

**Abuses of the Endangered Species Act:
the So-Called “Preble's Meadow Jumping Mouse”
Testimony of Kent Holsinger, Counsel to the
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Committee on Resources, U.S. House of Representatives
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Introduction

My sincerest thanks to Congresswoman Musgrave and Chairman Pombo for their significant efforts to pass the Threatened and Endangered Species Recovery Act (TESRA) in the House of Representatives. That historic legislation would significantly improve the Endangered Species Act (“ESA”) and help bring it into this century. Thank you also for holding this hearing on what has become a poster-child for what has gone wrong with the ESA.

The ESA has become known for its disincentives to landowners, lax or changing standards on science, and a recovery rate of less than 1%. The Preble’s meadow jumping mouse was listed in 1998 as one of thirteen subspecies of meadow jumping mice based on a review of only four adult specimens. But exhaustive reviews using the latest in scientific techniques and multiple articles published in peer-reviewed journals that rebut this listing are somehow not enough for the U.S. Fish and Wildlife Service (“FWS”).

The Endangered Species, Subspecies, Questionable Subspecies and Distinct, or Not-so-Distinct, Population Segment Act

Should Preble’s remain a listed subspecies under the ESA, the Act must be renamed “the Endangered Species, Subspecies, Questionable Subspecies and Distinct, or Not-so-Distinct, Population Segment Act. It is worthy to note that the ESA itself speaks in terms of preserving species.

And Congress directed the Secretary to exercise the authority to list subspecies or population segments “sparingly and only when the biological evidence indicates that such action is warranted.” (Senate Report 151, 96th Congress, 1st Session). The FWS has no authority to recognize a subspecies as significant on the basis of the importance of its role in the ecosystem. It is the significance to the taxon to which it belongs that must be considered. In this case, meadow jumping mice range over half of the North American continent and Preble’s is clearly not significant to the taxon of meadow jumping mice.

The Preble’s Petition Process

On December 17, 2006, the Coloradans for Water Conservation and Development petitioned FWS to delist Preble’s based on trapping data that demonstrated Preble’s was far from threatened or endangered and genetic and taxonomic data that demonstrated it was not a unique subspecies. The State of Wyoming filed a similar petition around the same time.

In February, 2005, FWS releases proposed rule to delist Preble's. But in the rule, the FWS completely ignored the trapping data as well as the ample regulatory mechanisms already in place to protect riparian habitat. Section 4 of the ESA requires the FWS to consider 5 factors in listing or delisting. The agency failed to consider such factors in the proposed rule.

Instead, FWS commissioned additional review of Dr. Rob Roy Ramey, II's work outside of the comment period on the proposed rule and after (Ramey et al. 2005) had already been peer-reviewed and published. This action violated the FWS Policy on Peer Review.

Section 4 of the ESA provides that petitions are to be considered within twelve months, but no more than 18 months should there be substantial scientific disagreement. Nearly three years have passed since CWCD filed its petition to delist Preble's.

Both the States of Colorado and Wyoming have called for the delisting of Preble's. FWS seems to have ignored their requests despite the direction in Section 6 of the ESA and the FWS's policies in regards to cooperating with the states.

The FWS Violated the Data Quality Act

The CWCD filed a Data Quality Act Challenge with the FWS on March 15, 2006. The Data Quality Act and its implementing guidelines require an agency respond to such a challenge within 60 days. It has been six months since the challenge was filed and CWCD has yet to receive a response from the FWS.

The Data Quality Act challenge pointed out that (Ramey et al. 2005) underwent at least five independent reviews and an additional four reviews prior to publication in the journal *Animal Conservation*. Further review, particularly by an agency employee, Dr. Tim King of the USGS, was an unnecessary taxpayer expense. But the FWS insisted that (Ramey et al. 2005) undergo scores of reviews—even after publication. Notably, the agency required no such reviews for two unpublished papers it relied upon in the original listing of Preble's: (Ryon 1995) and (Riggs et al. 1997).

Upon examination of physical and genetic differences, (Ramey et al. 2005) concluded Preble's was not unique from at least two other subspecies of meadow jumping mice. Notably, (Ramey et al. 2005) disproved that there were differences in skull measurements of the purported subspecies. The FWS had relied upon these hypothetical differences in its listing of Preble's. Dr. King supported subspeciation even where there are no physical nor ecological differences between populations.

And the King study failed to meet standards of quality, reliability, integrity and reproducibility under the Data Quality Act. For example, the The King study cherry-picked samples. When comparing Preble's to other subspecies, the King study used no samples within a four-hour drive (250 miles) of the Front Range. Some samples were taken from as far away as 600 miles, or a nine-hour car trip.

Even with bias in sampling, the King study could demonstrate less than one-half of one-percent genetic variation between Preble's and other purported subspecies of meadow jumping mice. More importantly, the conclusions of the King study are inconsistent with its results. Dr. King had to submit an Internet posting for help on how to conduct his tests on Preble's. In that posting, Dr. King admitted there was "weak differentiation," but the King study concludes there is "strong genetic differentiation" and calls for creating even more subspecies of meadow jumping mice (Preble's North and Preble's South).

This is not the first time the quality of a King study has been questioned, nor is it the first time Dr. King has flip-flopped on a decision. In 1995, Dr. King said Atlantic salmon in Maine were no different than Atlantic salmon in Canada. Later, Dr. King supported listing the Atlantic salmon in Main as a genetically distinct entity under the Endangered Species Act. "[W]e looked at 2,000 Atlantic salmon and they're all unique," King said. It took the State of Maine years to obtain data from the King study to review. Maine had to file two Freedom of Information Act ("FOIA") requests and two lawsuits to obtain the data. When the data was finally released, under court order, it appeared to have been tampered with by Dr. King. A qualified, independent review of the King study on Atlantic salmon revealed flawed sampling, an outdated statistical approach and suspect conclusions that were "incredibly naïve" and "overstated hyperbole."

No End in Sight? The SEI Review

Nevertheless, the FWS has relied upon Dr. King to delay the delisting process. FWS also commissioned the Sustainable Ecosystems Institute ("SEI") to review both the work of Ramey et al. and King. After exhaustive study using the latest scientific techniques and multiple published and peer-reviewed papers, SEI determined more work needs to be done prior to invalidating Preble's. SEI virtually ignored that Dr. Krutzch, the creator of the subspecies preblei, recanted his earlier work. They also ignored that (Jones 1981) concluded there were no physical differences between purported subspecies of meadow jumping mice. They also virtually ignored that the independent lab, Genova, reviewed Ramey and King and found Ramey's work much more reliable and acceptable under today's standards. Finally, SEI seems to have ignored that Ramey et al. used hypothesis testing and reviewed alleged physical differences against their genetic results.

Conclusion

The FWS must put an end to the Preble's debacle and delist this common mouse as called for by CWCD, the States of Colorado and Wyoming, and several local governments. Should FWS fail to establish sensible standards for listing species, any creature, no matter how common, could be listed under the ESA. Such results, in terms of wasted conservation resources, and impacts to landowners, would be disastrous.