

An Overview of the Endangered Species Act

Tiffany Dowell Lashmet

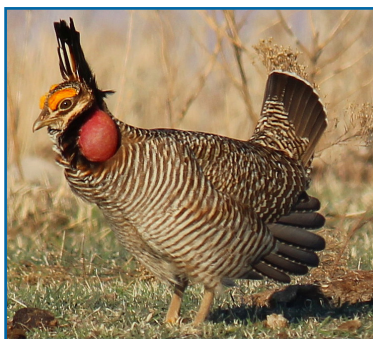
Assistant Professor and Extension Specialist, Texas A&M AgriLife Extension Service

The lesser prairie-chicken, the New Mexico jumping mouse, and the Gunnison sage-grouse are three of the more recent additions to the United States Fish and Wildlife Service (FWS) endangered species list. Although we often hear about the Endangered Species Act (ESA) in the news, many people know little about the law and how it works. The following overview highlights the basics of the act and the impact the listing of animal or plant species can have for landowners, farmers, and ranchers.

Prohibition of Take

Passed by Congress in 1973, the ESA requires the FWS or the National Marine Fisheries Service¹ to identify species of wildlife and plants (except for pest insects) that are endangered or threatened.

The act also prohibits “take” of a listed animal without a federal permit. Take is defined as “to harass, harm, pursue, hunt, shoot, wound,



Lesser prairie-chicken. Photo credit: Greg Kramos/FWS



New Mexico jumping mouse. Photo credit: FWS



Gunnison sage-grouse. Photo credit: Mike Danzenbaker/FWS

kill, trap, capture, or collect or attempt to engage in any such conduct.” It may include significant habitat modification that kills or injures wildlife by impairing their essential behavior. Take can also be an act or omission that creates the likelihood of injury to the species by annoying it to such an extent that it disrupts normal behavior such as breeding, feeding, or sheltering. As these definitions make clear, the ESA prohibits a broad range of conduct.

Unlike animal species, listed plants are not protected from take, but collecting or maliciously harming such plants on federal lands is prohibited.

Categories of Species

Under the ESA, a species is categorized as endangered or threatened. An endangered species is in danger of extinction throughout all or a significant portion of its range. A threatened species is likely to become endangered within the foreseeable future.

¹ Because the National Marine Fisheries Service deals only with marine animals, this publication refers to the FWS in discussing responsibility under the ESA.

As of January 2013, the FWS has listed 2,054 species as endangered or threatened worldwide, 1,436 of which are in the United States, and 110 of those are in Texas.

Animals may also be designated as an experimental population, which is a listed species (threatened or endangered) that is reintroduced into their former range. Animals included in experimental populations may be protected by FWS rules, if passed in keeping with Section 10(j) of the ESA, but are not given full protection under the act. Because a listed species reintroduced into native areas receives only protections passed under Section 10(j), the protections may differ for each experimental population.

Animals not yet listed under the ESA may be categorized as a candidate species. In this case, the FWS has sufficient information on biological status and threats to propose listing a plant or animal as threatened or endangered, but such regulation is not yet possible due to other, higher-priority listing activities. Candidate species receive no protection under the ESA, although certain programs such as Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAA) (discussed below) encourage the protection of these species to prevent future listing.

Determination of Listing

The FWS considers five factors when determining whether to list a species:

- ◆ Present or threatened damage to, modification of, or destruction of, a species' habitat;
- ◆ Overuse of the species for commercial, recreational, scientific, or educational purposes;
- ◆ Disease or predation;
- ◆ Inadequacy of existing protection; or
- ◆ Other natural or manmade factors that affect the species' continued existence.

The FWS must base the listing determination on the best available scientific information and commercial data, including the consideration of efforts

made by states or subdivisions of states to protect the species. The economic impact of listing a species may not be considered in the listing determination.

Although the ESA allows more flexibility in regulations related to threatened species, the ESA and federal regulations stipulate that threatened and endangered species be treated the same, unless the FWS rules otherwise. The FWS may pass a rule relaxing the normal ESA protections for a threatened species under Section 4(d), which allows necessary regulations to conserve a threatened species. However, without an FWS rule in agreement with Section 4(d), a threatened species is treated the same as an endangered species.

The ESA provides that the FWS should review the endangered species list every 5 years to determine whether a species should remain on the list or its designation be changed from threatened to endangered or endangered to threatened. Delisting or downlisting occurs only if the FWS finds that the species is extinct, is no longer threatened or endangered and does not require the protection of the ESA, or the original data used to list the species was erroneous.

Initiation of the Listing Process

The listing process for a species is initiated either by the FWS or by a petition from any person or organization. The FWS publishes a notice in the *Federal Register* identifying the species (which is then considered to be a candidate species), collects biological data, and allows public comment. Within 90 days, the FWS must make a finding of whether the petition action may be warranted. If it is, the agency begins review of the species, and within 1 year must make a finding that the petition is not warranted, is warranted and should be published in the *Federal Register*, or is warranted but precluded from listing (meaning that the species is already being considered for listing and has a higher priority). A 6-month extension is permitted if there is substantial disagreement in the scientific community as to the appropriateness of the listing.

The FWS has seen a significant increase in such petitions over the last several years. Between 1994 and 2006, the FWS considered, on average, 17 petitions per year covering 20 species. Between 2007 and 2011, the agency received requests to add more than 1,230 species to the list of threatened and endangered species.

Critical Habitat

Once a species is listed under the ESA, the FWS must designate critical habitat for the species when “prudent and determinable.” This critical habitat includes geographic areas that contain the physical or biological features essential to conserving the species and may need special protection.

Unlike a listing determination, the FWS is required to consider the economic impact of the decision, the impact to national security, and any other impacts when designating a critical habitat. An area can be excluded as a critical habitat if an economic analysis finds the benefits of excluding it outweigh the benefits of including it, unless not designating the area as a critical habitat may lead to the extinction of the species.

Federal agencies or federally funded permit activities, but not individual actions, are required to avoid the destruction or adverse modification of critical habitat and any associated penalties. Agencies must consult with the FWS to review whether agency actions might impact the listed species.

Tools for Private Landowners

According to the FWS, two-thirds of listed species have at least a portion of their range on private land, and some have most of their range on private property. In light of this, the FWS has developed a variety of programs and tools private landowners can use to balance their property rights with protecting listed species.

◆ *Candidate Conservation Agreement*

A Candidate Conservation Agreement seeks to conserve a species before it is listed under

the ESA and applies only to candidate species. These voluntary agreements between the FWS and interested parties (such as landowners, lessees, states, and federal agencies) allow the parties to the agreement to work to reduce or remove threats to the candidate species to avoid its listing. The participants agree to implement conservation measures designed to protect the particular species. These agreements are voluntary and do not contain any assurances or protections to the parties if their goal is not met and the species is eventually listed under the ESA.

◆ *Candidate Conservation Agreement with Assurances*

Similar to a CCA, a CCAA allows parties to work with the FWS on a conservation plan to avoid listing a species under the ESA. It differs from a CCA, however, in two important ways. First, a CCAA is available only to private, non-governmental landowners. Second, in return for the landowner developing and implementing a conservation plan, it provides an Enhancement of Survival Permit as well as assurances that if a species covered by the CCAA is eventually listed, the parties will not be required to take additional conservation measures beyond those in the CCAA. Also, they will not be liable for incidental take of the species or habitat modification if related to CCAA activities.

◆ *Habitat Conservation Plan*

Landowners wishing to develop property that listed species occupy may receive a permit for take incidental to other legal activities if they have developed a Habitat Conservation Plan. This permit, commonly referred to as an incidental take permit, allows a person who creates and follows a Habitat Conservation Plan to avoid liability for take that occurs while carrying out an approved activity.

The required Habitat Conservation Plan includes an assessment of the likely impact the

proposed development will have on the species, steps the permit holder will take to avoid such impacts, funding available to carry out the plan, and an explanation of why alternative actions are not implemented. Once a plan is developed and an incidental take permit issued, the FWS may not require additional funding or resources due to changed or unforeseen circumstances.

◆ **Safe Harbor Agreement**

A Safe Harbor Agreement allows landowners to voluntarily improve or maintain the habitat of the listed species. In return, the FWS provides assurances that land use restrictions will not be imposed even if conditions change during the agreement term. Landowners receive an Enhancement of Survival Permit that authorizes incidental take actions for activities allowed under the Safe Harbor Agreement. Landowners must enroll their property and manage it during the term of the agreement, but may return it to agreed-upon baseline conditions at the end of the agreement, even if doing so results in incidental take of the listed species.

◆ **Recovery Implementation Programs**

A Recovery Implementation Program (RIP) is a voluntary, multistakeholder plan that usually involves federal agencies and funding. Under an RIP, the parties seek to balance natural resource use and development with the recovery of an endangered species.

◆ **Conservation Banks**

A conservation bank involves land permanently protected as habitat for a listed species in order to offset the loss of such land elsewhere. A landowner may obtain mitigation credits when he or she enters into a Conservation Bank Agreement with the FWS. Under the agreement, the landowner agrees to protect and manage their land for one or more species. In return, the landowner receives the credits, which may be sold to others who need to mitigate for harmful impacts for the same species on their land in order to meet their mitigation requirements.

Penalties

Penalties for knowingly violating the ESA include up to a \$25,000 civil fine per violation. A person may also face imprisonment for up to 1 year and a fine up to \$50,000.

For more information

U.S. Fish and Wildlife Service, Endangered Species Act Document Library at <http://www.fws.gov/endangered/esa-library/>

U.S. Fish and Wildlife Service, *ESA Basics* at http://fws.gov/endangered/esa-library/pdf/ESA_basics.pdf

Crowell Moring, *The Endangered Species Act: An Overview* at <http://www.crowell.com/files/the-endangered-species-act-an-overview-crowell-moring.pdf>

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