



Ninth Circuit Defers to U.S. Fish & Wildlife Service's Distinct Population Segment Determination

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On August 28, 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision upholding a U.S. Fish and Wildlife Service (Service) determination that the Sonoran Desert Area bald eagle does not constitute a distinct population segment (DPS) under the Endangered Species Act (ESA). *Ctr. for Biological Diversity v. Zinke*, No. 14-17513, 2017 WL 3687443 (9th Cir. Aug. 28, 2017). The court deferred to the Service's interpretation of its DPS policy, holding that the Service reasonably applied the relevant factors and considered scientific evidence to support its decision.

The ESA makes reference to, but does not define, the term distinct population segment. As a consequence, the Service has developed a DPS policy, which states that a population segment must be both discrete and significant. The parties agreed that the desert eagle population was discrete, but disputed whether the population was significant. Pursuant to the Service's DPS policy, a determination regarding significance requires consideration of the following factors:

1. Persistence of the DPS in an ecological setting unusual or unique for the taxon,
2. Evidence that loss of the DPS would result in a significant gap in the range of a taxon,
3. Evidence that the DPS represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the DPS differs markedly from other populations of the species in its genetic characteristics.

Plaintiffs challenged the Service's determination with respect to the first two factors.

To begin with, the Service concluded that the proposed desert eagle DPS satisfied the first factor relating to persistence, but found that satisfaction of that factor alone did not necessarily compel a conclusion that the

desert eagle population was significant. Plaintiffs argued that this decision was improper because the Service has in the past always found significance when it found that one of the four factors was satisfied. While the Service disputed this contention, the court's decision did not turn on the Service's prior practices. Rather, the Ninth Circuit held as a matter of law that the Service's DPS policy is open-ended, and provides the Service with the discretion to consider whether various characteristics of a proposed DPS are ecologically or biologically significant for a taxon as a whole. The court's decision makes it clear that where a population satisfies one significance factor, the Service is not compelled to make a finding that the proposed DPS is significant.

Furthermore, the Service found that, if the proposed desert eagle DPS was extirpated, this would not result in a significant gap in the range of the bald eagle taxon. Plaintiffs argued that this conclusion was flawed because in a draft document prepared by the Service, the agency concluded that the desert eagle population constituted a peripheral population. Plaintiffs further argued that, in multiple prior cases, the Service concluded that the loss of a peripheral population resulted in a gap in the range of a taxon. The Ninth Circuit found this argument unpersuasive, reasoning that, while relevant, prior agency documents are not determinative. The court explained that agencies may change course, and that the court's role is to review the change of course to ensure that it is based on new evidence or otherwise based on reasoned analysis. The court concluded that, despite not expressly discussing peripheral populations in its final decision, the substance of the Service's analysis took into account the benefits of such populations. Thus, the court found that it was reasonable for the Service to conclude, based on a lack of evidence of distinctive traits or genetic variations among the desert eagle population, that loss of the population would not have a negative effect on the bald eagle species as a whole.

Lastly, plaintiffs asserted that the Service failed to consider climate change when making its determination regarding the desert bald eagle. Based on the record, the Ninth Circuit found this argument unpersuasive.

The Ninth Circuit's decision reinforces the court's inclination to defer to the Service's legal and technical determinations. It is also consistent with Ninth Circuit precedent in the recent past, including *San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014), that subjugates the ESA's requirement to make its decision on the basis of the best available scientific information to the more deferential arbitrary or capricious standard in the Administrative Procedure Act. That said, it is likely that stakeholders will continue to dispute (and, in some cases, litigate) DPS determinations made by the Service.