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Equal Protection, Daubert, and the ESA: The Proposed Rule to Designate Critical Habitat for Jaguars in Arizona and New Mexico and Resulting Subservience of States' Rights to Federal Primacy

The proposed rule to designate Critical Habitat for jaguars in Arizona and New Mexico under the Endangered Species Act can be best described, in view of the best scientific data available, as an "all pain for absolutely no gain" exercise that subordinates State-held rights to federal primacy. Therefore, how this abusive travesty has occurred, and others like it are occurring, is critically important to State Attorney Generals if something is to be done to stem the erosion of such rights through federal agency abuse of the ESA.

Such erosion of State-held rights almost invariably begins with 90-day Petition Findings made by the U.S. Fish & Wildlife Service (and to a less extent, the National Marine Fisheries Service) under the ESA where, despite Congress's clearly stated intent that these federal agencies rely on solely the best scientific information available as the basis for all decision making under the ESA, no procedural safeguard exists to ensure that either agency actually does. As a result, speculation and misrepresentation proffered by biased and self-interested environmental advocacy corporations all too often informs these agencies' findings of substantial "scientific" information at the 90-Day Petition Finding level because neither agency is under any onus of accountability to do otherwise.

Not only does this approach subvert Congress's intent that solely the best scientific data available inform basic threshold implementation of the ESA, it also turns that intent on its head by allowing political policy to drive agency determinations. This is because an affirmative 90-Day Finding on a petition to list establishes a presumption for listing. That presumption consequently biases the one-year review such finding triggers under the ESA, where the same speculations and misrepresentations relied on for the 90-Day Finding are also heavily relied on to justify decisions to list. Such is the case of the jaguar.

On August 3, 1992, the FWS received a petition from the instructor and students of the "American Southwest Sierra Institute" and "Life Net" to list the jaguar as endangered in the United States. Among the statements made by the petitioners and accepted carte blanche by the FWS as "scientific," were those that the jaguar should be listed in the United States because a minimum of 64 (presumed to be naturally-occurring jaguars) had been killed in Arizona since 1900, and, because Brown (1983) had presented an analysis suggesting that a resident, breeding

population of jaguars existed in the southwestern United States at least into the 20th century. (58 FR 19216, April 13, 1993; 62 FR 39147, July 22, 1997).

As amply shown in the comments submitted to the Fish & Wildlife Service by the Pima Natural Resource Conservation District and others on several occasions, however, both of these claims have been proven to be nothing more than inaccurate speculations unsupported by the best scientific data available. Nonetheless, these twin speculations formed the "scientific" basis for the FWS's listing of the jaguar and continue to form the FWS's basis of justification for designating critical habitat for jaguars and concomitant subservience of State-held water rights (i.e., allocation of surface waters for jaguars every 12.4 **miles**) across the areas of Arizona and New Mexico proposed as critical habitat for these animals by use of this proposed rule. Such outcome may have been far different, however, but for a one-word descriptor found within the language of the ESA.

That one word, "negative," relative to 90-Day Petition Findings, found in Section 4(b)(3)(C)(ii) of the ESA, currently prevents anyone seeking to hold the FWS accountable for implementing Congress's intent – that all ESA decisions be based solely on the best scientific data available – from doing so by excluding any judicial challenge of affirmative 90-Day Petition Findings made by the FWS or NMFS on petitions to list. A strong argument can be made, therefore, that the ESA's current denial of access to the courts for some by use of this single word violates Equal Protection under the law.

Where, as here, denial of a fundamental right to some – access to the courts – is involved, strict scrutiny, Equal Protection inquiry is arguably triggered. Such inquiry raises the question of whether those denied the fundamental right of access to the courts and those allowed to exercise that fundamental right are similarly situated. Here, a strong argument can be made that everyone is similarly situated because each could be from the same family, live under the same roof, and equally support the protection of endangered species. Thus, it can be strongly argued that those persons being denied a fundamental right, in this case access to the courts, are similarly situated to those who are not.

A finding of similar situation raises yet a further question -- whether the government's interest is so compelling or overwhelming as to outweigh a similarly situated person's fundamental right of access to the courts. Here, it can also be strongly argued that the government's interest in excluding judicial challenge of positive 90-Day Petition Findings is neither compelling nor overwhelming because Congress's plainly stated intent is that solely the best scientific data available be used as the basis for this and all findings made under the authority of the ESA.

This is because use of the best scientific data available, in keeping with Congress's stated intent, can only be ensured through subjection of determinations to necessary scientific inquiry that weeds out hypotheses and conclusions unsupported by scientific data by disproving them. Thus, the government's interest in denying the basic and fundamental right of access to the courts for those who would attempt to ensure Congress's intent through use of necessary scientific inquiry is neither compelling nor overwhelming. Instead, it can be strongly argued that denial of access to the courts to those who would seek by scientific inquiry to ensure that

decisions made by the USFWS and the NMFS are, in fact, based on the best scientific information available, is neither remotely rational nor in keeping with Congress's actually stated intent.

That such is in fact the case is shown by the four seminal steps for testing hypotheses indispensible to establishing scientific validity. As stated succinctly by Kanner and Casey in their 2007 law review article, *Daubert And The Disappearing Jury Trial* (University of Pittsburgh Law Review, Vol. 69:281, at p. 328), the four steps for testing hypotheses indispensible to establishing scientific validity are:

> "1. A hypothesis must be examined for internal consistency. A proposition that is illogical or self-contradictory on its face should be rejected.
>
> 2. A hypothesis must be examined to see if it really provides insight and understanding into why observed phenomena occur. Ad hoc hypotheses developed to fit a known set of facts typically have little explanatory power.
>
> 3. A new hypothesis must be reviewed for consistency with other hypotheses and theories already accepted as valid to see whether it represents any real improvement over well-established alternatives. Lack of consistency with accepted knowledge does not mandate rejection, but it does call for great caution.
>
> 4. The final, and most important step in testing a hypothesis is empirical corroboration. The need for testing hypotheses empirically is best illustrated by examples of what typically happens to ideas that get widely promoted even though they lack empirical support. Some scientists refer to this kind of work as "pathological science," characterized by a fixation on effects that are difficult to detect, a readiness to disregard prevailing ideas and theories, and an unwillingness to conduct meaningful experimental testing. Cold fusion is a classic example."

As clearly shown by the PNRCD and others in comments submitted to the FWS, the proposed rule to designate critical habitat of jaguars in Arizona and New Mexico is a classic example of the misuse of "pathological science" in ESA decision making. Unfortunately, such misuse of science in decision making is also virtually unassailable because of the placement of all ESA judicially challengeable decisions under the umbrella of the Administrative Procedure Act (APA) where, unfortunately, despite Congress's clearly stated intent that all decisions made under the ESA be based solely on the best scientific data available, the federal rules of evidence do not apply.

Thus, scientific challenges of the hypotheses and data underlying agency decisions relative to the jaguar and all other ESA-listed species are made virtually impossible because *Daubert* scientific evidentiary hearings are not available in actions brought under the APA. Instead, the courts merely defer to the agency (with limited exception) in the absence of any

rational scientific inquiry or scrutiny of agency decision making at all. (See: J. Tavender Holland, *Regulatory Daubert: A Panacea for the Endangered Species Act's "Best Available Science" Mandate)*.

The paradoxical result of these twin infirmities is that basic scientific inquiry, indispensible to ensuring that Congress's "solely the best scientific data available" ESA evidentiary standard is actually met, is rendered virtually irrelevant by both the federal agencies and reviewing courts entrusted with enforcing that intent. This paradoxical result has led and is continuing to lead to ever-greater abuses of citizens, States' rights, science, the treasury, and the species that the ESA was ostensibly enacted to support. It is also a result, in the present instance, that particularly threatens to subjugate Arizona's State-held water rights to federal control.

These abuses can be addressed at the federal level by adoption of two actions, one of which can be taken by Congress and the other of which can be taken by the President, the FWS, and/or the courts. First, Congress can take a major step in curtailing these abuses by amending the ESA (Section 4(b)(3)(C)(ii)) to allow for judicial challenge of all 90-Day Petition Findings. Such amendment would not only resolve the very serious Equal Protection issue previously discussed, but would also embrace necessary scientific inquiry (i.e., hypothesis testing) indispensible to ensuring that Congress's "solely the best scientific data available" evidentiary standard is actually met.

Secondly, the President (by Executive Order), the FWS (by rule) and/or the federal courts (by ruling) can also act to put an end to this pathological science charade by specifically making *Daubert* rules pertaining to scientific evidence and experts applicable to all ESA actions brought under the umbrella of the APA.

Finally, at the State level, litigation, sounding in Equal Protection and real science, could also be brought by the affected States in federal court to conceivably rein in this pathological science charade and to stop further subjugation of State-held rights to federal control. Establishing standing, however, will be critical to any State-initiated effort to do so.

Should any of these actions be taken or succeed, Congress's intent, judicial economy, the rights of the States, the interests of the people, and the conservation of endangered and threatened species will be much better served. If not, we can only expect more, all pain for absolutely no gain, States' rights-erosive, citizen-abusive, incredibly wasteful, pathological science charades, as represented once again here by the proposed rule to designate critical habitat for jaguars in Arizona and New Mexico where habitat essential to their conservation or existence as a species does not exist under any scientifically credible definition of that term.