



East
FOUNDATION

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We promote the advancement of land stewardship through ranching, science, and education.

Endangered Species Act Information for Private Landowners – An Introduction

Lindsay Martinez

Note for readers: This Management Bulletin is part one of a series of six bulletins intended to share East Foundation's research and its experiences as a private landowner interacting with the challenges and opportunities of managing threatened, endangered, and other at-risk species on private working lands. This series is meant to provide information relevant to decision making by land stewards. Each bulletin in the series will be released in sequence and is available through East Foundation's website at www.eastfoundation.net/media.

WHY IS THIS TOPIC IMPORTANT?

Private landowners are critical for conservation of threatened and endangered species in the United States; more than two-thirds of all Endangered Species Act-listed species are believed to occur somewhere on private lands, and one-third are found only on privately owned lands (Evans et al. 2016). However, private landowners can be understandably reluctant to acknowledge the presence of listed species on their properties, or to overtly manage for the species due to the risk of attracting attention that might result in federal Endangered Species Act (ESA) regulations on land use.

At East Foundation, we conduct cattle ranching on over 217,000 acres of South Texas rangelands. The lands we steward are home not only to our cattle herds, but also to communities of native plants and animals. These include several species federally protected by the ESA, and other at-risk species that may become protected by the ESA in the future. Like many private land operators, we view the continued presence of these species on our lands as an

indicator of successful land stewardship. **However, the potential regulatory to our ranching operations created by these species have prompted us to investigate ways to manage potential risks to our ability to continue to operate while still contributing to the conservation of listed and other at-risk species.**

In line with our mission to promote the advancement of land stewardship through ranching, science and education, our hope is that what we have learned through experiences with threatened, endangered, and at-risk species on our lands will provide valuable information, and perspective, for other landowners to make the most informed decisions for how they contend with management of these species on their lands.

WHAT IS THE ENDANGERED SPECIES ACT?

The U.S. Endangered Species Act has been in place for over 50 years and is considered one of the world's strongest biodiversity protection laws. The ESA requires the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) to maintain a list of plant and animal species that are endangered (at present risk of extinction) or threatened (likely to become endangered in the future) due to factors such as overutilization, habitat destruction, disease, or predation. According to the [USFWS Boxscore](https://www.usfws.gov/bioscience/boxscore), in 2025, there are 1,684 native species (744 animals and 940 plants) listed under the ESA as either threatened or endangered.

When listing a species, USFWS and NMFS decide whether to designate any "critical habitat" essential to

the species' conservation. Under Section 7 of the ESA, federal government agencies must consult with USFWS and NMFS to ensure that any actions they carry out, fund, or issue permits for - including actions on private lands - do not destroy a listed species' critical habitat or jeopardize the species' existence. Finally, after listing a species under the ESA, either USFWS (for terrestrial and freshwater species) or NMFS (for marine species) develop a plan to address threats to the species and "recover" it from threatened or endangered status.

Because many species historically became imperiled due to overharvest, Section 4 of the ESA prohibits "take" of listed animals without a permit. (For listed plants, prohibitions differ slightly). Both USFWS and NMFS can enforce prohibitions on take, which the ESA defines as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a species.

One type of prohibited "harm" to listed animals that can concern East Foundation and other stewards of working lands is "incidental take" during an otherwise legal activity not intended to impact the species (USFWS, 2018). Incidental take can occur due to land use activities that significantly modify a listed animal's habitat, alter its behavior, and ultimately lead to its injury or death. For example, harvesting trees (a legal activity) that hold endangered birds' nests could destroy those nests, causing death of the nestlings and thus incidental take of the species - even though harming the birds was not intended. Texas' [state endangered species law](#) prevents trapping or killing (i.e., direct take) or selling state-protected species without a permit, but only federal law prohibits incidental take.

PRIVATE LANDOWNERS' CHALLENGES WITH THE ESA

Many private working lands – like ranches, farms, and forests – sustain ESA-listed species and their habitats because of (not in spite of) their land stewardship practices and maintenance of undeveloped spaces (Hansen et al. 2018).

The ESA does not reward landowners whose properties support listed species, nor does it require them to take any action to help listed species increase in numbers. However, the ESA does create liability for private landowners like East Foundation who, during normal land use, may incidentally take listed animals that are present on their private property (incidental take prohibitions do not extend to plants on privately owned land). If a landowner causes incidental take of a listed animal, USFWS can enforce the ESA's civil or criminal penalties. Additionally, USFWS can introduce land use restrictions to prevent further take. Even if USFWS does not act, outside groups can use citizen lawsuits to enforce ESA penalties and restrict or prevent land uses that

incidentally take listed animals. **While the exercise of ESA enforcement actions against working lands may be rare, the threat that a landowner's otherwise lawful land uses might be federally regulated is enough to cause some landowners to be concerned about the presence of listed species on their properties.**

Still, some private landowners whose lands support ESA-listed animal species may be willing to accept the regulatory risks of the ESA because they believe that they do not incidentally take listed animals (including significantly modifying their habitat in a way that causes injury or death) or they believe that neither USFWS nor another outside group is aware that a listed species is present on their lands and impacted by incidental take. The latter may be true if the landowner has never released information about species presence on their land and is not:

- seeking a land use permit that requires surveys for listed species,
- pursuing a project with a nexus to a federal agency,
- attracting outside attention from citizens or interest groups.



Private working farms, ranches, and forests often sustain threatened and endangered species and their habitats because of thoughtful land management practices, though Endangered Species Act protections can expose landowners to regulatory risks and liabilities.

LANDOWNERS NEED ESA CERTAINTY

Private land – and therefore private landowners – are key to sustaining and recovering threatened, endangered, and other at-risk species. However, the ESA's prohibitions on incidental take can create strong regulatory disincentives for having listed species (or species likely to become listed in the future) present

on private property. Despite this, landowners may still be interested in initiating or continuing practices to sustain or increase abundances of listed species and their habitats on their properties. These practices could include keeping land undeveloped, controlling invasive species, prescribing livestock grazing or fire, restoring habitat, releasing animals onto a property, or conducting research that supports conservation planning. Many of these management actions may already be in place on private lands and may have allowed at-risk species to persist on those lands in the first place.

At East Foundation, we have recently gained experience in researching and participating in ESA landowner assurance programs. **These programs include both permitting and non-permitting approaches that allow private landowners to obtain certainty that they may freely operate across their lands without ESA restrictions for certain species if they agree to actions that benefit or sustain those species, whether already ESA-listed or with the potential to become listed in the future.** These programs allow some incidental take of a covered species on participating lands with no liability. **Also, through “no surprises” elements of the programs, landowners are assured that they will not be subject to additional land use restrictions nor conservation requirements for covered species outside those in the original agreement.**

Because incidental take due to private activities is not prohibited for listed plants on private lands, regulatory assurances for plants are not needed. As such, ESA assurance programs typically relate only to fish and wildlife species that are ESA-listed or that are at-risk and may become listed in the future.

PERMITTING APPROACHES FOR ESA ASSURANCES

Under Conservation Benefit Agreements (the new name for programs formerly called Safe Harbor Agreements [SHAs] and Candidate Conservation Agreements with Assurances [CCAAs]) with USFWS, private landowners can voluntarily agree to implement conservation practices that increase the abundance of a selected species, or its habitat, on private property. In exchange, landowners receive an “enhancement of survival permit” from USFWS that authorizes incidental take of the covered species and protects the landowners from any ESA regulatory surprises regarding land management requirements for the species – whether already listed under the ESA or at risk of becoming listed in the future.

In Habitat Conservation Plans (HCPs), private landowners self-identify practices to minimize and mitigate their impacts to selected species present on their properties. A landowner who sustains a covered species by implementing an HCP receives an “incidental take permit” from USFWS that relieves ESA incidental take

liability for the species due to otherwise legal land uses. The permit also assures landowners of no new land use restrictions for the covered species outside of those identified in the HCP.

While these approaches offer solutions and ESA risk abatement for landowners, it can be challenging to find the capacity to develop, secure, and implement these agreements/plans and the associated permits. Part of this challenge is the difficulty of navigating federal permitting procedures. These permitting programs – and their limitations – are discussed in more detail in the second bulletin in this series.



East Foundation developed a programmatic Safe Harbor Agreement to reintroduce endangered ocelots to its San Antonio Veijo ranch in South Texas while protecting ourselves and nearby landowners from any regulatory surprises regarding the reintroduced cats.

NON-PERMITTING APPROACHES FOR ESA ASSURANCES

Because federal permitting requires procedural elements that can be difficult for landowners to navigate, non-permitting approaches can be more straightforward routes to receiving ESA assurances for species listed under the ESA or likely to be listed in the future. In one approach, private landowners can create Partners for Fish and Wildlife Agreements with USFWS to implement projects or practices to benefit species on private lands. Landowners can also participate in the Natural Resource Conservation Service (NRCS) Working Lands for Wildlife program to implement NRCS-recommended practices for select listed or at-risk species and their habitats. With these approaches, no permits are required; ESA incidental take authorization for the species and assurances on the freedom to operate without additional land use restrictions for the species are provided to participating landowners through documentation written by USFWS

under Section 7 of the ESA. These types of approaches are further discussed in the third bulletin of this series.

LOOKING AHEAD

Private lands are critical for protecting and recovering threatened and endangered species, especially in a state like Texas that has [over 100 ESA-listed species](#) and a land base that is over 95% privately owned. The risk and uncertainty regarding ESA regulations and their potential impacts on land uses is important for private working landowners deciding how to coexist with threatened, endangered, or other at-risk species on their properties. Landowner assurance programs provide opportunities to establish regulatory certainty in exchange for conservation practices for species listed under the ESA or likely to become listed in the future.

East Foundation is a private working landowner subject to the same challenges, concerns, opportunities, and risks as other landowners. **Because we aim to be the best possible stewards of our land, we are committed to fully exploring how landowner assurance programs function for both working landowners and for species.** Recently, we developed a Programmatic Safe Harbor Agreement and received an enhancement of survival permit for the future reintroduction of endangered ocelots to our San Antonio Viejo Ranch, which is a working cattle ranch. Throughout this series of bulletins, we will continue to provide more detailed information about this agreement, other available programs related to the regulatory and economic dimensions of managing sensitive species on private working lands, and our experiences participating in these programs.

UPCOMING MANAGEMENT BULLETINS IN THIS SERIES:

- Permitting Approaches for Establishing Endangered Species Act Assurances on Private Lands
- Non-permitting Approaches for Landowners to Obtain Endangered Species Act Assurances
- Economic Incentives for Conservation of At-risk Species on Private Lands
- Confidentiality Matters for At-risk Species on Private Lands
- Endangered Plant Regulations and Opportunities for Private Landowners

KEY POINTS

Legal protections for federally threatened and endangered species can create regulatory disincentives for harboring listed species on private property, where conservation efforts are critically needed. This is because Section 9 of the Endangered Species Act prohibits “take” of threatened and endangered animals without a permit. On working lands, “incidental take” can occur due to land use activities that significantly modify a listed animal’s habitat, alter its behavior, and ultimately lead to its injury or death. Landowner assurance programs allow private landowners to obtain certainty on their incidental take liability for a species in exchange for actions that improve or sustain the species’ status.

Landowners interested in reading more about the ESA are encouraged to view resources from the [Texas A&M Natural Resources Institute](#), [National Agricultural Law Center](#), or [Western Landowners Alliance](#).

KEY ENDANGERED SPECIES ACT TERMS

U.S. Endangered Species Act:

1973 federal law to conserve threatened and endangered species and the ecosystems on which they depend

Section 4 of the Endangered Species Act:

requires maintenance of a list of threatened and endangered species, designation of critical habitat essential for listed species’ conservation, and recovery plans for listed species

Endangered:

species listed under the Endangered Species Act because it is at risk of extinction in all or part of its range

Threatened:

species listed under the Endangered Species Act because it is likely to become endangered in the future

Candidate:

species not yet listed under the Endangered Species Act but officially proposed for listing by the U.S.

Fish and Wildlife Service or National Marine Fisheries Service

Recovered:

species that has been delisted from threatened or endangered status and no longer has Endangered Species Act protection due to factors such as improved population status, abatement of threats to the species, or discovery of additional populations

Critical habitat:

federally designated areas for a listed species that are essential to its conservation and require special protection; federal government agencies are prohibited from destroying or adversely modifying critical habitat, including through any actions they fund or issue a permit for

Section 7 of the Endangered Species Act:

requires all federal agencies to consult with the U.S. Fish and Wildlife Service (terrestrial and freshwater species) or National Marine Fisheries Service (marine species) to ensure that actions they authorize (issue a permit for), fund, or carry out do not jeopardize the continued existence of listed species or destroy critical habitat for listed species. Agencies and the Services also consult on what incidental take is authorized in a federal action

U.S. Fish and Wildlife Service Biological Opinion:

report on the results of formal federal agency Endangered Species Act Section 7 consultations

Federal nexus:

any action that is connected to a federal agency through funding, technical assistance, authorization/permitting, occurrence on federal lands, or an agreement

Section 9 of the Endangered Species Act:

prohibits taking listed species, including incidental take of listed animals through significant habitat modification

Take:

harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect

Incidental Take:

prohibited for listed animals, take that is incidental to an otherwise lawful activity but not the purpose of that activity; it may occur through “harm” to animals due to land use that causes significant habitat modification or degradation, impacts animal behavior, and ultimately leads to injury or death

Section 10 of the Endangered Species Act:

establishes permits to take species legally

Enhancement of Survival Permit:

permit granted to a landowner who participates in a Conservation Benefit Agreement (formerly called Safe Harbor Agreements or Candidate Conservation Agreements with Assurances) authorizing incidental take of the covered species and assuring the landowner that, in exchange for implementing actions to increase abundance of covered species on their property, they will not be subject to additional Endangered Species Act land use restrictions or conservation requirements for the species

Incidental Take Permit:

permit granted to a landowner who participates in a Habitat Conservation Plan assuring them that, in exchange for actions to minimize and mitigate (offset) negative impacts to covered species on their property, they can incidentally take the covered species during land use and they will not be subject to additional Endangered Species Act land use restrictions or conservation requirements for the species

Certificate of Inclusion:

document provided to a landowner by an enhancement of survival or incidental take permit holder that extends the permit coverage to the landowner

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200 Concord Plaza Drive
Suite 410
San Antonio, Texas 78216



eastfoundation.net

We promote the
advancement of
land stewardship
through
ranching,
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Ranching



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