

“Finding the Cheese”

presented by

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The Endangered Species Act, or the ESA, has many facets and means many things to many people, but to landowners, developers, and anyone else using the landscape for any myriad of purposes, the ESA can be the most frightening, intimidating, frustrating, confusing and cumbersome regulatory process they may encounter. Running afoul of this regulation can mean months, if not years, of project delays and unimaginable costs. The ESA does not discriminate in its victims, affecting federal and state governmental entities, cities, counties, school districts, utility districts, big corporations, farmers, ranchers, landowners, and even little old ladies (e.g., Margaret Rector).

The teeth of the ESA are found primarily in Section 9, which prohibits the taking of listed species, but, more particularly, in the regulatory application of the US Fish and Wildlife Service's (the Service's) definition of "take," which includes the term "harm." The term "harm," as applied by the Service in its regulatory role under the ESA, is probably one of the most controversial and troublesome aspects of the Act. Through this term, the Service has expanded its regulatory purview beyond listed species and designated critical habitat to potentially include all habitats and areas that listed species might utilize. Therein lays the greatest rat maze the world has ever known.

How can you avoid being caught in this maze, or once in it, how can you escape with what is left of your project or life? This presentation explores practical due diligence procedures to avoid the maze and guidelines for a successful escape if unavoidably caught.

Defining The Maze - What Are The Catches?

It may be obvious that if you have a whooping crane, a jaguar (the cat, not the car), and a California condor residing on your property, you may have a problem if you desire to develop or change the conditions of that property. These large, generally well-known species are all protected by the ESA and their presence can definitely put a crimp in your development plans. However, what if you have something smaller and much less charismatic on your property such as a Coffin Cave mold beetle, a cave crayfish, a riparian brush rabbit, an Amargosa shrew, a Concho water snake, a Barton Springs salamander, a San Marcos gambusia, a Houston toad, a flat pigtoe, a Peridido Key beach mouse, or, better yet, a Delhi Sands flower-loving fly? These are all varmints, vermin, pests, and fish bait for gosh sakes! But hold on, these are also federally listed threatened or endangered species that carry all the same regulatory protections as the charismatic mega-fauna (big, beautiful animals) that we all recognize and generally appreciate. Yes, a fly, a cave bug, or a slimy salamander can put your project in the toilet just as fast as a grizzly bear! The presence of any of the hundreds of mammals, birds, reptiles, amphibians, fish, insects, spiders, and various invertebrates that are currently listed by the Service and National Marine Fisheries Service on or even near your project site spells trouble for your future land use plans. Note that I haven't mentioned plants. There are many plants listed as threatened or endangered; however, federal law does not afford plants the same protections as animals, and listed plants generally do not pose the extreme level of constraints on land use as listed animals. However, if a project should involve any type of federal permit, funding, or other federal approvals, listed plants can become just as critical as listed animals through the Section 7 consultation process. While private property owners are not directly restricted from impacting listed plants, all federal agencies are mandated to ensure that their actions and programs (federal projects, or regulatory, funding, or insurance) shall not jeopardize the continued existence of any listed species (animal or plant) or adversely modify designated critical habitats. That means any project requiring federal approval, funding, or insurance may trigger requirements for

consultation for listed species, including plants. How many projects meet this federal nexus? Any project with 5 acres or more of ground disturbance requires a federal National Pollution Discharge Elimination System stormwater permit from the Environmental Protection Agency, or the EPA. Any project affecting any water course or adjacent wetlands requires a permit from the US Army Corps of Engineers. Any farm receiving agricultural subsidies from the US Department of Agriculture. Any project receiving federal flood insurance from the Federal Emergency Management Agency. Any land development receiving funding from EPA for water and wastewater infrastructure, or a roadway receiving funding from the Federal Highway Administration, or a low-income housing project receiving funding from Housing and Urban Development. If listed animals are involved, the federal nexus is not required to initiate regulation of endangered species, as all private and public entities are directly regulated from impacting listed animals under the ESA. As you can see, the tentacles of the maze reach out a considerable distance.

From this discussion, it is pretty clear that if you have a listed species on your property (no matter how warm and fuzzy or cold and slimy), you have potential problems with any proposed changes to land use or the existing character of the land. Now let's dive off into the sea of gray of the ESA, the part that deals with Section 9 prohibitions related to the Service's definition and interpretation of "harm." As you have heard in previous presentations, the ramifications of "harm" to listed species are huge and extremely complicated from a biological, legal, and moral perspective. The Service has defined harm as:

...an act which actually kills or injures wildlife. Such 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. (50 CFR 17.3).

Read the words "habitat modification or degradation." From this, the Service has taken a giant step beyond protection of individuals of the species to now include the habitats or even "potential habitats" of listed species. And you were thinking hundreds of listed species and all manner of federal trip wires to get you dragged into the maze was enough of a morass to discourage even the strongest of hearts? What if your property has a habitat type considered potentially suitable for use by a listed species known to occur in the region, but the species has not been documented to occur on your property? You guessed it - the Service will attempt to regulate such areas until at least three successive qualified surveys for the species have been conducted (according to specific guidelines and by qualified and permitted biologists for that species) to determine the absence of the species. These surveys are usually annual, so you are likely looking at a minimum of three years to get an answer. Additionally, many species are difficult to find and finding them may depend on suitable weather or seasonal conditions. Many species, particularly birds, are migratory and may only be present seasonally, further complicating the means to discover them or prove their absence. What does that do to your financial basis in a property if you are paying big interest on a purchase or development loan, or you have already invested in engineering, permitting, entitlements, etc., and are getting ready to start development when you discover the potential endangered species problem? Defining "suitable habitat" for many listed species is a guess at best since many listed species are usually not well studied or understood. Therefore, the Service, under its mandate to protect the species, usually takes a very broad view of potential or suitable habitat.

We have now explored the potential problems associated with the presence of listed species or their habitats on your property and how that may affect your ability to develop or change the land use of the property. Now put a different twist on it. You remember in my introduction, I threw out the name of the little old lady, Margaret Rector? Many of you may not have heard of her or the quagmire that was bestowed on her by the ESA. Margaret owned a small parcel of land (about 20 acres) in west Austin on Highway 620 for many years. In 1990, the golden-cheeked warbler was listed as endangered and, from that, along with the listing of the black-capped vireo and several cave bugs in western Travis County, came the need to develop a regional habitat conservation plan to address the explosive issues of land

development and endangered species. Ms. Rector's land was arguably not great habitat for any of the species, but was situated adjacent to several larger parcels that were good habitat and in fact supported many of the listed species. The development of the regional plan proceeded forward over about 8 years and in that process, maps of habitat areas deemed necessary to acquire for preserve lands were produced. The stipulations of the regional plan that was approved by the Service were that any property identified as potential preserve land could not participate in the plan to allow development. Ms. Rector's land was included in the potential acquisition area because it was sandwiched between two larger parcels that were wanted for preserves. With property taxes rapidly increasing in the area of her land, Ms. Rector decided to sell the land, but soon found out that no developer would buy it because it could not be freed up by participation in the regional plan and obtaining an individual 10(a) permit for that parcel would be difficult and overly expensive. Ms. Rector also found out that while the regional plan identified her property for preserve acquisition, the plan proponents (the City of Austin and Travis County) did not have sufficient funds to purchase all the preserve lands and they were focusing on the large tracts for acquisition with the limited funds they had. Ms. Rector was now forced indirectly by the ESA to retain her property and pay high taxes with no way to recover those expenses or sell the land. In the end, after many years of battling this situation, including interactions with the Texas legislature and other political entities, Ms. Rector finally was able to sell her parcel to the regional plan. This is just another example of how tangled the maze can be.

Avoidance and Escape

Now that you have a picture of how big the spider web is, how do you stay out of it or escape it if you are inadvertently caught. Avoidance has a simple answer - DUE DILIGENCE. If you are buying a piece of property for any other intended purpose than a nature preserve, you need to exercise appropriate due diligence to determine whether you are about to step on a land mine. Hiring a qualified consultant and/or ESA attorney to conduct appropriate due diligence will very frequently be cheap insurance. If you know what to look for and how to find it, you can also conduct your own due diligence, or you can consult with the Service about your intended property purchase. Keep in mind that an answer may take some time and effort to acquire, particularly if species surveys are warranted. The standard 30- or 60-day due diligence period may not be long enough.

If you have already purchased a pig in a poke, how are you going to get out of the mire? First of all, don't attempt to sell the property to some other unsuspecting person once you know about the potential problems. Today's disclosure laws in real estate transactions are mean. Depending on the circumstances, it may be possible to use or develop the property in certain ways that will not adversely affect the species or their habitats. This is highly variable depending on the species involved, their ecosystems, the size of the property, and other factors. There may be an existing regional habitat conservation plan available (such as the Balcones Canyonlands Conservation Plan [BCCP] for Travis County) in which you can purchase participation in a relatively timely manner. You should investigate the possibility of selling the property for preserve land if it is suitable. And you always have the opportunity to pursue a permit for taking listed species (10(a) permit or Section 7 consultation) as long as they are not jeopardized by the action or other actions. The permitting process can be long, arduous, and expensive, but, in many cases, has proven feasible, and, in some cases, has proven to be a benefit for the development. If listed species habitat is prevalent in an area (such as western Travis County), acquiring a "take" permit may give the development a large market advantage against other non-permitted properties. The conditions and limitations of a permit on the development often result in a development that becomes very attractive to people that like open space and larger, exclusive lots surrounded by green belt. This has been demonstrated on various properties that received individual 10(a) permits or participated in the BCCP in Travis County. With flexible thinking and good consultants, the cheese can frequently be found in great abundance at the end of the maze. Don't get caught in the maze right off the bat without investigating your possibilities of finding the cheese.