

## VI. PROTECTION OF WILDLIFE

**Producer Note:** Agricultural producers also have responsibilities concerning wildlife and migratory birds which may have habitat on the producer's property. Federal and state laws contain measures designed to protect or enhance wildlife or wildlife habitat.

### A. Federal Endangered Species Act

The Endangered Species Act<sup>50</sup> (ESA) is designed to protect endangered and threatened species from federally-funded or directed activities, including pesticide use and wetlands manipulation.

The ESA also prohibits private persons from taking any listed endangered or threatened species of animal without a permit or exemption which allows the taking. Taking is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting the animal. An intent to take the animal is a required element for a violation of the ESA. No reported cases involve the taking of animals by pesticide poisoning, but the U.S. Fish and Wildlife Service has taken administrative action against farmers and ranchers who kill

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<sup>49</sup> S.D. CODIFIED LAWS ANN. § 34A-2A-1 *et seq.* (1992 & Supp. 1996).

<sup>50</sup> 16 U.S.C. § 1531 *et seq.* (1994).

protected animals with meat illegally laced with pesticides. For example, in *Christy v. Hodel*,<sup>51</sup> a court upheld the authority of the U.S. Fish and Wildlife Service to assess penalties against livestock owners who deliberately killed grizzly bears, an endangered species, in order to protect their livestock.

**Producer Note:** An unlawful taking can result in serious criminal and civil penalties. Producers can apply for incidental taking permits if a contemplated activity might result in an inadvertent taking of a protected species. Permits are granted by the U.S. Fish and Wildlife Service.

The ESA makes it unlawful for anyone to import, take, possess, sell, deliver, or transport an endangered species of fish or wildlife or an endangered species of plant. Any person who knowingly violates the ESA is liable for a criminal fine of up to \$50,000 and up to one year of imprisonment. All other ESA violations, such as reporting violations, are subject to a criminal fine of up to \$25,000 and up to six months imprisonment.

Through FIFRA, mandatory limitations on pesticide use are included on pesticide labels and in county specific use bulletins. If a producer uses pesticides in an area where mandatory limitations exist, they need to follow the directions and limitations contained in the bulletins. Voluntary limitations on pesticide usage may also be employed to protect endangered and threatened species and are contained in interim pamphlets available through EPA.

**Producer Note:** The Endangered Species Act can be a powerful tool in the protection of wildlife and its habitat through the imposition of serious criminal and civil penalties for the destruction or harming of protected species. Producers must be aware of any endangered or threatened species existing on their property and take steps to ensure that activities do not harm those species.

## B. Federal Migratory Bird Treaty Act

**Producer Note:** Treaty provisions like those which protect migratory birds will be taken into account by regulatory officials when making certain determinations. For example, these provisions will be considered by an agency when determining whether to grant or deny permits for concentrated animal feeding operations.

The Migratory Bird Treaty Act<sup>52</sup> implements conventions between the United States and Canada, Japan, Mexico, and the former USSR for the protection of migratory birds. Birds

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<sup>51</sup> 857 F.2d 1324 (9th Cir. 1988), *cert. denied* 490 U.S. 1114 (1989).

<sup>52</sup> 16 U.S.C. § 703 *et seq.* (1994).

protected under the Act are not necessarily endangered. The Act provides that, except as permitted by regulation, it is unlawful to pursue, hunt, take, capture, or kill any migratory bird. Violation of the Act is a misdemeanor with penalties including fines up to \$500 and imprisonment up to six months. Federal courts have split on the question of whether intent must be present in order to impose liability under the Act in cases where birds have been poisoned by pesticides.<sup>53</sup>

### C. State Wildlife Protection Laws and Regulations

**Producer Note:** Many states have additional measures which either enhance protections under federal laws or address issues peculiar to wildlife found within the state. These states also may address common problems caused by wildlife. South Dakota has laws protecting wildlife.

In South Dakota, an endangered species is a species of plant or animal which is threatened with extinction throughout all or much of its range, other than an insect species determined to be a pest and the protection of which would pose a significant risk to man.<sup>54</sup> The Department of Game, Fish, and Parks (DGFP) is required to develop lists of endangered species, and reevaluate the lists on a biennial basis.

Possession, taking, transporting, or engaging in commerce of a listed species is a misdemeanor, unless it enters the state from another region under a permit. An endangered species may be held under a permit granted by the Secretary of Agriculture or the Secretary of Game, Fish, and Parks for scientific, zoological, or educational reasons or for propagation.

A permit may be obtained to destroy a listed species upon a showing of good cause and where it is found necessary to alleviate damage to property or to protect human health.

**Producer Note:** What constitutes good cause to destroy a listed species has not been addressed by the courts of South Dakota, but it is generally held to be a substantially or legally sufficient reason for doing something. Producers are advised to contact DGFP for a determination if in doubt.

Listed carnivores may be removed or destroyed in an emergency without a permit, but a report must be filed within 24 hours of the action.

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<sup>53</sup> See *United States v. Van Fossan*, 899 F.2d 636 (7th Cir. 1990) and *United States v. Rollins*, 706 F. Supp. 742 (D.C. Idaho 1989).

<sup>54</sup> S.D. CODIFIED LAWS ANN. § 34A-8-1 *et seq.* (1992 & Supp. 1996).

Currently extinct species may not be reintroduced into the state without specific authorization from the legislature in each instance. Permits may also be obtained to kill wild animals, including wolves, which are damaging property.<sup>55</sup>

South Dakota allows the use of blinds and decoys in the hunting of migratory game birds, and has consented to the acquisition of land by the federal government to protect land and water habitat for these birds under the Migratory Bird Conservation Act.<sup>56</sup>

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<sup>55</sup> S.D. CODIFIED LAWS ANN. § 41-6-29 (Supp. 1996).

<sup>56</sup> S.D. CODIFIED LAWS ANN. §§ 41-8-33 *and* 41-3-6 (1991 & Supp. 1996).

<sup>57</sup> Federal Agricultural Improvement and Reform (FAIR) Act of 1996, P.L. 104-127.