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SENATE BILL 565

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

William F. Burt

AN ACT

RELATING TO THE ENVIRONMENT; REQUIRING THE STATE TO TAKE
PRIMARY RESPONSIBILITY FOR THE LISTING AND PROTECTION AND
MANAGEMENT OF ENDANGERED OR THREATENED SPECIES IN THE STATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 17-2-38 NMSA 1978 (being Laws 1974,
Chapter 83, Section 2, as amended) is amended to read:

"17-2-38. DEFINITIONS.--As used in the Wildlife
Conservation Act:

- A. "commission" means the state game commission;
- B. "director" means the director of the department
of game and fish;
- C. "ecosystem" means a system of living organisms
and their environment;
- D. "endangered species" means any species of fish

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1 or wildlife whose prospects of survival or recruitment within
2 the state are in jeopardy due to any of the following factors:

- 3 (1) the present or threatened destruction,
4 modification or curtailment of its habitat;
5 (2) overutilization for scientific, commercial
6 or sporting purposes;
7 (3) the effect of disease or predation;
8 (4) other natural or man-made factors
9 affecting its prospects of survival or recruitment within the
10 state; or
11 (5) any combination of the foregoing factors.

12 The term ~~[may also include any species of fish or wildlife~~
13 ~~appearing on the United States list of endangered native and~~
14 ~~foreign fish and wildlife as set forth in Section 4 of the~~
15 ~~Endangered Species Act of 1973 as endangered species, provided~~
16 ~~that the commission adopts those lists in whole or in part.~~
17 ~~The term shall not include any species covered by the~~
18 ~~provisions of 16 U.S.C. 1331 through 1340 (1971) and]~~ shall not
19 include any species of the class insecta determined by the
20 director to constitute a pest whose protection under the
21 Wildlife Conservation Act would present an overwhelming and
22 overriding risk to ~~[man]~~ humans;

23 E. "investigation" means a process pursuant to
24 Subsections B through L of Section 17-2-40 NMSA 1978 undertaken
25 whenever the director suspects that a species may be threatened

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1 or endangered and ~~[which]~~ that consists of a formal review of
2 existing data and studies and may include additional field
3 research to determine whether a species is threatened or
4 endangered;

5 F. "land or aquatic habitat interests" means
6 interests in real property or water rights consisting of fee
7 simple title, easements in perpetuity, time certain easements,
8 long-term leases and short-term leases;

9 G. "management" means the collection and
10 application of biological information for the purposes of
11 establishing and maintaining a congruous relationship between
12 individuals within species and populations of wildlife and the
13 carrying capacity of their habitat. The term includes the
14 entire range of activities that constitutes a full scientific
15 resource program of, including but not limited to, research,
16 census, law enforcement, propagation, acquisition or
17 maintenance of land or aquatic habitat interests appropriate
18 for recovery of the species; improvement and maintenance,
19 education and related activities; or protection and regulated
20 taking;

21 H. "recovery plan" means a designated program or
22 methodology reasonably expected to lead to restoration and
23 maintenance of a species and its habitat;

24 I. "peer review panel" means an advisory panel of
25 scientists, each of whom possesses expertise relevant to the

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1 proposed investigation and at least one of whom is a wildlife
2 biologist, convened to review the scientific methodology for
3 collection and analysis of data by a researcher based on
4 commonly accepted scientific peer review;

5 J. "species" means any species or subspecies;

6 K. "substantial public interest" means a
7 nonfrivolous claim indicated by a broad-based expression of
8 public concern;

9 L. "take" or "taking" means to harass, hunt,
10 capture or kill any wildlife or attempt to do so;

11 M. "threatened species" means any species that is
12 likely to become an endangered species within the foreseeable
13 future throughout all or a significant portion of its range in
14 New Mexico [~~the term may also include any species of fish or~~
15 ~~wildlife appearing on the United States list of endangered~~
16 ~~native and foreign fish and wildlife as set forth in Section 4~~
17 ~~of the Endangered Species Act of 1973 as threatened species,~~
18 ~~provided that the commission adopts the list in whole or in~~
19 ~~part~~]; and

20 N. "wildlife" means any nondomestic mammal, bird,
21 reptile, amphibian, fish, mollusk or crustacean or any part,
22 egg or offspring or the dead body or parts thereof."

23 SECTION 2. Section 17-2-39 NMSA 1978 (being Laws 1974,
24 Chapter 83, Section 3, as amended) is amended to read:

25 "17-2-39. FINDINGS AND DECLARATIONS.--The legislature

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1 finds and declares that:

2 A. species of wildlife indigenous to the state that
3 may be found to be threatened or endangered should be managed
4 to maintain and, to the extent possible, enhance their numbers
5 within the carrying capacity of the habitat;

6 B. the state should [~~assist in the management of~~]
7 manage species of wildlife that are deemed to be endangered
8 elsewhere by prohibiting the taking, possession,
9 transportation, exportation, processing, sale or offering for
10 sale or shipment within this state of species of wildlife
11 listed on the United States lists of endangered fish and
12 wildlife, unless such actions will assist in preserving or
13 propagating the species;

14 C. adequate funding should be made available to the
15 department of game and fish by annual appropriations from the
16 general fund or from other sources separate and apart from the
17 game protection fund for management of threatened or endangered
18 species; and

19 D. because the management and recovery of
20 threatened or endangered species are the responsibility of and
21 a benefit to all of society, the costs of management and
22 recovery should be the responsibility of all sectors of
23 society, and those costs should be minimized and should be
24 borne by federal, state and local governments with
25 contributions from the private sector."

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1 SECTION 3. Section 17-2-40 NMSA 1978 (being Laws 1974,
2 Chapter 83, Section 4, as amended) is amended to read:

3 "17-2-40. BIENNIAL REVIEW--INVESTIGATIONS--
4 RECOMMENDATIONS OF THE DIRECTOR--PROCEDURES.--

5 A. The director shall conduct a biennial review of
6 all species of wildlife named on the list required by Section
7 17-2-41 NMSA 1978. The director may conduct investigations at
8 any time of those other species of wildlife indigenous to the
9 state that are suspected of being threatened or endangered in
10 order to develop information relating to population,
11 distribution, habitat needs, limiting factors and other
12 biological and ecological data to determine [~~his~~]
13 recommendations for listing or not listing a species and
14 management measures and requirements necessary for [~~their~~] its
15 survival. The director shall also conduct, within a reasonable
16 time, an investigation to support listing or delisting [~~of~~] a
17 species based upon new evidence or, with the advice and consent
18 of the commission, based upon substantial public interest.
19 Upon completion of an investigation [~~or investigations, he~~],
20 the director shall make written recommendations to the
21 commission to list or not list any unlisted species or to
22 delist any listed species investigated. In conducting any
23 investigation for new listing or delisting required or
24 undertaken pursuant to this subsection, the director shall
25 comply with the procedures established in Subsections B through

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1 L of this section. [~~Species listed as threatened or endangered~~
2 ~~on the state list through adoption of the United States list~~
3 ~~pursuant to Subsections D and M of Section 17-2-38 NMSA 1978~~
4 ~~shall not be subject at the time of adoption to the listing~~
5 ~~procedures established in Subsections B through K of this~~
6 ~~section.~~]

7 B. The director shall select a researcher to
8 conduct an investigation pursuant to Subsection A of this
9 section and request the appointment of a peer review panel
10 composed of one qualified individual from each of the four-year
11 state universities to be appointed by the presidents of the
12 respective universities. The peer review panel shall be
13 requested to submit comments according to a schedule determined
14 by the director. The researcher shall submit [~~his~~] the
15 research design to the peer review panel.

16 C. When additional field research is undertaken as
17 part of an investigation, the peer review panel shall examine
18 the proposed research design for methodology for collection and
19 analysis of data. Upon receipt of the peer review panel's
20 submitted comments, the researcher shall initiate the field
21 research regarding the designated species.

22 D. To the extent practicable, as part of [~~his~~] the
23 researcher's investigation, the researcher shall meet and
24 consult with private landowners, lessees and land and resource
25 managers who are or may be affected by or have information

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1 pertinent to the investigation.

2 E. When the researcher initiates [~~his~~] the
3 investigation, the director shall:

4 (1) create a public repository file in which
5 copies of all documents filed with the director pertaining to
6 the investigation or a potential recovery plan, to be developed
7 pursuant to Section 17-2-40.1 NMSA 1978, including all peer
8 review comments, shall be maintained;

9 (2) mail a notice of the initiation of the
10 investigation to [~~federal and~~] state agencies and local and
11 tribal governments that are or may be affected by the results
12 of the investigation and individuals and organizations that
13 have requested notification of department actions regarding
14 threatened or endangered species;

15 (3) notify the general public of the
16 initiation of the investigation by information releases to the
17 media in the area of the state affected;

18 (4) indicate, in all notices and information
19 releases, where and until what date information may be
20 submitted for inclusion in the public repository file;

21 (5) accept data, views or information about
22 the biological or ecological status of the species for use in
23 both the investigation and the development of the potential
24 recovery plan; and

25 (6) accept data, views and information on the

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1 potential economic or social impacts or opportunities of a
2 change in the legal status of the species for inclusion in the
3 recovery plan.

4 F. The director shall file all written comments,
5 data, views and information furnished pursuant to Subsection D
6 of this section in the public repository file and shall
7 preserve that file for use in connection with the listing
8 process and development of any recovery plan developed pursuant
9 to the provisions of Section 17-2-40.1 NMSA 1978. The director
10 shall file in the public repository file all records indicating
11 contact by the director, the researcher, employees or
12 contractors with landowners or public or private resource
13 managers affected by the potential action.

14 G. Information from the public repository file
15 relating to social and economic impacts shall not be considered
16 by the director in making ~~[his]~~ a recommendation or the
17 commission in making its decision to list, delist, not list,
18 continue to list, upgrade or downgrade a species, but shall be
19 considered only in the development of any recovery plan for the
20 species.

21 H. The commission shall adopt, notwithstanding the
22 provisions of Section 14-2-1 NMSA 1978, regulations by January
23 1, 1996 governing the confidentiality of data from an
24 investigation.

25 I. The researcher shall prepare and submit draft

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1 reports to the peer review panel and to the public repository
2 file. The peer review panel will be requested to examine and
3 comment on the draft report in a timely manner.

4 J. After consideration of the peer review panel's
5 submitted comments on the draft reports, the researcher shall
6 prepare final reports and file them and all peer review panel
7 comments with the director and in the public repository file.
8 The peer review panel shall not be compelled to attend any
9 hearing before the commission.

10 K. Upon receipt of the researcher's final reports,
11 the director shall make recommendations to the commission to
12 list, not list or delist the species based upon criteria listed
13 in Subsection L of this section. The commission shall
14 establish dates and locations for public hearings on the
15 recommended actions and give notice of the public hearings in
16 the same manner and to the same persons as notice was given of
17 the initiation of the investigation and, in addition, publish
18 legal notice in a newspaper of general circulation in the area
19 affected at least ninety days before the date set for the
20 hearing. Public hearings shall be held at a place within any
21 quadrant of the state affected by the recommended actions when
22 the director determines that there is substantial public
23 interest indicated in holding a hearing in that quadrant. All
24 hearings on the recommended actions shall be held within six
25 months of the date the director makes [~~his~~] recommendations.

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1 The notice shall:

2 (1) include the date, time and location of all
3 hearings on the matter;

4 (2) include a statement of the recommended
5 action;

6 (3) include an indication of the location and
7 availability of the public repository file;

8 (4) indicate where and by what date written
9 comments and testimony to be included in the hearing record may
10 be filed;

11 (5) indicate that views, data and comments
12 pertaining to the final report may be presented orally at or in
13 writing to the hearing;

14 (6) specify that notice of intent to present
15 technical and scientific testimony and a written copy of the
16 testimony to be presented shall be submitted to the commission
17 not less than thirty days prior to the initial hearing; and

18 (7) specify that the public record shall
19 remain open for comments for thirty days after the date of the
20 final hearing.

21 L. The commission shall make its decisions and take
22 action based upon relevant and reliable evidence to list, not
23 list or delist a species at its next regularly scheduled
24 meeting within no more than thirty days after the close of the
25 hearing record. The commission shall:

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1 (1) list or maintain a species as endangered
2 and shall not delist a species if it finds that the species'
3 prospects for survival or recruitment within the state are in
4 jeopardy based upon the biological and ecological evidence in
5 the public repository file and based upon biological and
6 ecological evidence received in the public hearings; and

7 (2) list or maintain a species as threatened
8 and shall not delist a species if it finds that the species'
9 prospects for survival or recruitment within the state are
10 likely within the foreseeable future to be in jeopardy based
11 upon the biological and ecological evidence in the public
12 repository file and biological and ecological evidence received
13 in public hearings.

14 M. Whenever the director finds that there is an
15 emergency posing a significant risk to the well-being of any
16 species and that risk is likely to jeopardize the continued
17 survival or recruitment of the species within the state, the
18 director shall recommend to the commission that the species
19 should be listed as endangered. The commission shall act upon
20 the director's recommendation immediately and shall either list
21 or not list the species by regulation based upon the evidence
22 supporting the recommendation if it finds that the continued
23 survival of the species is in jeopardy. If the commission
24 lists the species as endangered, it shall waive the
25 requirements of Subsections A through L of this section.

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1 Whenever the commission adopts a regulation listing a species
2 as endangered pursuant to this subsection, it shall give notice
3 of the listing in the same manner and to the same persons as
4 notice is given in the initiation of investigations and in
5 addition shall publish legal notice in a newspaper of general
6 circulation in the area affected. The emergency listing shall
7 cease to have force and effect at the close of a three-year
8 period following the date of the finding unless, during the
9 three-year period, the procedures for listing pursuant to
10 Subsections B through L of this section or continuing to list
11 pursuant to commission regulations for the biennial review are
12 completed."

13 SECTION 4. Section 17-2-40.1 NMSA 1978 (being Laws 1995,
14 Chapter 145, Section 5) is amended to read:

15 "17-2-40.1. RECOVERY PLANS--PROCEDURES.--

16 A. To the extent practicable, a recovery plan shall
17 be developed pursuant to Subsections B through G of this
18 section for any species listed as threatened or endangered. If
19 indicated, the director shall conduct a social and economic
20 analysis and, if adverse impacts are found, develop a social or
21 economic mitigation plan.

22 B. To the extent practicable, the director shall
23 develop recovery plans that include several threatened or
24 endangered species that utilize similar habitats or share a
25 common threat or both. A multiple-species recovery plan shall

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1 be designed to accomplish recovery of the shared habitat or
2 reduce a common threat or both.

3 C. As the initial action in the development of a
4 recovery plan, the director shall, within one year of listing,
5 schedule a public information meeting in each of the quadrants
6 of the state determined by the director to be affected by the
7 development of a recovery plan. These meetings shall be held
8 in a manner calculated to provide a reasonable opportunity for
9 individuals and private and public entities to participate and
10 express their views about the development of a recovery plan
11 for one or more species and the attendant adverse social or
12 economic impacts, if any, that may result from implementation
13 of a recovery plan. At these meetings, the director shall
14 present background information about the basis of the listing,
15 an explanation of the process to develop a recovery plan and
16 the probable content in general terms, if known, of the
17 recovery plan and if needed, the process to develop a social
18 and economic mitigation plan.

19 D. Upon completion of the public information
20 [~~meeting or~~] meetings on a recovery plan, the director shall
21 consult and cooperate with other states or countries when
22 appropriate and shall solicit interest from representatives of
23 affected local governments, tribal governments, landowners,
24 state and federal agencies and other interested individuals and
25 organizations to serve on an advisory committee. [~~He~~] The

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1 director shall appoint to the advisory committee all of those
2 who are willing to participate in the development of the
3 recovery plan. When necessary, [~~he~~] the director may appoint
4 from the membership of the advisory committee a working group
5 reflecting the diversity of the advisory committee.

6 E. With the assistance of the advisory committee,
7 the director shall develop a draft recovery plan to achieve the
8 following objectives:

9 (1) restoration and maintenance of a viable
10 population of the threatened or endangered species and its
11 habitat reasonably expected to lead to the delisting of the
12 species;

13 (2) avoidance or mitigation of adverse social
14 or economic impacts;

15 (3) identification of social or economic
16 benefits and opportunities; and

17 (4) use of volunteer resources and existing
18 economic recovery and assistance programs and funding available
19 from public and private sources to implement the plan.

20 F. The director shall mail the draft recovery plan
21 to [~~federal and~~] state agencies and local and tribal
22 governments that are or may be affected by the recovery plan
23 and individuals and organizations that have requested
24 notification of department actions regarding threatened or
25 endangered species.

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1 G. The final recovery plan shall be presented to
2 the commission for its consideration not later than two years
3 from the date the species was listed. If the commission
4 determines that the proposed plan has achieved the objectives
5 set forth in Subsection E of this section, it shall approve the
6 recovery plan or approve with conditions. After approval of
7 the plan, the director shall seek cooperation with other states
8 and countries, when appropriate, and landowners, state and
9 federal agencies and local and tribal governments for
10 implementation of the recovery plan and when appropriate submit
11 the recovery plan to the secretary of the interior for approval
12 pursuant to the federal Endangered Species Act of 1973."

13 **SECTION 5.** Section 17-2-41 NMSA 1978 (being Laws 1974,
14 Chapter 83, Section 5, as amended) is amended to read:

15 "17-2-41. ENDANGERED SPECIES.--

16 A. On the basis of investigations concerning
17 wildlife and other available scientific and commercial data,
18 and after consultation with wildlife agencies in other states,
19 [~~appropriate federal agencies~~] with local and tribal
20 governments and with other interested persons and
21 organizations, the commission shall by regulation develop a
22 list of those species of wildlife indigenous to the state that
23 are determined to be threatened or endangered within the state,
24 giving their common and scientific names by species and
25 subspecies.

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1 B. The director shall conduct a review of the state
2 list of threatened or endangered species and shall present
3 biennially to the commission [~~his~~] recommendations for
4 appropriate action. The commission shall act on the director's
5 biennial recommendations at its next regularly scheduled
6 meeting. The commission shall adopt [~~no later than January 1,~~
7 ~~1996~~] regulations providing procedures for commission actions
8 on the director's recommendations to continue to list or to
9 upgrade or downgrade a species.

10 C. Except as otherwise provided in the Wildlife
11 Conservation Act, it is unlawful for any person to take,
12 possess, transport, export, process, sell or offer for sale or
13 ship any species of wildlife appearing on any of the following
14 lists:

15 (1) the list of wildlife indigenous to the
16 state determined to be endangered within the state as set forth
17 by regulations of the commission; and

18 (2) the United States lists of endangered
19 native and foreign fish and wildlife as set forth in Section 4
20 of the Endangered Species Act of 1973 as endangered or
21 threatened species, but only to the extent that those lists are
22 adopted for this purpose by regulations of the commission;
23 provided that any species of wildlife appearing on any of the
24 lists set forth in this subsection, transported into the state
25 from another state or from a point outside the territorial

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1 limits of the United States and [~~which~~] that is destined for a
2 point beyond the state, may be transported across the state
3 without restriction in accordance with the terms of any federal
4 permit or permit issued under the laws or regulations of
5 another state or otherwise in accordance with the laws of
6 another state.

7 D. The provisions of Subsection C of this section
8 shall not apply to a taking of wildlife by a Native American
9 for religious purposes, unless it materially and negatively
10 affects an endangered species or threatened species."

11 SECTION 6. Section 17-2-42 NMSA 1978 (being Laws 1974,
12 Chapter 83, Section 6) is amended to read:

13 "17-2-42. MANAGEMENT PROGRAMS.--

14 A. The director shall establish such programs,
15 including programs for research and the acquisition of land or
16 aquatic habitat, as authorized and deemed necessary by the
17 commission for the management of endangered species.

18 B. In carrying out programs authorized by the
19 Wildlife Conservation Act, the director may enter into
20 agreements with [~~federal agencies~~] political subdivisions of
21 the state or with private persons for administration and
22 management of any program established under this section or
23 utilized for management of endangered species.

24 C. The director may authorize by permit the taking,
25 possession, transportation, exportation or shipment of species

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1 or subspecies [~~which~~] that have been deemed by the commission
2 to be in need of management as provided in the Wildlife
3 Conservation Act, so long as such use is for scientific,
4 zoological or educational purposes, for propagation in
5 captivity of such wildlife or to protect private property.

6 D. Endangered species may be removed, captured or
7 destroyed where necessary to alleviate or prevent damage to
8 property or to protect human health. Such removal, capture or
9 destruction may be carried out only by prior authorization by
10 permit from the director, unless otherwise provided by law;
11 provided that endangered species may be removed, captured or
12 destroyed without permit by any person in emergency situations
13 involving an immediate threat to human life or private
14 property. Regulations governing the removal, capture or
15 destruction of endangered species shall be adopted by the
16 commission within one year after the effective date of the
17 Wildlife Conservation Act."

18 SECTION 7. EFFECTIVE DATE.--The effective date of the
19 provisions of this act is July 1, 2011.