Arbitrary and Capricious Species Conservation

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In recent months there has been a rash of federal court admonitions of decisions by the U.S. Fish and Wildlife Service (USFWS) and the U.S. Department of the Interior (Interior) not to list species under the Endangered Species Act of 1973 (ESA) as amended (USFWS develops species listings to be approved by the Department of Interior). The courts have found Secretary of the Interior Bruce Babbitt to be arbitrary and capricious in refusing to list, for example, the Canada lynx (*Lynx canadensis*) in the United States (*Defenders of Wildlife et al. v. Babbitt et al.*, U.S. District Court for the District of Columbia: Civil Action No. 96-160, Mar. 27, 1997) and the Barton Springs salamander (*Eurycea sosorum*), an endemic species in Texas (*Save Our Springs et al. v. Babbitt*, U.S. District Court for the Western District of Texas, Midlands-Odessa Division: MO-96-CA-168, Mar. 25, 1997). The Department of Interior consistently missed statutory deadlines for listing and deliberately allowed politics to influence listing decisions.

What does it mean to be arbitrary and capricious? Federal courts give substantial deference to USFWS species listings. Given the expertise of the USFWS in the area of wildlife conservation and management and the deferential standard of review, federal courts begin with a strong presumption in favor of upholding the listing decisions of the USFWS. The courts will not replace their scientific opinion with that of the deciding federal agency. Challenges to listing decisions are not based upon competing scientific opinions and data. Scientists for defendants and plaintiffs do not debate in front of a judge to demonstrate the veracity of plant and animal population models, genetic studies, and other scientific information. Rather, the court determines whether or not the listing decision was reasoned, was carried out correctly, both administratively and procedurally, and was undertaken without any underhanded behavior.

Challenges to species listing actions are brought under the Administrative Procedures Act (APA). An APA arbitrary and capricious analysis by a court is conducted by considering the relevant statute, in this discussion the ESA. A court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (e.g., ESA); contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or show of statutory right; or without observance of procedure required by law (e.g., ESA).

The ESA requires the Department of Interior to disregard politics and to make listing decisions based upon the best available scientific and commercial data. Individuals charged with the administration of the ESA do not have the legal authority to weight the political importance of an endangered species, says the Congress and the courts. In reality, politics can play a big role in species listings. Perhaps it is natural to wonder about "political fallout" from a species listing, but basing listing decisions on politics is another matter.

Some political appointees in government think mostly in terms of politics and have little or no field experience in fish, wildlife, and plant conservation. Many are attorneys bound for high-level positions inside and outside government. Moreover, upper-level USFWS administrators and others a little way down the ladder often view themselves as entry-level political appointees and behave accordingly.

In the Barton Springs salamander decision, the federal court in Texas decided that, during the period when the secretary of the interior continued to gather information relevant to the listing decision, political measures were taken to influence the listing decision, as evidenced by the involvement of the governor of Texas and by political lobbyists for the development community working with political appointees of the secretary.

The department's solution to the "political problems" surrounding the Barton Spring's salamander was to withdraw the proposed listing of the species and to sign a conservation agreement, the Barton Springs Salamander Conservation Agreement and Strategy, with the State of Texas. Because of the commitment by Texas to fully implement the conservation agreement and strategy, the

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Department of Interior concluded that listing was no longer warranted.

But the federal court in Texas viewed the Barton Springs salamander agreement as a ruse. The agreement did not take any tangible steps to reduce the immediate threats to the species. There were no assurances that measures would be carried out, when they would be carried out, or whether they would be effective in eliminating the threats to the species. The agreement failed to address the concerns for the species expressed in the original, later withdrawn, listing proposal. The court wrote that the "Secretary cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record." The court suggested a common-sense approach to listing the salamander: writing a recovery plan, carrying out the plan, and then delisting the species when appropriate. That sounds like the current lawful procedure under the ESA.

The Secretary violated the ESA and APA by failing to meet all statutory deadlines provided in the ESA for listing petitions and listing decisions and by failing to follow proper procedures. The federal court in Texas said the Secretary considered factors other than those contemplated by the ESA: "When the Secretary permitted an Agreement, with no proven track record for effectiveness in protecting the species, to play a pivotal role in his listing decision and when he considered political factors in making his listing decision, he acted arbitrarily and capriciously."

The Canada lynx provides another example of illegal and deliberate actions by officials in the Department of Interior. Every listing biologist in the USFWS regions straddling the U.S.-Canadian border from Maine to Washington recommended listing the Canada lynx in the United States. The politically appointed officials at the USFWS and Interior decided that the lynx did not warrant listing. On 27 March 1997, a federal court concluded that USFWS's "decision not to list the Canada lynx and grant it protection of the ESA is arbitrary and capricious, applied an incorrect legal standard, relied on glaringly faulty factual premises and ignored the views of its own experts."

Interior attempted to defend its stance by saying that there is no scientific certainty as to the lynx's status. But the ESA requires that decisions be based upon the best available data and not the more stringent standard of conclusive evidence. The federal court wrote:

> The ESA does not require scientific certainty to justify the listing of a species. To the contrary, the clear intent and purpose of Congress in enacting the ESA was to provide preventive protection for species before there is "conclusive" evidence that they have become extinct. Because the agency applied the wrong legal standard, in clear violation of the plain wording of the statute as well as the case law and its own prior interpretation of that statute, its decision not to list the lynx must be set aside.

In this and other listing cases, the federal courts have recognized that USFWS biologists were trying to do their job correctly but that the biologists and the ESA were being illegally undercut by political actions of USFWS and Department of Interior officials. USFWS employees are frequently reminded to have little direct contact with members of Congress and their staff or with state and other politicians—in other words, to stay clear of politics. Any contact must be reported immediately to the USFWS hierarchy. That rule does not seem to apply to the USFWS and Interior leadership, and in the end they became the greatest offenders of impropriety in ESA matters.

Listing species has been a controversial process for a long time (Sidle 1990; U.S. General Accounting Office 1993). When I was writing proposed and final listing decisions in the early 1980s, USFWS administrators rarely were interested in the biology of the species, only the political repercussions of a proposed listing. I had to garner letters of support from state governors and other non-scientists.

The USFWS is under intense pressure to curtail listings by saving species through other means such as conservation agreements and memorandums of agreements. Voluntary conservation agreements and strategies are now in vogue to prevent listings throughout the nation. The laudable thinking is that such agreements can address species conservation without applying the perceived distasteful, onerous, and regulatory mechanisms of the ESA. But such agreements are not as compelling as the listing of a species, and the track record of conservation agreements is poor (U.S. General Accounting Office 1993). They remain a potential but unproven tool for species conservation.

Who among us would be opposed to additional but effective means to protect species and their habitats? But before we give up on listing species under the ESA, we had better be sure of a new course for species conservation which is free of arbitrary and capricious shenanigans.

Literature Cited

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