

Endangered Species Act of 1973

16 U.S.C.A. §1531 et seq.

1) Highlights from the ESA

A) Select Definitions §1532

(5) (A) The term "*critical habitat*" for a threatened or endangered species means-

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features

(I) essential to the conservation of the species and

(II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "*endangered species*" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(8) The term "*fish or wildlife*" means any member of the animal kingdom, including without limitation any

mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(14) The term "*plant*" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term "*Secretary*" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term "*species*" includes 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.

(19) The term "*take*" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "*threatened species*" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

B) Cases analyzing "critical habitat"

(1) In determining critical habitat, the Court held: 1) all elements essential for conservation of species did not have to be present in same area to designate land as critical habitat; 2) FWS could determine what elements were necessary for conservation without determining exactly when conservation would be complete; 3) requirement for determination of criteria for measuring when species would be conserved applied only to preparation of recovery plan; 4) area designated as "critical habitat" that met requirements for unoccupied habitat also met requirements for occupied habitat; 5) explicit textual exclusion of structures from designation satisfied ESA's

requirement that "specific areas" be designated; and 6) economic analysis from outside consultant properly accounted for economic impact of designation.

Home Builders Ass'n of Northern Cal. v. U.S. Fish and Wildlife Service, 616 F.3d 983 (C.A.9 (Cal.), 2010)

(2) Fish and Wildlife Service (FWS), having determined that land currently unoccupied by endangered [Mexican spotted] owl species was nevertheless essential to owl's conservation, could not reasonably exclude such land when designating owl's critical habitat.

Center for Biological Diversity v. Norton, D.Ariz.2003, 240 F.Supp.2d 1090, amended in part 2003 WL 22849594

(C) Case analyzing determination of endangered species

(1) Fish and Wildlife Service's (FWS) reliance on future conservation efforts in deciding to withdraw proposed listing of Graham's penstemon wildflower violated ESA.

Center For Native Ecosystems v. U.S. Fish and Wildlife Service, D.Colo.2011, 795 F.Supp.2d 1199

(a) In other words, to avoid listing you have to show current implementation of regulations and the regulations need teeth. This is become very apparent with our work on Greater sage-grouse.

(D) Cases analyzing Incidental Takes and Conservation Plans

(1) Fish and Wildlife Service (FWS), in issuing incidental take permits allowing the trapping and relocation of prairie dogs, did not make a clear error in judgment, based on data available at the time of issuance, when it found that the relocation destination adequately mitigated the loss of golf course and Indian land habitats, despite claim that the FWS failed to establish the relocation destination as a viable habitat, in violation of the Endangered Species Act (ESA); the very purpose of a conservation easement at the destination location was to "protect and enhance forever" the prairie dog habitat at the

site, and a state agency had oversight of the easement to ensure its purposes were carried out.

WildEarth Guardians v. U.S. Fish and Wildlife Service, D.Utah 2009, 622 F.Supp.2d 1155.

(2) Applicant for permit to take an endangered species must submit a comprehensive conservation plan and the Fish and Wildlife Service's must then scrutinize the plan and, after affording opportunity for public comment, find that the proposed taking will be incidental to an otherwise lawful activity, that the applicant will minimize and mitigate the impacts of taking, that there is adequate funding for the conservation plan, and that the taking will not appreciably reduce the likelihood of the survival of the species.

Friends of Endangered Species, Inc. v. Jantzen, C.A.9 (Cal.) 1985, 760 F.2d 976.

(3) [Under] Section 7(a)(2), an agency's decision whether to take a discretionary action that may jeopardize endangered or threatened species is strictly governed by ESA-mandated inter-agency consultation procedures. The procedural obligation ensures that the agency proposing the action (the "action agency") consults with the FWS to determine the effects of its action on endangered species and their critical habitat. To meet its procedural obligation, the action agency must first determine whether its proposed discretionary action may affect a listed species or a critical habitat. If so, the agency must consult with the FWS. During consultation, the FWS "evaluates the effects of the proposed action on the survival of [the] species and any potential destruction or adverse modification of critical habitat" and, "based on 'the best scientific and commercial data available,' " formulates a biological opinion (also referred to here as "B.O.").

If the biological opinion concludes that jeopardy is not likely and that there will not be adverse modification of critical habitat, or that there is a 'reasonable and prudent alternative[]' to the agency action that avoids jeopardy and adverse modification

and that the incidental taking of endangered or threatened species will not violate section 7(a)(2), the consulting agency can issue an 'Incidental Take Statement'...." authorizing the action agency to take the endangered or threatened species so long as it respects the [FWS's] terms and conditions." If an action agency receives a jeopardy opinion, the action agency can comply with its substantive obligation under § 7(a)(2) only if it " 'terminate[s] the action, implement[s] the proposed alternative, or seek[s] an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e)." .

Rio Grande Silvery Minnow v. Bureau of Reclamation, C.A.10 2010, 601 F.3d 1096, 1105 (internal citations omitted)

(E) Cases analyzing best available science/data

(1) Under the Administrative Procedure Act (APA), Fish and Wildlife Service (FWS) acted arbitrarily and capriciously by failing to use the "best science" when determining that listing, pursuant to the Endangered Species Act (ESA), of the greater sage-grouse was not warranted; although it consulted with a panel of experts, FWS excluded them from its decision-making process and created no detailed record of their opinions, and it also ignored that portion of their opinions that had been preserved.

Western Watersheds Project v. Fish and Wildlife Service, D.Idaho 2007, 535 F.Supp.2d 1173.

(2) The best available data requirement set forth in the Endangered Species Act (ESA), which requires an agency to make its determinations solely on the basis of the best scientific and commercial data available to the agency, merely prohibits an agency from disregarding available scientific evidence that is in some way better than the evidence it relies on.

Home Builders Ass'n of Northern Cal. v. U.S. Fish and Wildlife Service, N.D.Cal.2007, 529 F.Supp.2d 1110, affirmed 321 Fed.Appx. 704, 2009 WL 971479

(3) Listing determinations under the ESA must be based solely on "the best scientific and commercial data

available. Fish and Wildlife Service's (FWS) failure to consider available data regarding the potential impact of energy extraction, grazing, and OHV on the Graham's penstemon was arbitrary and capricious.

Center For Native Ecosystems v. U.S. Fish and Wildlife Service, D.Colo.2011, 795 F.Supp.2d 1199

2) Useful information from U.S. Fish and Wildlife website

- (A) You can generate a "Species By County Report".
- (B) Their website provides useful information to educate the public. This becomes very helpful when trying to implement a conservation plan.
- (C) There is substantial information on how to engage U.S. Fish and Wildlife Service in developing a conservation agreement.

3) Practice Points

- (A) Be Engaged
 - (1) Make Comments and meet deadlines (extensions are rare).
 - (2) Form working relationships with local BLM and FS offices. This will help you know what is coming down the pike.
 - (3) Have your entity seek cooperator status, if possible, in the planning process. This will allow you to review Plan Amendments and other NEPA documents earlier and provide input during the drafting process.
- (B) Form Coalitions
 - (1) Collaborate with other state and local entities.
 - (2) Engage industry. They may have experts on their staff that can provide scientific assistance.
 - (3) Do not be afraid to engage the BLM or FS. Sometimes they are at odds with FWS and may be able to provide assistance.
- (C) Look in the Toolbox

- (1) Request extensions. Even though they are rare you can use your request to build the record against listing.
- (2) Request information through FOIA.
- (3) Help draft and implement Conservation Agreements.
- (4) As stated earlier, the only way to succeed is to fight science with better science. This is why your client must get engaged early on. Time is not on your side.
- (5) Of course, litigation is always an available tool.

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