



The Endangered Species Act and Texas: A Look Ahead

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Key Points

- The federal Endangered Species Act provides an antiquated and hidebound statutory framework for protecting endangered species. It is economically harmful without substantial environmental benefit.
- Between now and 2018, the federal government will decide whether to list 1,000 new species under the ESA, including around a 100 species in Texas.
- Texas has successfully resisted listings using a combination of litigation and voluntary conservation plans that protect landowner confidentiality and private property rights.

Introduction

The economy of Texas has thrived in recent years. Whether through vibrant cities, a booming oil and gas industry, or continued strength in manufacturing and agriculture, development has been strong.

Yet today, that prosperity is imperiled by an unusual source. Whether it is infrastructure, residential expansion, or the development of water supplies or oil and gas, endangered species regulations have proven time and again to be a formidable obstacle to development. And with the number of listed species in Texas likely to increase dramatically, the state needs to prepare itself for the challenges ahead. This paper looks at some of the dangers that ESA listings pose to Texas' continued success, and, more importantly, suggests how the state can move forward to meet these challenges without jeopardizing economic growth.

How the ESA Works

Enacted by Congress in 1973, the goal of the Endangered Species Act is "to halt and reverse the trend toward species extinction, whatever the cost."¹ This absolutist approach is reflected in the text of the ESA. Under the Act, species may be added to an official "endangered" or "threatened" list if the federal government determines them to be under threat of extinction. Listing decisions are made by the U.S. Fish and Wildlife Service or, in some cases, by the National Marine Fisheries Service (collectively "FWS"). However, in addition to government initiated listing decisions, individuals or organizations may also petition the agencies

to consider listing of a particular species, and may file lawsuits to compel them to do so.

A species may be determined to be endangered or threatened because of any of the following factors: 1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.²

If FWS does not find a species to be endangered, it may instead list a species as "threatened" if it determines the species is likely to become endangered in the foreseeable future. Once a species has been listed, FWS must also designate the species' "critical habit," which are the specific geographic areas necessary to sustain the species.

The decision whether to list a species as endangered must be "based solely on the best scientific and commercial data available."³ Note: the standard is based on the "best scientific and commercial data available." There is no requirement that the data meet any minimum standards for quality or reliability. Listing decisions may be and are made based on incomplete or low quality scientific data if no better data is available. In keeping with the ESA's "whatever the cost" approach, economic considerations can play no role in the listing decision.*

* By contrast, in designating a species' critical habitat, FWS may "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. §1533(b)(2).

How the ESA Hurts

Official listing under the ESA has been largely ineffective in helping species recover. In the 40 years since the ESA was enacted, only 2 percent of listed species have recovered to the point that they qualify for delisting. And some of these cases have been based on errors by FWS in deciding to list in the first place. For example, FWS listed as endangered the Johnson frankenia, a species of Texas plant, claiming that only 1,500 specimens remained in existence. Subsequent to listing, however, FWS discovered that their estimate was slightly off. In reality, there are more than 4 million individual Texas frankenia plants. Despite this, FWS did not move to delist the species for more than a decade.⁴

But while FWS has been ineffective at helping endangered species to recover, it has been quite effective in blocking needed infrastructure and industry. Listing can result in broad regulatory restriction on private land use by the federal government. For this reason, the ESA is increasingly used by environmental activists to limit development.

In 2010, for example, a group of environmentalists brought suit against the Texas Commission on Environmental Quality (TCEQ), claiming that TCEQ's management of Texas surface waters had led to the deaths of several dozen endangered whooping cranes. According to the suit, diversion of surface water under vested water rights authorized by TCEQ had increased the salinity of the freshwater inflows into Aransas Bay in the lower Guadalupe River basin. Higher salinity, argued the plaintiff, reduced the blue crab population in the area that served as a major food source for the migratory whooping cranes. Of the 23 claimed bird deaths at issue in the case, only four were based on discovered carcasses. The other 19 deaths were estimated by comparing bird sightings in 2008-2009 to numbers from previous years, and assuming that any reduction was due to death. The following year, FWS' population survey indicated that 19 new birds mysteriously showed up.⁵

Nevertheless, in March of 2013, a federal district court in Corpus Christi found that TCEQ was legally responsible for the death of the birds, and ordered an immediate halt to new water permitting in the Guadalupe and San Antonio River basins. The district court decision was ultimately reversed on appeal Fifth Circuit Court of Appeals. Yet had the decision stood, it would have mooted most of the water projects

listed in Region L of the State Water Plan (which includes San Antonio). The environmental plaintiff plans to take this suit to the U.S. Supreme Court.

To see how things might have turned out very differently, one need only to look westward to California, which is facing its own severe drought conditions right now. The acute water shortages occurring in California are caused, in large part, by the release of huge volumes of water from reservoirs on behalf of the welfare of the purportedly endangered Delta Smelt. An initial analysis by Berkeley Economic Consulting found that the short run economic damage alone from the diversions could be as much as \$3 billion a year during drought periods.⁶ The diversions have been particularly hard on farmers in California's Central Valley. Unemployment in the city of Mendota, to give one example, exceeds 40 percent.⁷

Environmentalists are now preparing to use the same tactics to thwart the oil and gas industry. According to recent reports, efforts are underway to stop export of fracked natural gas along the South Texas coast by citing the potential effects on the endangered ocelot, a species of wild cat.⁸

ESA-imposed restrictions have also hampered disaster relief efforts. In 2011, fires in Bastrop County burned 34,000 acres of land and destroyed 1,700 homes. The cost of clearing debris alone was in the millions. Yet progress on the debris removal was delayed due to concerns that "soil disturbance" caused by removal of dead trees would affect the endangered Houston Toad during its mating season. Bastrop County Commissioners estimate that accommodating the toad doubled the county's cost and time. The largest population of the Houston Toad resided in Bastrop State Park, 98 percent of which was consumed by the fire.⁹

Ironically, the Houston Toad is not the only example of ESA making natural disasters worse. According to a recent report by the Endangered Species Act Congressional Working Group, ESA litigation has "increased the federal government's inability to control catastrophic wildfires."¹⁰

The working group found that in Montana, lawsuits by environmentalists aimed at blocking habitat improvement have resulted in the accumulation of driftwood and unhealthy vegetation, leading to the area being identified as at a "sig-

Case Study: The Dunes Sagebrush Lizard



The best recent example of how to defeat a proposed ESA listing involves the Dunes Sagebrush Lizard. The lizard's habitat spans 745,000 acres running from West Texas to parts of southeastern New Mexico, and includes the Permian Basin that is at the heart of Texas' recent oil and gas boom. In 2010, FWS proposed adding the lizard to the endangered species list, based on claims that increased oil and gas production in critical habitat areas threatened the lizard's long term survival.¹¹ A listing could have proven a major obstacle to the continued success of Texas' energy boom.

In response to the proposed listing, voluntary habitat conservation plans were developed for the affected regions in both Texas and New Mexico. In Texas, research efforts were launched and coordinated by the Interagency Taskforce on Economic Development and Endangered Species, a group created by the state legislature to help with the response to ESA candidate listings.* Utilizing this research, Texas developed a voluntary conservation plan aimed at protecting the lizard without disrupting oil and gas production. Under the Texas plan, individual landowners voluntarily entered into a contractual arrangement agreeing to implement and maintain various conservation measures, such as removing abandoned service roads, fencing, and equipment, establishing preservation lands, and monitoring habitat areas to determine the effectiveness of the mitigation efforts. The agreed to conservation measures were aimed at avoiding activities that would degrade habitat, and mitigating habitat loss where it occurred. Importantly, the agreements protected landowner confidentiality, and minimized habitat disruption without disrupting oil and gas production.

By contrast, both the New Mexico state plan and a separate plan developed by the Bureau of Land Management (which governs federal land in New Mexico) relied on preventing oil and gas development in habitat areas as a main conservation strategy. These different approaches likely reflect the much larger amounts of federally owned land in the affected New Mexico area versus the overwhelmingly private land affected in Texas.

In 2012, FWS withdrew its proposal to list the lizard. FWS concluded, based on scientific research conducted in response to the proposed listing, that "more than 50 percent of the dunes sagebrush lizard's habitat is not fragmented, and provides adequate core habitat."¹² Citing the conservation plans as adequately protective, FWS also determined that listing was no longer necessary or appropriate because "current habitat conditions will be maintained or improved," for the foreseeable future.¹³

In 2014, this decision was upheld by the federal courts. The court rejected environmentalist arguments that the confidentiality provisions of the Texas plan prevented FWS from evaluating whether the plan was effective. The court noted that "Because the Texas Plan limits habitat loss within each level, and because the amount of habitat enrolled in each level is known, the FWS can monitor losses within each quality level, thereby protecting the most critical areas."¹⁴

** The Task Force is presided over by the Comptroller of Public Accounts and includes input from the Departments of Agriculture, Transportation, Parks and Wildlife, and the State Soil and Water Conservation Board.*

nificant risk of wildfire." The ESA has also limited the use of wildfire-fighting technologies, such as aerial retardant heavily mechanized equipment, and has restricted the use of water in some fire-fighting efforts "due to concerns about potential impacts to other ESA-listed species, such as salmon."¹⁵ Of course, endangered species are themselves at risk from wildfires. As noted in the report: "Endangered species

habitat destruction was a reality last year, when the Arizona Game and Fish Department noted that two major fires resulted in the destruction of 20 percent of Mexican spotted owl nests known to exist in the world."¹⁶ But the hidebound strictures of the ESA make no allowances for such unintended consequences.

Danger Ahead

The challenges from currently listed species are already substantial. But they could become much worse in the near future. As noted above, listing proposals under the ESA may be initiated by petitions filed by private activist groups. Over time, a flood of petitions by environmentalist groups has led to a large backlog of candidate species. In 2011, FWS entered into a court-approved, multi-year work plan to make final determinations by 2018 on over 1000 species that are the subject of environmentalist driven listing petitions. Currently, 1215 species are listed as “endangered” by FWS, while an additional 348 are listed as “threatened.”¹⁷ Thus, FWS’ settlement has the potential to nearly double the number of listed species in the next four years.

More than 100 of these species are in Texas. Every county in Texas contains habitat for at least two of these species, and some counties contained as many as 29.*

How to Fight Back

Attempts to rein in the ESA have been varied. At the federal level, political will has been building for ESA reform. In August, the U.S. House of Representatives passed HR 4315, the Endangered Species Transparency and Reasonableness Act. HR 4315 requires data used by federal agencies for ESA listing and proposed listing decisions to be made publicly available and accessible. The bill also requires the interior secretary to report and comprehensively track all litigation costs associated with the Act. Furthermore, the bill caps hourly fees paid to attorneys that prevail in cases filed under ESA, consistent with current law.

The ESA is a much weaker law politically than many people realize. In fact, the law has not been reauthorized in several decades. Congress annually appropriates funds without an authorizing bill because less than half of Congress supports the ESA in its current form. Yet while reforming the ESA will ultimately require Congressional action, there are things Texans can do to prevent or limit the damage from additional species listings.

First, because listing decisions are made based on the best “available” science, research can play a pivotal role in fighting back against listings. In 2009, the Texas Legislature created the Interagency Taskforce on Economic Development

and Endangered Species, which conducts research into the economic impacts of potential listings and coordinates strategy for protecting species without harming economic growth. When FWS announced its listing plans for the Dunes Sagebrush Lizard, this task force was able to quickly coordinate scientific research on the lizard’s habitat. This privately funded research was key to avoiding federal listing of the lizard.

Second, where conservation plans are developed, multiple plans—including voluntary landowner implemented plans—are preferable to a single state driven plan. No state agency will ever have the same incentives to protect private property and enterprise as the affected landowners and industries themselves. Long experience shows that no conservation plan can be successful if it doesn’t have the support of the landowners themselves. The state’s role should be to foster robust science, alternative plans and voluntary collaboration between landowners, industry, academia, and government, rather than in dictating a one size fits all approach.

Finally, legal challenges can and should be used to fight listing decisions when necessary. Yet even a successful legal challenge can drag on for years, doing potentially severe damage in the interim. Where possible, it is better to fight a listing before it happens, or to defend a FWS decision not to list, then it is to try to reverse a FWS decision to list in court.

The Wrong Approach

During the last legislative session, legislation was filed that would have restructured the state’s response to listings. HB 3509 would have given the Texas Park and Wildlife Department (TPWD) an expansive authority to enable and enforce federal land use controls on private land under the Endangered Species Act (ESA). Such regulatory authority over basic land use—like grazing, brush clearing or constructing drilling pads—has been long denied to the TPWD.

Texas differs from both the federal government and some other states in that state law does not provide regulatory authority for an endangered species protection program. Several state statutes do prohibit the killing, hunting, or trapping of any species on the state’s Nongame, Exotic, Endangered, Threatened & Protected Species list, but violation is a misdemeanor offence with a modest fine of a couple hundred

* A list of these species adapted from data on the Texas Comptroller’s website is included as an appendix.

dollars. These few statutory provisions do not require affirmative obligations on landowners to protect habitat.

By contrast, HB 3509 would have transformed TPWD from a state agency respecting private property rights and promoting voluntary private conservation to an agency which enforces federal mandates. The bill stipulated that TPWD “shall provide the state’s scientific response to proposed [species] listings.” Because science drives decisions under the ESA, HB 3509 would have made TPWD’s wildlife biologists the ultimate authority for the state’s response to candidates for ESA listing.

House Bill 3509 would have been the wrong approach for Texas. As the example of the Dunes Sagebrush Lizard non-listing shows, the current framework is working. Effective conservation plans can be developed and coordinated within the state’s existing inter-agency task force without going through any single state agency. Further, by transforming TPWD into a regulatory enforcer of FWS rulings, the bill would have created an adversarial relationship between TPWD and landowners. This would inevitably have eroded the trust necessary not only to effectively respond to official listings, but also to promote voluntary conservation on private land.

HB 3509 was vetoed by the governor. Nevertheless, during the interim TPWD began in certain respects to operate as if the bill had become law. A case in point is TPWD’s involvement in efforts of the Western Association of Fish and Wildlife Agencies to develop a multi-state conservation plan for the Lesser Prairie Chicken, another potentially listed species. The plan could encumber 41 million acres of land across five states, 7.8 million acres of which exist in Texas. This Western Association—not the state of Texas—would sign and oversee implementation of the plan in Texas. TPWD would implement on the ground. All this despite the fact that Texas law does not give TPWD jurisdiction over federally listed endangered species.

Conclusion

If properly executed, Texas has the capacity to effectively stem the tide of the nearly 100 pending ESA listings, blunting the impact on the state’s social and economic life. To do this, however, the state cannot afford to rely on any single strategy. Pursuing a decentralized approach will allow the nimbleness needed to protect any genuinely threatened wildlife, private property rights, and the economic engine that remains vital to the state’s prosperity. ★

Endnotes

- ¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).
- ² 16 U.S.C. §1533(a)(1).
- ³ 16 U.S.C. §1533(b)(1)(A).
- ⁴ 76 Fed. Reg. 66018 (25 Oct. 2011).
- ⁵ Lee Wilson, "Analysis of the Science: The Whooping Crane Decision," Texas Public Policy Foundation (May 2013).
- ⁶ "Economic Impacts of the Wanger Interim Order for Delta Smelt," Berkeley Economic Consulting (8 Dec. 2008).
- ⁷ Paul Feine, "Delta Smelt vs. Central Valley Farmers: The Battle Continues," Reason (29 Feb. 2012).
- ⁸ Asher Price, "Environmental clash in South Texas city: Gas exports over ocelots?" *Austin American Statesman* (27 Oct. 2014).
- ⁹ Kathleen White, "Of Toads and Humans in the Aftermath of the Bastrop Fire," *Washington Examiner* (16 Mar. 2012).
- ¹⁰ "Report, Findings and Recommendations," Endangered Species Act Congressional Working Group (4 Feb. 2014).
- ¹¹ Proposed Rule: Endangered and Threatened Wildlife and Plants; Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77,801, 77,813 (14 Dec. 2010).
- ¹² Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872, 36,887-89 (19 June 2012).
- ¹³ *Ibid.* at 36,895.
- ¹⁴ *Defenders of Wildlife v. Jewell*, No. 2013-0919 at 17 (D.C. Cir. Sept. 30, 2014).
- ¹⁵ *Ibid.*
- ¹⁶ *Ibid.*
- ¹⁷ "Summary Listed Species, Listed Populations, and Recovery Plans as of Friday 31 Oct. 2014," U.S. Fish & Wildlife Service Environmental Conservation Online Service (accessed 31 Oct. 2014).

About the Author



Kathleen Hartnett White joined the Texas Public Policy Foundation in January 2008. She is a Distinguished Senior Fellow-in-Residence and Director of the Armstrong Center for Energy & the Environment.

Prior to joining the Foundation, White served a six-year term as Chairman and Commissioner of the Texas Commission on Environmental Quality (TCEQ). With regulatory jurisdiction over air quality, water quality, water rights & utilities, storage and disposal of waste, TCEQ's staff of 3,000, annual budget of over \$600 million, and 16 regional offices make it the second largest environmental regulatory agency in the world after the U.S. Environmental Protection Agency.

Prior to Governor Rick Perry's appointment of White to the TCEQ in 2001, she served as then Governor George Bush appointee to the Texas Water Development Board where she sat until appointed to TCEQ. She also served on the Texas Economic Development Commission and the Environmental Flows Study Commission. She recently completed her term as an officer and director of the Lower Colorado River Authority. White now sits on the editorial board of the *Journal of Regulatory Science*, the Texas Emission Reduction Advisory Board, and the Texas Water Foundation. Her writing has appeared in numerous publications including *National Review*, *Investors' Business Daily*, *Washington Examiner*, *Forbes*, *Daily Caller*, *The Hill*, and major Texas newspapers. She most recently testified before the U.S. Senate Environment and Public Works Committee.

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