

Endangered Species Act Basics
Tiffany Dowell Lashmet, Texas A&M Agrilife Extension
for Progressive Cattleman

The Endangered Species Act (“the Act”) has been in the news frequently as of late. The fairly recent listings of the lesser prairie chicken and New Mexico jumping mouse have caused a slew of controversy and litigation. Conversely, a federal judge in Utah recently struck down the listing of the Utah prairie dog finding it to be an overreach of federal power. In light of the numerous ongoing issues, it is important for ranchers to have at least a basic understanding of how the Endangered Species Act operates.

Prohibition of a Take

The Act was passed in 1973 with a purpose of protecting and recovering species in danger of extinction and protecting their habitats. The United States Fish and Wildlife Service is the federal agency charged with enforcing the Act.

The key method for achieving this purpose is by prohibiting a “take” of a listed animal absent a federal permit. A take is defined under the Act as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” Additionally, the prohibited harassment of a listed species may include significant habitat modification that kills or injures wildlife by impairing their essential behavior and also includes creating 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. This extremely broad definition restricts many actions taken by ranchers located in areas with listed species.

Categories of Species

There are various categories of animals under the act. The highest listing—that with the most prohibitions—is endangered, which is defined as a species in danger of extinction throughout all or a significant portion of its range. The next level is a threatened species, defined as one likely to become endangered within the foreseeable future. Animals not yet listed under the Act, but on which enough information exists for concern are characterized as candidate species.

Determination of Listing

When considering whether a species should be listed, the Fish and Wildlife Service considers the following factors:

- (1) Present or threatened damage to, modification of, or destruction of, a species’ habitat;
- (2) Overuse of the species for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) Inadequacy of existing protection; or
- (5) 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.

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 attempt to balance their property rights with protecting listed species. These include Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, Habitat Conservation Plans, Safe Harbor Agreements, and Conservation Banks. Each of these programs operates in a different manner, but generally provide that landowners who undertake and complete voluntary conservation plans may obtain incidental take permits, protecting them from liability for takes occurring incidentally.

Conclusion

Although the Endangered Species Act is a complex, controversial issue, for now, it is here to stay. Landowners should at the very least have a basic understanding of how the Act works in order to be prepared in case the Act directly impacts them in the future.