The Endangered Species Act:
Species Protection or Federal Land Use Control?

by
Richard Clayton Trotter

In surveying the list of endangered species in Texas, one is struck not only by their multitude but also by their seeming ubiquity. The list, available on the Texas Department of Parks and Wildlife (TPWD) web site[1] is, by all accounts, very accomplished in meeting its stated purpose of promoting "public knowledge of the species considered endangered in Texas." Indeed, one is inclined to marvel at the process of discovery and listing until suspicion grows that governmental license to control or regulate land use is truly the issue. Enacted in 1973, the federal Endangered Species Act (ESA)[2] gives the U.S. Fish and Wildlife Service (FWS) the power to protect species, but the ESA has resulted in federal and state control of vast areas of land, timber and water resources not belonging to the government.

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Section 7 of the ESA provides for "interagency cooperation," and it is through this provision that TPWD enjoys its authority. Its web site lists a plethora of species, most of which are of absolutely no commercial value or human utility. Yes, some are glamorous such as the bald eagle, but most are ordinary like the Coffin Cave Mold Beetle. Since there are literally hundreds of species listed, it is beyond the scope of this article to consider all of them. However, a look at just a few will reveal the near impossible challenge faced by Texas landowners.

Little Aguja Pondweed – The Little Aguja Pondweed in Jeff Davis County affects only one private landowner, but woe unto him if he dares to alter its habitat. TPWD explains, "For an aquatic plant, Little Aguja Pondweed has picked a difficult place to live. Little Aguja Creek, where the species occurs, is prone to both drought and scouring floods. How the plant manages to survive such extremes is not known, but the species has a history of persisting at the site."

[1] The TPWD's web site at www.tpwd.state.tx.us/nature/endang is the source of the five endangered species discussed in this article. The U.S. Fish and Wildlife Service (FWS) maintains a more comprehensive web site of endangered species.

[2] The ESA is found at 16 U.S. Code Sections 1531 to 1544. This is supplemented by FWS regulations found at 50 Code of Federal Regulations (C.F.R.) Parts 17, 402 and 450-453.

This species was listed as endangered in 1991 and "only one population is known, and the plant has not been seen recently." What the landowner in Jeff Davis County must do is refrain from any action on his land that might alter the habitat of a species that has not "been seen recently" but has a "history of persisting at the site." In other words, it has been there although it isn't there now; it might come back; and you can't do anything on your own land that could harm it.

Tobusch Fishhook Cactus – The Tobusch Fishhook Cactus in Western Edwards Plateau in Bandera, Edwards, Kerr, Kinney, Real, Uvalde and Val Verde counties has the advantage of being almost invisible to the casual human eye. Unless the cactus is in bloom, its small size escapes detection by the most diligent species hunter. Listed as endangered in 1979, the TPWD describes the cactus as "round, usually 2 to 3 inches tall and up to 3 ½ inches in diameter" and notes that the "Tobusch Fishhook has been affected by over-collecting and habitat alteration."

The Tobusch Fishhook Cactus... is so small in size and so hard to see that it can create legal headaches for those who are unaware of its existence.

This endangered species is so small in size and so hard to see that it can create legal headaches for those who are unaware of its existence. A $25,000 civil penalty may be imposed for accidentally running the plant over with a jeep or SUV; criminal violations carry a $50,000 fine and one year in jail.

Tooth Cave Pseudoscorpion – Listed as endangered in 1988, the Tooth Cave Pseudoscorpion is an insect that "looks like a tiny, tailless scorpion without eyes. Pseudoscorpions use their pinchers to catch prey. Usually found under rocks, this species is quite rare and little is known of its habits." This creature is extremely small – approximately 4 millimeters or 3/16ths of an inch in length. It is about as long as the word "the" and eats even smaller invertebrates which are also assumed to be endangered.

TPWD explains its concern for the Pseudoscorpion and other endangered cave invertebrates in these words: "Many caves have been paved over or filled in. Other caves have been altered so that they no longer provide the stable temperatures and high humidities needed to support these animals. Contamination by pollutants is also a threat to their survival."

Coffin Cave Mold Beetle – Another of the "cave bugs" that appear to be selected for the purpose of land use restriction is the Coffin Cave Mold Beetle. Listed in 1988, this long-legged, eyeless beetle with short wings lives in total darkness. The "caves" inhabited by these species are most commonly only holes or cracks in the limestone, far too small for humans to enter even for the purposes of observing the species.

The Coffin Cave Mold Beetle is very small – approximately 2.6 to 2.9 millimeters in size. It is the only endangered invertebrate found in Williamson County in the Edwards Plateau.

Houston Toad – As described by TPWD, the endangered Houston toad is "2 to 3 ½ inches long and similar in appearance to Woodhouse's Toad (Bufo woodhousei), but smaller." The discussion of the Houston Toad is the most extensive on the TPWD web site and includes detailed species and habitat management guidelines for landowners.

THE "TAKE" PROVISION

The "take" provision constitutes the heart of the ESA problem. "Take" is defined by the ESA to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect." This definition also prohibits the intentional capture of a species for the express purpose of preserving it.

The provision makes it unlawful for any person to *take* any listed animal species, but excludes plants. It does not contain a jurisdictional element; that is, it makes unlawful any activity that takes a listed species wherever it occurs and without an explicit connection to interstate commerce.

This missing interstate commerce connection goes to the heart of the argument against ESA's constitutionality, a point that will be examined herein. Knowing violations of the ESA take provision carry civil penalties of up to $25,000 and criminal penalties of up to $50,000 and imprisonment for up to one year.[3]

When considering this issue, it is important to remember that under federal law, a species, once listed, controls legally the "habitat" around the species that is necessary to prevent taking of the species. Taking a species has been defined by the FWS to include not only shooting, trapping or other common uses, but also "harming" or "injuring" the species in some largely undefined way, such as reducing the flow of water in a spring where a salamander might live, or filling in a cave where a cave bug might live. Because of the fear of prosecution, fines and jail time, the net effect of listing a species as endangered is to make land totally unusable for humans or to severely restrict the ability of people to make use of their land.

[3] 16 U.S.C. §1540(a)(1) and 16 U.S.C. §1540(b)(1), respectively.

The FWS mischievously complicated the take provision by administratively defining "harm" to mean "an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." Note that this definition is not in the statute itself, but solely in the regulations imposed by bureaucrats under 50 Code of Federal Regulations (C.F.R.), Part 17.3 and upheld by the U.S. Supreme Court.

THE CASE OF HUNTER SCHUEHLE AND THE EDWARDS SPECIES

For 50 years, Hunter Schuehle has lived in Medina County where he raises livestock and exotics on Parker Creek Ranch, south of the town of D'Hanis. He is a former county official and a current member of the Edwards Aquifer Authority (EAA) Board of Directors. Schuehle owns several parcels of property that have Edwards Aquifer[4] wells that have been used for years for irrigated farming.

Schuehle's wells lie approximately 80 miles from Comal Springs (near New

[4] The Edwards Aquifer is a 175-mile long underground aquifer that underlies all or part of eight Texas counties: Atascosa, Bexar, Comal, Guadalupe, Hays, Kinney, Medina and Uvalde. See *Sierra Club v. Glickman,* 156 F.3d 606, 610 (5th Cir. 1998); *Barshop v. Medina County Underground Water Conservation Dist.,* 925 S.W. 2d 618, 623 (Tex. 1996).

Braunfels) and 100 miles from San Marcos Springs (near San Marcos). These distances are not significant of anything, but enter the Edwards Species (i.e., Fountain Darters,[5] San Marcos Gambusia,[6] San Marcos Salamanders,[7] Texas Blind Salamanders,[8] and Texas Wild Rice[9]) and matters change. Not only are the Edwards Species located entirely within the State of Texas, they are only found at or very near the San Marcos and Comal Springs.

... the Sierra Club has used the Edwards Species' endangered status and the ESA as means to wrest control of the Edwards from the State of Texas and private landowners.

As a consequence of pumping water from his Edwards wells, Schuehle has personally received several *Notice of Intent to Sue* letters from the Sierra Club for alleged violations of the ESA for takes of the Edwards Species. The Sierra Club and FWS both claim that when spring flows at San Marcos and Comal Springs fall below levels set by the FWS such as during the Summer and Fall of 1996 and the Summer of 1998, Edwards pumpers are in violation of the ESA take provision.

In addition to sending out *Intent to Sue* letters, the Sierra Club has in fact sued numerous times over alleged violations of the ESA. U.S. District Judge Lucius D. Bunton, III has repeatedly held in favor of the Sierra Club in ESA-related suits. Indeed, the path between the Sierra Club's headquarters in Austin and Judge Bunton's court in Midland is well worn, as is the Edwards pumpers' path from Midland to the Fifth Circuit in New Orleans.

The Sierra Club spent the entire decade of the 1990s filing numerous lawsuits challenging the use of Edwards water by cities, farmers, businesses, governmental agencies and practically anyone else who has any connection to the Edwards.[10] The stratagem is clear: the Sierra Club has used the Edwards Species' endangered status and the ESA as means to wrest control of the Edwards from the State of Texas and private landowners.

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[5] Etheostoma fonticola is listed as an endangered species under both the Federal and the Texas Endangered Species Acts. 50 C.F.R. §17.11, 31 T.A.C. §65.183.

[6] Gambusia georgei is listed as an endangered species under both the Federal and the Texas Endangered Species Acts. 50 C.F.R. §17.11, 31 T.A.C. §65.183.

[7] Eurycea nana is listed as an endangered species under both the Federal and the Texas Endangered Species Acts. 50 C.F.R. §17.11, 31 T.A.C. §65.173.

[8] Typhlomolge rathbuni is listed as an endangered species under both the Federal and the Texas Endangered Species Acts. 50 C.F.R. §17.11, 31 T.A.C. §65.183.

[9] Zizania texana is listed as an endangered species under both the Federal and the Texas Endangered Species Acts, 50 C.F.R. §17.12, TEX. PARKS & WILD. CODE ANN. §88.002.

[10] See *Sierra Club v. Lujan,* 1993 WL 151353 (W.D. Tex. 1993); *Sierra Club v. Babbitt,* 995 F.2d 571 (5th Cir. 1993); *Sierra Club v. Babbitt,* 81 F.3d 155 (5th Cir. 1996); *Sierra Club v. San Antonio,* Case No. M096CA097 (Western District of Texas, Midland/Odessa Division); *Sierra Club v. City of San Antonio,* 112 F.3d 789 (5th Cir. 1997); *Sierra Club v. City of San Antonio,* 115 F.3d 311 (5th Cir. 1997); *Sierra Club v. Glickman,* 82 F.3d 106 (5th Cir. 1996); *Sierra Club v. Glickman,* 156 F.3d 606 (5th Cir. 1998).

Schuehle has also received letters from FWS threatening that such pumping could cause takes of the Edwards Species in violation of Section 9 of the ESA. The FWS has even gone as far as to threaten criminal penalties against Edwards pumpers if any members of the Edwards Species are found dead.[11] Because of the numerous threats of civil and criminal enforcement by both the FWS and the Sierra Club and the numerous lawsuits filed by the Sierra Club, Schuehle has completely ceased irrigating with his Edwards wells on his agricultural properties.

THE SUMMER OF 1998

During the summer drought of 1998, spring flows at Comal and San Marcos Springs dropped and, once again, the Sierra Club and the FWS made renewed threats to sue Edwards pumpers. On June 25, 1998 – just two days after spring flows at Comal Springs fell below alleged take levels for the Fountain Darter – the FWS explicitly threatened to prosecute Edwards pumpers for civil and criminal penalties for harm to the Edwards Species.

The threats of civil and criminal prosecution were splashed across the front page of the *San Antonio Express-News* in an article entitled, "Suits ready if drought kills wildlife." The first paragraph of the article makes these threats of prosecution clear: "Federal wildlife officials said Wednesday that they are ready to file civil lawsuits and even criminal charges to protect species in danger of dying because of the drought." During his deposition, FWS official Bill Seawall confirmed the accuracy of the story.

On August 14, the Sierra Club once again sent a *Notice of Intent to Sue* letter directly to Hunter Schuehle and others. The letter gave notice of the intent to sue over takes of the Edwards Species caused by "excessive pumping" from the Edwards, stating: "Such a suit may be brought as part of the lawsuit, *Sierra Club and Clark Hubs v. City of San Antonio, et al*,...pending in federal district court in Midland, Texas as or as part of a new lawsuit."

On August 28 – 14 days after the Sierra Club's *Intent to Sue* letter was sent – Texas State Representative John Shields (R-San Antonio) filed suit against Bruce Babbitt, Secretary of the Interior; Jamie Rappaport Clark, FWS Director; and the Sierra Club. On November 19, Schuehle joined this suit as co-plaintiff, alleging the same claims as Rep. Shields. Lawyers from the Texas Justice Foundation (TJF) represent both Shields and Schuehle.[12]

[11] Edwards pumpers seeking to avoid ESA lawsuits through the only means available – a §10(a)(1)(B) incidental take permit or a §7 consultation – have been forced to dramatically reduce their pumping as well. Because FWS perceives Edwards pumping as the biggest threat to the Edwards Species, the sine qua non of such a permit or consultation is significant reductions in Edwards pumping. For instance, the Bexar Metropolitan Water District, which has been attempting to obtain an incidental take permit for its Edwards pumping since 1996, will have to reduce very significantly its Edwards pumping in order to obtain an incidental take permit. The EAA is also attempting to obtain an incidental take permit. The FWS has made it clear, however, that the EAA must impose dramatic reductions in Edwards pumping on its permittees – 40 percent mandatory reductions at stage IV, for instance – to avoid ESA liability.

[12] It is important to note that not only have TJF clients received letters from federal authorities threatening prosecutions, many others have been threatened for the offense of pumping water out of their own wells hundreds of miles away from springs where "endangered" blind salamanders live and wild rice grows.

SCHUEHLE AND SHIELDS v. U.S. FISH AND WILDLIFE

Schuehle and Shields' suit is a direct challenge to the constitutionality of the ESA take provision – which is the teeth of the ESA. The legal issue in the case centers on Congress' authority to regulate purely interstate, non-commercial activity pursuant to Article 1, Section 8 of the United States Constitution, which is also known as the Commerce Clause. Among its provisions, the Commerce Clause grants Congress the power to regulate commerce among the several states, with foreign nations and with Indian tribes. Schuehle and Shields filed suit seeking a declaration that the take provision of the ESA,[13] as applied to the endangered and threatened species living at or immediately downstream of San Marcos and Comal Springs, is unconstitutional. As applied to the Edwards Species, the take provision is unconstitutional because it plainly flunks the test announced in the Supreme Court's landmark Commerce Clause opinion in *United States v. Lopez*,[14] and as reaffirmed and expanded in the Supreme Court's decision last term in *United States v. Morrison.*[15]

Schuehle and Shields further challenge the Citizen Suit provision of the ESA,[16] as an unconstitutional delegation of governmental authority to a private entity. In brief, Schuehle and Shields have been harmed by the Edwards pumping restrictions and threats of civil and criminal prosecution resulting from the FWS and Sierra Club's attenuated theory of liability for a take of the Edwards Species.

There is not now nor has there ever been commerce in the Edwards Species. They are not purchased, sold or exchanged. Most significantly, the regulated activity – takes of the Edwards Species pursuant to the ESA – does not substantially affect interstate commerce.[17] In short, the Edwards Species are not articles of commerce, are not involved in interstate commerce and the taking of any of the Edwards Species does not substantially affect interstate commerce.

> *The possibility of finding the ESA unconstitutional is quite real...*

The suit has been winding its way through the federal court system, and oral arguments will soon be heard in the United States Court of Appeals for the 5th Circuit. The possibility of finding the ESA unconstitutional is quite real, especially given the decisions in the cases of *Lopez* and *Morrison.* There is cause for hope for a rational consideration of the relationship between state and federal authorities and the proper care and regulation of endangered species.

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[13] 16 U.S.C. §1538(a)(1)(B).

[14] 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

[15] 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

[16] 16 U.S.C. §1540(g).

[17] Schuehle and Shields' expert witness, economist Ray Perryman, extensively studied the Edwards Species and reached the following conclusions: "There is no established market for any of the Edwards Species in which trading or exchanging is conducted, nor have there ever been such a market. None of these species is used as a food source. None of these species possess any known medical value. They are not featured prominently in art, music, or any other element of popular culture that is substantially reflected in market activity, nor are they a major part of our historical heritage which could lead to commercial activity (such as the bald eagle). None of these species are a major tourist attraction (such as whales) and no souvenir replicas of them are sold on a significant scale."

LARGER ISSUES

The greater issue involved in the ESA is the cultural perspective on the relationship of man to his world. The fundamental Judeo-Christian worldview posits that man has dominion over the fish of the sea, over the birds of the air, and over every living creature. The ESA is an expression of public policy, enforced by the Sierra Club, that believes man is subordinate to the birds, fish, blind salamanders and beetles.

The TPWD web page notes that the Texas Blind Salamander, listed as endangered in 1967, depends on a "constant supply of clean, cool water from the Edwards Aquifer. Pollution and overuse of water caused by the growth of cities threatens its survival. You can help by conserving water and preventing water pollution."[18]

Thus, if the growth of the cities is the reason the Blind Salamander is endangered, the obvious the way to "save the species" is to stop the growth of human habitat – cities. In other words, the needs of man are subordinate to the needs of the species. Ironically, the last time the springs went dry was during the drought of the 1950s when the population of San Antonio was 450,000. Of further irony is the fact that this lack of water did not prevent full recovery of these species without human intervention.

As we have seen with Schuehle's situation, restrictions placed on pumping and use of Edwards water do not pose a mere theoretical threat. Citizens have been threatened with federal prosecution in San Antonio because of actions that allegedly take species by "harming habitat." During droughts, the ESA has engineered political water shortages, and government has imposed restrictions on lawn watering and other usage, all while abundant water supplies are available just under the feet of San Antonio citizens.[19]

The pumping and water use restrictions imposed by Judge Bunton's preliminary injunction in *Sierra Club v. San Antonio* were far-reaching. Reviewing Judge Bunton's pumping restrictions, the Fifth Court of Appeals took note of same and the impact they would have on the citizens of the Edwards region:

> *[T]he president of the San Antonio Water System testified that the injunction's limitation of water use to 1.2 times average winter use would likely require the city to maintain lower water pressure than state law requires for fighting fires. A consulting engineer for the City of Leon Valley testified that the restrictions would necessitate the complete curtailment of outside watering, resulting in damage to 50 percent of the foundations in the city with damages to each home ranging from $2,000 to $20,000. Other defendants offered similar evidence though affidavits.*[20]

The Fifth Court then vacated Judge Bunton's preliminary injunction on the basis of the "Burford abstention," a legal doctrine that says that the federal government should allow state

[18] There are members of the species in zoos and in other springs. A creature can be on the list though it is not actually endangered or its survival is not threatened.

[19] The Edwards Aquifer is one of the largest renewable sources of water in the world; conservative estimates of the amount of water range from 40 to 55 million acre feet to 200 million acre feet. The total amount of water in the aquifer is roughly seven times greater than Lake Mead, which provides water to most of Southern California.

[20] 112 F.3d at 794.

authorities to act where there is no clear federal preemption of an area.[21] The Court focused on the comprehensive Edwards Aquifer regulation and management program enacted by the Texas legislature. The resulting regulatory authority – the Edwards Aquifer Authority – is entrusted with regulating and managing Edwards pumping for the benefit of many diverse interests, including endangered species.[22] The case reveals how the government abusively and punitively interprets the ESA against landowners, pumpers and people who desire to use water to run their businesses or even water their lawns.

APPETITE FOR LAND CONTROL CONTINUES

San Antonio Express-News writer Christopher Anderson reported last December that the FWS has listed as endangered five species of spiders, three beetles and one harvestman (a daddy-longlegs), an action that will impact more than 100,000 acres north of San Antonio. One questions whether it is just coincidental that the acreage is considered prime real estate for development. Most of the land is in far north Bexar County and Comal County. Gary Young, supervisor of the FWS legal office in San Antonio, has stated: "We would investigate any reported violation of the act" and "we take them all very seriously."

Given the ESA's stiff civil and criminal penalties, the listing has severely curtailed development efforts, and, as a result, land values have fallen. Reporter Anderson of the *Express-News* quoted Gene Dawson, Jr., president of a local engineering firm, as saying that anyone driving by a real estate development project can sue under the ESA and seek an injunction that could cause an indefinite delay.[23]

Former San Antonio Mayor Howard Peak aptly summarized the attitude of ESA advocates. As quoted in Anderson's story, Peak said: "It shouldn't have much, if any effect on the city's economy. It might impact a few private folks. This is land that should not be developed in the first place as far as I'm concerned." One wonders if the former Mayor's attitude would be different if he owned part of the 100,000 acres affected and lost all effective use of his land.

THE STRATEGY IN BRIEF

Since filling in caves and other depressions in the earth is almost always a prelude to development, a cave bug is ideally suited for the purpose of halting development. Indeed, in the ever-expanding search for invertebrates that can be listed for apparent land use control, caves are an ideal place to look. The FWS strategy follows four simple steps:

1. Find a cave
2. Look for critters
3. Get them listed
4. Halt development

While caves are an effective source of species for land control, they are not essential, as is shown in the case of the Houston Toad, whose habitat is in coastal grasslands. Since "habitat alteration" is a violation of the ESA, an individual could be prosecuted for constructing

[21] *Sierra Club v. City of San Antonio*, 112 F.3d 789 (5th Cir. 1997)(abstention appropriate because the state of Texas has established a comprehensive groundwater management scheme through the Edwards Aquifer Act).

[22] *Barshop v. Medina County Underground Conserv. Dist.*, 925 S.W.2d 618, 623-24 (Tex. 1996).

[23] This, of course, raises another issue: the citizen enforcement provisions effectively make anyone a "Private Attorney General" for purposes of ESA enforcement.

roads, draining swampland (something common in the Houston area), taking measures to prevent forest fires and planting grasses for cattle.

The end result, by design, is to leave the cave bug and frog "habitats" in place, while denying landowners the use of their property. Private land thus becomes a wilderness preserve for bugs, and property owners are not paid "just compensation" for the loss of their land. Indeed, if an individual who owns real estate in Texas is not careful, he can wind up being prosecuted for not only developing his land, but for merely occupying it.

Allen Parker, Chief Executive Officer of the Texas Justice Foundation, has said many times that one of worst things that can happen to a landowner in Texas is to find an endangered species on his property. Until the Supreme Court recognizes that the ESA is unconstitutional insofar as it applies to intrastate species, the onerous and irrational enforcement of its provisions will continue to reign. Ironically, such enforcement often has the opposite effect from that originally intended by Congress, as landowners are tempted to destroy, not preserve, species because of the strong economic incentive to avoid the restrictions on land use that discovery and listing of a species bring. Surely modern science, law and public policy can find a better way to cultivate and protect these creatures than merely stopping the building of cities to prevent their loss.

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