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Endangered Species Act

What Landowners Should Know

By Charles E. Gilliland

After two previous Congressional acts failed to slow the extinction rates of endangered species, the Endangered Species Act (ESA) of 1973 enshrined species protection as the ultimate societal objective. Species preservation trumped all other considerations, even existing social and economic programs.

***MANY TEXAS LANDOWNERS** became personally acquainted with the Endangered Species Act when the Golden-Cheeked Warbler was added to the federal endangered species list. This warbler winters in Mexico and Central America but nests and breeds only in the juniper-oak woodlands of the Texas Hill Country.*

This uncompromising approach encountered vigorous opposition as the act took effect and unanticipated restrictions inhibited planned projects. After a tiny fish — a snail darter — initially killed the Tellico Dam project in Tennessee, the ESA came under the glare of the media spotlight. Public policy began to soften the act by creating some exceptions. The incidental take permit, which resulted from 1983 revisions to the ESA, opened the door to development even in the presence of endangered species.

In the 1990s, as newly designated species gained ESA protection, landowners facing enforcement of the ESA raised a series of highly publicized challenges. Political fallout from those confrontations has prevented renewal of the act since 1993. However, Congress continues to appropriate funds for ESA enforcement, and it remains in effect. Some current and potential landowners, fearing applications of what they refer to as the "Darth Vader" of environmental law, continue to regard ESA enforcement as a potentially debilitating regulatory straightjacket. They see ESA restrictions as a threat to the profitable use of their land.

In view of continued opposition, policy makers continue to search for regulations that can preserve endangered species while accommodating reasonable land uses. Consequently, the ESA regulatory framework now includes an array of measures designed to facilitate landowners' plans and protect endangered species.

ESA Basic Provisions

The U.S. Fish and Wildlife Service (FWS) of the Department of the Interior and the National Marine Fisheries Service (NMFS) administer ESA for both land- and marine-based species. According to the FWS, Texas could provide habitat for 82 endangered and 16 threatened species. Texas species range from the blue whale, two of which were reported to have beached on the coast at different times, to the coffin cave mold beetle.

Endangered or threatened status provides species a broad range of protections that can severely restrict how landowners can use their property. Many Texas landowners' objections to the ESA resulted from the uncertainty they faced concerning use of their property after the FWS listed the Golden-Cheeked Warbler as endangered. To comply with the ESA and maximize property potential, landowners must understand what the act does and does not allow.

Taking an endangered species violates the law, according to section 9(a)(1)(B) of ESA. Most people interpret *take* to mean capturing or killing an endangered plant or animal. However, 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." Through regulation, the FWS further defined *harm* to include any activity that "actually kills or injures wildlife" and incorporates actions "significantly impairing essential wildlife behavioral patterns, including breeding, feeding, or sheltering." In the *Sweet Home* decision, the U.S. Supreme Court upheld this broader interpretation of take (115 S. Ct. 2407 [1995]).

Most litigation addressing landowner activities under the ESA has focused on differing Congressional and FWS and NMFS interpretations of harm. The First Circuit Court has ruled that harm means actually killing or injuring wildlife and requires proof of past or present injury. The Ninth Circuit, however, has ruled that harm includes actions that are "reasonably certain" to cause injury in the future. The U.S. Supreme Court has not explicitly chosen between these conflicting standards.

WEBSITES

Endangered species in Texas
http://ifw2es.fws.gov/EndangeredSpecies/lists/

Endangered species, all states
http://ecos.fws.gov/webpage/webpage_usa_lists.html?state=all

Texas Parks and Wildlife Department
http://www.tpwd.state.tx.us/nature/endang/endang.htm

Little or no litigation has addressed the other elements of the take definition. For example, no rulings have established the meaning of *harass* under the ESA. However, activity that adversely impacts existing habitat qualifies as a take and, in the areas subject to Ninth Circuit jurisdiction, activity that may destroy habitat in the future may also be a take. Texas is in the Fifth Circuit, which has not yet seen litigation testing these specific issues dealing with the meaning of *harm*. Therefore, Texas landowners do not know which standard may apply.

Landowners running afoul of the take provision face both civil and criminal penalties from $25,000 to $50,000 per violation. Criminal penalties could include up to one year in prison.

Because the ESA allows both the U.S. Attorney General and private citizens to seek an injunction to prevent the taking of an endangered species, landowners face the prospect of both government and private individual intervention. Under the act's language, each action that takes an endangered species could result in imposition of a penalty. An incident that results in the deaths of several members of an endangered species thus could be considered separate violations, each requiring a separate penalty.

The broad scope of the ESA and the substantial penalties for breaching it make it a critical consideration for both current and prospective landowners. Land market participants would undoubtedly prefer to be able to apply a standardized checklist to determine if a given property contains critical habitat. This would allow them to evaluate the potential for restrictions on a property's use.

Each endangered species has unique habitat requirements, however, making it necessary to judge the potential for land use restrictions on a case-by-case basis. To assess the likelihood of future complications, landowners and land buyers should investigate the ecosystem surrounding a property to identify the possible presence of endangered or threatened species. It may be prudent to involve a specialist in endangered species at this step.

Planned activities that will result in a take, such as land development, generally require a permit from either the FWS or the NMFS. Landowners and prospective buyers must identify which activities are prohibited by the ESA. The FWS and NMFS can assist in determining which, if any, proposed actions are likely to result in a take.

THE TEXAS BLIND SALAMANDER *and the Houston Toad are among Texas species protected by the ESA.*

If the land is in an area with no listed species, ESA restrictions do not apply. If listed species inhabit the region, however, landowners may well discover protected habitat on their land. Land with extensive habitat may be effectively placed off-limits to any use other than habitat for endangered species. But the ESA has evolved to allow some exceptions to the Section 9 take prohibition. These options vary depending on the species' status within the listing process.

BREACHING THE ESA *still carries substantial penalties, but landowners now have options that may help them comply with the act and maintain profitable use of their land.*

Candidate Conservation Agreements

Candidate species are those that may eventually be proposed for listing as endangered. Landowners in areas inhabited by candidate species can enter into a Candidate Conservation Agreement (CCA) with the FWS or NMFS. Under ESA provisions, landowners can obtain regulatory guarantees from the services by protecting habitat prior to listing. These owners can voluntarily enter into a CCA that allows an incidental take if and when the species is listed.

The ESA defines an incidental take as one that is "incidental to . . . the carrying out of an otherwise lawful activity." An owner with an incidental take permit legally could engage in activities that destroy habitat in the course of using that property for an otherwise legal pursuit.

In negotiating the agreements, the FWS or NMFS strives for land management practices that would make species listing unnecessary if used by all landowners in the area. In return for employing these practices, owners receive a guarantee that they will not face more onerous measures should the endangered listing eventually occur. If an incidental take occurs after a listing, but the landowner remains in compliance with the terms of the CCA, the owner can continue to use those specified practices. The CCA limits much of the uncertainty the landowner faces regarding the identified species and possibly contributes to species recovery without listing.

Safe Harbor Agreements

The potential restrictions on land use associated with the ESA make many landowners reluctant to expand or enhance habitat on their properties. Owners fear that if they attract larger numbers of threatened or endangered species, they may be required to maintain the habitat at that higher level to avoid possible ESA penalties.

The FWS, in an effort to encourage rather than discourage voluntary land management practices that could aid in species recovery, offers the Safe Harbor program. Landowners signing Safe Harbor Agreements can improve habitat without fear of facing punitive action if they later choose to discontinue their extra efforts. The NMFS offers a similar form of protection.

Habitat Conservation Plans

While Safe Harbor Agreements do not normally allow an incidental take of the endangered species, a landowner may apply for a Habitat Conservation Plan (HCP) with the FWS or NMFS to obtain an Incidental Take Permit (ITP). The HCP process, created under Section 10 of the ESA, seeks to balance endangered species protection with economic development activities on a specified property.

The plan mandates practices the landowner must follow to secure the ITP. Once the HCP is in place, the landowner is able to undertake activities consistent with the plan even if an incidental take of protected species results. The landowner also may negotiate to avoid further management and mitigation requirements under the so-called "No Surprises" rule, which establishes the maximum requirements an owner will face, even if the FWS and the NMFS begin to impose stricter requirements on other landowners.

The FWS and NMFS have pledged to conduct the HCP application review process as expeditiously as possible. However, the process can be lengthy, depending on the potential effect on the species in question. An application may require specialized scientific studies and opinions such as environmental assessments or environmental impact statements.

After the landowner submits the application, the FWS or NMFS publishes an announcement in the *Federal Register*. Next, the public reviews and comments on the HCP application and the FWS and NMFS evaluate the comments. Other documentation including an Implementation Agreement and Environmental Action Memorandum plus a legal review of the application may be required.

The FWS or NMFS must verify that the plan will "to the maximum extent practicable, minimize and mitigate the impacts . . .", that there will be adequate funding to complete the plan, and that the HCP will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The agency also provides guarantees that the plan will be implemented. Even after the HCP is approved, third parties can sue if they consider it inadequate, adding to both the delay and

expense of the process. The entire application process may take several years in complicated situations.

Entities such as cities, counties and citizen groups can negotiate an HCP to cover a geographic region. The City of Austin and Travis County secured an ITP to cover habitat for the Golden-Cheeked Warbler, Black-Capped Vireo and more than 30 invertebrates in Travis County. The ITP was issued in connection with the HCP creating the Balcones Canyonlands Conservation Preserve (BCCP) in Travis County.

Landowners within western Travis County have the option of cooperating with the BCCP to obtain access to its ITP rather than submitting their own applications. Landowners can proceed with development after the BCCP approves their application. Fees range from $55 to $5,500 per acre. Before applying for an individual HCP, landowners can contact the Transportation and Natural Resources Department of Travis County to determine whether this option would be less expensive and time consuming.

Landowners and landbuyers must be aware of the consequences of violating the take provisions of ESA. The FWS and the NMFS have created mechanisms to allow private landowners to comply with the ESA while making profitable use of their property. The prudent landowner should consider engaging experts with experience in filing applications for the various permits available to them. Despite efforts to simplify the process, landowners wishing to develop areas with habitat for threatened or endangered species must anticipate potentially costly and lengthy time delays.

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