



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

October 4, 1977

ATTORNEY GENERAL OPINION NO. 77-324

Mr. Jerry M. Conley  
Director  
Forestry, Fish and Game Commission  
Post Office Box 1028  
Pratt, Kansas 67124

Re: Forestry, Fish and Game--Nongame, Threatened and Endangered Species--Compliance With Federal "Endangered Species Act of 1973.

Synopsis: To the extent this office may determine, Kansas' "Non-game and Endangered Species Conservation Act," K.S.A. 1976 Supp. 32-501, et seq., satisfies the specified criteria for determining this state's eligibility for a Cooperative Agreement with the U.S. Fish and Wildlife Service pursuant to the federal "Endangered Species Act of 1973," 16 U.S.C. § 1535(c).

\* \* \*

Dear Mr. Conley:

Your recent letter indicates that before the state of Kansas may qualify for "grants-in-aid funds" pursuant to the Federal "Endangered Species Act of 1973" [16 U.S.C. § 1535(c)] a memorandum of law must be issued by this office concluding that Kansas as a matter of law has complied with the above identified federal act.

The delineated criteria a state conservation program must satisfy to qualify for grant-in-aid funds are found at 16 U.S.C. § 1535(c) which in pertinent part provides:

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"In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the *Secretary must find*, and annually thereafter reconfirm such finding, that under the State program--

(1) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(2) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(3) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(4) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered species or threatened species; and

(5) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened."  
[Emphasis added.]

We have reviewed U.S. Department of Interior, Assistant Solicitor for Fish and Wildlife, Mr. Ronald E. Lambertson's memorandum dated April 28, 1977, regarding the interpretations of the above quoted requirements, and believe it necessary to address our comments in part to the observations expressed therein.

Insofar as § 1535(c)(1) is concerned, the Kansas Legislature has authorized the Forestry, Fish and Game Commission (Commission) to provide for the conservation of every resident fish or wildlife species determined by the Commission or U.S. Fish and Wildlife Service (Service) to be endangered or threatened. K.S.A. 1976 Supp. 32-506 provides in pertinent part thus:

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"(a) The commission shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened or endangered species."

"Nongame species" is defined at K.S.A. 1976 Supp. 32-502(e) as:

". . . any species of wildlife not legally classified a game species, furbearer, threatened species or an endangered species by statute or by rule or regulation adopted pursuant to statute." [Emphasis added.]

K.S.A. 1976 Supp. 32-502(j) defines "threatened species" as:

". . . any species of wildlife which appears likely, within the foreseeable future, to become an endangered species. The term shall also include of wildlife determined to be a threatened species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and acts amendatory thereof." [Emphasis added.]

And, "endangered species" is defined in K.S.A. 1976 Supp. 32-502(d)

". . . any species of wildlife whose continued existence as a viable component of the state's wild fauna is determined to be in jeopardy. That term shall also include any species of wildlife determined to be an endangered species pursuant to Pub. L. No. 93-205 (December 28, 1973), the endangered species act of 1973, and acts amendatory thereof." [Emphasis added.]

As emphasized, *supra*, all three categories of wildlife falling within the legislative mandate directing their conservation employ

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the term "wildlife" which is broadly defined at K.S.A. 1976 Supp. 32-502(k) as

"any member of the animal kingdom, including, without limitation, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof."

It is also necessary to note the definition of "conservation" (as quoted *supra* in K.S.A. 1976 Supp. 32-506) as provided at K.S.A. 1976 Supp. 32-502(b)

"the use of all methods and procedures for the purposes of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such numbers. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, regulated taking and, when and where appropriate, the periodic or total protection of species or populations of wild life. With respect to threatened species and endangered species, the terms mean the use of all methods and procedures, including but not limited to those described above, which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to this act are no longer necessary."

It is clear upon review of the above legislative mandate to the Commission and definitions applicable thereto that the Commission is broadly authorized to provide for the conservation of resident species of fish or wildlife which are determined by the Commission or federal government to be endangered or threatened.

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Section 1535(c)2 requires the state to have an acceptable, active and adequate conservation program. Inasmuch as these terms appear to pivot upon questions of fact premised upon biological principles we can not opine as to this state's compliance therewith since such determination appears to rest solely with the Secretary of the Interior.

Section 1535(c) (3) requires the state agency to have authority to investigate to determine the status and requirements for survival of all resident species of fish and wildlife. K.S.A. 1976 Supp. 32-503 provides in part:

"The commission shall conduct investigations on nongame species in order to develop information relating to population, distribution, habitat needs, limiting factors and other biological and ecological data to determine conservation measures necessary for their continued ability to sustain themselves successfully."

While this covers in part the investigatory requirement, we note that it does not provide for investigation on *all* fish and wildlife since the definition for "nongame species" as noted above excludes game species and furbearers (as designated by rule or regulation adopted by statute.) These latter species however are subject to status investigations premised upon a necessarily implied power conferred by the provisions of K.S.A. 32-164 which states:

"The forestry, fish and game commission of the state of Kansas is hereby empowered and authorized to take such action as may preserve, introduce, distribute, restock, and restore wild birds, game birds, fish, bullfrogs, game animals and furbearing animals to the state of Kansas."

The provision of Section 1535(c) (4) expressly requires the state agency be authorized to acquire "land or aquatic habitat or interests therein" for the conservation of resident listed species. K.S.A. 1976 Supp. 32-506 provides in part that the

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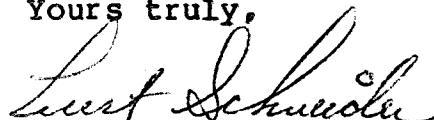
"[t]he commission shall establish such programs, including acquisition of land or aquatic habitat, as are deemed necessary for the conservation of nongame, threatened or endangered species." [Emphasis added.]

This provision while clearly providing for fee simple acquisition of property, necessarily implies authority to acquire interests less than fee simple to the end that the objectives of the act can be fully satisfied.

Last, Section 1535(c)(5) provides that the state must make provision to permit public participation in designating resident species of fish or wildlife or endangered or threatened. Suffice it to say that the express provisions of K.S.A. 1976 Supp. 32-504 fully satisfy in my judgment this requirement.

In light of the foregoing it is the opinion of this office that the Kansas Non-game and Endangered Species Act, K.S.A. 1976 Supp. 32-501 et seq. satisfies to the extent such can be determined as a matter of law the specified criteria for determining state eligibility for cooperative agreements with U.S. Fish and Wildlife Service pursuant to 16 U.S.C. § 1535(c). This conclusion must be qualified however insofar as this office cannot opine as to the acceptability of the state's program per § 1535(c)(2) which requires a factual determination resting uniquely with the Secretary of the Interior.

Yours truly,

  
CURT T. SCHNEIDER  
Attorney General

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