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Splitting Feathers Part 2: Listing, delisting, uplisting and downlisting

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CAMP VERDE - The Endangered Species Act (ESA) covers most life forms visible to the human eye. It provides two levels of federal protection -- threatened and endangered -- for birds, insects, reptiles, fish, mammals, crustaceans, flowers, grasses and trees.

Endangered species are on the brink of extinction. Threatened species are headed there.

The protections of the law are extended beyond a general species to include, when necessary, protection for subspecies. Originally, the portion of the act defining "species" included "...any subspecies of fish or wildlife of the same species or smaller ...that interbreed when mature."

In 1978 Congress amended the law to read "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife, which interbreeds when mature."

In essence it gave special dispensation to vertebrates. But it would take the U.S. Fish & Wildlife Service another 18 years to fully flesh out the term "distinct population segment."

In making the change, Congress told the USFWS to use the "distinct population segment" (DPS) authority "sparingly and only when the biological evidence indicates that such action is warranted."

Over the years the USFWS has strictly adhered to Congress's admonition, granting separate DPS status to only about 10 percent of the vertebrates covered under the ESA.

The USFWS has a three-step process for determining if a DPS designation is warranted.

First it must pass the "discreteness" test, meaning that it is "markedly separate from other populations" of the same general species "as a consequence of physical, physiological, ecological or behavioral factors."

Satisfying one or more of those factors, its biological significance must be determined as important to the larger species to which it belongs, a more complex determination considered in light of Congress's "sparingly" directive.

If the species passes both tests, a determination is then made as to the current conservation status.
The law allows anyone to petition the USFWS for species protection, DPS or otherwise. The USFWS has 90 days to make a determination as to whether or not the petition is warranted. This is commonly referred to as a "90-day finding."

If the agency deems the petition unwarranted, a negative 90-day finding is issued and further challenges must be made in federal court.

If the 90-day finding is positive, the agency must conduct a more detailed inquiry known as a status review in which USFWS consults with affected parties including other state and federal agencies, Native American tribes, organizations and interested individuals.

After the status review and within 12 months of the petition being submitted, the USFWS must make a determination, known as a 12-month finding, as to whether or not the species warrants ESA protection.

In 2004, as the USFWS was determining if it should remove all bald eagles in the lower 48 from their list of threatened species, the Center for Biological Diversity filed a petition seeking DPS status for the Sonoran desert nesting bald eagles and their reinstatement to endangered status.

Work on the petition was begun, but subsequently ignored. A suit was filed forcing USFWS to agreed to issue a 90-day finding by August 2006. The 90-day finding concluded that the CBD petition lacked scientific information to support the request.

The CBD filed suit in federal court challenging the agency's finding. The CBD argued that the USFWS had not used the best available science and asked a judge to declare that the negative 90-day listing was arbitrary and capricious.

Meanwhile, in 2007, the USFWS delisted all bald eagles in the lower 48 from all ESA protections. The ruling also included a finding that the Arizona eagles were not a "distinct population segment."

In the federal courtroom of Judge Mary Murguia, the USFWS argued that the matter was moot, as the agency had already addressed the DPS question when it delisted all bald eagles in 2007.

But the CBD came to court loaded for bear.

They demonstrated that the USFWS had not followed its own procedures for determining DPS, by determining that the desert eagles were not eligible for DPS after stating they weren't considering the DPS status of any eagles, Arizona's or not.

The CBD also produced documents showing that USFWS biologists studying the Arizona eagles had disagreed on whether or not the birds warranted DPS designation. That alone, they argued, warranted a status review and 12-month finding.

But perhaps most damning, they produced notes from a July 18, 2006, conference call between agency officials in Washington, D.C., and scientists and officials at the regional office in Albuquerque.

The notes showed that Washington officials had issued "marching orders" to the regional office to come up with a determination denying DPS status to the desert eagles.
Judge Murguia ruled that USFWS's actions were in fact arbitrary and capricious and prevented USFWS from delisting the Arizona eagles until a status review and a 12-month finding had been completed.
As ordered, the USFWS undertook a status review, including consultations with interested parties. On Feb.

19, 2010 they published their 12-month finding, determining the desert eagles passed the “discreteness” test but not the “significance” test.

The CBD asked Judge Murguia to rule that the 12-month finding was also arbitrary and capricious, but the judge ruled that the conclusions of the 12-month was a separate legal question requiring a separate legal action

She also lifted the ban on removing federal protections. The Arizona eagles were once again off the threatened species list.

The CBD immediately filed another suit, this time asking a federal court to determine that the USFWS’s 12-month finding was flawed.

On Nov. 30, 2011, federal Judge David Campbell, citing additional documents showing that the Washington, D.C., office of the USFWS was dictating the results of the 12-month determination, issued a rare summary judgment in the CBD’s favor.

The judge ruled that the USFWS’s negative 90-day finding was “procedurally flawed” and an “abuse of discretion.”

In his conclusions he stated, “...the court concludes that the 12-month finding is not in accordance with law and ‘not founded on a rational connection between the facts found and the choices made.’”

The judge did not find fault with the agency’s status review, which means that the public comment period will not be reopened. Instead the agency must now take all the comments gathered during the status review and reevaluate them.

“The court expresses no view on the proper outcome of the new 12-month finding,” Campbell wrote.

As to whether or not the birds will return to threatened status, while the USFWS reviews its 12-month finding, will be addressed by the court in the near future.