



Number Twenty, \$5 U.S.

WAR OF ATTRITION

**Sabotage of the
Endangered Species Act
by the
U.S. Department of Interior**

December 1997

About PEER

Public Employees for Environmental Responsibility (PEER) is an association of resource managers, scientists, biologists, law enforcement officials and other government professionals committed to upholding the public trust through responsible management of the nation's environment and natural resources.

PEER advocates sustainable management of public resources, promotes enforcement of environmental protection laws, and seeks to be a catalyst for supporting professional integrity and promoting environmental ethics in government agencies.

PEER provides public employees committed to ecologically responsible management with a credible voice for expressing their concerns.

PEER's objectives are to:

1. **Organize** a strong base of support among employees with local, state and federal resource management agencies;
2. **Inform** policymakers and the public about substantive issues of concern to PEER members;
3. **Defend** and strengthen the legal rights of public employees who speak out about issues of environmental management; and
4. **Monitor** land management and environmental protection agencies.

PEER recognizes the invaluable role that government employees play as defenders of the environment and stewards of our natural resources. PEER supports resource professionals who advocate environmental protection in a responsible, professional manner.

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About This Report

This PEER white paper documents the Department of Interior's practice of consistently overruling the recommendations of its own scientists to list species as threatened or endangered under the Endangered Species Act (ESA). This posture is part of a deliberate campaign by the highest officials in the Department of Interior to frustrate the implementation of ESA.

The Department of Interior has decided to stall needed species protection measures until it can secure Congressional approval of a reauthorization bill which would greatly weaken the Act and allow the Department to use prospective "conservation agreements" with states—an arrangement commonly derided as "a lick and a promise"—as a legal barrier against lawsuits seeking to force listing decisions or designation of critical habitat.

War of Attrition lays out Interior's self-imposed moratorium on ESA listing activity. It profiles a sampling of representative cases in which the science of species and habitat protection developed by the agency's own scientists has been undermined by the politics of agency leaders.

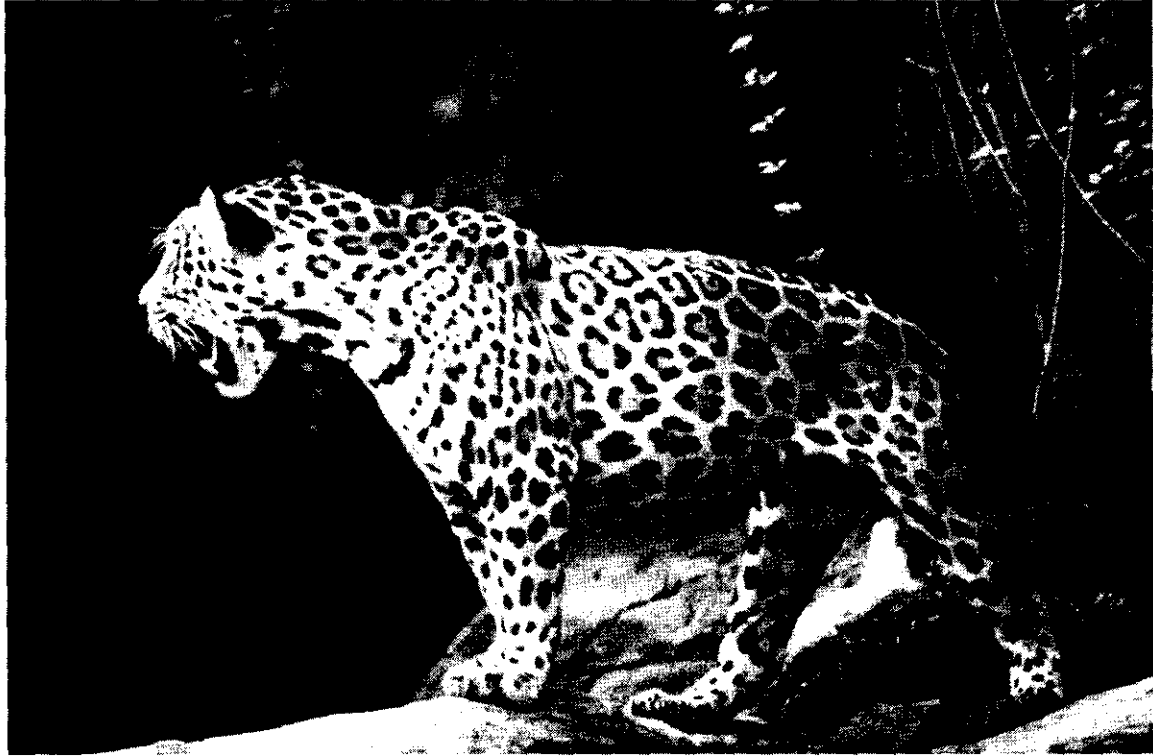
This report is the fourth in a series of reports detailing the failure of the Department of Interior to implement the letter as well as the spirit of the Endangered Species Act: **Grizzly**

Science describes the experiences of more than a dozen federal and state biologists working within the Greater Yellowstone Ecosystem who have been trapped in the conflict between the practice of wildlife biology and the political pressure emanating from their resource agencies to declare the grizzly bear a "recovered" species despite all evidence to the contrary. **Noah's Ark is Leaking**, written by scientists within the U.S. Fish & Wildlife Service (USFWS), documents the almost complete abandonment of international ESA protections by the Department of Interior and the resulting detriment to global biodiversity. In **Tarnished Trophies**, USFWS specialists spell out the role played by the Department of Interior in facilitating trophy hunting of foreign threatened and endangered species.

This white paper could not have been completed without the research and hard work of Wiley Sawyer of the New York University Law School and Teresa Berwick of the Georgetown University Law Center.

PEER is proud to serve conscientious public employees who have dedicated their careers to faithful execution of the laws protecting this country's and this planet's natural resources.

Jeffrey Ruch
PEER Executive Director



USFWS / JOHN & KAREN HOLLINGSWORTH

I. Executive Summary

The Department of Interior and its Fish & Wildlife Service (USFWS) have suspended enforcement of the Endangered Species Act, systematically refusing to list new species despite the findings of their own scientists. This white paper profiles a representative sampling of cases where the listing recommendations of USFWS biologists were reversed by Interior for non-biological reasons, in clear violation of law.

While proclaiming concern for endangered species, the Department of Interior has quietly lobbied Congress to restrict funding for Endangered Species Act (ESA) listing activities. Without listing, wildlife are vulnerable to continued habitat destruction, poaching and trafficking in their parts and products. At the Department's urging, Congress has capped ESA funding at levels which Interior admits are inadequate.

Blaming these secretly self-imposed budgetary limitations, USFWS has ceased review of almost all new listing petitions yet is spending millions of dollars to fight lawsuits brought by environmental groups to force listing.

Citing the work of USFWS's own biologists, environmental groups are winning lawsuits to force Interior to list endangered and threatened species.

More than twenty species have recently been listed pursuant to court order. The status of nearly 300 domestic species is now the subject of pending litigation while notices of intent to sue have been filed on behalf of another 150 species.

Unfortunately, this species by species legal trench warfare being waged by small non-profit groups against the government cannot progress quickly enough to slow the march of many species toward extinction. In effect, the Department of Interior is waging a legal war of attrition against unprotected wildlife.

Fearing a political backlash from development interests, state governments and influential Congressional delegations, Clinton Administration officials are blocking new listing recommendations from their own scientists:

► One case profiled in *War of Attrition* is the lowly Barton Springs salamander, a small amphibian found only at one place on earth—Barton Springs in the City of Austin, Texas. Contrary to the USFWS position that the salamander was a "top priority for listing," Interior Secretary Bruce Babbitt overruled the agency because of the politically sensitive nature of the case.

To justify his action Secretary Babbitt entered into a Conservation Agreement with the State of Texas. Despite the state's abysmal track record, Babbitt declared that the agreement would be "sufficient to reduce the risks to the salamander." The U.S. District Court found that Babbitt's decision was "arbitrary and capricious," noting that the "Secretary cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record."

► Notwithstanding the outcome of the Barton Springs salamander battle, Interior has taken almost the identical stance in refusing to list the Arkansas River shiner, a small minnow-like fish. Once again, Interior wants to rely on a Consent Agreement with the State of Texas, which, among its other failures, has, according to its own scientists, manipulated population data in order to make the shiner population appear more numerous. The responsible state agency, the Texas Parks & Wildlife Department, describes itself as the "strongest ally" of agribusiness in the fight to prevent the listing of the shiner as an endangered species.

► This refusal to list is by no means confined to the Southwest. A federal district court, in a suit brought by the Defenders of Wildlife, ruled that the USFWS Director, by refusing to list the Canada lynx, was ignoring the "overwhelming consensus among the [agency's] biologists...that the lynx must be listed." The court faulted the "glaringly faulty factual premises" used by USFWS to avoid listing, premises which were "contradicted by the entire Administrative Record."

War of Attrition recounts the elaborate legal gymnastics employed by USFWS to deny en-

U.S. Fish & Wildlife Service

dangered species protection to the northern goshawk and focuses on the recent efforts of agency officials to avoid listing despite a string of adverse court rulings. Another case of endangered species malpractice by the USFWS involves the Alexander Archipelago wolf which, despite unanimous listing recommendation of agency biologists, is the subject of a protracted legal battle with recalcitrant agency officials. The same pattern of legal malfeasance is seen in other cases profiled in the report.

Secretary Babbitt has recently endorsed Endangered Species Act reauthorization legislation authored by Senator Dirk Kempthorne (R-Idaho) which will, among other things, legitimize the use of speculative conservation agreements with state and local agencies as an alternative to

invoking the protections of the Act. Secretary Babbitt is blocking new listings and prolonging legal resistance to listing litigation in order to buy enough time to win legislative relief. As a consequence, today, the greatest barrier to implementation of the Endangered Species Act is Bruce Babbitt.

While all of this legal and political maneuvering continues, little is accomplished by way of recovery efforts for animals in jeopardy. On September 19, 1997, the USFWS deleted five species from the list of "candidates" for listing as threatened or endangered. The reason for the action is that the five species, which had been in candidate status for years without any steps taken toward listing, had gone extinct in the meantime.

II. The Self-imposed Listing Moratorium

The Republican-controlled 104th Congress, as part of the FY 1996 Omnibus Appropriations bill, imposed a thirteen month long moratorium on additions to the endangered species list. During the moratorium, officials of the Clinton Administration warned that hundreds of species faced extinction if the listing prohibition was not lifted. After the moratorium ended in mid-1996, Interior officials argued that the Congressionally imposed delays had aggravated an already large backlog of listing decisions.

These officials repeatedly testified that USFWS lacked the funding to process decisions for even those 150 species previously declared by the agency to be candidates for listing due to their deteriorating status and acknowledged need for protection, let alone the hundreds of other species being proposed for listing by environmental organizations.

Despite these pleas for resources to address the plight of species in jeopardy, the Clinton Administration requested less money in FY 1997 for USFWS listing activities (which includes delisting and designation of critical habitat) than they had requested for the previous fiscal year—\$7.483 million versus \$8.157 million. Congress responded by appropriating only \$5 million for FY 1997.

Interior officials insisted that the \$5 million appropriation was insufficient to allow USFWS to meet its listing responsibilities under ESA. USFWS pointed to a lack of funding as the reason it could not act on listing petitions. Administration lawyers also used the shortage of available funding as an argument in litigation to counter environmental groups who were seeking to force listing decisions through the courts.

For the FY 1998 budget, the Clinton Administration requested even less money than the previous year, \$5.190 million, only slightly more than the amount Congress had appropriated in FY 1997. To put this request in context, the Bush Administration requested \$10.175 million for listing activities in FY 1992—an amount almost double the FY 1998 Clinton request.

Meanwhile, John Leshy, the Solicitor General of the Department of Interior, had approached Republican appropriators to lobby for the inclusion of spending cap language on the ESA listing line item. The Leshy cap prohibits the Department of Interior from spending any additional funds from other line items, or from the Secretary's discretionary accounts, on the listing program.

Surprisingly, this "hard" cap proved to be a hard sell. Reportedly Secretary Babbitt himself had to personally call skeptical Republican members to explain why he wanted to legislatively limit his own administrative flexibility. The Leshy language was approved in the House but was not acted upon in the Senate. The Conference Committee on Interior Appropriations adopted the language, noting in its committee report:

"As requested by the Department of Interior, the managers [the members designated to handle that particular portion of the bill] reluctantly agreed to limit statutorily the funds for the endangered species listing program."

The Clinton Administration wanted to make sure its own hands were securely tied as part of a larger legal strategy. Facing an armada of lawsuits demanding listing of hundreds of species [see Chapter IV] and anticipating a steady diet of litigation defeats, Secretary Babbitt hoped to block the realization of judicially ordered relief by contending that it was absolutely forbidden from spending more than \$5.190 million on all listing activities. Thus, no matter how many listing decisions the courts ordered the Clinton Administration to make, the Leshy language would guarantee that new listings could continue at no faster than a glacial pace.

The slow pace of recent listing decisions following the lifting of the Congressional moratorium had finally begun to draw even Republican critics. Senator John Chafee (R-Rhode Island), Chairman of the Senate Committee on Environment and Public Works, wrote to Secretary Babbitt on October 3, 1996 to express "strong concern about what

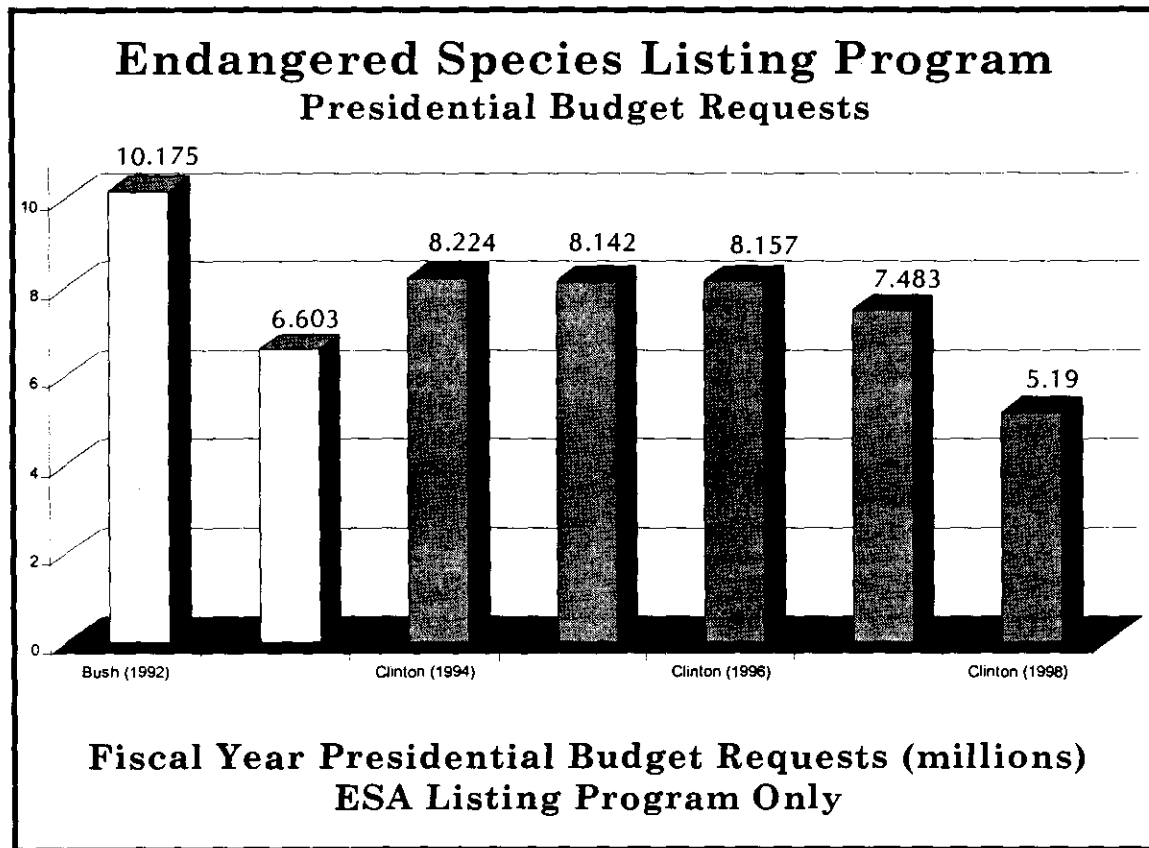
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appear to be politically motivated administrative delays in the listing of species under the Endangered Species Act." Senator Chafee noted:

"While I recognize that listing decisions can be controversial, the law directs that listings must be based on science, not politics. It is my understanding that few species have been listed since the

moratorium ended and that most, if not all, of those listings were under court order."

Senator Chafee's concern that election year politics explained the Clinton Administration's self-imposed moratorium proved groundless because the delays in listings continued past the election and persist today.



The Proof is in the Pudding. The Clinton Administration listing budget is little more than half that of the pre-election Bush Administration.

Credit:
Earth Justice Legal Defense Fund
Contact: Heather Weiner (202) 667-4500

III. Microcosms Of Malfeasance

Barton Springs Salamander

The Barton Springs salamander is a small, unusual amphibian. Instead of trading life underwater for life on land, as most amphibians do, it retains its bright red external gills and spends its entire life in the water. This unique salamander is found naturally in only one place in the world Barton Springs in the City of Austin's Zilker Park.

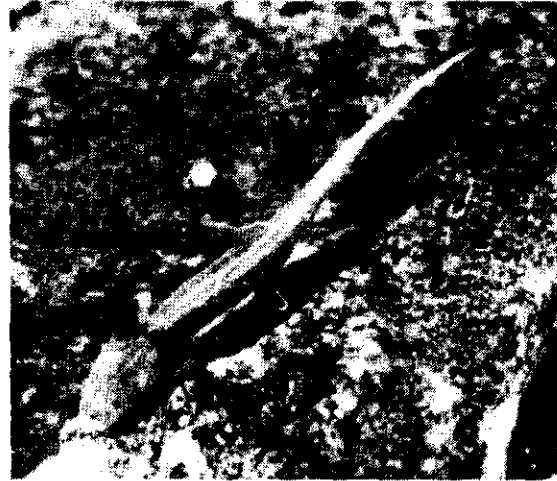
Because the salamander is isolated and depends on a constant supply of clean, flowing water from Barton Springs to survive and reproduce, it is especially vulnerable to water pollution. Indeed, toxic substances can easily be absorbed by the salamander's eggs and larvae, as well as through the adults' semi-permeable skin. Neither the salamander, nor the amphipods it eats can survive in contaminated water. Unfortunately, attempts to breed the salamander in captivity have failed, probably because of the animals' sensitivity to environmental stress.

Impact of Urban Development

In recent years, unchecked urban development has jeopardized the survival of the Barton Springs salamander by contaminating and removing water from the Springs. The salamander's plight has become even more urgent as a result of the ongoing drought in Central Texas. In 1946, the salamander was reportedly "abundant" in the Barton Springs Pool, and in the 1970s, "dozens or hundreds" of salamanders were observed in the adjacent Eliza Pool.

By 1996, however, the number had plummeted to a yearly range of 3 to 45 salamanders for the Barton Springs Pool, and 0 to 28 for the Eliza Pool.

For these reasons, Lisa O'Donnell, a biologist with the Southwest Regional Office of the U.S. Fish and Wildlife Service (USFWS) identified the Barton Springs salamander as the most endangered among species "deemed to face imminent, high magnitude threats" in the southwestern states, and made the salamander a "top priority for listing." O'Donnell informed her supervisors that the following



Taking a Dive. Court said that politics, not law, governed Babbitt's decision to block listing for the Barton Springs salamander.

urban activities seriously jeopardized the Barton Springs salamander:

- discharges or dumping of chemicals
- new developments that degrade water quality and quantity
- highway and roadway construction projects
- water withdrawal from the sources contributing to the Springs
- water withdrawal from the Barton Springs aquifer itself
- introduction of non-native species
- destruction or alteration of the Spring's caves and other land formations

Inadequate Protection from Texas Agencies

Lisa O'Donnell faults Governor Bush and the Texas state agencies for consistently failing to take any steps to protect the salamander and for siding with industrial and development interests. O'Donnell evaluated and reported the inadequacy of state efforts in 1994. She warned her superiors at USFWS about the failure of the Texas Parks and Wildlife Department to list the salamander on the State's endangered species list, the ineffectiveness of Texas' water quality rules, the absence of regulation of hazardous material transporta-

tion across Barton Springs, the absence of any binding commitment or incentive for the City of Austin to protect the salamander, and the absence of regulatory authority over the Springs in general.

Since she observed no improvement in state actions between 1994 and 1997, Lisa O'Donnell expressed grave doubt about relying on these state agencies to protect the salamander in the future. In a memorandum to her supervisor, she said that based on the "...actions (or inactions) made by State agencies [Texas Natural Resource Conservation Commission (TNRCC), Texas Department of Transportation (TDOT), Texas Parks and Wildlife Department (TPWD)] during the last couple of years, I just can't bring myself to acknowledge beneficial measures taken to protect the Barton Springs watershed that don't exist."

Political Opposition to Salamander Listing Prevails

As political pressure intensified, Bruce Babbitt, Secretary of the U.S. Department of the Interior, which oversees the Fish and Wildlife Service, stepped into the decision-making process. Secretary Babbitt was immediately bombarded by those who opposed listing the salamander as an endangered species. Developers threatened to sue if the salamander was listed as endangered. Governor Bush wrote Babbitt a letter conveying "deep concerns" because the listing might inhibit the use of private property.

Even Babbitt's Deputy Chief of Staff, Susan Rieff, sent an e-mail describing the listing of the salamander as a "hot issue." As a result, the summary of the withdrawal decision states that the issue was "sensitive politically among the State and local agencies" and that "intense opposition" had been expressed by "the State, the City of Dripping Springs, certain Congressional representatives, and developer interests."

Although the Endangered Species Act of 1973 required the Secretary to disregard politics and to make listing decisions based solely on the best scientific and commercial data available, Babbitt ignored the warnings of Lisa O'Donnell and other USFWS biologists, and

withdrew the proposed rule to list the Barton Springs salamander as endangered. To justify his action, Secretary Babbitt relied on a Conservation Agreement in which several Texas agencies promised to "...expedite developing and implementing conservation measures needed for the species..." Despite Texas' unimpressive track record, he felt these promises would be "sufficient to reduce the risks to the salamander."

The Fish and Wildlife Service redrafted the final rule in accordance with Babbitt's decision. In the process, USFWS superiors deleted many key pages O'Donnell had written describing threats to the Barton Springs salamander. USFWS also avoided references to industrial and development activities, such as "infiltration of 'bad water'" and "Federal and Federally-funded roadway projects." In addition, USFWS failed to mention the history of inadequate protection offered by Texas agencies. Finally, USFWS removed O'Donnell's recommendation that the usual thirty-day delay be waived so that the implementation of protective measures could begin immediately.

District Court Finds Listing Decision Unlawfully Tainted by Politics

Outraged by the decision not to list the salamander, a local environmental group called Save Our Springs successfully sued to reverse it. Although courts usually defer to federal agency determinations, Judge Bunton of the U.S. District Court found that Bruce Babbitt had violated his legal duties as Secretary of the Interior so egregiously that he ordered him to list the salamander as endangered.

First, Judge Bunton found that Secretary Babbitt unlawfully delayed making a determination about the salamander for more than a year past the mandatory deadline.

Second, the judge concluded Babbitt illegally made his decision based on information he received after the public comment period had closed.

Third, he concluded that Babbitt's decision was based on political considerations, rather than solely on scientific data as required by law.

Fourth, he found that Babbitt's reliance on the Conservation Agreement to protect the salamander was "arbitrary and capricious" given the poor track record of Texas agencies and the fact that the benefits of the proposed measures were "speculative," with "no assurances" that they would be effective and that "...even if the activities have been fully implemented, they do not take any tangible steps to reduce the immediate threat to the species."

Finally, Judge Bunton emphasized that the "Secretary cannot use promises of proposed future

actions as an excuse for not making a determination based on the existing record." After more than three years of delay, the Fish and Wildlife grudgingly complied with the court order by listing the Barton Springs salamander as endangered on April 30, 1997.

While a departure from traditional judicial deference to agency positions, the District Court's decision was typical of recent rulings in challenges against agency failures in meeting their statutory duties under the Endangered Species Act.

Arkansas River Shiner

The Arkansas River shiner is a slender, silver minnow, about two inches in length, that is endemic to the western Arkansas River basin. The shiner characteristically inhabits channels of fluctuating shallow streams with sand beds, and it is commonly used by anglers as a baitfish. According to the USFWS, the shiner is primarily threatened by "habitat destruction and modification from stream dewatering or depletion due to diversion of surface water and excessive ground water pumping," in other words, the diversion of water for use in agriculture.

Within the last twenty years, biologists report that the shiner has been extirpated from nearly 80 percent of its historic range and is now largely restricted to the Canadian/South Canadian Rivers of New Mexico, Oklahoma, and Texas. In terms of river miles, the shiner currently occupies a total of about 598 river miles, a dramatic decline compared to its total historic range of 2,875 river miles.

In terms of numbers of fish, samples taken in various Texas counties over the last forty years show declines ranging from 22.8 percent to more alarming declines of 67 and 99.6 percent. The Texas declines are especially disturbing since there is "general agreement that Texas has the last remaining stronghold of the species," according to the Texas Parks and Wildlife Department (TPWD).

USFWS Biologists Report Inadequate Protection from Texas State Agencies

The Texas agricultural industry has been aggressively campaigning to keep the shiner off the federal endangered species list for fear that water conservation efforts will interfere with farming activities. Texas Governor Ann Richards and State Representatives David Swinford and Warren Chisum took up their fight by applying pressure to state agencies. As a result, TPWD has become the "strongest ally" of agribusiness in the fight to avoid listing the Arkansas River shiner as endangered. Its strategy has been to manipulate biological data in order to make Arkansas River shiner populations appear stronger.

In an internal memorandum, Leland Roberts, a TPWD official, admitted that another TPWD

employee, Gary Graham, had manipulated data in a public hearing presentation to make the shiner population appear more numerous. The memorandum notes that Graham left out the one sample (out of four taken in 1990) which contained no shiners. Graham had also left out some information from Joe Kraai, a fisheries biologist with the most expertise on the shiner, showing the decline of the species.

Even Roberts himself mischaracterized the biological data. After evaluating Graham's hearing testimony, he concluded by "supporting the end result of the hearing statement," namely the recommendation not to list the shiner as endangered. Yet this conclusion egregiously downplays his own concern, stated earlier in the same document, that "...our Texas data, based on samples in 1983, could be subject to some doubt when extrapolated to say that Texas' populations are in good shape," especially in light of the fact that the population of shiners "has been essentially lost in Kansas and Oklahoma during the last 20 years" (emphasis supplied by Roberts).

Fortunately, USFWS biologists were not misled by this misinformation campaign. They concluded, first, that the remaining populations of shiners in Texas are "crucial to the continued existence of the Arkansas River shiner throughout its historic range" and, second, that TPWD's "past management of the species has not been sufficient to prevent habitat loss or a considerable reduction in population." However, senior USFWS officials inexplicably stopped short of listing the shiner as endangered, instead relying on a consent agreement signed by TPWD as sufficient protection for the shiner.

Consent Agreement Offers No Real Protection for Shiner

The U.S. Fish & Wildlife Service entered into a consent agreement with TPWD and the Oklahoma Department of Wildlife Conservation (ODWC) in 1997. All three agencies acknowledged that "without these cooperative actions to assure the conservation of the species and its habitat, existing information would provide justification for the Service to recommend an endangered listing." Unfortunately, the agreement came nowhere near providing an accept-

able substitute for an endangered listing. Instead, the terms made it clear that protection of agriculture, not the shiner, was the goal. The main points of the agreement were:

- USFWS agreed to list the Arkansas River shiner as threatened rather than endangered.
- Conservation strategies will not restrict or regulate the groundwater use of the High Plains Aquifer.
- Conservation strategies will not require any releases of water from Lake Meredith, except those voluntarily agreed to.
- Existing agricultural and land management activities will not be adversely affected as part of developing conservation strategies. Only newly proposed activities will be subject to review to determine their impact on the shiner.
- States (Texas) will not be held responsible for actions, or lack of action, by other states or entities that adversely affect conservation strategies for the shiner and its habitat.

The agreement speaks of "partnership" and "cooperation" and the inclusion of "other stakeholders" (read agribusiness) in the "development of strategies." The agreement does not mention any concrete recovery goals or measures to be used to achieve those goals. Most importantly, it offers no way to enforce adherence to conservation and recovery measures. On the contrary, the agreement actually pro-

hibits any changes from being made to the current agricultural practices which have already been shown to cause shiner populations to decline. Moreover, the agreement relies heavily on promises of future voluntary action on the part of state actors that, so far, have expressed an unwillingness to take any steps to protect the shiner. As such, it is ludicrous to imagine that this conservation agreement provides an acceptable substitute for listing the Arkansas River shiner as endangered and providing it with federally-sponsored protection.

The USFWS decision to enter a consent agreement with TPWD rather than list the Arkansas Rivershiner as endangered violated the agency's obligations under the Endangered Species Act (ESA). Indeed, Judge Bunton of the federal District Court recently overturned a nearly identical decision involving the same state agency, TPWD, and the Barton Springs salamander. In both cases, the consent agreements were convenient mechanisms to avoid listing species that desperately needed federal protection, just to appease the powerful local industrial and agricultural lobbies.

In the salamander case, Judge Bunton found that a listing decision based on political considerations, rather than solely on biological considerations, was unlawful. It is very likely that the federal courts will also strike down this latest failure to list the Arkansas River shiner, since it was likewise based on the empty promises of Texas agencies to protect the species in the future.

Alexander Archipelago Wolf

The Alexander Archipelago wolf is dark, short-haired and usually smaller than other gray wolf subspecies of Alaska and Western Canada. This distinctive wolf lives only on a few islands in the Alexander Archipelago chain and nearby mainland within Alaska's Tongass National Forest, and it depends heavily on the Sitka black-tailed deer as its prey. Biologists estimate the total population of Archipelago wolves to be between 635 and 1,000, with the greatest concentration on Prince of Wales Island. The wolves travel in packs of 2 to 8 over a home range anywhere from 13 to 143 square miles.

Federal and State Governments Provide Inadequate Protection

Several factors combine to threaten the long-term survival of the Archipelago wolf, and none are adequately addressed by existing forest management and regulatory mechanisms. First, the Archipelago wolf is especially vulnerable to the fragmentation of its habitat caused by logging. The system of islands in the Tongass naturally fragments the wolf's habitat. Because of this natural fragmentation, the Archipelago wolf is adapted to a narrow set of conditions and more vulnerable to extinction than wolves with larger and more contiguous ranges. This is a typical trait of island species. As a result, the Archipelago wolf is poorly equipped to withstand the additional fragmentation caused by logging activities.

Criticizing the forest management policies of the U.S. Forest Service (USFS), biologist Dave Person, considered by the USFWS to be one of the top Alaskan wolf biologists, stated that "the Forest Service just doesn't seem to understand" that the Tongass National Forest "is a collection of forests, many isolated on islands"—which means that once an isolated area is clearcut, there is nowhere else for the displaced species to go.

Second, since the main food of the Archipelago wolf is the Sitka deer, activities which threaten the Sitka deer also threaten the survival of the Archipelago wolf. The biggest threat to the Sitka deer is the destruction of old-growth forest by clearcutting. The younger trees which replace the old-growth trees create "poor deer habitat." The early growth does not protect against snow accumulation, and then later, when the trees



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Lone Wolf. The Alexander Archipelago Wolf, found in southeast Alaska, is isolated from other wolf populations by water and mountain barriers.

grow big enough to form a canopy, they block out sunlight and inhibit the growth of forage plants. Thus clearcutting reduces the number of deer and, in turn, the number of wolves a forest can support.

After clearcutting, it takes about 150 years for the forest to return to the old-growth conditions that will allow the deer population to bounce back. Regrowth on areas that have already been clearcut will soon make them unusable by Sitka deer. As a result, USFWS expects localized populations of Archipelago wolves to decline significantly in the next 10 to 30 years. Yet instead of making plans to reverse this trend and foster a return to old growth conditions, USFS plans to allow further logging that will result in the permanent destruction of 68 to 70 percent of the critical deer habitat within a significant portion of the Archipelago wolf's territory.

Third, the Archipelago wolf is threatened by hunting and trapping, particularly on Prince of Wales Island. The total number of wolves killed each season in the Alexander Archipelago has risen to a peak of 189 in 1992-93. On

Prince of Wales Island alone, 105 wolves were killed in 1992-93, translating into a loss of 30 to 35 percent of the wolf population on that island. USFWS studies in Alaska have shown that this rate of killing is "sufficient to cause [a] decline in the wolf population." Nevertheless, the State of Alaska currently permits "excessive" levels of hunting and trapping in areas which are critical for the wolf's survival.

Fourth, the Archipelago wolf is jeopardized by the construction of roads to facilitate the removal of timber. The roads themselves reduce the habitat available to the Archipelago wolves and Sitka deer, and they further fragment the remaining habitat. Even more important, however, is the accessibility the roads provide to people who hunt and trap wolves.

USFWS studies have shown a "strong relationship between road density and the presence or absence of wolves"—the higher the road density, the lower the number of wolves in an area. As of 1991, about 2,829 miles of roads had been built within the territory of the Archipelago wolf. Moreover, under the current USFS forest management plan, an additional 2,250 miles of roads are planned by the end of the first decade.

Politics Override Science

The Forest Service established the "Viable Population Committee" in 1990 and it included biologists from USFS and the Alaska Department of Fish and Game. In 1991, this interagency committee unanimously concluded that the Archipelago wolf, along with several other species, was in danger of extinction if large tracts of habitat were not preserved in the Tongass.

The scientists recommended that at a bare minimum, USFS must reserve "Core Areas" of at least 40,000 acres throughout the Tongass, as well as smaller "Habitat Conservation Areas" of old-growth habitat of at least 16,000 acres. The committee also recommended strong limitations on timber harvests and road construction, particularly when these activities would isolate wolf populations.

Giving no biological justification for its decision, USFS ignored the advice of its own scien-

tists by choosing "Alternative P," a management strategy that allowed clearcutting and road construction to continue in old growth forests at the same high rates. When USFS ordered the scientist who headed the committee not to release the report to the public, this long-time Forest Service biologist resigned.

Echoing the warnings of the committee, USFWS repeatedly informed USFS that Alternative P was inadequate to protect the Archipelago wolf and the other species that depend on the Tongass' old growth forests. These cautions were likewise dismissed. Incredibly, during a meeting in which USFWS had reiterated its concerns, the Forest Service's Team Leader stated that USFWS was "talking to the wrong group" because "[t]he decisionmakers have already decided to maximize the timber harvest."

In light of the Forest Service's unwillingness to incorporate protection for the Archipelago wolf in its long-term forest management plan, environmental groups petitioned the USFWS to list the wolf as a "threatened" species and to designate critical habitat for the wolf since, in the words of the Endangered Species Act, it is "likely to become an endangered species in the foreseeable future."

During the twelve-month period for consideration of the decision to list the Archipelago wolf as "threatened," the USFWS called a meeting and circulated a list of "Pros and Cons." A major "pro" of issuing a "not warranted" finding was listed as the fact that this was the "[l]east controversial option with agencies, industry, and the Alaskan delegation to Congress."

A "con" of the "not warranted" finding was the fact that this was "[n]ot consistent with our analysis of the 5 factors in the listing regulation." Ignoring these political considerations, as it was required to do under the Endangered Species Act, the USFWS Field Office recommended that the USFWS list the Archipelago wolf as "threatened."

Nevertheless, the Regional Office overruled the recommendation of its own Field Office and concluded that listing the wolf as threatened "is not warranted at this time." The USFWS Director approved the recommenda-

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tion of the Regional Director. Despite its own repeated criticism of the Forest Service's existing forest management plan and its acknowledgment of the overwhelming scientific evidence showing that this plan was causing the wolf population to decline, USFWS justified its decision by stating that the finding "was facilitated by the commitment of the U.S. Forest Service to review the existing [forest management plan] to manage for the long-term viability of the Alexander Archipelago wolf."

The decision not to list the Alexander Archipelago wolf as "threatened" is now being challenged in court. Since the circumstances of this decision closely parallel those of other agency listing decisions which courts found "arbitrary and capricious," there is a good chance that USFWS will be forced to list the Archipelago wolf.

As in the other wrongful decisions not to list, USFWS violated three of its important duties. First, the USFWS referred to the absence of industry opposition as a "pro," demonstrating that the initial listing decision was illegally based on political considerations, rather than "solely" on scientific considerations, as required under the Endangered Species Act.

Second, the USFWS relied on the "promise" of the Forest Service to revise its forest management plan to protect the wolf, but the Act only allows consideration of the adequacy of "existing" regulatory mechanisms.

Third, the USFWS's characterization of the wolf population as "currently stable" contradicts the overwhelming scientific evidence showing that the wolf's survival was already severely threatened by past logging activities.

Northern Goshawk

The northern goshawk is a short-winged, long-tailed hawk whose range extends from Alaska through Canada, the United States and into Mexico. In the contiguous United States, the Great Plains serve as a geographic barrier between the eastern and western populations of the goshawk.

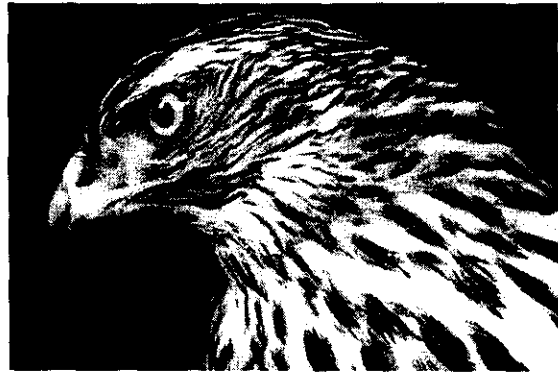
Goshawk numbers have declined substantially as its habitat has been destroyed by logging in old growth forests, especially ponderosa pine. In the western states, three goshawk subspecies live in "essentially every old growth forest not [already designated critical habitat in order to protect] the three spotted owl species." This means that a decision to list the goshawk as endangered will have "dramatic effects on old growth protection in the West."

Agency Ignores Advice of its Own Biologists

In 1991, the Southwest Center for Biological Diversity filed a petition requesting that USFWS list the northern goshawk as endangered. Thereafter, biologists in the Phoenix Ecological Services District Office of USFWS wrote a draft opinion which found that the petition presented "substantial evidence" that the northern goshawk would qualify for listing. A few years earlier, a USFS biologist had reached a similar conclusion, noting that the goshawk population in New Mexico was "threatened" and represented "only a fragment of a once larger population."

As the timber industry fought to protect its stake in old-growth logging in the Mogollan Rim country in Central Arizona and the Gila National Forest in southwest New Mexico, USFWS decided in June 1992 not to list the northern goshawk as endangered. An April 1996 internal memorandum suggests that top USFWS officials overruled recommendations from lower-level staffers to approve the petition. In another internal memorandum, USFWS official Tom Gatz acknowledged that the service was basing its ruling on a technicality in order to avoid listing the goshawk as endangered.

This technicality involved USFWS's interpretation of the phrase "distinct population segment" contained in the Endangered Species Act (ESA). In 1991, USFWS departed from a



Raptor War. USFWS has gone to extensive and expensive lengths to avoid listing the northern goshawk.

long-established policy which had focused on general biological, ecological, and geographical factors in determining the viability of an isolated population of a species by adding the requirement that an isolated population be genetically or morphologically distinct from other population segments in order to qualify for protection under the ESA.

This interpretation effectively narrowed the number of species that would warrant protection, and it contradicted Congress's intent that "the United States should not wait until an entire species faces global extinction before affording a domestic population segment of a species protected status." Even USFWS officials have admitted that the ESA as a whole says "when in doubt, protect the species."

USFWS officials have had difficulty justifying this unnecessarily restrictive interpretation of the ESA. As a result, in 1992, the USFWS Deputy Director issued a draft interim policy which essentially reinstated the more expansive policy adhered to prior to 1991. Although this new policy was issued two weeks prior to the decision not to list the northern goshawk, USFWS applied the more stringent 1991 standard to the northern goshawk anyway.

Non-Listing Decision Twice Struck Down by Federal Court

When Southwest Center challenged the USFWS decision not to list the northern goshawk, Judge Bilby found the decision "arbitrary and capricious." Bilby criticized USFWS in open court, "I get the gut feeling that we have one series of rules when we deal with trees and we

U.S. Fish & Wildlife Service

have another series of rules when we deal with species that occupy trees that can be cut down and made into lumber. And we have a different set of rules when we deal with black bears and alligators and eagles and things like that.”

Subsequently, in his February 22, 1996 order, Judge Bilby stated that “this reliance on an earlier draft policy (1991) and ignoring the current draft policy (1992) makes the agency Finding suspect.” If USFWS officials were allowed to “arbitrarily elect to follow any draft policy...USFWS may elect which draft policy to follow depending on a predetermined outcome.”

Judge Bilby further scolded USFWS by saying that the lack of a final policy after eighteen years could also be seen as an abuse of discretion, although he declined to rule on that issue. The judge overturned the decision, but he stopped short of ordering USFWS to list the goshawk. Instead, he ordered the agency to conduct a new 90-day determination.

Once again, USFWS failed to list the northern goshawk, and Southwest Center challenged the decision in court. As before, Judge Bilby found the USFWS decision “arbitrary and capricious and an abuse of discretion.” This

time, USFWS had changed both its characterization of the northern goshawk and its interpretation of the ESA.

The agency justified its decision not to list the goshawk by claiming that an isolated population cannot contain more than one subspecies. “In other words,” explained Judge Bilby incredulously, “Southwest Center’s petition was first rejected because the goshawks are too homogeneous throughout North America, and then rejected [a second time] because there are too many variations of goshawks to justify a DPS (distinct population segment) in the West.”

Bilby also criticized USFWS for delaying the process and for overruling the advice of its own biologists, who had recommended both times that the northern goshawk be listed as endangered.

Although Judge Bilby stopped short of ordering USFWS to list the northern goshawk, his strongly worded opinions have encouraged environmental groups to believe that the northern goshawk will soon be listed as endangered. His opinions also severely undermine the credibility of USFWS policy concerning “distinct population segments” in general.

Peninsular Bighorn Sheep

Peninsular bighorn sheep are a paler brown than other bighorns, with heavier horns that vary from yellowish to dark brown. The horns of the male are massive and coiled, while in females they are smaller and not coiled. Peninsular bighorns occupy hot, dry, sparsely vegetated desert regions characterized by steep slopes of rough and rocky terrain.

The bighorn's range extends from the San Jacinto Mountains of California (near Palm Springs) southward through the Santa Rosa Mountains, the Anza-Borrego Desert and into Baja California, Mexico. Although biologists recall that the Peninsular bighorn once had "the most dense and stable population of all bighorn sheep in California," the current population of Peninsular bighorns has dropped to fewer than 400, reduced from an estimated 1,171 in 1979.

Inadequate Protection of the Peninsular Bighorn Sheep

Although California has afforded Peninsular bighorns state protection since 1972, USFWS biologists conclude that state efforts have "failed to reverse the population decline of the Peninsular bighorn." The main reason is that the California Endangered Species Act "does not include habitat safeguards available under section 7 of the Federal Act." As a result, development projects and grazing activities have been permitted to encroach on bighorn territory, with a severe impact on their ability to survive.

One of the biggest threats to the survival of Peninsular bighorn sheep arises from the failure of federal and state agencies to adequately separate bighorns from domestic cattle and sheep. According to USFWS biologists, domestic livestock "can act as disease reservoirs for bighorn sheep." For instance, the biologists report that in 1981 a herd of about 42 California bighorns died of pneumonia after coming in contact with domestic sheep. Similarly, in 1988 "all animals (approximately 65) from a relocated group of [California bighorn] sheep died as a result of pneumonia believed to have been contracted by one domestic sheep."

Domestic livestock also compete with bighorns for scarce food and water. A prolonged five-year drought in southern California has compounded this problem, resulting



USFWS / PETER J. CARBON

A Trail Too Far. Peninsular Bighorn Sheep have been a candidate for listing as endangered since 1992.

in the deaths of many sheep, especially older sheep and lambs. Although the California Department of Fish and Game "supports the concept of separating livestock from bighorns...it has not been a policy of the Department to recommend removal of current livestock permittees." Furthermore, neither the U.S. Bureau of Land Management (BLM), nor USFS have stepped in to redress the problem.

Peninsular bighorns are also sensitive to environmental stress from road construction and development, low flying planes, traffic, and other human activities. Biologists believe these stresses increase the bighorns' susceptibility to disease and inhibit their ability to reproduce. Since 1977, the mortality rates of lambs in the Santa Rosa mountains has become particularly shocking an estimated 90 percent of lambs between 2 and 4 months of age die.

In addition to these threats, "in terms of trophy hunting" bighorn sheep are "one of the most highly sought big game species in North

U.S. Fish & Wildlife Service

America." Many states utilize a lottery or auction system for allocating permits to hunt several types of bighorns. Although hunting of Peninsular bighorns is not permitted in the United States, hunters may not be able to distinguish this subspecies from others and poaching is known to occur.

Finally, Peninsular bighorns suffer from general habitat loss and degradation. USFWS biologists list the "proliferation of residential communities, development of transportation corridors, water development projects, vehicular and pedestrian recreational uses, and historic mining operations" as factors which have contributed to the decline and fragmentation of suitable habitat for the Peninsular bighorn.

Currently, bighorn habitat is in a "checkerboard pattern" of public and private ownership, and several development projects have been proposed on the private segments of land. Without Federal ESA protection, these projects are likely to go forward and further fragment bighorn territory. As a result, small populations of Peninsular bighorns will become more isolated and more vulnerable to inbreeding, which can wipe out local populations one by one.

U.S. Fish & Wildlife Service Dragging its Feet

In May 1992, USFWS published a proposed rule to list the Peninsular bighorn sheep as endangered. Citing a limited budget, higher listing priorities, and a federal moratorium on listing actions, USFWS delayed the deci-

sion-making process for almost a five years. Then in April, and again in June, 1997, USFWS reopened the public comment period.

In both notices, USFWS specifically requested that the public submit information related to the "distinctiveness" the bighorn sheep in the Peninsular ranges as compared to other populations of bighorn sheep to "ensure that this proposed listing of a population of desert bighorn sheep is consistent with Service policy published on February 7, 1996, regarding the recognition of distinct vertebrate population segments [DPSs]."

The agency's strong emphasis on "distinctiveness" is surprising given the fact that USFWS has been thoroughly condemned in recent federal court cases for using its DPS policy unlawfully to avoid listing species when doing so would offend development, industry, timber, or ranching interests.

Indeed, the use of the "distinctiveness" term might provide warning that USFWS will attempt to avoid listing by claiming that the involved sheep population does not qualify under the stated policy. Conversely (or perversely), USFWS, in an incredible turnabout, may be seeking an excuse to list only the sheep on the U.S. side of the border—those in Mexico would not be listed in deference to pressure from hunting groups.

In any event, environmental groups have filed a notice of intent to sue and thus force USFWS to choose which excuse to employ.

Bull Trout

The bull trout is known for its tremendous spawning journeys of up to 175 miles. Weighing an average of five pounds as adults and often exceeding 30 pounds, the bull trout is the largest of the native migratory trout in the Northern Rockies and Pacific Northwest. Bull trout were once plentiful in America's finest blue-ribbon fishing streams but are now extinct in California and declining elsewhere at an alarming rate. Gone from most of their historic range, the last strongholds of the bull trout in Montana, Idaho, Oregon, Washington and Nevada are threatened.

Indicator Species Faces Uncertainty

Bull trout depend on very clean, cold water and therefore are a prime indicator of the health of forest ecosystems and watersheds. Bull trout are a monitor of our own quality of life because they are extremely sensitive to human-caused changes to their environment and are less tolerant of disturbances to their habitat than are most other fresh water fish species.

The bull trout have been restricted or eliminated from most of their habitat due to human-caused stream alterations. The leading factors in the demise of the bull trout, according to USFWS and USFS, are habitat destruction and degradation brought about by logging and road-building. These activities cause stream sedimentation, which fills in spawning areas and smothers eggs. Logging can remove overhanging vegetation and woody debris necessary for keeping stream temperatures low and creating pool habitat.

The bull trout face a host of other threats as well. Improper cattle grazing reduces streamside vegetation, also leading to higher water temperatures and increased sedimentation, in addition to trampling and collapsing stream banks. Dams prevent migration by fragmenting bull trout into isolated, genetically non-viable remnant populations. Other water diversions for irrigation purposes (i.e., agriculture) dry up crucial streams. Mining poisons prime waters with toxic mine tailings and cyanide. Introduced or exotic fish species compete with bull trout and sometimes interbreed, creating sterile offspring. Poaching, legal harvest, drought and residential development also affect their viability. All of these



HTTP://WWW.AGT.NET

A River Runs Through It. Habitat impacts threaten remaining bull trout populations.

multiple threats are synergistic, thus increasing the bull trout's overall risk of extinction.

A scientific status review by USFWS found that highly migratory populations of bull trout have been eliminated from the largest, most productive river systems and that virtually every bull trout population within the conterminous United States is threatened by a wide variety of land and water management practices. Of Idaho's 35 bull trout populations evaluated in 1993, 69 percent were declining and none were increasing. The majority of Washington's bull trout populations are declining as well and Nevada's only population, isolated in one river, is at high risk of extinction. The risk of extinction for bull trout in Oregon is 81 percent; in Montana it is 90 percent.

Compounding these problems are the effects of habitat destruction. The Forest Service estimates that 82 percent of all bull trout populations and stream segments rangewide are threatened by degraded habitat conditions. Although the USFS manual classifies bull trout as a "sensitive species" whose viability is of concern because "they have significant current or predicted downward trend in numbers or density," the agency admits that forest management practices are one of the chief causes of the bull trout's declining status.

Agencies Ignore Science and Law by Failing to Provide Adequate Protection

Even though USFWS's own scientific status review team concluded that bull trout are at "imminent risk of extinction" throughout their range in the 48 states, the government failed to muster the political will necessary to provide adequate protection. In an effort to appease western governors and timber interests opposed to listing, the government has repeatedly imple-

mented delaying tactics, relying on the governors of Montana and Idaho to implement recovery plans. Both governors have publicly admitted that the major purpose of their plans is to prevent listing the bull trout as an endangered species.

These hollow state plans, which promise more than they can deliver, fail to implement specific habitat standards and do not address the primary factors causing the bull trout's slide toward extinction. Moreover, states do not have jurisdiction over the vast majority of bull trout habitat, which is located on federal public, tribal and corporate lands. The courts have therefore rejected future promises of action from state governments as adequate reasons for preventing listing.

After years of inaction and litigation, federal agencies have been ordered to move forward with plans to protect and recover the bull trout. As a result, the bull trout has been proposed for listing by USFWS as a threatened species throughout the Columbia River basin in western Montana, Idaho, Oregon and Washington, and as an endangered species in the Klamath River basin in southwest Oregon. In Montana, Idaho and Oregon (Regions 1, 4 and 6), USFS classifies the bull trout as both a sensitive species and a management indicator species. State fish and game agencies have closed fishing seasons for bull trout throughout most of their range.

USFS management strategies to protect the bull trout were the subject of a recent case in Oregon. One issue was the agency's Inland Native Fish Strategy (INFISH) which "is intended to provide interim direction to protect habitat and populations of resident native fish outside of anadromous fish habitat in eastern Oregon, eastern Washington, Idaho, western Montana, and portions of Nevada." The other issue involved the Interim Strategies for Managing Anadromous Fish-Producing Watersheds in eastern Oregon and Washington, Idaho, and portions of California, commonly known as PACFISH, which include a "range of interim management strategies designed to arrest the degradation and begin the restoration of habitat" of fish species, of which the bull trout is affected.

In May, 1997, a federal judge ruled that because the Forest Service originally expected INFISH to last 18 months and now expects that it will last three years, the plan "will be inadequate as a

long-term fulfillment of USFS's viability responsibilities to the bull trout." In adopting PACFISH, Judge Robert Jones determined that the agency was "arbitrary and capricious" because it failed to protect bull trout within the National Forests. Under USFS plans, virtually 100 percent of the planned logging, roadbuilding, grazing, and mining within bull trout habitat would proceed unchanged. For this reason, both measures were found in violation of the National Forest Management Act for failure to adequately provide for bull trout viability over the long-term.

Action or Extinction

There are several reasons for an Endangered Species Act listing for bull trout, as well as many benefits. A listing of the bull trout will provide the legal teeth necessary to require mandatory habitat protections and ensure that the best available scientific data are applied. Because states lack the financial resources to go it alone, listing will spur coordination among different management entities, as well as provide necessary federal funding for habitat protection and restoration projects.

With listing, USFS will have to consult with other agency biologists on whether or not proposed developments such as logging roads and timber sales will have an impact on bull trout recovery. USFWS would then have legal authority to require USFS to modify its plans, or halt them altogether. There is currently no such review process. Listing also provides citizens the right to file lawsuits to prevent illegal destruction of bull trout habitat and to ensure that recovery decisions will be based upon sound scientific data rather than political pressure.

Finally, as a primary indicator of water quality, bull trout protection is in the public's best interest. Bull trout rely on cold, clean water for survival and serve as the front line of defense for humans. Their decline is an early warning that water quality is in jeopardy, and that the entire ecosystem is at risk.

Business as usual will not save the bull trout. The bull trout will continue to suffer if state legislatures succeed in weakening water quality standards. This has already happened in Montana in regard to mining operations. Further delay will bring a wave of extinction throughout the Northwest.

Canada Lynx

The Canada lynx resembles a bobcat, but is usually larger and has long tufts on its ears and a short, black-tipped tail. The lynx has large, furry paws that spread out over a wide surface area to create a "snowshoe effect," and it has elongated back legs that are capable of great springing action. These features allow the lynx to travel quickly over deep snow in pursuit of prey. Unlike some other predators, the Canada lynx is a specialist and depends heavily on the snowshoe hare for survival. Since "good snowshoe hare habitat is good lynx habitat," the lynx is generally found in "open, mature conifer forests."

No Home on the Range

Currently, the Canada lynx's range extends from Alaska through Canada, with a few remnant populations in Montana and Washington. Historically, the lynx occupied a much larger range throughout New England, the Great Lakes, the Rocky Mountains, and the Pacific Northwest. Yet due to heavy trapping, logging, road building, development, and habitat degradation, the lynx has been completely "eliminated from approximately seventeen states" in which it once lived. Biologists estimate that total number of lynx in the lower 48 states, "may not exceed several hundred individuals far fewer than many other species now listed as endangered."

State and federal agencies have done little to curb harmful activities. First, the lynx's habitat is continuously degraded by unchecked logging. In the western United States, since the majority of Canada lynx habitat occurs on public lands, the lynx's survival depends on past and current timber management practices.

Unfortunately, even though the USFS classifies the lynx as a "sensitive species" within the contiguous United States, "[h]abitat regulatory mechanisms specific to Canada lynx are limited..." and "...few national forests have developed the required population viability objectives or management guidelines for Canada lynx..." For instance, in Washington, timber harvest on national forest and state lands is "likely to exceed the recommended rate of harvest described in Canada lynx habitat management guidelines."



Unburdened by Facts. Court found USFWS ignored not only its own biologists but the "entire Administrative Record" in deciding not to list the Canada lynx.

In the northeastern United States, the majority of lynx habitat occurs on private land, of which about 60 percent is used for commercial timber. Because logging and development in the East has already caused a dramatic decline in lynx populations, efforts to create connections between existing parcels of suitable habitat across public and private lands "may be essential to reestablish viable Canada lynx populations." However, there are currently, "...no regulatory mechanisms that address the management or conservation of functional Canada lynx habitat" in eastern states.

A second factor threatening the lynx is excessive hunting and trapping, spurred on by the unprecedented high pelt prices of the 1970s. Scientific studies have shown that trapping mortality far exceeds the natural mortality rate for the lynx. Although lynx populations naturally fluctuate in ten-year cycles, unchecked hunting and trapping has reduced the ability of the lynx to recover after low population periods.

USFWS biologists explain that decades of unregulated hunting and trapping in the contiguous United States "may have caused significant declines in, or the extirpation of, local lynx populations." Even in states which limit the hunting of Canada lynx, "illegal harvest has been a serious problem in localized areas in the past."

Third, Canada lynx habitat is threatened by encroaching development. In particular, the clearing of forests for ski resorts and agriculture has degraded the available habitat for the lynx. USFWS biologists have also expressed "serious

concern" about the "...rapid pace of subdivision for recreation home sites..." in lynx territory. Yet state authorities have done little, if anything, to constrain developers.

A fourth, related, factor is that recently built roads and highways dissecting Canada lynx habitat have had a strong negative impact on their survival. The roads further isolate populations which already suffer from trapping pressure and encroaching development. Moreover, both poaching and legal hunting have increased since roads have made lynx populations more accessible to humans. The growing popularity of snowmobiles and off-road vehicles has exacerbated this trend. Lynx populations have also suffered disturbing numbers of traffic deaths in recent years. USFWS biologists warn that "dispersing or transient lynx are especially vulnerable to traffic deaths."

Federal Court Finds Non-Listing Decision Unlawful

Remarkably, USFWS first placed the lynx under review two decades ago but had rejected several attempts to list any of populations thereof. Then, on April 27, 1994, the Biodiversity legal Foundation and four individual conservationists petitioned USFWS to add the entire lynx population of the conterminous United States to the List of Endangered and Threatened Wildlife. On August 26, 1994, USFWS published a finding, as required by ESA, that the petition had presented substantial information indicating that the requested action was warranted.

Subsequently, two biologists in the Helena, Montana field office of USFWS, Lori Nordstrom and Anne Vandehey, drafted a finding that the requested action was in fact warranted, together with a proposal to list the lynx. They were supported by comments from the scientific community that were nearly unanimously in favor of listing. The draft was approved by both the field office and the USFWS Rocky Mountain Regional Office in Denver.

The Washington, D.C. Office of USFWS then did something that was unprecedented. Acting Director Richard N. Smith overruled the regional listing recommendation and ordered the Rocky Mountain Regional Office to rewrite the finding as "not warranted." The not

warranted finding was made and signed by Smith on November 10, 1994. The finding was fraught with contradictions. On one hand, it suggested that the lynx had become so rare, and its critical habitat so reduced, that it no longer constituted a viable population that can be listed. On the other hand, the finding states that the lynx is so common in Montana, and has such an "expansive and improving habitat," that it does not warrant listing.

Defenders of Wildlife and other conservation groups challenged the USFWS decision not to list the Canada lynx, and Judge Kessler of the D.C. District Court agreed that the Director of USFWS had violated several mandatory obligations. First, the Director had required that USFWS biologists provide "conclusive evidence" that the lynx was endangered, rather than making his decision according to the Endangered Species Act (ESA) standard of the "best scientific and commercial data available" and giving "the benefit of the doubt to the species."

Judge Kessler reprimanded the director for using an overly stringent standard that "violates the plain terms of the statute." Furthermore, in light of the "overwhelming consensus among the biologists...that the lynx must be listed," Judge Kessler said "it is difficult to imagine how much more evidence would be needed to qualify as 'conclusive.'"

Second, Judge Kessler concluded that USFWS unlawfully based its decision on "glaringly faulty factual premises" that "contradicted the entire Administrative Record." Specifically, the judge rejected the agency's unsupported claims that "hunting and trapping pressure on the lynx has been historically low;" "the lynx currently occupies much of its original historic range;" the lynx is "actually common through its North American range;" and that the "past trend of declining lynx populations has now been reversed." Each of these statements "flies in the face of the overwhelming evidence gathered and analyzed by the Region 6 biologists."

Third, and most importantly, USFWS abused its discretion in rejecting the unanimous conclusion of its own biologists that the lynx should be listed because it satisfied four out

of the five statutory criteria destruction of habitat, overutilization, inadequate regulatory protection, and other natural or manmade factors. Any one of these criteria would have been sufficient to justify listing the lynx as endangered. Since the agency gave "no rational reason" for rejecting the views of its own biologists, the court set aside the decision as "arbitrary and capricious."

Although Judge Kessler did not explicitly discuss the role of political pressure in USFWS's decision not to list the Canada lynx, the blatant disregard shown by the Director of USFWS for the unanimous conclusion of USFWS biologists in several regions can only be explained by a desire to satisfy the logging and development industries.

USFWS had finally been backed into a corner. Overwhelmed by legal arguments and

bioconservation data, pressured by biologists both in and outside government, it would have to list the lynx.

Or would it?

On May 27, 1997, USFWS issued a finding that listing of the lynx in the coterminous United States was warranted and, gratifyingly, Lori Nordstrom and Anne Vandehey were the senior authors. But, utilizing a technicality in the ESA, the agency claimed that list was precluded by the need to work on other species of higher priority. A reevaluation of the finding was to be made within 12 months.

So suddenly USFWS, which had all the time and resources to fight listing the lynx for years, now could not make the small additional effort to finish the formal listing.

Desert Tortoise

The desert tortoise is an oblong-shaped member of the tortoise family, with a shell that is domed on top and flat on the bottom. Desert tortoises reach about 14 inches in length, and they live in the dry, sandy and rocky terrain of the Mojave and Sonoran Deserts of southern California, southern Nevada, Arizona, southwestern Utah, and northern Mexico.

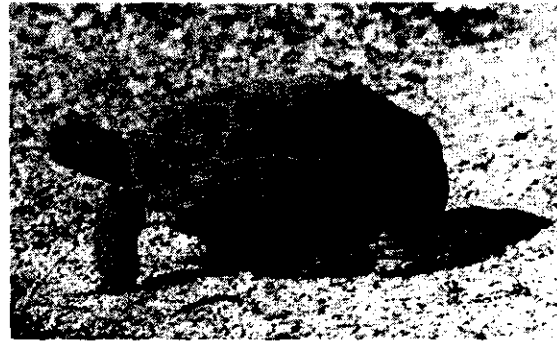
Desert tortoises eat desert grasses, flowers, and other vegetation, and are well-suited to harsh desert climates. With claws adapted for digging, they burrow underground and emerge only to feed and mate in the Spring and Fall. If necessary, the tortoises are able to live for months or years in their burrows by dramatically slowing their metabolism. Once abandoned, the tortoise burrows are used by other desert animals such as pack rats, mice, rabbits, lizards, and snakes.

Desert tortoises can live to be eighty or more years old if they are left undisturbed. However, since young shells are easily pierced, eggs and hatchlings are vulnerable to natural predation and suffer a 98 percent mortality rate. As a result, the desert tortoise's success as a species depends on its longevity and continuous reproduction over the course of each tortoise's life.

Federal Listing and Critical Habitat Designation

Over the last thirty years, biologists have documented a dramatic decline in desert tortoise populations. USFWS scientists report that tortoise populations have been extirpated from large parts of their western and northern Mojave Desert ranges, and they expect future extinctions of tortoise populations near cities and developed areas. Dr. Kristin Berry has estimated a decline as high as 60 percent per year in some locations, due primarily to habitat destruction and fragmentation.

In 1984, USFWS determined that the Mojave population of the desert tortoise should be listed as endangered, but the agency failed to act. When new information emerged in 1989 showing alarming mortality rates, USFWS emergency listed desert tortoise populations east and west of the Colorado River as endangered. Eight months later, the entire Mojave population was listed as threatened.



HTTP://CURLY.TEC.ARMY.MIL

Rapid Decline. Development of the turtle's desert habitat is a major reason for its sharp decline.

USFWS, however, delayed designating critical habitat for the desert tortoise. Even worse, in 1993, former Secretary of the Interior Manuel Lujan attempted to transfer 1,000 acres of federal land in Ward Valley to California for a nuclear waste facility despite USFWS's own finding that the "largest and most robust population of desert tortoises remaining within the geographic range is found in portions of the Ward and Chemehuevi Valleys."

Several environmental and Native American groups sued the government to stop the transfer and to force the designation of critical habitat. The court issued an injunction against the land transfer and required the Secretary to designate critical habitat. The habitat finally designated in 1994 included Ward Valley, but this did not stop efforts to build the nuclear waste facility there.

Agency Supports Nuclear Waste Site, Ignoring the Advice of its Own Biologists

Once a species is listed as endangered or threatened, USFWS must develop a recovery plan for the species. USFWS appointed a team of eight government and university scientists to develop such a plan for the desert tortoise. The Recovery Plan, published in June 1994, prohibited "habitat destructive military maneuvers, clearing for agriculture, landfills, and any other surface disturbance..." The Plan also warns that relocation of tortoises would threaten recovery of the species since "translocating desert tortoises is not likely to be very successful."

After the designation of critical habitat and the issuance of the Recovery Plan in 1994, USFWS

was obligated to issue a new opinion on whether the proposed nuclear waste facility would jeopardize desert tortoise survival. For projects proposed to be built on critical habitat, as opposed to undesignated land, government agencies must apply a more stringent standard. They must go beyond considering whether the project would cause the extinction of the species and determine whether the project would interfere with the recovery and conservation of the species. Yet USFWS's 1995 Biological Opinion did not apply this stricter standard and reached a conclusion that the nuclear waste facility was "not likely to jeopardize" the desert tortoise.

The USFWS "no jeopardy" decision was unsound for several other reasons as well. First, although in 1990, the Service acknowledged that "locating the low-level radioactive waste disposal site within a moderately dense population of tortoises...negates the intents of...tortoise management..." in 1995 the Service did not give any weight to the potential impacts of radioactivity on desert tortoises.

Second, even though USFWS acknowledged that critical habitat would be disturbed by

construction and road-building activities, USFWS concluded that mitigation, such as relocation of tortoises and revegetation, would adequately compensate for the disturbances. This conclusion directly contradicts the advice of USFWS biologists about the ineffectiveness of these measures. Third, the 1995 Opinion allowed for "incidental take" of tortoises, essentially giving the nuclear waste site construction contractors permission to destroy tortoises in the process of building the waste facility.

In this instance, USFWS gave in to overwhelming biological evidence and decided to list desert tortoise populations as endangered and threatened under the Endangered Species Act (ESA). Nevertheless, in the implementation phase after the initial listing, USFWS continued its pattern of refusing to carry out its ESA obligations. Once again, the agency ignored the advice of its own scientists and sided with developers against the protection of the desert tortoise. Concerned environmental and Native American groups continue fighting to prevent the construction of the nuclear waste facility in the Ward Valley critical habitat area.



Not So Fast. The Swift fox is but one of a score of species recently listed pursuant to litigation.

IV. The Endangered Species Scorecard

The following is intended to give a snapshot overview of the litigation status of various native plants and animals caught in the Department of Interior's war of attrition against endangered species. While this listing is long, it is not comprehensive. Unfortunately, the fortunes of each species is somewhat dependent upon the legal budget of their non-profit organizational advocate.

Lawsuits Filed/Won

Barton Springs Salamander	Apache Goshawk	San Marcos Gambusia
Bull Trout	Northern Goshawk	San Marcos Salamander
Buffalo	Queen Charlotte Goshawk	Sonoran Tiger Salamander
Cactus Ferruginous Pygmy Owl	Grizzly Bear Swift Fox	Texas Blind Salamander
Canada Lynx	Huachuca Water Umbel	Texas Wild-Rice
Coho Salmon	Jaguar	
Fountain Darter	Mexican spotted owl	

Lawsuits Filed/Pending

Alexander Archipelago wolf	Marblet Murrelet
Hawksbill Sea Turtle	Southwest willow flycatcher
Alabama Beach Mouse	Huachuca duck
Critical Habitat for 282 Species in Hawaii	Harlequin duck

Letters of Intent to Sue to Force Listing of Species

Peninsular Bighorn Sheep	Least Chub	Coachella Valley Milk-Vetch
Black Legless Lizard	Peck's Cave Amphipod	Shining Milk-Vetch
Alameda Whipsnake	San Diego Thornmint	Fish Slough Milk-Vetch
Flat-Tailed Horned Lizard	Rawhide Hill Onion	Sodaville Milk-Vetch
Arkansas River Shiner	Sonoma Alopecurus	Peirson's Milk-Vetch
San Jacinto Valley Crownscale	Hoffman's Rock-Cress	Coastal Dunes Milk-Vetch
San Xavier Talsussnail	Johnston's Rock-Cress	Triple-Ribbed Milk-Vetch
Comal Springs Riffle Beetle	Island Barberry	Clara Hunt's Milk-Vetch
Comal Springs Dryopid Beetle	Pallid Manzanita	Bear Valley Sandwort
Callippe Silverspot Butterfly	Nevin's Barberry	Santa Rosa Island Manzanita
Behren's Silverspot Butterfly	Sacramento Splittail	Atlantic Salmon

Potential Lawsuits

Flat-Tailed Horned Lizard	Bog turtle	Devil's River Minnow
California red-legged frog	Houston Toad	Alameda Whipsnake
Callippe Silverspot Butterfly	Coho Salmon	Golden Cheeked Warbler
Great Basin redband trout	Silver rice rat	Desert tortoise
Rio Grande silvery minnow	Alabama sturgeon	Arkansas River Shiner
Western Yellowbill Coo Coo	Bald eagle	Umpqua Trout
Mt. Graham red squirrel	Cactus wren	Longnose Darter
Lavender Suisun Thistle	Gray wolf	Woodland caribou
North American Wolverine	Brown pelican	Sturgeon
California Mountain Lion	Fisher	



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