

Texas Landowners' Guide to the **ENDANGERED SPECIES ACT**

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Listing an animal or plant as “threatened” or “endangered” under federal law can impact the lives of landowners, ranchers, and farmers. Unlike states where much of the land is publicly owned, Texas is roughly 97 percent privately owned. For this reason, successful conservation efforts in Texas require private landowners and government agencies to work together.

The preservation of plants and animals in peril of disappearing is a concept many Texans support. The Endangered Species Act (hereafter ESA), however, can lead to worry among landowners affected by its provisions. Most agricultural producers are dedicated stewards of the land, but some do not fully understand the ESA and its potential effect on them. This can lead to animosity, suspicion, and a failure to achieve conservation goals.

The increasing number of species protected under ESA has been cause for concern among Texas landowners and agricultural producers. Early on, the ESA provided few options for protecting traditional land use practices. Today, however, options exist that allow landowners to continue the same land management practices

that have made their property a haven for these imperiled animals. Unfortunately, misinformation, bad experiences, and confusion regarding the law can cause unwarranted alarm for Texas landowners.

The following is a guide to the Endangered Species Act in terms that are understandable and relevant to the general public.

Overview of the ESA

The Endangered Species Act of 1973 is a federal law aimed at preserving sensitive ecosystems and human quality of life for future generations.



Figure 1. Ocelot. Photo by João Carlos Medau, CC-BY-2.0.

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Figure 2. Golden-cheeked Warbler. Photo by the U.S. Fish and Wildlife Service National Digital Library.

Since the beginning, the complex task of conserving imperiled species through the ESA has been a subject of conflict and controversy. This is likely because of the law's authority to protect the habitat of imperiled species, which is often on private lands. The ESA has undergone many changes and additions to address conflicts between landowner interests and species' habitat protections. The various provisions of the ESA explored below can help landowners understand their options and opportunities when dealing with a protected, or soon to be protected species on private land.

The U.S. Fish and Wildlife Service (FWS) is in charge of enforcing the ESA and has state and multistate regional offices (see the "Agency Contacts" section below for offices in Texas).

What defines protected species and how do they get listed?

Species protected under the ESA can be listed as either "endangered" or "threatened." An endangered species is considered to be at a high risk for extinction throughout a significant portion of its range. A threatened species is likely to become endangered in near future.

Species for listing are proposed from within the FWS or are, more often, petitioned by an outside individual or group. If an outside petition is filed, the FWS reviews the petition and

publishes a 90-day rule that the petition either does or does not "present substantial scientific or commercial information indicating that the petitioned action may be warranted" in the Federal Register (www.regulations.gov). If the petition is found to warrant action, the FWS begins a more rigorous status review for the species. For this level of review, the FWS requests information on the biological status and threats to the species in order to evaluate its eligibility for protection under ESA. This eligibility is based on the following five factors.

- The present or threatened destruction, modification, or curtailment of its habitat or range
- Over-utilization for commercial, recreational, scientific, or educational purposes
- Disease or predation
- The inadequacy of existing regulatory mechanisms
- Other natural or man-made factors affecting its continued existence

If any of these factors apply to the species in review, according to the best scientific information available, then the species is eligible for protection under the ESA. The conclusion from this review is presented in a "12-month finding" proposed rule published in the Federal Register, and a public comment period begins. The FWS can propose any of the following four options:

- Endangered
- Threatened
- Not warranted
- Warranted but precluded-species meets requirements for protection but protection is impeded by the protection of species that having a higher listing priority, precluded species are placed on a candidate list and will be re-evaluated in the future

After the proposed rule is published in the Federal Register, individuals and interested parties can submit their comments to the FWS or request the FWS host a public meeting. If there is no delay or major alteration to the proposed rule after 12 months, the FWS publishes a "Final Rule" designating protection under the ESA or withdrawing the Proposed Rule.

What is against the law once a species is listed under the ESA?

It is unlawful to harass or kill as well as destroy or disturb the habitat of a threatened or endangered species. This is described as “take” which means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” The term “harm” includes significant modification or degradation to habitat used by the species during any part of its life cycle.

Unless a special rule is passed that relaxes the normal regulations for a threatened species listed under the ESA, this classification is treated the same as one listed as “endangered.”

When the ESA was implemented in the 1970s, all the activities that resulted in the actions listed in the paragraph above were against the law, with no immunities or exceptions. However, several modifications have been made to the ESA that create exceptions for landowners. Many of these options and programs were a direct outgrowth of unexpected situations that caused hardship to landowners who were currently conserving the species with their management techniques. Lawmakers recognized that, in those situations, ESA was having the opposite effect than the one intended. Over the decades, the federal government recognized this problem, and worked to

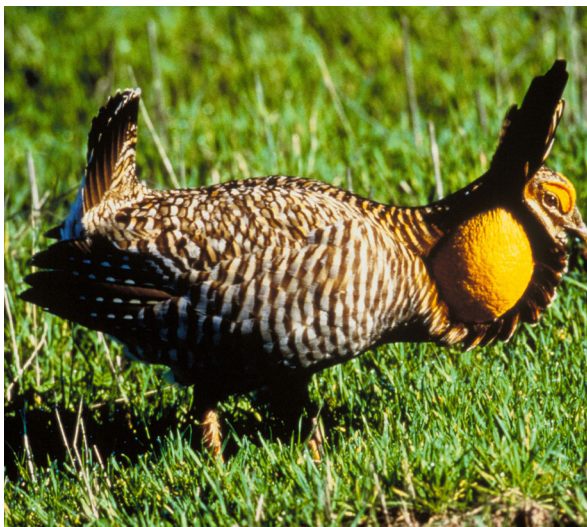


Figure 3. Attwater's Prairie Chicken. Photo by the U.S. Fish and Wildlife Service National Digital Library.

strike a balance between enforcing the law and rewarding landowners for stewarding listed species. Options were introduced to provide exceptions to qualified landowners. These are discussed next.

What is critical habitat and how does it affect me?

The most controversial situation surrounding the ESA involves the “critical habitat” designation. The term critical habitat for a threatened or endangered species means “the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection.” When a species is deemed to warrant protection under the ESA, the FWS also makes a rule on (1) if habitat exists that is essential to the species’ conservation and (2) where that habitat is located. The public review and comment period for critical habitat rules can be combined with the listing decision or addressed separately afterward.

The issue of critical habitat has been controversial because the public has misunderstood what exactly it is and historically the FWS has explained it poorly. The fact is that the critical habitat designation primarily affects Federal agencies—it adds a more rigorous consultation process for management or modification of habitat on public lands.

Critical habitat does not affect private landowners who are undertaking activities that do not require federal permits, funding, or approval.

However, if the private landowner is using federal funding or authorization, then it must be reviewed by the FWS and an Incidental Take Permit (ITP) may be needed.

How does a species get off the endangered species list?

Under ESA the FWS should review the list of endangered species every five years to determine whether a species needs to remain on the list or be down-listed from endangered to threatened, or delisted all together.

As of 2013, only one percent of species protected by the ESA have been delisted; however, 90 percent of protected species are considered to be recovering. Delisting occurs when a species is said to be extinct, recovered, or new viable populations are discovered that were not known before the species listed under ESA. The recovery process is often rigorous and requires each species meet the recovery goals laid out in its individual recovery plan.

ESA listing: Where does the landowner fit into the process?

There are a few ways a landowner can be involved in the process when species are proposed for listing under the ESA. For example, the landowner can contact their U.S. Congressional representatives. Citizens are also given the opportunity to comment directly to the FWS during the written comment period, either by letter to the appropriate FWS office or online (www.regulations.gov), as well as at public meetings. However, public meetings are not automatic in the listing process and typically occur only when requested.

Additionally, before a species is listed, landowners can consider voluntary collaborative conservation efforts. Recently, several ESA decisions that proposed species listings were reversed because of collaborative conservation efforts involving state and federal entities, landowners, and other conservation organizations. These programs are called Candidate Conservation Agreements (CCAs) or Candidate Conservation Agreements with Assurances (CCAAs). Under these programs, landowners can voluntarily participate in the preservation of candidate species by providing their land for habitat conservation. Landowners do this in order to prevent species listings under the ESA which could potentially trigger the regulatory burdens. Information on CCAs and CCAAs is provided on the next page.

Finally, if a species on a landowner's property is listed under ESA, the landowner should carefully review actions taken on the land to deter-



Figure 4. Houston toad. Photo by the U.S. Fish and Wildlife Service National Digital Library.

mine if they meet the broad definition of take—actions prohibited under the ESA. Landowners should also consider various tools and programs available to help with conservation and land use after species are listed. These programs and additional information are included on page 5.

Conclusions

Where does a landowner go from here? The best advice is to stay involved, aware, and proactive. The goal of all agencies involved is to prevent a species from becoming listed under ESA, and if listed, to get it delisted as quickly as possible. In recent years, volunteer conservation efforts to prevent a species of concern from listing have been encouraged by USFWS, and have seen great success, especially in the western states.

As we have learned since ESA was passed, hasty moves without landowner input are some of the worst. Although we must follow the law, conservation ethics from landowners have done more good than any set of laws. Stay involved with the regulatory process, and work with agency staff and lawmakers. A landowner knows their land better than any government biologist or policymaker ever could, and their input is critical to making sure that species that need help get it.

Private landowner options

Program	Description	Managing Organization(s)
Before ESA listing		
Candidate Conservation Agreement (CCA)	Voluntary agreements between landowners, federal agencies, and one or more other parties to reduce or remove threats to candidate species by preserving or improving habitat.	FWS
Candidate Conservation Agreement with Assurances (CCAAs)	Voluntary agreements between landowners, federal agencies, and one or more other parties to reduce or remove threats to candidate species by preserving or improving habitat. These agreements differ from CCAs in that they offer landowners assurances that if they implement specified conservation actions, they will not be subjected to additional restrictions if the species goes on to be listed under the ESA.	FWS
Partners for Fish and Wildlife Program	Voluntary program designed to help protect, enhance, and restore wildlife habitat on private lands for select candidate species by providing technical and financial assistance to landowners.	FWS
Post ESA listing		
Safe Harbor Agreement (SHA)	Provides regulatory assurances to landowners that voluntarily protect or improve endangered or threatened species habitat under a specified agreement, within a specified term. At the end of the agreement, the landowner can return the property to its originally agreed upon baseline conditions even if that means endangered species are incidentally taken.	FWS
Habitat Conservation Plan (HCP)	Allows the permitted take of species that are protected under the ESA through protection or improvement of habitat that occurs elsewhere. The plan is drafted, approved, and implemented under an Incidental Take Permit (ITP) when an ESA protected species is being taken under the ESA. HCPs must include the likely impacts to the species, the steps the permit holder will take to avoid, minimize, and mitigate the impacts to the species, and the funding that will be used to carry out the HCP for its duration. HCPs can be small and privately managed or large and publically managed. Mitigation can also be done through conservation banks.	FWS
Non-ESA specific		
Conservation Easement	Voluntary legal agreements between a private landowner and a private nonprofit organization or land trust whereby the landowner essentially gives up future development rights, which are transferred to the organization in order to protect certain desirable features of their land in perpetuity. This is done according to the landowner's wishes and can provide significant tax benefits.	Nonprofit or Land Trust
Landowner Incentive Program (LIP)	This is a program funded under Partners for Fish and Wildlife intended to provide technical and financial assistance to Texas landowners in order to enact good conservation practices on their land. Conservation practices that enhance ESA listed species in prioritized watersheds are given highest priorities but projects that could benefit other imperiled species are also considered.	TPWD and FWS
Farm Bill	Funding for agricultural producers that participate in conservation practices	U.S. Department of Agriculture

Glossary

Conservation bank: A parcel or parcels of land managed to provide for endangered or threatened species. If an entity wishes to engage in activity that may harm listed species or their habitat, they must first purchase credits in a conservation bank, thereby providing for conservation of the species at the bank, and offsetting the damage they will do elsewhere.

Critical habitat: Specific geographic areas that contain features essential to the conservation of an endangered or threatened species and may require special management and protection. Critical habitat may also include areas that are not currently occupied by the species but will be needed for its recovery.

Endangered: An animal that is in danger of extinction throughout all or a significant portion of its range.

Incidental Take Permit (ITP): A permit issued under Section 10 of the ESA to private, non-federal entities undertaking otherwise lawful projects that might result in the take of an endangered or threatened species.

Recovering: A species whose current range and/or abundance is projected to allow it to be removed from listing under ESA in the foreseeable future.

Recovery plan: A detailed plan set down by agencies, biologists, researchers, managers, and landowners that provides guidelines for a listed species to regain the range extent or abundance such that it is no longer at risk of extinction.

Take: Actions that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species.

Threatened: An animal that is likely to become an endangered species in the foreseeable future.

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