

## ESA Listing Change Shows Conservation Partnership Benefits

By **Elizabeth Dawson, Felicia Isaac and Mary Marston**

(November 21, 2022, 3:43 PM EST)

On Oct. 12, the U.S. Fish and Wildlife Service published its final decision as to the status of the gopher tortoise under the Endangered Species Act[1] — while the species would remain listed as threatened throughout the western portion of its range as it has been since 1987, it would not be listed as threatened or endangered throughout the eastern portion of its range.[2]

On its face, this action may seem unremarkable; the service makes listing decisions all the time. But the gopher tortoise is a keystone species, meaning that it "has a disproportionately large effect on its natural environment relative to its abundance," and in the case of the gopher tortoise, that effect includes providing habitat for hundreds of other species.[3]

And this decision is notable for another reason — the vast majority of potential gopher tortoise habitat is privately held.[4]

The ESA is a powerful tool intended to bring species back from the brink of extinction. At the same time, the listing of a species as threatened or endangered can be perceived as the death-knell to private landowners' ability to manage their lands as they wish to in an area where the species can be found, especially if the listing is accompanied by a critical habitat designation.

But the ESA also provides landowners and project proponents with proactive tools that allow them to partner with the government to preserve their rights while benefiting species: voluntary conservation agreements. State and local regulatory and nonregulatory conservation efforts can also contribute to species conservation through habitat management. These initiatives can aid in the recovery of listed species, and indeed can help prevent listing from being necessary in the first place.

There are three main types of voluntary conservation programs that the service administers under the ESA: habitat conservation plans, or HCP, safe harbor agreements, or SHA, and candidate conservation agreements, or CCA.[5]

An HCP is a planning document geared toward development projects where incidental take is anticipated. Under an HCP, a take of a listed species or destruction of critical habitat will not violate the



Elizabeth Dawson



Felicia Isaac



Mary Marston

law if the plan is followed, including avoidance, minimization and mitigation measures.

By contrast, SHAs and CCAs are more proactive and geared toward preservation and enhancement of ongoing land management activities. Unlike HCPs, SHAs and CCAs require land to be managed to provide a net conservation benefit for listed or candidate species — i.e., species that may require future listing.[6]

According to FWS guidance on safe harbor agreements, landowners can contribute to the recovery of species in numerous ways under these agreements, including through:

- "maintenance, restoration, or enhancement of existing habitats;"
- "reduced habitat fragmentation; increases in habitat connectivity;"
- "stabilized or increased numbers or distribution;"
- "the creation of buffers for protected areas; and"
- "opportunities to test and develop new habitat management techniques." [7]

In exchange, property owners may receive assurances from the service that it will not require any supplementary management measures by the participants without their consent if they adhere to their specified conservation guidelines.[8]

In addition to these agreements enabled by the ESA, voluntary collaborative conservation projects may supplement or enhance more formal efforts. This collaboration may occur with environmental nongovernmental organizations, government agencies and universities. For example, in the case of private working forests, certification programs exist to confirm that lands are managed to conserve habitat and protect water quality.

Voluntary conservation efforts such as these feature prominently in the story of the gopher tortoise. In 2006, the service received a petition to list the gopher tortoise as threatened throughout the eastern portion of its range.[9] Gopher tortoises' most prominent habitats include longleaf pine forest that, in this species' range, is mostly privately owned.[10]

Mindful of the potential for listing and the impact such listing could have, in 2008 several federal agencies, state agencies, nongovernmental organizations and private organizations entered into a CCA.[11] This CCA sought to implement proactive and coordinated conservation activities to help preclude the need to list the gopher tortoise under the ESA.[12]

In the CCA, all parties committed to undertake activities related to landscape-level habitat conservation, local conservation and issues specific to the individual party or region.[13] Those activities included the identification of suitable or potentially suitable gopher tortoise habitat, developing and implementing practices to minimize impacts to gopher tortoises, and timber management.[14] Importantly, all parties also committed to seeking funding in order to carry out their commitments.[15]

Despite these early efforts, in 2011 the service found that, in addition to the threatened status for the western portion of its range, the gopher tortoise's status in the eastern portion rendered it a candidate for listing as well — listing was warranted, but precluded due to higher priorities at the time.[16] But work under the CCA continued, and other voluntary efforts ramped up.

In Florida, for example, the state Fish and Wildlife Conservation Commission developed best management practices for private owners of working forests to reduce gopher tortoise take. By 2021,

landowners had committed to implement these practices on over 3.7 million acres of land in the state.[17] Similarly, the Longleaf Alliance continues to support gopher tortoise conservation efforts through its 2014 initiative that comprises about 5 million acres and primarily focuses on proper fire management of potential gopher tortoise habitats.[18]

In addition to implementing the best management practices to develop and maintain suitable gopher tortoise habitat, private forest owners also contributed to surveys that demonstrated that the gopher tortoise could thrive in working forests among forest types beyond longleaf pine.[19] And millions of acres of private working forests within the gopher tortoise's range are certified through the Sustainable Forestry Initiative — which requires specific habitat-management activities — in addition to other collaborative partnerships.[20]

And after 14 years of concerted voluntary efforts, the service concluded that these efforts, in combination with other factors, were sufficiently successful that listing of the gopher tortoise as threatened in the eastern portion of its range was no longer warranted.[21]

Indeed, in its 2022 decision, the service expressly credited private, voluntary conservation efforts as having benefited the species. The service also explained that those efforts and the implementation of the best management practices on private lands, particularly those managed as working forests, are expected to continue.[22] The continuation of those efforts was an important factor in the conclusion that the eastern population of the gopher tortoise was not likely to become endangered in the foreseeable future.[23]

To be sure, the gopher tortoise is not the only example of public-private voluntary conservation efforts undertaken to prevent a species from being listed under the ESA. But given the importance of this particular species, the benefits of its conservation ripple throughout its ecosystem, extending to other species that may be at risk.

Moreover, the gopher tortoise decision demonstrates the powerful incentive that the specter of listing provides to private landowners to proactively engage with the service and state land management and conservation agencies to formalize new and ongoing conservation measures to ensure that they can keep managing their land without restrictions that could come with listing.

Given that currently, two-thirds of federally listed species have at least some habitat on private land, and others — like the gopher tortoise — have most of their habitat on private land,[24] voluntary public-private partnerships are likely only to increase in importance in this era of increasing threats to species.

Furthermore, land conservation and restoration are increasingly recognized as critical elements not only of biodiversity protection efforts, but also a necessary component of efforts to forestall, mitigate and adapt to climate change. Forested landscape protection in particular is seen as crucial in securing the stability of the climate system.[25]

In sum, creative mechanisms like public-private voluntary conservation partnerships can help leverage landowners' knowledge of their working lands to benefit species and the broader ecosystem, while meeting landowners' desire to keep those lands working.

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] 16 U.S.C. § 1531 et seq.

[2] Endangered and Threatened Wildlife and Plants; Finding for the Gopher Tortoise Eastern and Western Distinct Population Segments, 87 Fed. Reg. 61,834 (Oct. 12, 2022).

[3] Id. at 61,836.

[4] Id. at 61,848.

[5] U.S. Fish & Wildlife Serv., Endangered Species, <https://www.fws.gov/program/endangered-species/what-we-do> (discussing the purpose of its Listing and Classification program) (last visited Nov. 9, 2022).

[6] Endangered Species Act, § 10, 16 U.S.C. § 1531 (establishing the purpose of a Habitat Conservation Plan); U.S. Fish & Wildlife Serv., Habitat Conservation Plans, <https://www.fws.gov/service/habitat-conservation-plans> (detailing what an HCP is, who can participate, what the applicant's role is, and who are the beneficiaries) (last visited Nov. 9, 2022).

[7] U.S. Fish & Wildlife Serv., Safe Harbor Agreements, <https://www.fws.gov/service/safe-harbor-agreements> (offering an example of the purpose of a Safe Harbor Agreement) (last visited Nov. 9, 2022).

[8] 16 U.S.C. § 1539 (enumerating a Safe Harbor Agreement as an exception to the Endangered Species Act); 16 § 1539(a)(1)(A) (highlighting the purpose of a Candidate Conservation Agreement with assurances); U.S. Fish & Wildlife Serv., Safe Harbor Agreements, <https://www.fws.gov/service/safe-harbor-agreements> (detailing what a SHA is, who can participate, and the process for applying) (last visited Nov. 9, 2022); U.S. Fish & Wildlife Serv., Candidate Conservation Agreements, <https://www.fws.gov/service/candidate-conservation-agreements> (detailing what a CCA is, who can participate, and the process for applying) (last visited Nov. 9, 2022); U.S. Fish & Wildlife Serv., Candidate Conservation Agreements with Assurances, <https://www.fws.gov/service/candidate-conservation-agreements-assurances> (offering similar information to the CCA webpage, but defining what an "assurance" is in this context) (last visited Nov. 9, 2022).

[9] 87 Fed. Reg. at 61,834.

[10] Candidate Conservation Agreement for the Gopher Tortoise (*Gopherus Polyphemus*) Eastern Population, [https://ecos.fws.gov/docs/plan\\_documents/tcca/tcca\\_3523.pdf](https://ecos.fws.gov/docs/plan_documents/tcca/tcca_3523.pdf) (last visited Nov. 9, 2022).

[11] Id. at 2-3.

[12] Id. at 4.

[13] Id. at 16-17.

[14] Id. at 17-36.

[15] Id.

[16] 50 C.F.R. pt. 17 (October 26, 2011).

[17] 87 Fed. Reg. at 61,847.

[18] 87 Fed. Reg. at 61,848; America's Longleaf Restoration Initiative, The Longleaf Alliance, <https://longleafalliance.org/what-we-do/restoration-through-partnerships/americas-longleaf-restoration-initiative/> (last visited Nov 10, 2022).

[19] See 87 Fed. Reg. at 61,848; Species Status Assessment for the Gopher Tortoise (*Gopherus Polyphemus*) § 3.9.9 (2021), [https://downloads.regulations.gov/FWS-R4-ES-2009-0029-0073/attachment\\_9.pdf](https://downloads.regulations.gov/FWS-R4-ES-2009-0029-0073/attachment_9.pdf); id. at 99 ("[P]rivate forest owners and managers cooperate with each other via the National Alliance of Forest Owners, NCASI, and the Wildlife Conservation Initiative to ensure gopher tortoise conservation efforts happen throughout the species' range. Lastly, forest certification programs provide further assurances that at-risk species conservation (including gopher tortoise conservation) will continue to be a priority on private forests."). Note, Crowell & Moring represents the National Alliance of Forest Owners.

[20] 87 Fed. Reg. at 61,848; sSpecies Status Assessment for the Gopher Tortoise (*Gopherus Polyphemus*) § 3.9.9 (2021), [https://downloads.regulations.gov/FWS-R4-ES-2009-0029-0073/attachment\\_9.pdf](https://downloads.regulations.gov/FWS-R4-ES-2009-0029-0073/attachment_9.pdf).

[21] U.S. Fish and Wildlife Service completes gopher tortoise review: U.S. Fish & Wildlife Service, FWS.gov (2022), <https://www.fws.gov/press-release/2022-10/us-fish-and-wildlife-service-completes-gopher-tortoise-review> (last visited Nov 9, 2022).

[22] 87 Fed. Reg. at 61,847-48; Partnership helps private landowners manage thriving habitats for at-risk species, Managing Habitats for At-Risk Species (2021), <https://www.forestfoundation.org/why-we-do-it/family-forest-blog/partnership-helps-private-landowners-manage-thriving-habitats-for-at-risk/> (last visited Nov 10, 2022).

[23] 87 Fed. Reg. at 61,858-59.

[24] U.S. Fish & Wildlife Serv., Endangered Species, <https://www.fws.gov/program/endangered-species/what-we-do> (discussing the purpose of its Listing and Classification program) (last visited Nov. 9, 2022).

[25] World Resources Inst., Not Just Carbon: Capturing All the Benefits of Forests for Stabilizing the Climate from Local to Global Scales (2022), <https://www.wri.org/research/not-just-carbon-capturing-benefits-forests-climate>.