

2019-20

LEGISLATOR'S GUIDE to the Issues

Endangered Species Act

The Issue

The Endangered Species Act (ESA) has long been known as the “pit bull” of federal environmental laws because of the inflexibility of how it attempts to protect species listed under the act, regardless of cost or impact on human activities. The law makes it a felony to “take” any species listed as endangered or threatened. The extremely broad interpretation of “take” includes activity to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any of these activities.” The scope of a take finding extends to both intentional and non-intentional activity.

For decades, the U.S. Fish and Wildlife Service (FWS) focused its implementation of the ESA on federal lands and thus had little impact on Texas. This has changed over the last 10 years as the FWS has lengthened its listing of protected species on private land and water resources.

After seven years of litigation regarding the federal protection of the endangered whooping crane and its impact on the state's authority to allocate surface water, the federal court exonerated Texas and upheld state authority. In this litigation known as *Aransas Project v. Shaw*, an environmental group sued the Texas Commission on Environmental Quality (TCEQ) for the alleged take of a number of cranes. The Aransas Project claimed that TCEQ's past or future issuance of water rights to divert water from the Guadalupe and the San Antonio rivers caused the cranes' death. The federal district court's ruling against the TCEQ was overturned by the 5th Circuit U.S. Court of Appeals.

If the district court's decision had not been reversed, Texas' long-recognized authority to allocate surface water within its borders through the issuance of water rights would have taken a backseat to a conservation plan enforced by the federal government.

The number of areas in Texas affected by species listed as threatened or endangered continues to grow. Concern over the listed Houston toad impeded recovery after the Bastrop fires in 2011, perhaps doubling the cost and time involved. The discovery of a single endangered spider, 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. In 2012, the potential listing of the dunes sagebrush lizard threatened to shut down significant oil and gas operations in the Permian Basin of west Texas. In a rare decision, the FWS decided not to list the lizard because of the protectiveness of the existing voluntary conservation plans, a decision subsequently upheld by a federal court. In the summer of 2018, environmental activists have again petitioned to list the lizard.

Williamson County is now battling the FWS on constitutional grounds over the listing of the Bone Cave harvestman. This tiny eyeless arachnid is stalling development of crucial infrastructure in the county, and its taking could lead to \$50,000 in fines and one year in prison. Incidental take permits and other mitigation

measures are exorbitant. Mitigation permits cost \$10,000 per acre to develop within 345 feet of a harvestman cave spider and 40 times more—\$400,000 per acre—within 35 feet. In November 2015, the Foundation's Center for the American Future (CAF) filed a suit to delist the harvestman—a species existing only within Texas. CAF's suit questions the constitutional legitimacy of federal protection of exclusively intrastate species. In March 2018, the trial court held a final hearing on the merits with the order anticipated in the fall of 2018.

Texas freshwater mussel species have been a hot ESA topic since 2009. In February 2018, the Texas hornshell became the state's first mussel to be listed as a federally endangered species. There are 14 others that remain threatened at the state level, five of which (the golden orb, smooth pimpleback, Texas fatmucket, Texas fawnsfoot, and Texas pimpleback) are now candidate species under consideration for federal ESA listing. Listing of the mussels would lead to federal oversight of their aquatic habitats, which most likely involve federal mandates to augment environmental flows in many streams and rivers in central Texas. Dedicating this water to habitat conservation could significantly limit water supply available for human use.

The 83rd Texas Legislature passed HB 3509 to give the Texas Parks and Wildlife Department (TPWD) authority to help implement federal ESA programs. Ultimately vetoed by the governor, HB 3509 would have substantially expanded what has long been TPWD's limited authority over private land use.

The Facts

- Less than 2% of listed species have been removed from the ESA's endangered list in 40 years.
- The ESA's listing of the Delta Smelt fish forces the state of California to flush three million acre-feet of water intended for human use into the ocean instead.
- Texas' first mussel species, the Texas hornshell, has been federally listed as endangered under the ESA. It might be a foreshadowing for further listing decisions of 14 other freshwater mussel species to come.

Recommendations

- Texas should not use state programs used to protect species listed under the ESA that facilitate federal land use controls on private land.
- Texas should encourage proactive state, local, and private strategies to conserve wildlife by means of rigorous science and voluntary programs.
- Support the efforts of Texas congressional members to reform the ESA.
- Maintain current program to assist local government, land owners, and businesses in challenging ESA listings and habitat conservation plans.
- Do not use top-down, state-centralized programs for Texas' response to ESA listings.

continued

Resources

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

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

“[Challenge to Endangered Species Act About Respect for Law](#)” by Chance Weldon, Austin American-Statesman (March 28, 2016).

“[The Tangled Web of the Commerce Clause](#)” by Chance Weldon, Texas Public Policy Foundation (Dec. 17, 2015).

[*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 The Honorable John Shadegg and Robert Gordon, Heritage Foundation (Aug. 2012).

GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003).

“[Texas Nature Trackers: Texas Mussel Watch](#),” Texas Parks & Wildlife (Accessed April 2018).

“[All Federal and State Listed Animal and Plant Species](#),” Texas Parks & Wildlife (Accessed April 2018).

