



Texas Public Policy Foundation
**LEGISLATOR'S GUIDE
TO THE ISSUES
2021-2022**

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 nonintentional 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, which, unlike many Western states, is comprised overwhelmingly of private land. This implementation policy has changed over the last 10 years as the FWS has expanded its listing of protected species on private land and water resources. Several recent cases in Texas highlight how the ESA is being used as a bludgeon to limit economic activity while providing almost no measurable environmental benefits.

In 2012, the potential listing of the dunes sagebrush lizard threatened to shut down significant oil and gas operations in the Permian Basin by instituting the same type of overbearing regulation that devastated the timber industry in the Pacific Northwest after the listing of the spotted owl. 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.

Unfortunately, the Center for Biological Diversity is continuing a chain of activism that it began in 2002, despite the proven success of the voluntary conservation plans and the lack of evidence that the lizard's numbers have been in terminal decline over the past 2 decades. The center again [petitioned](#) to list the lizard in May 2018 and filed a [lawsuit](#) in October 2019. As of this writing, the petition is [under review](#) by the FWS.

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. Mitigation permits cost \$10,000 per acre for development within 345 feet of this spider and 40 times more—\$400,000 per acre—within 35 feet.

In November 2015, the Foundation's Center for the American Future filed a suit to delist the harvestman—questioning the constitutional legitimacy of federal protection of an exclusively intrastate species and noting that the species should no longer be considered endangered. After a [judgment from the federal district](#)

[court](#) that the federal government did not adequately consider the evidence in favor of delisting, the case is now making its way through the appeals process, contingent upon a FWS [review](#) of the Foundation's petition to delist the species.

Texas is also adding to these problems through excessive state regulation. The Texas Parks and Wildlife Department recently [added 45 species](#) to its threatened list and 10 species to its endangered list while only removing 13 species, bringing the total to over 200 species. Additions to this list should be done carefully with an eye toward preventing federal regulations, not en masse without proper justification for each addition. Instead of top-down conservation programs for private lands, Texas should encourage local and private strategies that have been shown to achieve better results with much lower costs.

The Facts

- Efforts to delist species are often mired in litigation by environmental groups, thanks to the tortured process of restoring species under the ESA. Less than 2% of listed species have been removed from the ESA's endangered list in 40 years.
- Voluntary conservation programs on private land often face consistent pressure and bureaucratic bias toward greater federal regulation under the ESA.
- Texas sometimes compounds these issues with unnecessary state regulation, including the recent addition of 55 species to its threatened and endangered list.

Recommendations

- Texas should not use top-down, state-centralized programs 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 the current program to assist local government, landowners, and businesses in challenging ESA listings and habitat conservation plans.

Resources

[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 Endangered Species Act in Texas: A Survey and History*](#) by Megan Ingram. Texas Public Policy Foundation (Feb. 2018).

“[The Little Lizard Threatening to Derail the Trump Agenda](#)” by Kathleen Hartnett White, *The Hill* (July 12, 2018).

“[All Federal and State Listed Animal and Plant Species](#),” Texas Parks & Wildlife (Accessed Aug. 2020).

