



## BENEFITS OF SECTION 10 PERMIT COVERAGE FOR PRIVATE DEVELOPMENT ACTIVITIES

The benefits of receiving coverage under the County's Section 10 permit (Permit) are available only to those projects that occur within the Permit Area and which are identified as Covered Activities in the Final MSCP (visit [www.pima.gov/mscp](http://www.pima.gov/mscp) for more information).

The first section below provides an overview of the Endangered Species Act, as a basic understanding of this federal law is key to fully appreciating the benefits that Section 10 permit coverage provides. The subsequent section discusses key benefits of coverage under the County's Section 10 permit.

### ENDANGERED SPECIES ACT OVERVIEW



*Photo by Iris Rodden, Pima County*

The Endangered Species Act (ESA) of 1973, as amended, provides legal protection to those species listed as threatened or endangered under the auspices of the Act, and establishes penalties for violations of the Act's provisions. There are three sections of the ESA that are especially relevant to both public and private development projects: Section 9, which strictly prohibits any unauthorized "take" of any listed species; Section 7, which requires all federal agencies to consult with the U.S. Fish and Wildlife Service (Service) on activities that may affect listed species; and Section 10, which provides non-federal entities such as the County and private landowners with a means to avoid violating the ESA when engaged in lawful activities.

**SECTION 9** makes it illegal for any individual or any entity to "take" any species protected under the ESA without authorization from the Service. The ESA defines "take" as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or any attempt to engage in any such conduct." This broad definition of "take" also includes habitat modification or destruction that impairs basic behaviors such as breeding, feeding, or sheltering and results in the death or injury of a listed species.

**SECTION 7** requires all federal agencies to consult with the Service when undertaking any activity that may impact a listed species. These interagency consultations ensure that federal actions, including issuing permits, do not jeopardize the long-term survival of any listed species or adversely impact the species' habitat. The Service usually imposes mitigation measures on the federal agency who then passes the mitigation responsibility to the permit recipient.

#### **SECTION 7 CONSULTATION FOR FEDERAL PERMITS AND "RESIDUAL LIABILITY":**

Development activities are subject to Section 7 consultation if the activities involve some sort of federal action such as a permit. One example is when a development project needs a Clean Water Act 404 permit from the U.S. Army Corps of Engineers (ACOE). As the permitting agency, the ACOE, in keeping with Section 7, must consult with the Service before issuing the 404 permit. In such cases, it is important to note that Section 7 consultations and any protections they provide under the ESA are strictly limited to the scope of the federal permit. If the federal permit does not cover the entire project area, there is still potential for the project to inadvertently harm, harass, or even kill a listed species thereby violating Section 9. This is called "residual liability". Pima County had to deal with the consequences of residual liability in 2000, when Department of Transportation (DOT) roadway improvements along Thornydale Road resulted in unauthorized take of the cactus ferruginous pygmy-owl.



*Photo by Pima County Regional Flood Control District*

The DOT received the required 404 permits from ACOE after the required Section 7 consultation with the Service was completed. However, because the 404 permit only applied to wash areas and not the whole project area, project impacts that happened outside the washes resulted in unauthorized impacts to the pygmy-owl. Those unauthorized 'residual' impacts meant Pima County DOT violated Section 9. Consequently, road improvements halted until the County could provide suitable mitigation.

**SECTION 10** provides a way to comply with the ESA for projects that do not need a federal permit or have a federal permit that only applies to a portion of the project. To receive a Section 10 permit, the applicant must submit a conservation plan that, among other things, specifies what steps will be taken to avoid, minimize, and mitigate impacts to listed species and habitat, and what funding will be available to implement those steps. For those activities covered under a Section 10 permit, they are not vulnerable to violating Section 9 if their activities inadvertently harm or kill a listed species.

Pima County applied for a Section 10 permit and submitted the Multi-species Conservation Plan (MSCP) as the required conservation plan. The Service has issued a Section 10 permit to the County which will cover both County development activities and certain private development activities.

### **BENEFITS OF RECEIVING COVERAGE UNDER PIMA COUNTY'S SECTION 10 PERMIT**

- **SAVES TIME AND MONEY:** By streamlining ESA compliance, the Section 10 permit saves county and private developers significant time and money that would otherwise be spent on individual, project-specific consultations with the Service. For example, Pima County Regional Flood Control District estimates that coverage under the County's Section 10 permit will save it months of time, and \$10,000 to \$15,000 in biological survey costs for each project.
- **PROVIDES CERTAINTY:** Every project covered under the County's Section 10 permit is guaranteed that a violation of Section 9 will not occur for any of the species included in the Final MSCP. Without coverage under the County's Section 10 permit, there is no clear cut way to determine when or if a Section 9 violation has occurred, especially if the project does not require a federal permit.
- **OFFERS A LOCAL PROCESS FOR COMPLIANCE:** Without participating in the County's Section 10 permit, each development project (County or private) must endure the time and cost of waiting for projects to be reviewed by the Service one-by-one. The County's Section 10 permit offers a local process, specifically designed around our local needs, that provides County and private development projects with a simple, easy, less time consuming, and ultimately less costly opportunity to achieve compliance with the ESA.
- **COUNTY PROVIDES MITIGATION LAND AND IS RESPONSIBLE FOR MANAGEMENT AND MONITORING:** Projects covered by the County's Section 10 permit will not have to bear the full brunt of providing mitigation land to off-set their impacts or the related management and monitoring responsibilities. This is largely due to the community's past support for open space bonds, which have been used to purchase mitigation land. Monitoring and management of this Section 10 mitigation land is also the County's responsibility. Individual projects no longer have to deal with the time and cost of finding suitable mitigation and funding long-term mitigation obligations. If the project is not covered by the County's Section 10 permit, the responsibility of finding suitable mitigation and funding long-term mitigation obligations falls solely to the individual project.
- **ENSURES THE RULES DO NOT CHANGE IN THE FUTURE:** The County's Section 10 permit covers a total of 44 species - nine currently listed species and 35 others that may be listed in the future. Projects covered under the County's Section 10 permit will be able to proceed without delay and will not be required to comply with additional regulation should any of the 35 non-listed species be listed, or a listed species' distribution on the landscape changes, or if critical habitat is designated.
- **PROTECTS AGAINST "RESIDUAL LIABILITY":** Coverage under the County's Section 10 permit will prevent situations like the 2000 Thornydale Road improvement project, where a federal permit does not cover all of the project area. Extended time delays and significant financial costs necessary to correct inadvertent violations of Section 9 because of residual liability after-the-fact would be avoided.



*Photo by Aaron Flesch*