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OPINION NO. 85-43

February 18, 1985

Mr. Harold K. Grimmett
Executive Director
Arkansas Natural Heritage Commission
Suite 500, Continental Building
Little Rock, Arkansas 72201

RE: ELIGIBILITY OF ARKANSAS FOR A LIMITED AUTHORITIES
PLANT COOPERATIVE AGREEMENT

Dear Mr. Grimmett:

The purpose of this letter is to set forth the bases upon which the Arkansas rare plant conservation program qualifies for federal financial assistance under Section 6(c)(2) of the Endangered Species Act. Based on our review of the provisions of the Endangered Species Act, 16 U.S.C. §1531 et seq (1983 Supp.), and the Arkansas Environmental Quality Act of 1973, Ark. Stat. Ann. 9-1401--9-1418 (1983 Supp.), we believe that the Commission is eligible to enter into a limited authorities cooperative agreement for plant conservation under Section 6 of the Endangered Species Act. To qualify for limited authorities agreement for plants, the following three criteria must be met:

- (1) the relevant state agency must be authorized to conduct investigations to determine the status and requirements for survival of resident species of plants. 16 U.S.C. §1535(c)(2)(C);
- (2) provision must be made for public participation in designating resident species of plants as endangered or threatened. 16 U.S.C. §1535 (c)(2)(d); and
- (3) plans must be included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs. 16 U.S.C. §1535 (c)(2)(D)(ii).

Under the Endangered Species Act, a state agency is defined as "any state agency, department, ... or other a state." 16 U.S.C. §1532 (18). The Natural Heritage Commission is responsible for protecting rare plant species in Arkansas pursuant to the Environmental Quality Act. Ark. Stat. Ann. SS 9-1404--9-1418. That act established the Commission, Ark. Stat. Ann. 1404, and empowers it to identify, acquire, and protect natural areas within the state, including areas containing habitat for rare plant species. As will be discussed below, the Commission in administering the Environmental Quality Act meets each of the criteria specified above and therefore is eligible to enter into a limited authorities cooperative agreement for plant conservation.

1. Investigation Authority.

This criterion requires that the state agency have adequate authority to investigate the status and survival requirements of resident species of plants. The Commission clearly meets this requirement. In administering the Arkansas Natural Areas System, the Commission is authorized, inter alia, "to maintain an inventory of habitats of rare, vanishing, or endangered species, subspecies, or populations of plants ...; to conduct research and investigation ... pertaining to natural areas and to the system; (and) to investigate, promote, advise and assist in the preservation, protection, and management of natural areas; ..." Ark. Stat. Ann. 9-1409 (f)(g)(i). In determining whether particular natural areas shall be acquired, the department must consider for inclusion in the system "areas containing habitat for rare, vanishing or endangered species, subspecies, or populations of animals or plants." Inasmuch as the Commission is empowered to inventory and evaluate such areas on both private and public land in order to determine whether they should be protected, it is also authorized to investigate the status and survival requirements of all native plant species occurring on private, state and federal lands. Clearly, in order for the Commission to identify, acquire and manage natural areas which contain habitat for rare plant species, it must determine the status and requirements for survival of rare plants within and without such natural areas.

2. Public Participation.

This criterion requires that provision be made for public participation in the designation of resident species of plants as endangered or threatened. This requirement is apparently only important when the state agency designates resident species as endangered or threatened independently from the federal list. In such instances, it must provide for notice and comment rulemaking or public hearings in the designation process. (See, Memorandum Opinion From

Associate Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, U.S. Fish and Wildlife Service, April 9, 1980.)

There is no statute in Arkansas which expressly mandates compilation of a state list of endangered and threatened plant species. However, the Natural Heritage Commission has administratively established such a list. The Commission can fully satisfy this second criterion by agreeing to sign a cooperative agreement which provides for public participation in the process of designating endangered or threatened species, and in the process of acquiring natural areas containing rare plant species.

For those natural areas recommended for acquisition because of the presence of plant species believed to be endangered or threatened, the question of whether or not to acquire the area turns largely on a determination whether the species in such area is endangered or threatened. If it is agreed at a public hearing that the plant species of concern is indeed endangered or threatened, then the recommended area would be acquired thereby conferring protection to such species. The relevant state agencies in Colorado and South Carolina, on the basis of similar provisions for public participation, fully satisfied this second criterion by agreeing to sign a cooperative agreement which specifically provides for public participation in the process of acquiring areas containing rare plant species. (See, Memorandum Opinion from Associate Solicitor, Fish and Wildlife, to Associate Director, Federal Assistance, U.S. Fish and Wildlife Service, April 14, 1980.)

3. Plans for Immediate Conservation Attention.

This criterion requires the Commission and the U.S. Fish and Wildlife Service, acting in behalf of the Secretary of the Interior, to agree on those state and federally listed species in Arkansas that are most urgently in need of conservation programs. The Commission must then provide plans for immediate attention to the conservation of these species. While the determination of which plant species in Arkansas are most urgently in need of conservation requires a biological evaluation, we must determine whether the State's authorities are adequate to provide immediate attention to the conservation of such species.

We believe that the Environmental Quality Act provides ample authority to the Commission to develop and implement plans for the conservation of endangered and threatened plant species in Arkansas. Although this Act does not expressly

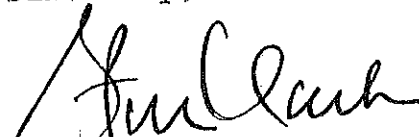
authorize the Commission to control interstate or intrastate commerce in listed plant species, it provides sufficient authority to protect rare plants from commercial exploitation by empowering the Commission to acquire natural areas and control all activities therein, including taking of rare species. In any event, that conservation authority is not necessary to satisfy this third criterion because those plant species not urgently in need of conservation in Arkansas are not threatened principally by commercial exploitation but rather by habitat destruction. The Commission is broadly empowered to redress such threats.

The Commission is authorized to acquire and protect "Areas containing habitat for rare, vanishing, or endangered species, subspecies, or populations of animals or plants", Ark. Stat. Ann. §9-1410(c) by purchase, gift, devise, grant, dedication or otherwise. Ark. Stat. Ann. §9-1409(b), (c). To that end, it is empowered to establish and enforce policies, rules and regulations for the "selection, acquisition, management, protection, and use of the system, as it may find necessary or appropriate to preserve the lands or interests therein ...". Ark. Stat. Ann. §9-1409(d), (h). Once such areas are acquired or interests therein dedicated, they must be protected and may not be alienated or encumbered unless the Commission finds that the particular change is required by "imperative public necessity, that there is no feasible and prudent alternative thereto, and that all possible planning has been done to minimize harm caused to the system thereby." Ark. Stat. Ann. §9-1413, 9-1414. Although the Commission's regulatory jurisdiction is ultimately limited to acquired or dedicated natural areas and plants therein, Ark. Stat. Ann. §9-1409(f), it should be emphasized that because the Commission has authority to identify and protect such areas, it can provide immediate attention to the conservation of rare plant species. For this reason, we conclude that the Commission satisfies this third requirement.

4. Conclusion.

Based on the foregoing analysis of the Arkansas rare plant protection program with the requirements of Section 6(c)(2) of the Endangered Species Act, we conclude that the Natural Heritage Commission is eligible to enter into a limited authorities cooperative agreement for the conservation of plants.

Sincerely,


STEVE CLARK
Attorney General