

Texas Public Policy Foundation

Endangered Species Act

Legislator's Guide to the Issues 2015-16

Endangered Species Act



The Issue

Unlike some states, Texas law does not create 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 offense with a modest fine of a couple hundred dollars. These few statutory provisions do not give the Texas Parks and Wildlife Department (TPWD) regulatory authority to impose land use restrictions on landowners to protect habitat on private land.

By contrast, the regulatory terms of the federal Endangered Species Act (ESA) are vastly more restrictive. The decision whether to list a species as endangered must be "based solely on the best scientific and commercial data available." This means that 1) economic considerations can play no role in the listing process, and 2) listing decisions may be made based on incomplete or low quality scientific data if no better data is available. Listing can result in broad regulatory land use authority on private land by the federal government.

The ESA is increasingly being used in Texas by environmental activists to long-established land use and to limit development. On March 11, 2013, the federal district court in Corpus Christi ruled that Texas had violated the federal Endangered Species Act by causing harm to the endangered Whooping Cranes who winter in San Antonio bay and the estuary of the Guadalupe River basin. According to the judge, Janis Jack, the state's past actions and inactions reduced freshwater inflows and thus reduced the main food source of the Cranes. Rare among ESA rulings, the judge held that Texas' implementation of state water law made the state liable for the deaths of some 23 whooping cranes during the severe drought of 2008-09 and imposed federal oversight of state surface water allocation in the Guadalupe River Basin.

The court's decision sunders the state's long-recognized authority to allocate water within its borders through the issuance of water rights for beneficial use without federal interference. Such a primary state authority is recognized in most federal laws but not in the ESA. Unless reversed, this decision could make state efforts to meet Texas' growing water demand all but impossible to achieve. The case is currently before the Fifth Circuit Court of Appeals, with a ruling expected soon.

The whooping crane, however, is only the beginning of Texas' ESA problems. Concern over the endangered Houston Toad impeded recovery efforts after the 2011 Bastrop fires. The discovery of a single endangered spider, called the Braken Bat Cave meshweaver, immediately halted construction of the last 1,500 feet of a six mile \$11 million pipeline to convey water to the west side of San Antonio. Completion of the last leg remains in limbo. The meshweaver is one of 90 endangered or threatened species in Texas. As a result of an out of court settlement with environmentalist groups, FWS has agreed to make final listing decisions on 100 additional species in Texas.

In 2012, the potential listing of the dune sagebrush lizard threatened to shut down significant oil and gas operations in the Permian Basin of west Texas. While the federal government ultimately agreed not to list the lizard, future listings could similarly imperil the state's oil and gas boom. A decision on whether to list the Lesser Prairie Chicken, which could potentially impact over three million acres of Texas land, is expected in March.

In 2009, the state 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.

During the last legislative session, a controversial bill (HB 3509) to empower the Texas Parks and Wildlife Department (TPWD) to deal with the federal ESA actions in the state passed but was then vetoed by the governor. TPWD's authority has historically been limited to voluntary wildlife stewardship programs on private land. Texas needs to resist expanding TPWD's authority to include implementation of federal land use controls imposed by habitat conservation plans under the ESA. Texas would be wise to develop proactive strategies emphasizing the development of rigorous science and voluntary programs.

ESA is a politically weaker law than many realize. Congress has refused to authorize the law for over 20 years. Congress annually appropriates funds without an authorizing bill because less than half of Congress supports the ESA in its current form. The Endangered Species Act Congressional Working Group, a coalition of geographically diverse House members, recently released a report detailing problems with the current ESA and making recommendations for reform.

Limiting the unjustified and unnecessary harms of endangered species listings will require a variety of different tactics and plans. Instead of relying on a single, centralized approach, Texas needs to provide more flexibility for individuals, groups, and regions to use different methods to reach the common goal of protecting Texas property and sovereignty. Texas should not underestimate the power of the ESA.

The Facts

- Less than 2% of species have been removed from the ESA's endangered list in 40 years.
- Nearly 100 species in Texas are set for potential listing by 2017.
- The ESA's protection of a tiny fish in California called the Delta Smelt in the middle of acute water shortages caused by an historic drought—California was forced to flush three million acre feet of water allocated for human use into the ocean.

Recommendations

- Avoid a top-down state-centralized program for Texas response to ESA listings.
- Encourage landowner and local choice on ESA strategies.
- Enhance current program to assist local government, land owners and business to challenge listings and minimize adverse impacts from ESA conservation plans.
- Resist transforming TPWD into regulatory agency implementing ESA regulation in Texas.
- Reform the ESA to prevent abuse of citizens' lawsuits and curb taxpayer funding of ESA attorneys' fees.
- Support Texas Congressional member's efforts to reform the ESA.

Resources

Fiscal Size-up: 2012-13 Biennium, Legislative Budget Board (Jan. 2012).

Report, Findings, and Recommendations, Endangered Species Act Congressional Working Group (Feb. 2014).

Analysis of the Science: The Whooping Crane Decision by Lee Wilson, Texas Public Policy Foundation (May 2013).

The Endangered Species Act: An Opportunity for Reform by Hon. John Shadegg and Robert Gordon, The Heritage Foundation (Aug. 2012).

