative agreement have authority to oversee protection of endangered and threatened species.

However, narrow regulatory interpretations of section 6(g)(2) by the agencies implementing the ESA—the US Fish and Wildlife Service and the National Marine Fisheries Service (collectively "the Services")—have prevented Congress's intent from being fully realized. The result is that states, under the ESA, have largely been relegated to providing information as opposed to truly implementing species conservation.

Why it's important

This article contributes to the field of legal and policy scholarship by offering a uniquely comprehensive review of the ESA's legislative and regulatory history. This review clearly demonstrates that Congress intended for the federal regulatory agencies to cooperate with the states under the ESA and that the regulatory agencies refused to carry that intent forward.

This article further suggests that, rather than reform the ESA, the Services should implement new regulations. The federal government could apply the existing version of the ESA in such a way as to give states a more meaningful role in endangered species conservation, as Congress intended in 1973.

When Congress passed the ESA, it did so understanding that the federal government would not totally appropriate the protection of threatened and endangered species from the states. Instead, Congress intended that states with approved conservation programs under cooperative agreements with the Services would oversee the protection of threatened and listed species within their boundaries. As a result of 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.

Erosion of the states' cooperative role

1973	Congress passes the Endangered Species Act including Section 6, "Cooperation with the States"
1975	Fish and Wildlife Service issues regulations that fail to mention the states' authority to regulate take of listed species, described as a "missed opportunity"
1977	Congress amends ESA Section 6, narrowing the definition of cooperative agreements with the states
1979	Regulations from Fish and Wildlife Service reiterate that the cooperative agreement is simply meant to exempt state employees from take violations
1988	Congress amends ESA Section 6 to specify that the Interior Department will monitor all candidate and newly recovered species
1994	Services issue a policy to clarify communication channels with the states, again failing to provide meaningful opportunity to cooperate
2016	Services replace the 1994 policy with lofty language about conservation tools available to states, but again fail to offer the states a meaningful partnership

About the researcher

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Read the paper

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