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Fish & Game Commission's Decision To Deny Petition To Remove Coho Salmon From The State Endangered Species List Upheld

The California Endangered Species Act allows interested parties to file a petition with the California Fish & Game Commission to list or delist a species as threatened or endangered. If the Commission accepts the petition, it then decides whether to take the action requested in the petition, based on a scientific report on the species prepared by the Department of Fish & Game.

In 1995, the Commission listed coho salmon in two creeks in Santa Cruz County as endangered. Nine years later, a timber industry association and a logging company filed a delisting petition claiming that the factual basis for the 1995 listing was erroneous. The Commission declined to accept the petition for full consideration, but a trial court overturned that decision and ordered that the Commission consider the petition.

The court of appeal – in a 2-1 decision – reversed the trial court and upheld the Commission's action, ruling that the delisting petition filed with the Commission was not a proper method for challenging the basis of a prior listing decision. *Central Coast Forest Association v. California Fish & Game Commission* (3d Dist. Case No. C060569, Dec. 14, 2012).

The court analyzed the provisions of the California Endangered Species Act and determined that the "exclusive means" for attacking a listing decision is a lawsuit challenging that decision. By contrast, the court explained, petitions for delisting filed with the Commission are reserved for presenting new information, arising after the listing, that shows the conditions that led to the listing have changed, and the species has either recovered or is extinct. The delisting petition in this case was improper because it sought to show that the 1995 listing was erroneous, rather than that new information demonstrated the species' condition had changed since then.

The dissenting opinion asserted that the majority incorrectly focused on the statutory section governing judicial review of a final listing decision, instead of the section governing delisting petitions, which broadly provides for reconsideration of the original listing if such a reevaluation is "warranted." As a result, the dissent maintained, the majority avoided the key issue in the case: whether the delisting petition included sufficient scientific information to support delisting – regardless of when the original listing decision was made and whether it was challenged in court. The dissent further argued that delisting may be "warranted" not only if a listed species has recovered or is extinct, but also if the data supporting the original listing is discovered to be in error.

Lamenting that the majority foreclosed consideration of the merits of the delisting petition by seizing on a "technicality," the dissent concluded: "Plaintiffs seek nothing more from the Commission than a full and fair consideration of the new scientific evidence they presented in their petition and whether the listing no longer satisfies the statutory prerequisites. CESA is written to allow that consideration to take place at any time."

Update: On February 27, 2013, the California Supreme Court granted a petition to review the court of appeal's decision. The grant of review is discussed in our March 6 post on the case.

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