INTRASTATE SPECIES UNDER THE ENDANGERED SPECIES ACT

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Congress passed the Endangered Species Act (ESA) in 1973 to protect species at risk of extinction.[1] The federal government claims the Constitution's Commerce Clause, which gives the federal government the power to regulate economic activity between states, also grants it authority to regulate endangered and threatened species nationwide. Under the ESA, the federal government imposes regulations on property owners to protect species that live in a single state (i.e., intrastate), even when protected species have little to no impact on interstate commerce.[2]

PROHIBITING "TAKE"

One of the strongest ways in which the ESA protects endangered fish and wildlife in the United States is by prohibiting "take."[3] The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[4] Importantly, none of this regulated activity is economic or defined with reference to any economic activity.

The prohibition of take is often enforced through the regulation of property owners' activities. If the federal government determines that an endangered species, or a threatened species under an ESA "4(d) rule,"[5] lives on an individual's property, the government can restrict that person's right to use his or her property if such use would "harm" the species. Agencies have historically interpreted "harm" broadly to include activities that alter a species' habitat, as opposed to injuring the species directly.[6]

THE COMMERCE CLAUSE AND INTRASTATE SPECIES

The Constitution's Commerce Clause is the claimed authority for the federal government to enforce the ESA,[7] but legal experts have challenged the authority of the federal government to regulate species found only in one state and with no commercial value, like the Florida scrub jay or the Utah prairie dog.[8]

The ESA prohibits the take of species on private property for animals only, not for plants. As of June 2025, the US Fish and Wildlife Service lists 673 animal species extant in the United States.[9] These include species classified as endangered and threatened, as well as subspecies—geographically isolated populations of larger species—and species that closely resemble listed species (i.e., similarity of appearance).[10] For ESA enforcement, these are deemed distinct species.

Of the 673 animal species listed as endangered or threatened, 375 species (55.7 percent) reside in only one US state, and the other 298 species (44.3 percent) reside in either more than one state or in a US territory (see Figure 1a).[11] Of the 459 animal species listed as endangered, 273 reside in only one US state, and of the 214 threatened animal species, 102 reside in only one state (see Figure 1b).

By regulating intrastate species, the federal government burdens landowners, imposing penalties of up to $63,991 for each knowing take violation.[12] According to the US Supreme Court, only intrastate activity with a

FIGURE 1. INTRASTATE VERSUS INTERSTATE ENDANGERED AND THREATENED ANIMAL SPECIES

Figure 1a. Listing Status by Geographic Range

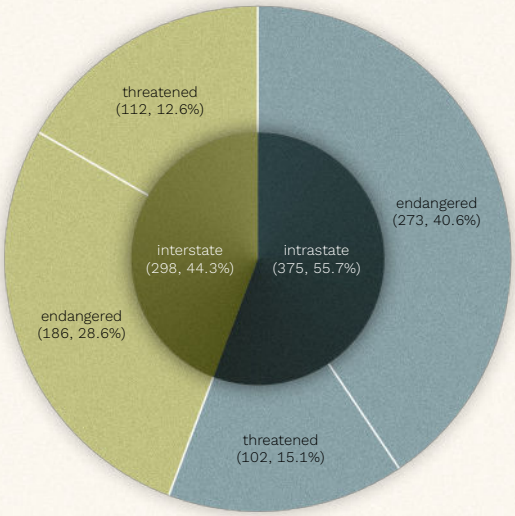
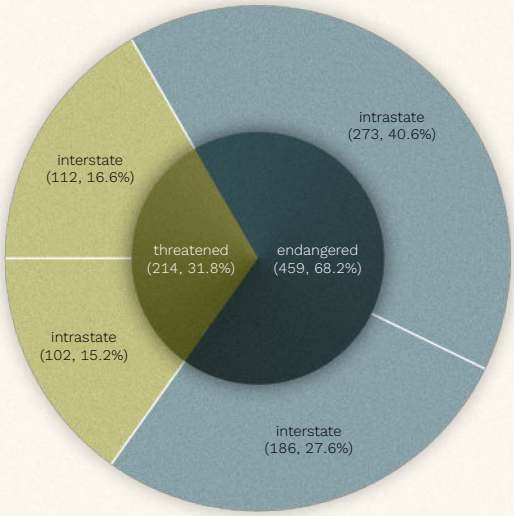


Figure 1b. Geographic Range by Listing Status



Note: "Interstate" includes species found in a US territory.
Source: US Fish and Wildlife Service, "FWS-Listed U.S. Species by Taxonomic Group - All Animals," Environmental Conservation Online System, accessed June 20, 2025, https://ecos.fws.gov/ecp/report/species-listings-by-tax-group?statusCategory=Listed&groupName=All%20Animals.

"substantial effect" on interstate commerce falls within the federal government's regulatory power.[13] No evidence exists of the substantial effect of isolated, intrastate species on interstate commerce. Yet these species account for almost 60 percent of the endangered and threatened species whose protection under the ESA introduces regulatory burdens for property owners.

NOTES

1. 16 U.S.C. § 1531–1544; US Fish & Wildlife Service, "Endangered Species Act," accessed June 20, 2025, https://www.fws.gov/law/endangered-species-act.
2. The authors thank Maxwell Steinberg and Tobias Russell for their contributions to data collection, as well as Will Yeatman and Damien Schiff for their feedback and expertise.
3. 16 U.S.C. § 1538(a)(1)(B).
4. 16 U.S.C. § 1532(19).
5. 16 U.S.C. § 1533(d).
6. Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16102 (April 17, 2025); Robert Gordon, "'Whatever the Cost' of the Endangered Species Act, It's Huge" (OnPoint No. 247, Competitive Enterprise Institute, August 21, 2018), 3, https://cei.org/studies/whatever-the-cost-of-the-endangered-species-act-its-huge/.
7. US Const. art. I, § 8, cl. 3.
8. Pacific Legal Foundation, "Florida County's Land Use Permit Extortion Is for the Birds—and Illegal," accessed October 16, 2025, https://pacificlegal.org/case/colosi-scrub-jay-exactions/; Pacific Legal Foundation, "Prairie Dogs and Property Owners: Both Need Protection from Massive Federal Overreach," accessed October 16, 2025, https://pacificlegal.org/case/people-for-the-ethical-treatment-of-property-owners-v-fish-and-wildlife-service/.
9. Four listed species are currently found in only foreign countries and are excluded from this total: white-necked crow, Bolson tortoise, olive ridley sea turtle, and thick-billed parrot. Experimental populations of species do not count as distinct species listings for purposes of enforcing the ESA, but the states in which those experimental populations are located are accounted for in the analysis. US Fish and Wildlife Service, "FWS-Listed U.S. Species by Taxonomic Group - All Animals," Environmental Conservation Online System, accessed June 20, 2025, https://ecos.fws.gov/ecp/report/species-listings-by-tax-group?statusCategory=Listed&groupName=All%20Animals.
10. 16 U.S.C. § 1533(e).
11. The federal government has significant authority to regulate US territories under the Property Clause of the US Constitution. US Const. art. IV, § 3, cl. 2.
12. 2024 Inflation Adjustments for Civil Monetary Penalties, 89 Fed. Reg. 7295 (February 2, 2024).
13. Wickard v. Filburn, 317 U.S. 111 (1942).