The Endangered Species Act of 1973: An Overview

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Overview

- Pre-1973 Statutes

- Endangered Species Act of 1973
  - Listing/Designation Procedure
  - Listing Decision Standards
  - Critical Habitat Designation Standards

- Current Legal Issues

Pre-1973 Legislation

- Endangered Species Preservation Act (1966)
  - First comprehensive federal effort
  - Land acquisition program
- Endangered Species Conservation Act (1969)
  - List of wildlife “threatened with worldwide extinction”
  - Importation ban
- Shortcomings

Endangered Species Act of 1973

- Sec. 2: Broad Purpose
  - "provide a means whereby the <u>ecosystems</u> upon which endangered species and threatened species depend may be conserved . . . ." 16 U.S.C. § 1531(b).

Endangered Species Act of 1973 (cont'd)

- Definition: Species
  - Sec. 3(16): "species" means "any subspecies of fish or wildlife or plants, and any <u>distinct population segment</u> of any species of vertebrate fish or wildlife which interbreeds when mature."
  - DPS Policy: 61 Fed. Reg. 4722 (Feb. 7, 1996)
    - Step 1: Discreteness (2 factors)
    - Step 2: Biological and ecological significance (4+ factors)
  - Policy for pacific salmonids (ESUs): 56 Fed. Reg. 58612 (Nov. 20, 1991)

Endangered Species Act of 1973 (cont'd)

- Definition: Endangered Species
  - Sec. 3(6): "endangered species" means "any species which is in danger of extinction throughout all <u>or a significant portion of its range</u> . . ." (but not pesty insects).
    - <u>Defenders of Wildlife v. Norton</u>, 258 F.3d 1136 (9th Cir. 2001): SPOIR phrase is an oxymoron. Nonetheless, concluded a species is in danger of extinction throughout a SPOIR "if there are major geographical areas in which [the species] is no longer viable but once was."

Endangered Species Act of 1973 (cont'd)

- Definition: Threatened Species
  - Sec. 3(20): "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."
    - Strunk and White, Elements of Style: Too "fuzzy" to have meaning.
    - Agency has discretion and generally proceeds on case-by-case basis, but
      - Two years is not enough. Or. Natural Res. Council v. Daley, 6 F.Supp.2d 1139 (D. Or. 1998).
      - Twenty years not necessarily enough. W. Watersheds Proj. v. Foss, 2005 WL 2002473 (D. Idaho Aug. 19, 2005)

Endangered Species Act of 1973 (cont'd)

- Sec. 4: Listing Procedure
  - Two ways: by petition or Secretary's initiative
  - Petition:
    - 90 days to make finding whether
      - Petition presents substantial scientific or commercial information that petitioned action <u>may be</u> warranted
    - If positive finding made, commence status review

Endangered Species Act of 1973 (cont'd)

- Sec. 4: Listing Procedure (continued)
  - Petition (continued)
    - 12 month deadline for 1 of 3 findings
      - Not warranted
      - Warranted
      - Warranted but precluded
    - Secretary's initiative
      - No timeline

Endangered Species Act of 1973 (cont'd)

- Sec. 4: Listing Determinations
  - (4)(a)(1) – Listing factors (any one is sufficient)
    - Habitat/range destruction, modification, curtailment
    - Overutilization
    - Disease or predation
    - Inadequacy of existing regulatory mechanisms
    - Other natural or manmade factors

Endangered Species Act of 1973 (cont'd)

- Sec. 4(b) Basis for Listing Determinations
  - "best scientific and commercial data available"
  - Economic considerations?
  - Consideration of state/foreign efforts to protect species
    - But, voluntary or speculative future efforts not sufficient. Or. Natural Res. Council v. Daley, 6 F.Supp.2d 1139 (D. Or. 1998); Biodiversity Legal Found. v. Babbitt, 943 F. Supp. 23 (D.D.C. 1996).

Endangered Species Act of 1973 (cont'd)

- Sec. 4: Critical Habitat Determinations
  - At the time a species is listed, Secretary must also designate critical habitat to the maximum extent prudent and determinable. 16 U.S.C. § 1533(a)(3)(A).
    - If critical habitat is not determinable, Secretary may extend designation decision up to 1 more year.
    - Prudent: will designation harm the species?

Endangered Species Act of 1973 (cont'd)

- Consequences of a Positive Listing/Designation
  - Section 7 Consultations
  - Section 9 Prohibitions

Endangered Species Act of 1973 (cont'd)

- Current Legal Questions
  - Does the National Environmental Policy Act apply to critical habitat designation decisions?
    - No: Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995)
    - Yes: Carson County Bd. of Comm'rs v. USFWS, 75 F.3d 1429 (10th Cir. 1996)

      Cape Hatteras Access Pres. Alliance v. USDOI,

      344 F.Supp.2d 108 (D.D.C. 2004)

Endangered Species Act of 1973 (cont'd)

- Current Legal Questions
  - What is the proper method for considering economic impacts of critical habitat designations: incremental vs. co-extensive costs
    - Co-extensive approach: full analysis of all of the economic impacts of designation, regardless of whether those impacts are attributable co-extensively to other causes.
      - N.M. Cattle Growers Ass'n v. USFWS, 248 F.3d 1277 (10th Cir. 2001)
    - Incremental (or baseline) approach: to find the true cost of a designation, the world with the designation must be compared to the world without it.
      - Gifford Pinchot Task Force v. USFWS, 378 F.3d 1059 (9th Cir. 2004)
      - Sierra Club v. USFWS, 245 F.3d 434 (5th Cir. 2001)
      - Cape Hatteras Access Pres. Alliance v. USDOI, 344 F.Supp.2d 108 (D.D.C. 2004)

Endangered Species Act of 1973 (cont'd)

- Current Legal Questions
  - In light of our current understanding of climate change and as it develops further, what role will it play . . .
    - in listing decisions?
    - in critical habitat designations?
    - in consultations?