

**ENDLESS WAR OR END THIS WAR?  
THE HISTORY OF DEADLINE LITIGATION UNDER SECTION  
4 OF THE ENDANGERED SPECIES ACT AND THE MULTI-  
DISTRICT LITIGATION SETTLEMENTS\***

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*Benjamin Jesup\*\**

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\*\* Attorney-Adviser, Office of the Solicitor, Department of the Interior. J.D., New York University, 1990; B.A. Haverford College, 1986. The views expressed in this Article are solely those of the author and do not purport to reflect the views of the Office of the Solicitor, the Department of the Interior, or the United States. Thanks to all of my comrades-in-arms, including Joan Goldfarb, Philip Kline, and Mike Young in the Fish and Wildlife Branch of the Solicitor’s Office; the attorneys in the regional Solicitor’s Office and Department of Justice who have done most of the actual fighting in the Listing Wars; and the FWS personnel who work tirelessly to conserve species despite the constant distractions caused by my profession.

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#### ABSTRACT

The Fish and Wildlife Service’s (FWS) program to list species under the Endangered Species Act (ESA) has been mired in litigation and controversy for decades. Much of that litigation has addressed not substantive decisions, but FWS’s inability to comply with the ESA’s deadlines for taking action. With limited resources, effectively unlimited workload, and strict statutory deadlines, each management or litigation strategy that FWS used to try to address this conundrum ultimately failed. As a result, court orders and settlement agreements swamped the listing program and FWS lost any ability to prioritize its efforts and get the most bang for the buck in protecting imperiled species. This race-to-the-courthouse environment decreased the program’s efficiency and further limited the number of species actually listed and protected by the ESA.

This article traces the history of this deadline litigation (the “Listing Wars”), beginning with the skirmishes over the listing of the northern spotted owl over twenty years ago, through the congressionally imposed moratorium on listings in the mid-1990s and its aftermath, the battles over designation of critical habitat for listed species, and to the influx of massive petitions to list hundreds of additional species in the late 2000s. This article then discusses in detail a pair of settlement agreements signed in 2011 that have the potential to change the trajectory of the listing program and the Listing Wars. Those settlements impose obligations on the parties until 2017: they require FWS to make listing determinations for hundreds of species that have remained in administrative limbo due to lack of resources, but they also are designed to give FWS a respite from the litigation that has contributed to the logjam.

This article also explores why settlement was possible, and describes the developments since the settlements were filed. In the year and a half since the settlements were approved, deadline litigation has radically decreased, and the rate of listing determinations is at the highest level in

fifteen years. Whether congressional action will again derail the program remains to be seen.

## INTRODUCTION

“War is only a cowardly escape from the problems of peace.”

Thomas Mann

Call me Thucydides.<sup>1</sup> Some years ago—never mind how long precisely—having nothing particular to interest me in other areas of the law, I thought I would enter the fray of Endangered Species Act litigation. Although it has done nothing for my spleen or circulation, it has given me a unique opportunity to play the role of historian to the Listing Wars.<sup>2</sup>

Historians need history. And history is made up of historic events. The resolution—in the form of two separate settlement agreements—of a single, centralized multi-district case has the potential to be a historic event by drastically changing the trajectory of the listing program under the Endangered Species Act (ESA).<sup>3</sup> This paper provides an insider’s view of the history that led to these settlements, an analysis of the settlements themselves, and some thoughts on how they may change the course of history of the ESA.

The ESA is one of the most ambitious and far-reaching of environmental statutes anywhere in the world.<sup>4</sup> In fact, the ESA endows the United States Fish and Wildlife Service (FWS) with considerable power

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1. Ancient Greek, author of *History of the Peloponnesian War*. In describing his history, Thucydides wrote:

The absence of romance in my history will, I fear, detract somewhat from its interest; but if it be judged useful by those inquirers who desire an exact knowledge of the past as an aid to the understanding of the future, which in the course of human things must resemble if it does not reflect it, I shall be content. In fine, I have written my work, not as an essay which is to win the applause of the moment, but as a possession for all time.

THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 16 (Robert B. Strassler, ed., 2008). A worthy sentiment, which I share (although I do not mean to suggest that my essay is one for the ages).

2. With apologies to Herman Melville. See HERMAN MELVILLE, *MOBY DICK, OR THE WHALE* 3 (Penguin Classics, Deluxe ed. 2009).

3. 16 U.S.C. §§ 1531–44 (2006).

4. See, e.g., Bruce Babbitt, *The Endangered Species Act and “Takings”: A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 356 (1994) (explaining that the ESA is “undeniably the most innovative, wide-reaching, and successful environmental law which has been enacted in the last quarter century”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (noting that ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation”).

over actions that may affect species that the ESA protects. Exercise of that power, however, requires compliance with a host of procedural and substantive requirements.<sup>5</sup> Those requirements begin with FWS's determination that a species should be protected by the ESA.<sup>6</sup> That determination (referred to as "listing," as the species is added to the list of threatened and endangered species) is governed by section 4 of the ESA.<sup>7</sup>

Given the extinction crisis being caused by the power of industrialized society as well as the sheer number of human beings on the planet, there are many species that might qualify for protection under the ESA. But because of the actual and perceived effect of listing under the ESA, those decisions are controversial, as is the very paradigm of the ESA's protection of imperiled species.<sup>8</sup> Thus, FWS is faced with significant "problems of peace": a statute that places many demands on FWS, a political system that routinely fails to provide FWS with the resources necessary to meet those demands, and interested parties watching FWS's every move (or failure to move).<sup>9</sup>

Congress apparently anticipated that FWS would at times be either unable or unwilling to fully meet its responsibilities under the ESA, and it provided the public with the ability to sue the government to force compliance with the mandates of section 4.<sup>10</sup> Thus, armed and motivated by

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5. The ESA is implemented by both the Secretary of the Interior and the Secretary of Commerce. 16 U.S.C. § 1532(15). Those Secretaries have delegated their responsibilities under the ESA to FWS and the National Marine Fisheries Service (NMFS), respectively. Pursuant to Reorganization Plan No. 4 of 1970, which established the National Oceanic and Atmospheric Administration (NOAA), FWS implements the ESA with respect to terrestrial and freshwater species, as well as some marine mammals; NMFS, a part of NOAA, implements the ESA with respect to the remainder of marine species. See 50 C.F.R. § 222.101 (explaining that the National Oceanic Atmospheric Administration implements the ESA "pertaining to wildlife and plants under the jurisdiction of the Secretary of Commerce"). As a practical matter, FWS has jurisdiction over the vast majority of listed species (and species being considered for listing). Unlike FWS, NMFS has not faced an extreme mismatch between resources and responsibilities with respect to section 4 of the ESA. Nat'l Oceanic Atmospheric Admin., *Candidate and Proposed Species Under the Endangered Species Act (ESA)*, <http://www.nmfs.noaa.gov/pr/species/esa/candidate.htm> (last updated Feb. 28, 2013) (listing NOAA candidate species). Therefore, NMFS has largely been a noncombatant in the Listing Wars. This article focuses exclusively on FWS.

6. *Listing a Species as Threatened or Endangered*, U.S. FISH & WILDLIFE SERV. (June 2011), <http://www.fws.gov/endangered/esa-library/pdf/listing.pdf>.

7. 16 U.S.C. § 1533 (2006).

8. Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVTL. L. 483, 494 (2004).

9. See *id.* (describing this situation as setting up an "inevitable conflict between the huge task of listing all deserving species as threatened or endangered, and the agencies' limited ability to do the job").

10. See 16 U.S.C. § 1540(g)(1)(C) (2006) (establishing procedure for suing FWS where there is an alleged failure of the Secretary to perform non-discretionary duties under section 4 of the ESA).

the power of the ESA, a variety of combatants have reacted to the problems of peace by launching the Listing Wars.<sup>11</sup>

Referring to the litigation over the listing program as warfare is not a new creative insight on my part. In 2003, Jason Patlis published an excellent article that used the listing moratorium, the listing budget cap, and the early battles of the Listing Wars as the case study for his discussion of legislative riders.<sup>12</sup> In it, he used the metaphor of warfare to describe the situation.<sup>13</sup> Better still, he nested that metaphor within a larger one: a five-act play that tells the story of epic battles.<sup>14</sup> Mr. Patlis cleverly describes his fifth act as unfinished, awaiting the intervention of the *deus ex machina* for resolution of an apparently insoluble problem.<sup>15</sup>

As I am no playwright, I will stick with the first metaphor. This history begins by examining the origins of the Listing Wars. It then follows the conflict through each of its major phases: the Battle of Overdue Listings, the First and Second Battles of Critical Habitat, and the Battle of the Mega-Petitions. This history does not attempt to address in detail the myriad of substantive disputes relating to section 4 or issues arising from the key provisions of section 4 and related definitions—many of those battles have already attracted whole colleges of historians. The history concludes with an extended discussion of the Multi-District Litigation (MDL) settlement agreements that hold some chance of de-escalating the conflict, if not actually leading to a complete cessation of hostilities. The other parties to these settlement agreements are WildEarth Guardians (Guardians), and the Center for Biological Diversity (CBD). Over time, these organizations have become the most active and litigious environmental groups with respect to section 4 issues—in recent years, they have filed considerably more section 4 lawsuits against FWS than all other plaintiffs combined.

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11. Working on ESA issues for the government is usually intellectually stimulating, often fun, but rarely violent. Thus, referring to the litigation and controversy of the ESA's implementation as a "war" may seem inappropriate. And yet, meaning no disrespect to those who have experienced the horrors of actual war, as someone on the front lines of the listing wars for sixteen years, the metaphor has sometimes seemed surprisingly apt. Litigation is stylized battle—lawyers the warriors, and settlements the ceasefires and peace treaties. Thus, the reader will perhaps forgive my extended use of this martial metaphor.

12. Jason M. Patlis, *The Endangered Species Act: Thirty Years of Politics, Money, and Science: Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257, 257 (2003).

13. See *id.* at 306 (using the metaphor of war to describe the "great battle waged by Congress and the President," in reference to the power of the purse versus the power of the veto).

14. *Id.* at 262.

15. *Id.* ("The final Act remains unfinished, as the characters await the arrival of the *deus ex machina*—that unexpected, improbable, and often supernatural character in Greek and Roman drama that never fails to intervene in an otherwise hopeless situation and untangle the plot to the satisfaction of all concerned.").

The MDL settlements were described as one of the top ten environmental issues to watch in 2012.<sup>16</sup> It remains to be seen whether they will truly resolve the problem described in Mr. Patlis's play; if so, I would argue that they are better characterized as flowing from the internal logic of the play, rather than an external *deus ex machina*.

## I. PRELUDE TO WAR

### A. *The ESA*

“[A prince] must also learn the nature of the terrain . . . .”  
Machiavelli, *The Prince*

During the Twentieth Century, there was an increasing realization that population growth, technological advances, and market forces were able to drive ever more species to extinction. As the myth of America's infinite resources slowly faded (a process not yet completed), there were fitful efforts to harness the power of the federal government to forestall extinction.<sup>17</sup> Wildlife law and federal conservation actions in the first half of the Twentieth Century focused largely on regulation of commercial exploitation of vulnerable species. The best examples of this were the Lacey Act of 1900,<sup>18</sup> the Fur Seal Treaty (1911),<sup>19</sup> the Migratory Bird Treaty Act (1918),<sup>20</sup> and the Bald Eagle Protection Act (1940).<sup>21</sup> There was also an effort to protect particular lands for the benefit of species conservation, beginning with President Theodore Roosevelt's designation of Pelican Island as a federal wildlife refuge.<sup>22</sup>

Notwithstanding those efforts, the threats to what we now call biodiversity continued to escalate. In the 1960s, Rachel Carson's *Silent Spring*, warning of the insidious threat that pesticides pose to wildlife, contributed to the growing understanding that merely regulating the

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16. Patrick A. Parenteau and Daniel Niedzwiecki, *Landmark Settlement Under the Endangered Species Act*, VERMONT LAW TOP 10 ENVTL. WATCH LIST (Dec. 12, 2011), <http://watchlist.vermontlaw.edu/esa-settlement>.

17. Stewart Udall famously referred to this as the “Myth of Superabundance” in Chapter 5 of his classic history of environmentalism, *The Quiet Crisis*. STEWART UDALL, *THE QUIET CRISIS* 54 (1963).

18. 6 U.S.C. §§ 3371–3378 (2006).

19. 18 U.S.C. § 42 (2006).

20. 16 U.S.C. §§ 703–12 (2006).

21. 16 U.S.C. § 668–668(d) (2006).

22. See *Pelican Island National Wildlife Refuge: History of Pelican Island*, U.S. Fish & Wildlife Serv., <http://www.fws.gov/pelicanisland/history.html> (last updated Sept. 18, 2009) (describing the beginning of designating wildlife sanctuaries in the United States with the designation of Pelican Island).

exploitation of species directly used by humans was inadequate to prevent additional extinctions.<sup>23</sup>

These concerns found their ultimate legislative expression in the ESA. Passed in 1973, the ESA is one of a series of laws resulting from the environmental awakening of that era, symbolized by the celebration of the first Earth Day in 1970.<sup>24</sup> The ESA superseded two attempts in the prior decade to create a broader federal law to stem extinction: the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969.<sup>25</sup> These precursors to the ESA had significant limitations that the ESA was meant to address.<sup>26</sup>

The ESA is the metaphorical battlefield on which the Listing Wars have been fought; its provisions are the terrain that can provide tactical advantages to its combatants. Those who would understand (or participate in) the Listing Wars must understand the terrain of the ESA as Machiavelli encouraged his Prince to understand the literal terrain of his dominion. What follows is a description of the relevant provisions of the ESA as it read in 2011 (and as it still reads in 2013). Some of the amendments to the original text are discussed in the next section.

In contrast to earlier laws, the ESA is not limited to a single class of animals, but covers all wildlife and plants.<sup>27</sup> Also in contrast to earlier laws, it is not limited merely to prohibiting or regulating direct overexploitation, but contemplates a comprehensive program of conservation.<sup>28</sup> Thus, it not only prohibits direct taking and killing of protected species,<sup>29</sup> but it also: (1) prohibits “harm” of protected species,<sup>30</sup> defined by regulation to include habitat modification that kills or injures wildlife (even if indirectly)<sup>31</sup>; (2) requires federal agencies to consult with FWS to ensure that they do not take actions that jeopardize listed species or adversely modify habitat identified as critical (this is referred to as “section 7 consultation”)<sup>32</sup>; and

23. RACHEL CARSON, *SILENT SPRING* 296–97 (Houghton Mifflin Co., 25th ed. 1987).

24. In particular, the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370(f) (2006), the Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006), the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006), and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421(h) (2006).

25. Endangered Species Preservation Act of 1966, Pub. L. No. 89–669, 80 Stat. 926 (Oct. 15, 1966); Endangered Species Conservation Act of 1969, Pub. L. No. 91–135, 83 Stat. 275 (Dec. 5, 1969).

26. See generally MICHAEL J. BEAN AND MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 194–98 (3d ed. 1997) (providing an overview of the precursors to the Endangered Species Act).

27. See 16 U.S.C. § 1532(16) (defining “species” to include “fish or wildlife or plants”).

28. *Id.* § 1531 (b) (defining the purposes to include conservation).

29. See *id.* § 1538 (referencing that the protection for plants is more limited).

30. See *id.* § 1532(19) (defining “take” to include “harm”).

31. 50 C.F.R. § 17.3; see *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 687 (1995) (upholding regulation defining “harm” against a facial challenge).

32. 16 U.S.C. § 1536(a)(1)–(2).

(3) provides federal agencies with authority to take positive actions to conserve listed species.<sup>33</sup>

The prerequisite for application of this comprehensive program of conservation is listing as a threatened or endangered species. “Species,” “threatened species,” and “endangered species” are all defined terms in the ESA.<sup>34</sup> The genesis of the Listing Wars is found in the statute’s procedures for making listing determinations; those procedures make up the bulk of section 4.

Section 4(a)(1) authorizes (or, arguably, mandates) FWS to determine whether species are threatened or endangered based on a number of enumerated factors.<sup>35</sup> The determination must be made by regulation.<sup>36</sup> Section 4(a)(3)(A) requires that FWS, “to the maximum extent prudent and determinable,” designate critical habitat for the species concurrently with listing it.<sup>37</sup> “Critical habitat” is also a defined term and the FWS must also make critical habitat designations by regulation.<sup>38</sup> Listing decisions must be made solely on the best scientific and commercial data available, without any consideration of the impacts of listing.<sup>39</sup> Critical habitat designations must similarly be made on the basis of the best scientific data available; however, in contrast to listing determinations, FWS must consider the economic as well as other impacts of the designation and has the authority to exclude areas from the designation if the benefits of excluding the area outweigh the benefits of including it.<sup>40</sup>

Rulemaking to list a species can be triggered in two different ways.<sup>41</sup> First, FWS has the authority to initiate rulemaking to list any species that it concludes is threatened or endangered. FWS implements this authority through the candidate-assessment program, by which it evaluates species for which it has information suggesting that listing may be warranted. If FWS determines that listing is warranted, it either immediately proposes to list the species, or adds the species to the “candidate list.” Species on the candidate list are assigned a “listing priority number” based on the threats

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33. *Id.* § 1536(a)(1); *see also* 16 U.S.C. § 1531(c)(1) (explaining that Congress’s policy requires federal agencies to “seek to conserve endangered species and threatened species”).

34. *Id.* § 532(6), (16), (20).

35. *Id.*

36. *Id.*

37. *Id.* § 1533(a)(3)(A).

38. *Id.* § 1532(5)(A).

39. *Id.* § 1533(b)(1).

40. *Id.* § 1533(b)(2).

41. The procedures described below generally apply to determinations that a listed species no longer warrants listing (“delisting”), to determinations to change the listing status from endangered to threatened, or vice versa.

they face and their taxonomic uniqueness.<sup>42</sup> Species with the highest priority are the first to be proposed for listing when resources to do so are available.

Second, members of the public can force FWS to consider listing a species by petitioning FWS. Upon receipt of a petition to list, FWS must, to the maximum extent practicable, make a preliminary determination on the petition and publish that finding in the Federal Register within ninety days.<sup>43</sup> This is referred to as a “90-day finding.” If FWS determines that the petition presents “substantial information” that listing may be warranted, FWS must initiate a review of the status of the species.<sup>44</sup> If not, the petition process is concluded. If FWS initiates a status review, it must, within 12 months of receipt of the petition, issue another determination, referred to as a “12-month finding.”<sup>45</sup> That finding can conclude that listing the species is not warranted, in which case the petition process is over.<sup>46</sup> Alternatively, it can conclude that listing is warranted, in which case FWS must promptly issue a proposed rule to list the species.<sup>47</sup> Or it can conclude that listing is warranted, but rulemaking is currently precluded by pending proposals for other species.<sup>48</sup> This is referred to as a “warranted-but-precluded finding” and requires that FWS also find that it is making expeditious progress in adding and removing species from the list.<sup>49</sup> The allowance for a warranted-but-precluded finding is Congress’s express acknowledgement that FWS may not always have sufficient resources to begin the listing process immediately for every species that it determines warrants listing.<sup>50</sup> When FWS makes a warranted-but-precluded finding, it assigns the species a listing priority number and adds it to the candidate list. Thereafter, FWS must annually reconsider the species until FWS either makes a not-warranted finding or proposes the species for listing.<sup>51</sup> FWS is also required to monitor the status of warranted-but-precluded species.<sup>52</sup>

Regardless of which process triggers the proposed rule, the rulemaking process is governed by the Administrative Procedure Act, supplemented by

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42. See sources cited *infra* notes 97, 98 and accompanying text.

43. 16 U.S.C. § 1533(b)(3)(A).

44. *Id.*

45. *Id.* § 1533(b)(3)(B).

46. *Id.* § 1533(b)(3)(B)(i).

47. *Id.* § 1533(b)(3)(B)(ii).

48. *Id.* § 1533(b)(3)(B)(iii)(I).

49. *Id.* § 1533(b)(3)(B)(iii)(II).

50. See H.R. CONF. REP. No. 97-835, at 21–22 (1982), reprinted in 1982 U.S.C.A.N. 2860, 2862–63.

51. 16 U.S.C. § 1533(b)(3)(C)(i).

52. *Id.* § 1533(b)(3)(C)(iii).

additional requirements specific to section 4.<sup>53</sup> (FWS can forego those required procedures in emergency circumstances.)<sup>54</sup> Once a species is proposed for listing, the ESA requires that FWS make a final listing determination within one year (which can be extended by six months in certain circumstances).<sup>55</sup>

Note that the procedural framework laid out by the ESA imposes deadlines of various degrees of rigidity for different parts of the process. First, there is no deadline at all for FWS to issue a proposed listing rule on its own initiative. Second, the deadline for making a ninety-day finding is subject to the modifier “to the maximum extent practicable.”<sup>56</sup> Third, the deadline for a twelve-month finding is unqualified, but one of those findings allows for a proposed listing rule to be deferred for some indefinite period of time, until rulemaking is no longer precluded by higher priorities. Fourth, once FWS issues a proposed rule there is again an unqualified deadline by which FWS must issue a final determination (subject to a six-month extension). And finally, the deadline for designating critical habitat is qualified by the ambiguous phrase “to the maximum extent prudent and determinable.”<sup>57</sup>

The ESA also allows the public to enforce these varying deadlines. Section 11(g)(1)(C) allows any person to commence a civil suit against FWS “where there is alleged a failure of [FWS] to perform any act or duty under section 4 which is not discretionary.”<sup>58</sup>

### B. *The First Twenty Years of Skirmishes*

“The bugle sounds, the charge begins/But on this battlefield no one wins.”  
Iron Maiden, *The Trooper*

Despite the broad language and sweeping objectives of the 1973 Act, there appears to have been relatively little conflict regarding the ESA during its first five years (particularly with respect to section 4). This may have been because none of the interested parties yet realized the strength of the language of the ESA, or that its scope extended so far beyond

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53. See *id.* § 1533(b)(4) (explaining that the provisions of section 553 of title 5 will apply to any regulation promulgated to carry out the purposes of this chapter); *id.* § 1533(b)(5)–(6).

54. *Id.* § 1533(b)(7).

55. *Id.* § 1533(b)(6)(A); *id.* § 1533(b)(6)(B)(i).

56. *Id.* § 1533(b)(3)(A).

57. *Id.* § 1533(a)(3)(A).

58. *Id.* § 1540(g)(1)(C).

charismatic megafauna.<sup>59</sup> In any case, as the assassination of Archduke Ferdinand led inexorably to World War I, the Supreme Court's 1978 decision in *Tennessee Valley Authority (TVA) v. Hill*<sup>60</sup> led (although less immediately) to the Listing Wars.

In *TVA v. Hill*, an environmental group sought to enjoin completion of the almost-finished Tellico Dam.<sup>61</sup> That dam would flood the only known habitat of an obscure, recently discovered small fish, the snail darter.<sup>62</sup> Since the snail darter had been listed as endangered, the environmental group argued that the Tennessee Valley Authority could not complete the dam without violating section 7's prohibition of jeopardizing a listed species.<sup>63</sup> The Supreme Court agreed, based in part on Congress "plain intent" to "halt and reverse the trend towards species extinction, whatever the cost."<sup>64</sup> With this decision, the power of the ESA, which allowed citizens to halt federal actions despite major economic consequences, was revealed.

*TVA v. Hill* was controversial and Congress acted quickly to amend the ESA. Notwithstanding the controversy, the 1978 amendments to the ESA were relatively modest. Rather than changing the fundamental balance struck by section 7 (as interpreted by the Supreme Court), Congress added provisions to try to encourage early resolution of possible conflicts between endangered species conservation and economic activity.<sup>65</sup> More dramatic, but less significant in practice, Congress created an ad-hoc, cabinet-level "Exemption Committee," empowered to override the prohibitions of section 7 in certain circumstances if a conflict could not be avoided.<sup>66</sup> The committee is popularly referred to as the "God Squad" for its authority to make the ultimate decision of whether to approve an action that might cause a species to become extinct—an authority that has been infrequently invoked and has resulted in only two exemptions (and none since 1979).<sup>67</sup>

Because the power of section 7 survived largely intact from this legislative adjustment, one of the indirect results of *TVA v. Hill* was to

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59. See Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 466–67 (1999) (exploring the expectations for the Endangered Species Act at the time of its passage).

60. 437 U.S. 153 (1978).

61. *Id.* at 157–58.

62. *Id.* at 158–59.

63. *Id.* at 150–60.

64. *Id.* at 184.

65. *E.g.*, 16 U.S.C. § 1536(d) (limiting the ability to commit resources to projects after consultation begun).

66. 16 U.S.C. § 1536(e)–(n).

67. See Eric M Yuknis, *Would a "God Squad" Exemption Under the Endangered Species Act Solve the California Water Crisis*, 38 B.C. ENVTL. AFF. L. REV. 567, 578–83 (2011).

highlight the importance of listing decisions, the prerequisite for section 7 consultation. In fact, the 1978 amendments included two additional procedural requirements in section 4: (1) additional provisions relating to notice and public hearings and (2) the requirement that critical habitat be designated concurrent with listing.<sup>68</sup> These new requirements had the effect of slowing listings.<sup>69</sup> With the arrival of the regulation-averse Reagan Administration, the listing program effectively came to a halt. During the first year of that Administration, FWS issued final listing determinations for only two species.<sup>70</sup> This, in turn, was the impetus for the 1982 amendments to the ESA. With those amendments, section 4 largely reached its current form.<sup>71</sup>

The principal purpose of the amendments to section 4 was to ensure that listing determinations (in contrast to critical habitat designations) were based “solely on biological criteria and to prevent non-biological considerations from affecting such decisions,” but the amendments were also “intended to expedite the decisionmaking process and to ensure prompt action in determining the status of the many species which may require the protections of the Act.”<sup>72</sup> It aimed to achieve the latter goal in part by “replac[ing] the Secretary’s discretion with mandatory, nondiscretionary duties.”<sup>73</sup> Thus, the amendments added deadlines for petition findings, but with the escape valve for warranted-but-precluded twelve-month findings.<sup>74</sup> The amendments also shortened the time allowed between proposed and final rules from two years to one, but clarified that listings could be finalized without concurrent critical habitat designations in certain circumstances, eliminating a major reason for the gridlock in the listing program in the previous several years.<sup>75</sup>

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68. An Act to Amend the Endangered Species Act of 1973, Pub. L. No. 95-632, 92 Stat. 3751 (1978).

69. See J. Michael Scott, et al., *Introduction*, in *THE ENDANGERED SPECIES ACT AT THIRTY: REVIEWING THE CONSERVATION PROMISE*, VOL. 1, at 3, 9 (Dale D. Goble, et al. eds., 2006). But see D. Noah Greenwald et al., *The Listing Record*, in *THE ENDANGERED SPECIES ACT AT THIRTY: REVIEWING THE CONSERVATION PROMISE*, VOL. 1, at 51, 56 (Dale D. Goble, et al. eds., 2006) (arguing that the new requirements in the 1978 amendments did not slow the rate of listing).

70. See H.R. REP. NO. 97-567, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2810; Greenwald et al., *supra* note 69, at 56–57.

71. For an excellent discussion of the early years of the listing program, including the various amendments to section 4, see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 278, 281–85 (1993).

72. H.R. CONF. REP. NO. 97-835, at 19 (1982), reprinted in 1982 U.S.C.C.A.N. 2860.

73. *Id.* at 20.

74. *Id.* at 21.

75. *Id.* at 21–22.

The 1982 Amendments led FWS and NOAA to rewrite the implementing regulations for section 4 in 1984.<sup>76</sup> Those regulations, found at 50 C.F.R. part 424, have not been revised since.

Despite *TVA v. Hill* and the 1982 amendments, there was very little litigation regarding section 4 during the first fifteen years of the ESA, even though, as discussed in the next section, FWS had never been able to keep up with the backlog of species requiring listing determinations.<sup>77</sup> But after 1982, the pieces were in place, awaiting a triggering event. That event was the challenge to FWS's determination that listing the northern spotted owl was not warranted.<sup>78</sup>

The northern spotted owl is associated with old-growth forests in the Pacific Northwest. The hope of some, and the fear of others, was that the spotted owl would make the snail darter look like a minor skirmish, as listing the spotted owl would affect not just a single large project, but a major economic activity (old-growth logging) throughout the Pacific Northwest. In other words, listing the spotted owl might provide significant protection to an entire ecosystem. In response to a 1987 petition to list, FWS conducted a status review and determined that listing was not warranted.<sup>79</sup> A broad coalition of environmental groups filed suit.

FWS argued that the court should defer to its expert judgment.<sup>80</sup> The court, however, found that the finding failed to provide any analysis in support of FWS's conclusion, and remanded the matter to FWS to provide an analysis.<sup>81</sup> In response, FWS proposed to list the species and issued a final listing rule on June 26, 1990.<sup>82</sup> In the meantime, the courts addressed a few other challenges to listing determinations.<sup>83</sup> The environmental groups

76. Listing Endangered and Threatened Species and Designating Critical Habitat; Amended Procedures To Comply With the 1982 Amendments to the Endangered Species Act, 49 Fed. Reg. 38,900, 38,900 (Oct. 1, 1984).

77. Most of the handful of cases related to protections for threatened species under section 4(d), e.g., *Christy v. Hodel*, 857 F.2d 1324, 1326 (9th Cir. 1988), rather than issues relating to the merits of listing determinations or the process for making those determinations. Greenwald et al. describe the period from 1982 to 1990 as the paradigm for how FWS implemented the current section 4 language in the absence of NGO enforcement: better than the preceding two years, but still inadequate. Greenwald et al., *supra* note 69, at 58.

78. Endangered and Threatened Wildlife and Plants; Finding on Northern Spotted Owl Petition, 52 Fed. Reg. 48552, 48552 (Dec. 23, 1987) (codified at 50 C.F.R. pt. 17).

79. Endangered and Threatened Wildlife and Plants; Finding on Northern Spotted Owl Petition, 52 Fed. Reg. at 48,552.

80. *Id.* at 481.

81. *Id.* at 483.

82. Determination of Threatened Status for the Northern Spotted Owl, 50 C.F.R. § 17.11 (2011).

83. See *Am. Fisheries Soc'y v. Verity*, Civ. No. 88-0174 (E.D. Cal. Feb. 24, 1989) (reviewing decision not to list the winter-run Chinook salmon); *Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (reviewing decision to emergency list the desert tortoise).

then sued FWS for its failure to designate critical habitat concurrently with the listing of the spotted owl. In 1991, the court invalidated FWS's not-determinable finding and ordered it to designate critical habitat.<sup>84</sup> Although technically a challenge to FWS's finding that critical habitat for the spotted owl was "not determinable" rather than a deadline case, this case was a harbinger of things to come. Environmental groups, aware of the potential of the ESA to cause significant changes to the landscape, had begun to petition FWS for action, use the deadlines of the ESA to force action if it was not forthcoming, and challenge (if necessary) the substantive result of the action.<sup>85</sup>

The chief of the Wildlife Section at the Department of Justice noted in an article in 1991 that the growing backlog of species under consideration for listing was leading to a then-new trend of challenges to agency inactivity.<sup>86</sup> Some of those early deadline cases were rendered moot by FWS taking the required action,<sup>87</sup> while others settled,<sup>88</sup> and a few were litigated to conclusion. The first reported judicial decision on a pure deadline claim was issued in 1992, in which the court enforced the deadline for designating critical habitat for the razorback sucker.<sup>89</sup> By the time Congress imposed the moratorium discussed in section II(B), FWS was subject to a number of court orders and court-approved settlement agreements that required it to make a variety of listing and critical habitat determinations (with many more cases pending).<sup>90</sup> The most significant of these was the settlement in the *Fund for Animals* case.

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84. *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. Feb. 26, 1991).

85. *See Houck, supra* note 71, at 284 (discussing Congress's intent to force the listing process forward by creating an opportunity for citizen petitions and judicial review).

86. James C. Kilbourne, *The Endangered Species Act under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 501-02 (1991).

87. *See, e.g., Silver Rice Rat v. Lujan*, Nos. 89-3409, 91-2479, slip op. at 2 (D.D.C. May 26, 1992).

88. Two settlement agreements included large numbers of species. *Cal. Native Plant Soc'y v. Lujan*, No 91-0038 (E.D. Cal. Aug. 22, 1991) (FWS agreed to resolve the conservation status of 159 California plants and animals on the candidate list); *Conservation Council for Haw. v. Lujan*, No. 89-953 (D. Haw. May 9, 1991) (FWS agreed to make petition findings for 189 species of Hawaiian plants). These settlements were ultimately overshadowed by the *Fund for Animals* settlement, discussed *infra* note 108.

89. *Colo. Wildlife Fed'n v. Turner*, 1992 U.S. Dist. Lexis 22046, at \*15-16 (D. Colo. Oct. 27, 1992).

90. *See Patlis, supra* note 12, at 293-94.

## II. MOBILIZATION

A. *The Fund For Animals Case*

“We are going to have peace even if we have to fight for it.”

Dwight D. Eisenhower

Almost since the inception of the Act, FWS has faced a backlog of listing actions. The 1973 Act directed the Smithsonian Institution to report to Congress which plants may be or become threatened or endangered.<sup>91</sup> In 1975, the Smithsonian issued its report recommending that FWS consider over 3,000 plant species for listing.<sup>92</sup> In effect, this was a petition for over 3,000 species. Presto, instant backlog.

FWS’s budget for the listing program has never been sufficient to address the entire backlog.<sup>93</sup> It must be noted here that, as is common practice with respect to appropriations for federal agencies, Congress includes much of the detailed budget allocations in associated committee reports, not in appropriations laws. Thus, the “listing budget” originally referred to the committee report language that specified how much of FWS’s general appropriation was to be spent on section 4.

As suggested by one commentator, after the 1982 amendments, the language of section 4 itself demonstrated that Congress recognized the inevitable conflict between the goals of the statute and the resources likely to be available to implement it.<sup>94</sup> Thus, as discussed above, Congress created petition-driven enforceable deadlines, while at the same time allowed FWS to delay issuing proposed listing rules in deference to higher

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91. 16 U.S.C. § 1541.

92. See Threatened or Endangered Fauna or Flora: Review of Status of Over 3000 Vascular Plants and Determination of “Critical Habitat,” 40 Fed. Reg. 27,824 (July 1, 1975) (listing vascular plants that the Smithsonian Institution considers to be endangered).

93. One rather biased commentator has suggested that FWS’s listing backlog is at least in part due to purposeful delay, part of an alleged pattern of illegally allowing political considerations to influence management of the listing program. Ivan J. Lieben, Comment, *Political Influences on USFWS Listing Decisions under the ESA: Time to Re-think Priorities*, 27 ENVTL. L. 1323 (1997); see also Timothy Bechtold, *Listing the Bull Trout Under the Endangered Species Act: The Passive-Aggressive Strategy of the United States Fish and Wildlife Service to Prevent Protecting Warranted Species*, 20 PUB. LAND & RESOURCES L. REV. 99 (1999) (alleging that FWS used a myriad of delay tactics to avoid listing the bull trout and other species). A more objective commentator criticized the Department of the Interior for, in the 1980s, resisting budget increases for the listing program. Houck, *supra* note 71, at 293–94. In fact, as early as 1979, the General Accounting Office recognized that insufficient funding was hampering FWS’s efforts to list candidate species and recommended that funding for the listing program be commensurate with its priority (the highest within the endangered species program). U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES—A CONTROVERSIAL ISSUE NEEDING RESOLUTION PROGRAM 30, 38 (1979).

94. Rohlf, *supra* note 8, at 494.

priorities. Congress's instruction that FWS develop "a ranking system to assist in the identification of species that should receive priority review" is more evidence that Congress recognized this problem.<sup>95</sup> FWS complied with this mandate by publishing the 1983 Guidelines.<sup>96</sup> The 1983 Guidelines required that every candidate species be assigned a listing priority number, which set its relative priority for being proposed for listing. The listing priority numbers depend on the magnitude and imminence of the threats facing the species and its taxonomic distinctiveness.<sup>97</sup>

Nonetheless, by the early 1990s, the growing size of the candidate list (FWS had not yet issued proposed listing rules for over 600 species that it had determined warranted listing)<sup>98</sup> concerned environmental groups. Those groups worried that FWS's ability to make warranted-but-precluded findings and put species on the candidate list instead of actually listing them created an administrative "black hole" where imperiled species would languish without protection, in some cases causing extinction.<sup>99</sup> That perception continues to the present day.<sup>100</sup>

This concern intensified in 1992, when President George H.W. Bush announced a moratorium on new regulations.<sup>101</sup> For a period of time, this

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95. 16 U.S.C. § 1533(h)(3).

96. Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098-02, 43,098-02 (Sept. 21, 1983).

97. *Id.* at 43,099-100.

98. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, REPORT NO. 90-98, AUDIT REPORT: THE ENDANGERED SPECIES PROGRAM—U.S. FISH AND WILDLIFE SERVICE 6 (1990) (stating that as of December 11, 1989, FWS had listed 601 domestic species on the candidate list and had an additional 3,033 domestic species for which it needed further data to make a determination as to whether listing was warranted).

99. See Houck, *supra* note 71, at 286 ("Whatever Congress's intent, the 'warranted but precluded' category had become a black hole for unlisted species."). This perception was not limited to environmental groups: the Department of the Interior's own Inspector General released a report in 1990 criticizing FWS for its progress in listing candidates. OFFICE OF THE INSPECTOR GEN., *supra* note 98, at 5-10.

100. See Press Release, WildEarth Guardians, Federal Court Approves Historic Species Agreement (Sept. 9, 2011), available at [http://www.wildearthguardians.org/site/News2?news\\_iv\\_ctrl=1&page=NewsArticle&id=7177](http://www.wildearthguardians.org/site/News2?news_iv_ctrl=1&page=NewsArticle&id=7177) ("The candidate list has been the black hole of the Endangered Species Act, where animals and plants that deserve the protection of the Act were consigned to an endless queue," said Jay Tutchton, General Counsel of WildEarth Guardians.). A web search for "black hole," "Endangered Species Act," and "candidate" resulted in about 294,000 hits. For a detailed discussion of controversy surrounding FWS's use of the warranted-but-precluded finding, see K. Mollie Smith, *Abuse of the Warranted But Precluded Designation: A Real or Imagined Purgatory?*, 19 SOUTHEASTERN ENVTL. L.J. 119 (2010) (arguing that the "warranted but precluded" designation of species is causing a serious delay in protecting at-risk species).

101. David E. Rosenbaum, *Bush Is Extending Regulation Freeze as a Great Success*, N.Y. TIMES, Apr. 29, 1992, <http://www.nytimes.com/1992/04/29/us/bush-is-extending-regulation-freeze-as-a-great-success.html?pagewanted=print&src=pm>.

resulted in a cessation of new final listing and critical habitat rules.<sup>102</sup> A coalition of environmental groups filed a lawsuit, *Fund for Animals, Inc. v. Lujan*, challenging the manner in which the Department of the Interior implemented this moratorium with respect to rules to list species under the ESA.<sup>103</sup> When FWS recommenced issuing final listing rules because those rules were subject to statutory deadlines (an exception to the moratorium), thus mooted plaintiffs' original claim, plaintiffs amended their complaint to challenge more broadly FWS's progress in listing species. The first count of the amended complaint asserted that FWS was unreasonably delaying the listing species in violation of section 706(1) of the Administrative Procedure Act.<sup>104</sup> The second count asserted that FWS's warranted-but-precluded twelve-month findings were illegal because FWS could not demonstrate that it was making "expeditious progress" in carrying out its listing responsibilities.<sup>105</sup>

The *Fund for Animals* case thus challenged FWS's key tool in managing the workload of the listing program. If the court ruled against FWS, it is not clear what remedy it would have imposed, but nothing other than legal impossibility would have prevented the court from ordering immediate action on all of the warranted-but-precluded species. Although plaintiffs' victory was anything but assured, the relevant numbers gave plaintiffs significant ammunition, as did a 1990 report of the Inspector General of the Department of the Interior that suggested that the length of time (twelve years) that it calculated it would take FWS to address the candidate list was "not indicative of the 'expeditious progress' specified in the Act."<sup>106</sup> Settlement presented a way for both sides to hedge the uncertainty of the situation.

On December 15, 1992, the parties entered into what was certainly the most significant settlement agreement in the section 4 program until 2011. In it, FWS agreed to resolve the conservation status of the entire candidate list (then 401 species)<sup>107</sup> by September 30, 1996.<sup>108</sup> The settlement also

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102. *Id.*

103. *The Fund for Animals, Inc. v. Lujan*, No. 92-800 (D.D.C. 1992). See generally Eric R. Glitzenstein, *On the USFWS Settlement Regarding Federal Listing of Endangered Species*, 10 ENDANGERED SPECIES UPDATE 1 (Mar. 1993) (lead attorney for plaintiffs describing the settlement).

104. Amended Complaint for Declaratory and Injunctive Relief at 33-34, *The Fund for Animals v. Lujan*, No. 92-800 (D.D.C. 1992).

105. *Id.* at 34.

106. OFFICE OF THE INSPECTOR GENERAL, *supra* note 98, at 7.

107. Technically, the settlement applied only to "C-1" candidates, which correspond to the current candidate list. At the time, FWS maintained additional lists of species ("C-2" and "C-3" candidates), which it had not yet determined warranted listing. FWS subsequently discontinued the later categories. Notice of Final Decision on Identification of Candidates for Listing as Endangered or Threatened, 61 Fed. Reg. 64,481 (Dec. 5, 1996).

included complex provisions for dealing with additional species that FWS determined to be warranted-but-precluded.<sup>109</sup> Finally, the settlement expressly endorsed an ecosystem approach to listing.<sup>110</sup>

With the issue of the candidate list resolved, all that remained was for FWS to comply with the settlement.

### B. Budget Battles: The Moratorium

“War is a matter not so much of arms as of money.”  
Thucydides, *The History of the Peloponnesian War*

FWS listed significantly more species per year from 1991 to 1995 than it had between 1973 and 1990.<sup>111</sup> While environmental groups thought FWS was doing too little in the listing program, many in industry thought the opposite. When the Republican Party gained a majority of Congress in the 1994 elections, one of its targets was the ESA.<sup>112</sup> As a result, in April 1995, Congress rescinded one and a half million dollars from what had been an eight million dollar listing budget in fiscal year (FY) 1995; at the same time, Congress imposed a moratorium on final listing determinations and final critical habitat designations.<sup>113</sup> It is possible that the *Fund for*

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108. Settlement Agreement at 2, *The Fund for Animals, Inc. v. Lujan*, No. 92-800 (D.D.C. 1992).

109. *Id.* at 5–6.

110. *Id.*

111. Greenwald et al., *supra* note 69, at 55, 59. Greenwald et al. argue that the primary reason for this increase was the series of lawsuits discussed above. *Id.* at 59. Although there may be some truth to that assertion, Greenwald et al. do not sufficiently address the principle that correlation does not imply causation. In fact, in one sentence, they directly equate “species . . . listed following lawsuits” with “species . . . listed as a result of litigation.” *Id.* Thus, according to Greenwald et al., FWS only gets “credit” for listings if it manages to complete the process without any group filing a petition or a lawsuit. This is a classic example of the fallacy *post hoc ergo propter hoc*. To be fair, Greenwald et al. support their conclusion by dividing the listing record into various periods to which they assign different characteristics (particularly the prevalence of litigation). But there are too many variables involved to make that segmentation useful for counterfactual comparison. Greenwald et al. never discuss the possibility that any of the listings that occurred after litigation would have occurred at about the same time absent the litigation. This is all the more problematic because legal vulnerability under the ESA often results from FWS choosing to begin the listing process, and FWS is more likely to agree to settle a case that is consistent with its preexisting priorities, facts that suggest that at least some of the time, FWS would take final action without the prompt of a lawsuit. Finally, Greenwald et al. never address the reality, discussed throughout this paper, that litigation can divert limited resources from the making of actual listing determinations.

112. Robert T. Nelson, *Rewrite Endangered Species Act?—New GOP Representatives Plan To Emphasize Private-Property Rights*, SEATTLE TIMES, Dec. 9, 1994, <http://community.seattletimes.nwsourc.com/archive/?date=19941209&slug=1946279>.

113. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104–06, 109 Stat. 73, 86 (1995); *see generally* Patlis, *supra* note 12, at 287–91 (discussing rescission and moratorium).

*Animals* settlement contributed to the moratorium because it had resulted in a large number of proposed listing rules, and called for still more in the next year and a half.<sup>114</sup> This may have heightened the controversy already associated with section 4 due to the listing of the northern spotted owl.

In addition to the substantive and administrative challenge the moratorium posed for the implementation of section 4, the moratorium also raised legal questions in the context of the listing backlog and the existing court orders and settlement agreements.<sup>115</sup> The definitive case from this period was *Environmental Defense Center v. Babbitt* (a/k/a the “Red-Legged Frog case”).<sup>116</sup> In this case, the latest in a series seeking to enforce the ESA’s deadlines with respect to a petition to list the red-legged frog, the issue was FWS’s failure to make a final listing determination on the proposed rule to list the species. The Environmental Defense Center filed suit on May 1, 1995, after the moratorium took effect. Nonetheless, the district court ordered FWS to make a final determination by September 15, 1995.<sup>117</sup> FWS appealed, and sought a stay of the district court’s order. The Ninth Circuit denied the motion for stay, but the Supreme Court granted the stay so that the Ninth Circuit could rule on the appeal before FWS was required to violate either the moratorium or the district court order.<sup>118</sup> On the merits, the Ninth Circuit agreed with the plaintiff that the moratorium did not repeal FWS’s duty under the ESA, but agreed with FWS that the moratorium prevented it from making a final listing determination. The Ninth Circuit vacated the district court’s order, and remanded to the district court to provide that compliance be delayed “until a reasonable time after appropriated funds are made available.”<sup>119</sup>

That moratorium continued into FY 1996 and became part of the budget showdown between the Clinton Administration and the Republican Congress.<sup>120</sup> Although the bulk of the federal government was shut down “only” twice during the showdown, the “continuing resolutions” that kept the government operating often zeroed out the listing budget. Therefore, the

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114. Glitzenstein, *supra* note 103, at 2.

115. See Patlis, *supra* note 12, at 293 (the moratorium resulted in limited funding leading to all activities being stalled).

116. 73 F.3d 867, 867 (9th Cir. 1995) (concerning final determination of endangered listing for red legged frog). (Note that within the “section 4 bar,” we tend to refer to cases by the critter, rather than the parties, as so many of the hundreds of cases have the same parties.)

117. *Id.* at 869–70.

118. *Babbitt v. Env’tl. Def. Ctr.*, 515 U.S. 1193, 1193 (1995).

119. *Env’tl. Def. Ctr v. Babbitt*, 73 F.3d at 872.

120. See generally Patlis, *supra* note 12, at 283–87 (two aspects of the appropriations bill led to the impasse that resulted in the government shutdown during the winter of 1995-1996).

listing program was mothballed for much of the first half of FY 1996.<sup>121</sup> The compromise to end the budget impasse included four million dollars for the listing program, and authorized the President to waive the moratorium,<sup>122</sup> which he did on April 26, 1996.<sup>123</sup>

*C. Post-Moratorium: The Listing Priority Guidance*

“Therefore whoever desires peace, let him prepare for war.”  
Vegetius, *De Re Militari*

FWS anticipated that when the moratorium eventually ended, it would have a significant backlog of work with limited resources.<sup>124</sup> Because the listing program had effectively been shut down for seven months, addressing the backlog no longer meant just answering the question of which proposed listing rules should have the highest priority (a question that could be answered by reference to the listing priority numbers assigned to candidates under the 1983 Guidelines).<sup>125</sup> FWS also needed to prioritize the different types of listing activity. To meet this need, even before the moratorium was lifted, FWS issued an “Interim Listing Priority Guidance.”<sup>126</sup> Shortly after the moratorium was lifted, the Interim Guidance was superseded by a similar but more detailed “Final Listing Priority Guidance.”<sup>127</sup> The goal of this document was to “focus the limited listing resources on those actions that will result in the greatest conservation benefits to the species in the most urgent need of the Act’s protections.”<sup>128</sup> Thus, the Guidance combined the strict biological priority of the 1983 Guidelines with an evaluation of the conservation importance of the different types of administrative action. The Guidance therefore gave

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121. Endangered and Threatened Wildlife and Plants; Restarting the Listing Program and Final Listing Priority Guidance, 61 Fed. Reg. 24,722-02, 24,723 (May 16, 1996) (codified at 50 C.F.R. pt. 17); see also Patlis, *supra* note 12, at 291–94 (explaining that on April 26, 1996, the President suspended the listing moratorium language, while signing the omnibus appropriations bill into law, thus lifting the suspension period).

122. Final Guidance, 61 Fed. Reg. at 24,723; Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321–159 to 1321–160 (1996).

123. Suspension of the Provision Limiting Implementation of Subsections (a), (b), (c), (e), (g), or (i) of the Endangered Species Act of 1973 (16 U.S.C. § 1533), Contained in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (H.R. 3019), 61 Fed. Reg. 24,667 (May 16, 1996).

124. Final Guidance 61 Fed. Reg. at 24,723.

125. *Id.*

126. Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance, 61 Fed. Reg. 9651-01 (Mar. 11, 1996) (codified at 50 C.F.R. pt. 17).

127. Final Guidance, 61 Fed. Reg. 24,727.

128. *Id.* at 24,725.

highest priority (after addressing any emergency situations) to final listing determinations for the 243 species with outstanding proposed listing rules. Proposed listing rules for the 182 candidate species, petition findings, critical habitat determinations, and delisting actions were a lower priority and FWS did not expect to undertake any work on those actions in FY 1996.<sup>129</sup> The Guidance was intended to be temporary, until the backlog of proposed listings for species facing high-magnitude threats was brought under control.<sup>130</sup>

Attorneys for plaintiffs in the *Fund for Animals* case submitted comments on the Interim Guidance complaining, among other things, that giving final listing determinations a higher priority than new proposed listing rules was inconsistent with the settlement in that case.<sup>131</sup> FWS responded that although it had proposed listing rules for 359 of the 443 species required to comply with the settlement, the budget situation of the previous year had made it impossible to comply with the settlement. More importantly, devoting all of its resources to issuing proposed rules for candidates would deny needed protection to higher-priority species just a step away from achieving that protection.<sup>132</sup>

The Guidance also expressly addressed how outstanding deadline litigation would be handled; the Department of Justice would notify the respective courts of the priority under the Guidance of the action at issue, and seek appropriate relief to allow the highest priority actions to be completed first.<sup>133</sup> The Guidance concluded with a bold statement of intent that FWS and its lawyers would work mightily to defend during the first battles of the Listing Wars: “The Service will not elevate the priority of proposed listings for species simply because they are subjects of active litigation. To do so would let litigants, rather than expert biological judgments, control the setting of listing priorities.”<sup>134</sup> FWS ultimately would be forced to abandon that aspiration.

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129. *Id.* at 24,727–28.

130. *Id.* at 24,736.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 24,738.

## III. THE BATTLE OF OVERDUE LISTINGS

“In the practical art of war, the best thing of all is to take the enemy's country whole and intact; to shatter and destroy it is not so good.”

Sun Tzu, *The Art of War*

If it was FWS's hope that the rationality of the Guidance would help convince environmental groups to give FWS a grace period from additional litigation while FWS began to clean up the mess caused by the moratorium, that hope was quickly dashed. Although the Red-Legged Frog case insulated FWS from deadline litigation while funds were unavailable, it did not toll the deadlines of the ESA—the clock kept ticking throughout the moratorium. Thus, when the moratorium was lifted, final determinations for most of the 243 species already proposed for listing were overdue. Despite the fact that under the Guidance FWS gave completing final determinations for those species the highest priority, environmental groups filed a flurry of lawsuits seeking to accelerate that work. In addition, numerous petitions were filed before and during the moratorium that FWS had not been able to respond to;<sup>135</sup> these overdue petition findings were the subject of additional litigation.

The Guidance then became exhibit A in FWS's defense against those suits. FWS argued that the courts should defer to it in how to allocate its limited resources as it emerged from the moratorium. Under this view, injunctions are extraordinary equitable remedies, and under these circumstances, courts should refrain from imposing them, even if FWS was admittedly in violation of the clear deadlines of section 4.<sup>136</sup>

FWS had some success, especially early on. For example, in *Sierra Club v. Babbitt*,<sup>137</sup> plaintiffs challenged FWS's failure to make a final determination on a 1992 proposed rule to list the peninsular bighorn sheep. The court stayed the litigation during the moratorium. After the moratorium was lifted, plaintiff moved to have the stay likewise lifted. The court denied the motion, and relying on the Guidance, held that the budgetary circumstances excused FWS's failure to comply with the statutory deadline:

Given that it would be “impossible,” for defendants to discharge their § 1533(6)(A) obligation as to all pending species within this fiscal year, the court finds that defendants' prioritization scheme,

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135. Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance, 61 Fed. Reg. 9651-01.

136. *Sierra Club v. Babbitt*, 948 F. Supp. 56, 56 (E.D. Cal. July 24, 1996).

137. *Id.*

predicated upon biological need, is reasonable in light of the Endangered Species Act's purpose. Sporadic and disorganized judicial interference with defendants' priorities would result in a game of musical chairs plainly disruptive to a thoughtful and reasoned allocation of defendants' limited resources.<sup>138</sup>

But from the beginning, some courts found it easy to distinguish the Red-Legged Frog case. In contrast to *Sierra Club v. Babbitt*, those courts did not view the question to be whether FWS had the resources to immediately take all overdue actions—they found it dispositive that FWS now had some resources and that those resources could be used to take the action at issue in their particular cases. Thus, they either declined to exercise their discretion to refrain from issuing an injunction,<sup>139</sup> or denied that they had such discretion.<sup>140</sup> As time passed, and the moratorium receded, courts had less and less patience with FWS blaming its then-current situation on an event that had occurred years before.<sup>141</sup>

Before it became obvious that the Guidance would ultimately be little help with the courts, FWS periodically revised the Guidance to reflect its progress on reducing the backlog of final listing determinations. Thus, on December 5, 1996, it announced that as of April 1, 1997, it would end its single-minded focus on final listing determinations and begin to allocate resources to other actions.<sup>142</sup> But even with the last Guidance published, FWS was still making distinctions between actions—in particular, it kept designation of critical habitat as a low priority.<sup>143</sup>

In the meantime, the plaintiffs in the *Fund for Animals* case moved to enforce the settlement agreement, as FWS had publicly admitted in the Guidance that it would not attempt to comply with the settlement after the

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138. *Id.* at 57 (citations omitted); see also *Env'tl. Def. Ctr. v. Babbitt*, No. 94-CV-5561 (C.D. Cal. May 23, 1996) (concerning the western snowy plover); *Env'tl. Def. Ctr. v. Babbitt*, No. 96-CV-6987 (C.D. Cal. Apr. 7, 1997) (concerning sixteen Channel Island plants); *Catron County Bd. of Commissioners v. FWS*, Civ. No. 93-700-HB (D.N.M. Aug. 18, 1997) (concerning the spikedace and loach minnow); cf. *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) (concerning the Columbian sharp-tailed grouse and approving Guidance in the context of the statutory flexibility provided with respect to 90-day findings—"to the maximum extent practicable").

139. See, e.g., *Cal. Trout v. Babbitt*, No. C-95-3961 (N.D. Cal. May 14, 1996).

140. See, e.g., *Natural Res. Def. Counsel v. U.S. Dep't of Interior*, No. CV 98-7596, slip op. at 14–15 (C.D. Cal. Apr. 5, 1999), *appeal dismissed as moot*, 2001 WL 760519 (9th Cir. 2001).

141. E.g., *Sw. Ctr. for Biological Diversity v. Babbitt*, No. 98-CV-0180-K, slip op. at 9–10 (S.D. Cal. May 7, 1998) (distinguishing cases decided shortly after moratorium, noting that two years had passed, and ordering FWS to complete final listing determinations for 44 species by stated deadline).

142. Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. 64,475, 64,479 (Dec. 5, 1996).

143. Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 2000, 64 Fed. Reg. 57,114-01 (Oct. 22, 1999).

moratorium—the Guidance required a focus on final determinations, as opposed to the proposed rules (or not-warranted findings) at issue in *Fund for Animals*. FWS moved to amend the settlement agreement.<sup>144</sup> Ultimately, the parties entered into negotiations once more, and agreed to amend the settlement agreement by extending the date for compliance until December 31, 1998.<sup>145</sup>

Here we must take a brief detour into matters only a quartermaster could love: the budget. As mentioned above, the listing budget was not originally reflected in statutory language. As the volume of listing-deadline litigation increased, and available resources grew only slowly, the Department of the Interior and its appropriators in Congress realized that there was a distinct possibility that FWS would face a combination of court orders with which it would be impossible to comply without violating the budget allocations in the committee reports. Given the less-authoritative nature of committee reports, there was some concern that FWS would not be able to argue successfully in court that it was technically impossible for FWS to work on listing actions that would require in aggregate expenditures in excess of the listing budget. In that circumstance, to avoid contempt of court, FWS might be forced to seek to have resources reallocated from other areas of its budget. This would dramatically reduce the certainty with which FWS could administer its other programs, with concomitant decreases in efficiency and effectiveness.<sup>146</sup> As a result of these concerns, Congress converted the budget allocation for the listing program into a statutory mandate for FY 1998.<sup>147</sup> This is referred to as the “listing cap,” and it has been in effect ever since.<sup>148</sup>

In effect, the Battle of Overdue Listings was fought to a draw. On the downside for FWS: (1) the Guidance was as ineffective at preventing listing deadline litigation as the Maginot Line was ineffective at sparing France from a German invasion; (2) FWS ultimately lost the judicial battle on the legal significance of the Guidance; and (3) FWS was required to spend a

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144. See Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. at 64,476 (discussing plaintiff’s motion to enforce the settlement agreement).

145. See Final Listing Priority Guidance for Fiscal Years 1998 and 1999, 63 Fed. Reg. 25,502, 25,507 (May 8, 1998) (noting that amended settlement required a resolution of the status of eighty-five species by December 31, 1998).

146. See Press Release, U.S. Department of the Interior, Endangered Species Act “Broken”—Flood of Litigation over Critical Habitat Hinders Species Conservation at 1 (May 28, 2003), available at [http://www.doi.gov/archive/news/03\\_News\\_Releases/030528a.htm](http://www.doi.gov/archive/news/03_News_Releases/030528a.htm) (describing a circumstance in which DOI eventually did seek to shift funding from other programs).

147. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105–83, 111 Stat. 1543 (1997); Final Listing Priority Guidance for Fiscal Years 1998 and 1999, 63 Fed. Reg. 25,502, 25,503 (May 8, 1998) (discussing the listing cap and its effects).

148. See generally Patlis, *supra* note 12, at 306–11 (describing evolution of the listing cap language).

significant amount of resources and energy managing the enormous litigation workload—this cut into the amount of substantive listing work that FWS was able to get done.<sup>149</sup>

On the other hand, FWS nonetheless made reasonable progress in digging out from the backlog caused by the moratorium. Many of the deadline cases brought by environmental groups sought final listing determinations on proposed rules. This was, of course, FWS's highest priority under the Guidance, so the litigation focused on the propriety of a court setting a deadline for the action, and, if so, what the deadline should be. So FWS was able to settle some of these cases because the final listing determinations at issue were nearing completion. Even in the absence of a settlement, courts often adopted FWS's schedule for completion of the final determination.<sup>150</sup> Thus, FWS was more or less able to follow the Guidance for several years, and by the end of the twentieth century, it had largely eliminated the backlog of final listing determinations while being able to shift sufficient resources to issuing proposed listing rules and complete its compliance with the *Fund For Animals* settlement.<sup>151</sup> But even as FWS achieved this goal, new battle lines were being drawn.

#### IV. THE FIRST BATTLE OF CRITICAL HABITAT

“Even if some disgruntled citizen had threatened to vandalize water umbel critical habitat, threats of environmental terrorism should not be allowed to defeat the ESA.”

Judge Alfredo Marquez<sup>152</sup>

Not all of the litigation in the late 1990s was limited to seeking acceleration of final listing determinations. During this period, the focus of

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149. Greenwald et al. argue that litigation accelerates the speed at which listing determinations are made. Greenwald et al., *supra* note 69, at 63. This is certainly true with respect to some species in some circumstances. But that blanket assertion fails to reflect both the varied circumstances in which listing determinations are made as well as the larger picture. Sometimes settlements and court orders merely codify what would have happened in the absence of litigation. In others, priorities are shuffled due to litigation, and the determination for one species is accelerated, but those for others (which the FWS views as higher priorities) are then necessarily delayed. Turning to the big picture, litigation imposes transaction costs. This raises the question of whether any greater efficiency spurred by litigation outweighs the inefficiency created by responding to litigation. This is an interesting and difficult-to-answer question, but its existence is not even acknowledged by Greenwald et al.

150. See, e.g., *Env'tl. Def. Ctr. v. Babbitt*, No. 96-CV-6987 (concerning sixteen Channel Island plants); see also *Sw. Ctr. for Biological Diversity v. Babbitt*, 97-CV-00704 (D. Ariz. Aug. 24, 1998) (permitting FWS to maintain its schedule regarding the listing of the San Xavier talus snail).

151. Final Listing Priority Guidance for Fiscal Years 1998 and 1999, 63 Fed. Reg. 25,502, 25,507 (May 8, 1998).

152. *Sw. Ctr. for Biological Diversity v. Babbitt*, 97-CV-00704, at 23.

litigation began to shift to critical habitat. Indeed, one of the reasons that FWS was able to list so many species in the 1990s, both before and after the moratorium, is that those listings were rarely accompanied by designations of critical habitat.<sup>153</sup> In most cases, FWS relied on the statutory exception included in section 4(a)(3)—designation concurrent with listing is only required “to the maximum extent prudent.”<sup>154</sup> Thus, for hundreds of species in the 1990s, FWS concluded that designation was “not prudent.” In doing so, FWS was creating a piper that would have to be paid, and thus paving the way for the next phase of the Listing Wars.

At that point, FWS had long viewed the designation of critical habitat as an expensive and controversial process that usually added little additional protection to a species once it was listed.<sup>155</sup> FWS eventually employed a variety of strategies to deal with the critical-habitat problem: it tried to avoid the legal requirement of designation; failing that, it tried to delay the requirement; and failing that, it tried to designate cheaply to conserve its resources for higher priorities. Three circuit court decisions blew the first two strategies out of the water and severely limited the third.

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153. Between April 1996 and July 1999, FWS listed 256 species, but published critical habitat designations for only two of them. Patlis, *supra* note 12, at 300.

154. 33 U.S.C. § 1533(a)(3)(A).

155. A discussion of the basis of FWS’s historical antipathy to designating critical habitat, how that antipathy has manifested itself in administrative action (or inaction), and how the courts have reacted to FWS’s position is beyond the scope of this paper. See generally Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 BUFFALO L. REV. 1095, 1097–98 (2010) (discussing problems plaguing critical habitat designations and their protections); Michael Senatore et al., *Critical Habitat at the Crossroads: Responding to the G.W. Bush Administration’s Attacks on Critical Habitat Designation Under the ESA*, 33 GOLDEN GATE U.L. REV. 447, 449 (2003) (arguing that the George W. Bush Administration’s attacks on critical habitat protection warrants priority attention); Jared B. Fish, Note, *Critical Habitat Designations After New Mexico Cattle Growers: An Analysis of Agency Discretion to Exclude Critical Habitat*, 21 FORDHAM ENVTL. L. REV. 575, 582–96 (2010) (arguing that the U.S. Fish and Wildlife Service has failed to fulfill its obligation to make critical habitat designations for threatened or endangered species). But a good snapshot of FWS’s position at the beginning of the First Battle of Critical Habitat is found in a *Federal Register* notice that announced FWS’s intention to develop policy on the role of habitat in endangered species conservation. Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871 (June 14, 1999). If anything, the Department of the Interior’s views regarding critical habitat strengthened during the George W. Bush Administration. See Press Release, U.S. Department of the Interior, Endangered Species Act “Broken,” *supra* note 146 (discussing the high costs of critical habitat designations and court orders forcing the FWS to make the designations). More recently, partly in response to *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1076 (9th Cir. 2004), which invalidated the regulatory definition of “destruction or adverse modification” of critical habitat, 50 C.F.R. § 402.02, FWS has moderated its position. The MDL settlement with WildEarth Guardians, discussed below, announced FWS’s intent to designate critical habitat concurrently with future listings. Stipulated Settlement Agreement, Exhibit 1, ¶ 8, *In re: Deadline Litig.*, Misc. Action No. 10-377 (EGS) (D.D.C. May 10, 2011).

First, in *Natural Resources Defense Council v. Department of the Interior*,<sup>156</sup> plaintiffs challenged FWS's not-prudent finding with respect to critical habitat for the coastal California gnatcatcher.<sup>157</sup> The district court upheld this finding; the Ninth Circuit reversed. In its opinion, the Ninth Circuit emphasized that Congress intended the not-prudent exception to the requirement of designating critical habitat to be invoked only in the rare circumstance in which designation would not benefit the species.<sup>158</sup> FWS had made not-prudent findings for hundreds of listed species in the 1990s based on similar logic. Thus, this case, along with several subsequent district court cases following it,<sup>159</sup> not only made future not-prudent findings very difficult to justify (FWS has made only a handful in the last twelve years), but it made FWS vulnerable to challenges on hundreds of past findings.

Second, *Forest Guardians v. Babbitt* drove the last nail in the coffin of the Guidance.<sup>160</sup> The district court, in a challenge to FWS's failure to designate critical habitat for the Rio Grande silvery minnow, had deferred to the Guidance, and stayed the case for two years.<sup>161</sup> The Tenth Circuit reversed.<sup>162</sup> It held that the failure to designate was agency action unlawfully withheld in violation of section 706(1) of the Administrative Procedure Act.<sup>163</sup> The court further held that because the APA states that a "reviewing court shall . . . compel" such action, courts have no equitable discretion not to issue an injunction.<sup>164</sup> Therefore, the Tenth Circuit remanded the case to the district court with instructions to order FWS "to issue a final critical habitat designation for the silvery minnow as soon as possible, without regard to the Secretary's other priorities under the ESA."<sup>165</sup> Thus, the silvery minnow case made it essentially impossible to delay designation because of inadequate resources.

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156. *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1123 (9th Cir. 1997).

157. Recall that critical habitat must be designated only "to the maximum extent prudent," 16 U.S.C. § 1533(a)(3)(A); therefore, if FWS finds that designation is not prudent, it need not designate critical habitat.

158. *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d at 1126.

159. *E.g.*, *Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998) (remanding not-prudent findings for 245 listed plants); *Jumping Frog Research Inst. v. Babbitt*, 1999 WL 1244149, at \*1 (N.D. Cal. Dec. 15, 1999), *as amended* (Jan. 18, 2000) (remanding not-prudent finding for red-legged frog).

160. 174 F.3d 1178, 1178 (10th Cir. 1999).

161. *Id.* at 1181.

162. *Id.* at 1193.

163. 5 U.S.C. § 706(1); *Forest Guardians v. Babbitt*, 174 F.3d at 1191.

164. *Forest Guardians v. Babbitt*, 174 F.3d at 1191.

165. *Id.* at 1193.

Third, in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*,<sup>166</sup> FWS designated critical habitat for the southwestern willow flycatcher. Under section 4(b)(2), FWS was required to consider the economic impacts of designation.<sup>167</sup> FWS limited its analysis to the incremental impacts of the designation—in other words, it did not consider those impacts that would equally be caused by other factors. Because FWS determined that any measures to avoid destruction or adverse modification of critical habitat would also be required to avoid jeopardy to the species, and thus were already required by the listing of the species, designation of critical habitat would have no incremental impacts.<sup>168</sup> The designation was challenged by a ranchers' organization. The district court upheld the designation, affirming FWS's use of an incremental analysis,<sup>169</sup> but the Tenth Circuit reversed. Because FWS interpreted the section 7 prohibitions regarding jeopardy and adverse modification so similarly, an incremental analysis would render meaningless the requirement of considering economic impacts.<sup>170</sup> The court remanded the designation to FWS to consider the impacts of designation that were "co-extensive" with other causes.<sup>171</sup> Conducting a co-extensive economic analysis is necessarily a more expensive proposition than conducting an incremental one because it must address additional considerations. This not only meant that future designations would be more expensive, but, similar to the gnatcatcher case, it also meant that past designations relying on incremental analyses were vulnerable to challenge.

To switch metaphorical horses: those students of physics out there may have heard the three Laws of Thermodynamics drolly paraphrased as "you can't win, you can't break even, and you can't get out of the game." Similarly, the Gnatcatcher, Silvery Minnow, and Flycatcher critical habitat cases can be considered to form the three Laws of Critical Habitat: you have to do it, you have to do it now, and it's going to be expensive.

FWS's fundamental difficulty after the moratorium was that, unlike during the moratorium (when FWS could spend no money at all on final listings and designations), FWS had some money and therefore could take

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166. 248 F.3d 1277 (10th Cir. 2001).

167. See *Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Southwestern Willow Flycatcher*, 62 Fed. Reg. 39,129 (July 22, 1997) (codified at 50 C.F.R. pt. 17.95) (designating critical habitat by FWS under court order on July 22, 1997).

168. *Id.* at 39,138. ("[B]ecause critical habitat designation is not expected to cause additional habitat restrictions in any biological opinions issued under the Act, there are no incremental economic effects attributable to the designation.")

169. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 81 F. Supp. 2d 1141, 1162 (D.N.M. 1999), *rev'd*, 248 F.3d 1277 (10th Cir. 2001).

170. *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285.

171. *Id.* at 1285–86.

some, but not all, of the required actions.<sup>172</sup> Although the court in the Peninsular Bighorn Sheep case had been willing to look at the big picture and realize that the ability to take some actions did not equate with the ability to take every action required by the statute, most courts were unwilling to look beyond the immediate issue before the court: the ESA requires an action, FWS has some money available to take it, and therefore the court must order compliance on a schedule that assumes that the action is FWS's highest priority.<sup>173</sup> Of course, in the context of limited resources, everything cannot be the highest priority.<sup>174</sup> Eventually, this myopia on the part of the courts resulted in FWS having its priorities decided almost exclusively by the courts (and therefore the plaintiffs). A species not lucky enough to have an advocate would languish at the back of the line, as FWS sought to juggle the listing balls so as to avoid contempt of court.<sup>175</sup> This was difficult, but not crippling—immediately after the moratorium, the acknowledged backlog consisted mostly of actions that FWS viewed as relatively high priorities. However, as the Laws of Critical Habitat unfolded in the circuit court decisions discussed above, the scope of the backlog in effect increased by orders of magnitude, and the prospect of taking actions not subject to court orders (particularly proposed listing rules) became increasingly unlikely.

INTERLUDE: A PRISONER EXCHANGE—THE “MINI-GLOBAL SETTLEMENT”

“I don't know whether war is an interlude during peace, or peace an interlude during war.”  
Georges Clemenceau

Thus it was that FWS eventually had to pay the piper with respect to all of the critical habitat designations it avoided in its effort to get final listings completed. But the environmental groups had a piper of their own: their success in forcing FWS to undertake a plethora of designations. On November 22, 2000, FWS announced that environmental groups had

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172. Patlis, *supra* note 12, at 295.

173. *Id.* at 294.

174. *Cf.* Lake Woebegone (“where all of the children are above average”).

175. Those of us fighting the Listing Wars on behalf of the government sometimes remarked during this period, and only half in jest, that it would be helpful if a court would appoint a receiver (who would be insulated from deadline challenges) to run the listing program. Although it would be best for FWS to be able to set its own priorities, the worst possible situation was the one we actually faced: with dozens of environmental groups and judges chaotically pulling the listing program one way or another, the ability to be efficient and maximize the conservation benefit with available resources seriously suffered. Thus, a single receiver or single judge would have been an improvement. But there did not seem to be any way to achieve this.

succeeded in securing so many court orders requiring FWS to designate critical habitat that this preempted all other work.<sup>176</sup> In 2001, after additional court orders, FWS reached the point where it would soon be forced to choose between violating the Anti-Deficiency Act<sup>177</sup> or violating court orders. Worse, from a species-protection perspective, the entirety of the listing budget was now being allocated to complying with court orders; this left no funds for other actions, no matter how high the relative priority.<sup>178</sup> Because, as discussed above, there is no specific deadline for issuing proposed listing rules, and even meritorious petitions could result in warranted-but-precluded findings of indefinite duration, there were no court orders to propose listing. Without proposed listings, final listings, which FWS identified as the highest conservation priority after the moratorium, ground to a halt.<sup>179</sup>

The environmental groups realized that they had been perhaps too successful in their campaign to force FWS to designate critical habitat, proving again the old adage: “Be careful what you ask for.” With this recognition, however, came an opportunity. Both sides had some leverage (environmental groups, the threat of contempt; FWS, the ability to withhold progress on less legally vulnerable actions that were high priorities for the environmental groups). Moreover, the parties had parallel interests: both wanted to refocus the listing program more on listings. Taking advantage of this opportunity, the parties began to discuss a global settlement. It eventually became clear that the parties would not be able to agree to a comprehensive settlement of the litigation involving the listing program, but they were able to agree to some of each other’s highest priorities. Thus, the oxymoronically dubbed “Mini-Global Settlement” was filed on September 28, 2001, and approved on October 4, 2001.<sup>180</sup> In it, FWS agreed to undertake a laundry list of petition findings, proposed rules, and

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176. Press Release, U.S. Fish & Wildlife Serv., Flood of Court Orders Preclude New Listings of Threatened and Endangered Species in FY 2001 (Nov. 22, 2000), *available at* <http://www.fws.gov/pacific/news/2000/2000-195.htm>.

177. The Anti-Deficiency Act makes it a crime for federal employees to expend more than is appropriated by Congress, among other things. 31 U.S.C. § 1341(a)(1)(A) (2006).

178. Press Release, U.S. Fish & Wildlife Serv., *supra* note 176.

179. Greenwald et al. note that the numbers of final listings decreased from 1994 to 1999 as a result of the implementation of policies meant to stymie the public’s ability to force listings, Greenwald et al., *supra* note 69, at 60–61, and that “[t]he increase in critical habitat designations only contributed to an existing trend,” *id.* at 61. In addition to disagreeing with their characterization of “Interior’s strategy,” *id.* at 60, I note that the moderate decrease in final listings could have resulted from the moratorium, decreased budgets, and the increased resources need to undertake the entire listing process for species that were not already proposed for listing or at least longstanding candidates.

180. Consent Decree, *Ctr. for Biological Diversity v. Norton*, Civ. No. 01-2063 (D.D.C. Oct. 4, 2001).

decisions about emergency listing.<sup>181</sup> In return, plaintiffs agreed to work in good faith with FWS to obtain modifications to court orders and settlement agreements in three cases to extend deadlines for critical habitat designations, and to dismiss a fourth case.<sup>182</sup>

In an effort to avoid a similar crisis in the future, the Department of the Interior and its appropriators agreed to revise the listing cap. Beginning in FY 2002, FWS's appropriation included language limiting the amount of the listing budget that could be spent on critical habitat for species already on the list.<sup>183</sup> This is referred to as the "critical habitat subcap."

In agreeing to the Mini-Global Settlement, the parties succeeded in averting a worst-case scenario. There was perhaps insufficient trust and negotiating space on the part of both sides at that time to allow additional progress to be made, and the listing program continued to be mired in controversy and litigation. As one commentator put it in 2003:

On the cusp of their fourth decade, the ESA's listing and critical habitat designation programs are more dysfunctional than at any other point in the statute's history. Almost constant litigation, as well as heated rhetoric from the agencies, lawmakers, environmentalists, and industry groups, now characterize the deceptively simple processes set forth in section 4. Bringing some semblance of order to this area continues to present one of the foremost administrative challenges in implementing the entire endangered species program.<sup>184</sup>

There would be a number of years and battles before it could reasonably be argued that the challenge had been met. In the meantime, the situation deteriorated again with more and more deadline challenges (and, as discussed below, remands of critical habitat designations). For about five years, the listing program was in a constant state of crisis, often on the verge (or past the verge) of running out of money, and being unable to meet its court ordered obligations.<sup>185</sup> For example, in the spring of 2003, FWS

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181. *Id.* ¶¶ 1–6.

182. *Id.* ¶ 7. In a story that predated the filing of the consent decree, the Washington Post described the settlement as a "surprising collaboration." Deborah Schoch, *Deal is Struck on 29 Endangered Species; Agreement Between Bush Administration, Environmental Groups Is Unexpected*, WASH. POST, Aug. 30, 2001, at A7.

183. Appropriations for the Department of the Interior and Related Agencies Act of 2002, Pub. L. No. 107-63, 115 Stat. 419 (Nov. 5, 2001).

184. Rohlf, *supra* note 8, at 494.

185. U.S. FISH & WILDLIFE SERV., FISCAL YEAR 2008 BUDGET JUSTIFICATIONS 78 (2008) [HEREINAFTER FY 2008 BUDGET JUSTIFICATIONS], available at <http://www.fws.gov/budget/2008/2008%20GB/03.03%20Listing.pdf> (finding that "since FY 2000 the

was again on track to run out of money before the end of the fiscal year. The Department of the Interior issued a long press release, entitled “Endangered Species Act ‘Broken’—Flood of Litigation over Critical Habitat Hinders Species Conservation.”<sup>186</sup> In it, the Department railed against the requirement of designating critical habitat and the litigation attempting to force additional designations, and noted that it had been forced to request permission from Congress to divert funds from other endangered species programs, notwithstanding the critical habitat subcap. Ultimately, due to a combination of increased budgets, stipulated extensions, and opposed extensions being granted by courts, FWS managed to avoid being held in contempt of court.<sup>187</sup>

## V. THE SECOND BATTLE OF CRITICAL HABITAT

“The best tank terrain is that without anti-tank weapons.”  
Russian Military Doctrine

As discussed in the previous section, FWS’s rear-guard action to avoid designating critical habitat eventually crumbled, as the courts swept away each argument FWS sent into battle. Thus, FWS began to designate critical habitat—a lot of it. This did not satisfy the environmental groups in all cases. In many cases, they viewed the designations as inadequate. The result? Back to the battlefield. Environmental groups contested numerous designations. The challenges included arguments that FWS: (1) should have designated unoccupied habitat;<sup>188</sup> (2) set too high a standard for when “special management considerations or protection may be required”;<sup>189</sup> (3)

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Service has spent essentially all of its listing appropriation on compliance with existing court orders, litigation, support, and related program management and administrative functions”).

186. *Id.*

187. Plaintiffs in several cases moved for contempt during this period, but the courts avoided ruling on those motions. *See* *Defenders of Wildlife v. Norton*, No. 00-2996 (D.D.C. Jan. 15, 2004) (holding that although the FWS “openly and willfully” ignored the court’s original order, it would not be a productive use of judicial resources or the litigants’ resources to undertake a proceeding that might further divert FWS from designating critical habitat for the Canadian lynx); *Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174 (D. Ariz. 2003) (denying motion as premature in litigation concerning the Mexican spotted owl); *Sw. Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. C 99-02992 CRB (N.D. Cal. Nov. 6, 2003) (court issued order to show cause in case concerning La Graciosa thistle, but scheduled hearing over four months in the future, giving FWS time to comply).

188. *See* *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003) (concerning the Mexican spotted owl).

189. *Id.* at 1099.

improperly excluded areas under section 4(b)(2);<sup>190</sup> or (4) otherwise failed to designate sufficient habitat.<sup>191</sup>

Regardless of the merits of those cases, their defense once again diverted precious resources from actually implementing section 4. Worse, when successful, those cases resulted in costly remands or settlements. And worse still, even if the environmental groups did not challenge a designation, FWS still needed to watch its flank.

INTERLUDE: A SECOND FRONT: THE REGULATED COMMUNITY STRIKES  
BACK

“You must not fight too often with one enemy, or you will teach him all  
your art of war.”

Napoleon Bonaparte

The larger part of the Second Battle of Critical Habitat actually was fought against the regulated community. As mentioned above, FWS was issuing new designations at a furious pace in the early 2000s. While environmental groups challenged some of these designations as inadequate, the regulated community challenged more as unsupported or procedurally defective. Thus, FWS was required to fight a two-front war in earnest. This “Malachi Crunch”<sup>192</sup> threatened to put the listing program on a treadmill of designating, redesignating, and re-redesignating critical habitat<sup>193</sup> with no end in sight.<sup>194</sup>

190. See *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1146 (N.D. Cal. 2006) (concerning the Peirson’s milkvetch).

191. *Ctr. for Biological Diversity v. Army Corps. of Engineers*, No. CV 03-29-M-DWM (D. Mont. May 25, 2005) (concerning the Kootenai River white sturgeon).

192. From an episode of the television series “Happy Days” involving a demolition derby, in which the Malachi brothers notoriously incapacitated opponents by simultaneously colliding with a victim from opposite directions. See *Malachi Crunch*, URBAN DICTIONARY <http://www.urbandictionary.com/define.php?term=Malachi%20Crunch> (last visited Mar. 4, 2013) (defining term).

193. For example, FWS designated critical habitat for the southwestern willow flycatcher under court order on July 22, 1997. Final Determination of Critical Habitat for the Southwestern Willow Flycatcher, 62 Fed. Reg. 39,129-01 (July 22, 1997) (codified at 50 C.F.R. pt. 17); see *Sw. Ctr. for Biological Diversity v. Babbitt*, 1997 U.S. Dist. Lexis 23935, \*1, \*11 (D. Ariz. Mar. 20, 1997) (ordering designation in 120 days). The regulated community successfully challenged the designation and FWS issued a new designation on October 19, 2005. 50 C.F.R. § 17.11(h). In turn, this designation was challenged by environmental groups in 2008. FWS settled the case on July 13, 2010, pursuant to which it issued a new final designation on January 3, 2013. Designation of Critical Habitat for Southwestern Willow Flycatcher, 78 Fed. Reg. 344-01 (Jan. 3, 2013) (codified at 50 C.F.R. pt. 17).

194. Representatives of the regulated community also challenged FWS’s alleged failure to review the status of listed species at least every five years as required to section 4(c)(2). Although these were deadline suits with respect to section 4, those reviews were conducted by a different office than listing and critical habitat designations, and were not covered by the listing cap. While complying with

In the wake of the New Mexico Cattle Growers (flycatcher) decision, FWS settled or sought voluntary remands of many cases on the ground that it needed to reconsider the economic impacts of the designation.<sup>195</sup> The regulated community also challenged designations, with some initial success, on a variety of other grounds, including: whether FWS had correctly identified particular areas as “occupied by the species at the time of listing,”<sup>196</sup> whether FWS had identified the physical and biological features with sufficient specificity,<sup>197</sup> and whether the areas designated actually had those features.<sup>198</sup> One of the first comprehensive opinions on the merits of a critical habitat designation was in a case challenging the designation of critical habitat for the Alameda whipsnake. In that case, the court agreed with plaintiffs on many of the criticisms of the designation, using hypertechnical reasoning and language that was very problematic for FWS.<sup>199</sup> This case encouraged more challenges raising similar arguments.<sup>200</sup>

Beyond simply responding to legal challenges from the regulated community, during this period the Department of the Interior actively sought to craft critical habitat designations in a way less likely to create conflict with the regulated community. Thus, the Department was willing, and perhaps eager, to exclude areas from designation under section 4(b)(2) or otherwise reduce the size of designations.<sup>201</sup>

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this duty has also been a serious challenge for FWS, it has not had a significant effect on the Listing Wars.

195. See, e.g., *Natural Res. Def. Council v. U.S. Dep’t of the Interior*, 275 F. Supp. 2d 1136 (C.D. Cal. 2002) (concerning the coastal California gnatcatcher); *N.M. Cattle Growers v. U.S. Fish & Wildlife Serv.*, 2004 U.S. Dist. Lexis 28289 (D.N.M. Aug. 31, 2004) (concerning the spikedace and loach minnow).

196. See, e.g., *Homebuilders Ass’n v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1235 (E.D. Cal. 2003) (concerning the Alameda whipsnake).

197. *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1178 (D.N.M. 2000), *aff’d*, 294 F.3d 1220 (10th Cir. 2002).

198. See, e.g., *Cape Hatteras Access Pres. Alliance v. U.S. Dep’t of the Interior*, 344 F. Supp. 2d 108, 123 (D.D.C. 2004) (concerning the piping plover).

199. For example, one of the court’s criticisms of the designation was that FWS was not clear whether its use of the term “need” was meant to be synonymous with “essential” (the statutory term). *Homebuilders Ass’n*, 268 F. Supp. 2d at 1213, 1214. In addition, the court suggested that FWS could not determine what areas were essential for the conservation of the species unless it had determined the conditions under which the species would be delisted. *See id.* at 1214.

200. See *Settlement Agreement and Stipulation of Dismissal, Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. 2:05-cv-01363-LKK-JFM (E.D. Cal. Mar. 14, 2006) (concluding a challenge to critical habitat for twenty-seven California species; settlement required FWS to reconsider five designations in light of the decision in the Alameda whipsnake case).

201. See generally *Senatore et al., supra* note 155 (discussing George W. Bush Administration’s attempt to limit critical habitat protection); *Fish, supra* note 155 (discussing failure of U.S. Fish and Wildlife Service to designate critical habitats). During this period, the Inspector General of the Department of the Interior conducted investigations of alleged misconduct by a deputy assistant secretary with respect to the listing program, and her impact on the outcome of a number of listing and

Ultimately, it is not clear that the regulated community achieved much lasting benefit from its campaign against critical habitat designations. In many cases, industry challenges resulted in remands in which the new designations were significantly reduced. However, those smaller designations were usually challenged by environmental groups leading to a third set of relatively larger designations.<sup>202</sup> Challenges to the designation of particular limited areas perhaps have been the most successful in achieving their aims.<sup>203</sup>

Moreover, subsequent cases limited some of the interpretive victories that the regulated community achieved in early cases. Thus, the Ninth Circuit has now solidly rebutted the need for FWS to consider the co-extensive economic impacts of designation.<sup>204</sup> It is not clear whether *New Mexico Cattle Growers* has any continued vitality outside, or even within, the Tenth Circuit. Similarly, subsequent courts have rejected the most problematic language in the Alameda whipsnake case.<sup>205</sup> But challenges on both fronts continue, and some courts continue to be willing to nitpick FWS designations.<sup>206</sup>

From a cynical and strategic perspective, the regulated community's second front may have achieved two goals that are difficult to assess. First, by tying up the listing program for years in defending and redesignating the critical habitat, the regulated community prevented FWS from taking additional actions that might have increased the regulatory burden on that community. Second, by regularly challenging critical habitat designations,

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critical habitat determinations. See DEP'T OF THE INTERIOR, OFFICE OF INSPECTOR GEN., REPORT OF INVESTIGATION: JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS (2007); DEP'T OF THE INTERIOR, OFFICE OF INSPECTOR GEN., REPORT OF INVESTIGATION, THE ENDANGERED SPECIES ACT AND THE CONFLICT BETWEEN SCIENCE AND POLICY (Dec. 10, 2008).

202. See, e.g., Designation of Critical Habitat for Southwestern Willow Flycatcher, 78 Fed. Reg. 344 (Jan. 3, 2013) (designating a new critical habitat for the Southwester Willow Flycatcher after a previous designation was challenged by the Center for Biological Diversity); see also Press Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Designates Critical Habitat Releases Economic Analysis for Bull Trout 2 (Oct. 12, 2010), available at [http://www.fws.gov/pacific/bulltrout/pdf/FCH\\_final%20NRv2\\_101210.pdf](http://www.fws.gov/pacific/bulltrout/pdf/FCH_final%20NRv2_101210.pdf) (describing designation of approximately five times as many stream miles as previously designated in 2005 in response to a challenge by environmental groups).

203. See, e.g., *Otay Mesa Property, L.P. v. U.S. Dep't of the Interior*, 646 F.3d 914 (D.C. Cir. 2011) (concerning the San Diego fairy shrimp and vacating the designation of the particular property subject to the challenge).

204. *Ariz. Cattle Growers' Assoc. v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (concerning the Mexican spotted owl).

205. See, e.g., *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010) (upholding critical habitat designation for fifteen endangered or threatened vernal pool species).

206. See, e.g., *Otay Mesa Property, L.P.*, 646 F.3d at 915 (holding that the FWS designation of property as "occupied" based on the isolated observation of four San Diego fairy shrimp on the property was not supported by the record).

the regulated community drove up the cost of designations and contributed to the perception of a program dominated by litigation, reinforcing the narrative that the ESA is broken.<sup>207</sup> As noted below, that narrative can support legislative efforts to amend the ESA or limit its implementation.<sup>208</sup>

## VI. THE BATTLE OF THE MEGA-PETITIONS

“Those who cannot remember the past are condemned to repeat it.”

George Santayana, *The Life of Reason*

Environmental groups arguably achieved their primary goals during the battles over critical habitat. By FY 2007, FWS had designated critical habitat for most of the species listed in the 1990s (and therefore most of the domestic species listed as threatened or endangered).<sup>209</sup> The environmental groups had more successfully challenged the resulting designations than the regulated community. The listing budget increased dramatically during the 2000s; the Bush Administration apparently preferred to seek increases in the listing budget rather than risk contempt proceedings.<sup>210</sup> As the volume of critical habitat work began to wane, FWS was able to increase the resources spent on other actions. Having learned hard lessons from the ultimate failure of the Listing Priority Guidance to act as an effective shield against deadline litigation, FWS chose to focus its resources on the actions most vulnerable to successful deadline challenges: petition findings.<sup>211</sup> FWS had come a long way from the bold statement in the Guidance that it would not give priority to species subject to litigation: after a decade of the Listing Wars, FWS now gave priority to whatever action was most vulnerable to potential litigation.<sup>212</sup>

There had been a slow but steady stream of new petitions and litigation to enforce the deadlines for petitions; FWS had never stopped making petition findings, but there were many that were years overdue. Beginning

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207. Press Release, U.S. Department of the Interior, Endangered Species Act “Broken,” *supra* note 146.

208. See *infra* text accompanying note 329.

209. Patrick Parenteau, *An Empirical Assessment of the Impact of Critical Habitat Litigation on the Administration of the Endangered Species Act*, 2–3 (Aug. 6, 2005), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1000&context=vermontlaw\\_fp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1000&context=vermontlaw_fp).

210. See Press Release, Earthjustice, Ken Goldman, U.S. FWS Listing Moratorium Threatens Endangered Wildlife (Nov. 22, 2000), available at <http://earthjustice.org/news/press/2000/u-s-fws-listing-moratorium-threatens-endangered-wildlife> (describing the listing budget for 2001 of around 6.4 million dollars); see also FY 2008 BUDGET JUSTIFICATIONS, *supra* note 185, at 77 (describing the listing budget for 2007 of around seventeen million dollars).

211. FY 2008 BUDGET JUSTIFICATIONS, *supra* note 185, at 78.

212. Cf. Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance, 61 Fed. Reg. 9651, 9654 (Mar. 11, 1996).

in FY 2006, FWS began making substantial progress in reducing the backlog of petition findings. Thus, by FY 2007, FWS began allocating some resources to high-priority listing proposals.<sup>213</sup> And having learned from the critical habitat battles, FWS attempted to include concurrent critical habitat proposals with those listings, hoping that it would be more efficient in the long run.<sup>214</sup>

In 2007, Guardians filed two unprecedented petitions with FWS. One covered 475 species in the southwest;<sup>215</sup> the other covered 206 species in FWS's Mountain-Prairie Region.<sup>216</sup> These petitions did not directly include information in support of listing; instead, they incorporated by reference information on these species found in NatureServe, a non-profit clearinghouse for species data from natural-heritage programs.<sup>217</sup> These petitions were nicknamed "mega-petitions."

The mega-petitions presented a dilemma for FWS—just when resources were starting to become available for proposed listing rules, FWS had to choose between responding to the petitions and issuing proposed rules for candidate species.<sup>218</sup> Knowing that deadline litigation would be forthcoming,<sup>219</sup> FWS chose to undertake the enormous job of making the petition findings. But for a while, FWS was able to continue working on proposed listing determinations, albeit at a reduced rate.

Not to be outdone by Guardians, on April 20, 2010, CBD filed its own mega-petition, covering 404 aquatic species in the southeast. In contrast to

213. FY 2008 BUDGET JUSTIFICATIONS, *supra* note 185, at 79.

214. See Press Release, U.S. Fish and Wildlife Service, Draft Economic Analysis of Critical Habitat Proposal for Nevin's Barberrry Plant Available for Public Review and Comment (Oct. 17, 2007), available at <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=B4E90055-C3BE-C78B-BFEFDA9D83A65EA5> (proposing a critical habitat for Nevin's Barberrry Plant).

215. Press Release, WildEarth Guardians, Group Seeks Federal Protection for 475 Southwestern Endangered Species: Largest Listing Petition Filed in Thirty Years (June 21, 2007), available at [http://www.wildearthguardians.org/site/News2?news\\_iv\\_ctrl=-1&page=NewsArticle&id=5701](http://www.wildearthguardians.org/site/News2?news_iv_ctrl=-1&page=NewsArticle&id=5701).

216. Press Release, WildEarth Guardians, Petition to List 206 Critically Imperiled or Imperiled Species in the Mountain-Prairie Region under the Endangered Species Act (July 24, 2007), available at [http://www.wildearthguardians.org/site/News2?news\\_iv\\_ctrl=-1&page=NewsArticle&id=5445](http://www.wildearthguardians.org/site/News2?news_iv_ctrl=-1&page=NewsArticle&id=5445).

217. See *About Us: Our Mission*, NATURESERVE.ORG, <http://www.natureserve.org/aboutUs/index.jsp> (last visited Feb. 12, 2013) (describing the mission and operations of NatureServe).

218. U.S. Fish and Wildlife Service, *US Fish and Wildlife Service Listing Program Work Plan Questions and Answers*, [http://www.fws.gov/endangered/improving\\_ESA/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF](http://www.fws.gov/endangered/improving_ESA/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF) (last visited Feb. 27, 2013).

219. Guardians did sue before FWS could complete the ninety-day findings. Partial 90-Day Finding on a Petition to List 475 Species in the Southwestern United States as Threatened or Endangered with Critical Habitat, 74 Fed. Reg. 66,866 (Dec. 16, 2009) (codified at 50 C.F.R. pt. 17).

Guardians' mega-petitions, the CBD petition contained detailed substantive information, and totaled 1,145 pages in length.<sup>220</sup>

The FWS listing staff worked feverishly to make ninety-day findings on the mega-petitions. As many of these findings were likely to be positive, FWS began making plans for staffing and funding status reviews and the required twelve-month findings.<sup>221</sup> As a result, it became clear that after a small spurt of new proposed listing rules, FWS would have to redirect its forces almost exclusively to making petition findings. But once again, a piper-paying moment was approaching: by focusing on petitions, FWS had reduced its litigation risk with respect to the ESA's statutory deadlines. In doing so, however, it gradually increased its legal vulnerability with respect to the growing list of species subject to warranted-but-precluded findings (the candidates). Similarly, CBD and Guardians had successfully pressed FWS where FWS was legally weakest. But in doing so, they had prevented FWS from allocating resources to proposing and listing the species that those groups thought were really the highest priorities. The parallels to the circumstances that led to the Mini-Global Settlement were striking.

Initially, the environmental groups again turned toward litigation to address the delay in listing candidate species. In fact, even before the filing of the mega-petitions, a number of environmental groups were pressing FWS to take action on candidate species. In 2005, five environmental groups, including CBD and the predecessor group of Guardians, filed suit in the United States District Court for the District of Columbia, challenging FWS's alleged failure to make petition findings for four species. The case, *Biodiversity Conservation Alliance v. Norton*,<sup>222</sup> was assigned to Judge Kessler, who had ruled against FWS on many occasions.<sup>223</sup> FWS made the overdue findings before any court ruling, concluding that listing two of the

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220. CTR. FOR BIOLOGICAL DIVERSITY, PETITION TO LIST 404 AQUATIC, RIPARIAN AND WETLAND SPECIES FROM THE SOUTHEASTERN UNITED STATES AS THREATENED OR ENDANGERED UNDER THE ENDANGERED SPECIES ACT (Apr. 20, 2010), *available at* [http://www.biologicaldiversity.org/programs/biodiversity/1000\\_species/the\\_southeast\\_freshwater\\_extinction\\_crisis/pdfs/SE\\_Petition.pdf](http://www.biologicaldiversity.org/programs/biodiversity/1000_species/the_southeast_freshwater_extinction_crisis/pdfs/SE_Petition.pdf).

221. In fact, FWS found that the Guardians' petitions presented substantial information that listing may be warranted for ninety-six species. Partial 90-Day Finding on a Petition To List 206 Species in the Midwest and Western United States as Threatened or Endangered with Critical Habitat, 74 Fed. Reg. 41,649 (Aug. 18, 2009); Partial 90-Day Finding on a Petition to List 475 Species in the Southwestern United States as Threatened or Endangered with Critical Habitat, 74 Fed. Reg. 66,866 (Dec. 16, 2009). FWS found that CBD's petition presented substantial information that listing was warranted for 374 species. Endangered and Threatened Wildlife and Plants; Partial 90-Day Finding on a Petition To List 404 Species in the Southeastern United States as Endangered or Threatened With Critical Habitat, 76 Fed. Reg. 59,836 (Sept. 27, 2011) (codified at 50 C.F.R. pt. 17).

222. Memorandum Opinion, *Biodiversity Conservation Alliance v. Norton*, Civ. No. 1:04-cv-02026-GK (D.D.C. May 8, 2006).

223. *See, e.g.,* *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997) (challenging whether the Canadian lynx should be on the endangered species list).

species was warranted but precluded. Plaintiffs amended their complaint to challenge those findings. Perhaps thinking that in Judge Kessler they had a good forum for a more dramatic challenge, the plaintiffs eventually amended their complaint to challenge the warranted-but-precluded findings for as many as 268 candidate species.<sup>224</sup> Thus, this initially limited case morphed into a modern *Fund for Animals* case, sometimes referred to as the “candidate case,” the “mega candidate case,” or the “CNOR case.”<sup>225</sup> The basis for the plaintiffs’ claims was that FWS was not making “expeditious progress” with respect to listing.<sup>226</sup>

The government moved to strike the amended complaint as to the additional species, but the court denied the motion, noting that FWS may nonetheless have achieved its objective, because ruling on the motion delayed the case by five months.<sup>227</sup> (The plaintiffs must have been pleased, with Judge Kessler already evincing skepticism of the government’s motives.) Summary judgment briefing was completed by the summer of 2007.

Then something unexpected happened. Or, rather, didn’t happen. Judge Kessler, who was on senior status, never ruled. Years passed. Plaintiffs occasionally filed a notice of related authority. The parties engaged in on-again-off-again settlement discussions, which never led to an agreement. Guardians and CBD eventually filed additional cases challenging a handful of new warranted-but-precluded findings in other courts, alleging among

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224. Third Amended Complaint for Injunctive and Declaratory Relief, Biodiversity Conservation Alliance v. Norton, Civ. No. 04-2026 (GK) (D.D.C.). The number of candidates actually at issue in the case was never clear. In addition to the two original candidates, the plaintiffs stated that they were challenging the warranted-but-precluded findings for “many other species of great interest to plaintiffs,” *id.* ¶ 1; the plaintiffs also noted that FWS had made warranted-but-precluded findings for “286 candidate species, including more than 240 species subject to formal petitions by plaintiffs,” *id.* ¶ 28; the plaintiffs made claims and sought relief for “other species,” *e.g.*, *id.* ¶ 41; and the plaintiffs included an addendum, listing fifty-seven species and “Hawaiian plants,” entitled “Partial List of WBP Species as to which CBD Members, Board Members and Staff Have Aesthetic, Recreational, Professional and Similar Interests,” *id.* at 23–26. Presumably the addendum was meant to be an assertion of standing.

225. “CNOR” stands for “Candidate Notice of Review,” a document in which FWS makes its required annual findings for species for which listing is warranted-but-precluded. *See* 16 U.S.C. § 1533(b)(3)(C)(i) (articulating that a petition for a warranted-but-precluded finding is treated “as a petition that is resubmitted to the Secretary . . . on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted”). The most recent CNOR: Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 77 Fed. Reg. 69994 (Nov. 21, 2012) (codified at 50 C.F.R. pt. 17).

226. 16 U.S.C. § 1533(b)(3)(B)(iii)(II).

227. Memorandum Opinion, Biodiversity Conservation Alliance v. Norton, Civ. No. 04-2026, at 1.

other things, FWS's failure to make "expeditious progress." The most significant of these related to the greater sage-grouse.<sup>228</sup>

While the listing of the northern spotted owl was hoped or feared to make the battle of the Tellico Dam versus the Tennessee snail darter look like a minor skirmish, the greater sage-grouse is widely considered to have the potential to be the spotted owl on steroids.<sup>229</sup> The greater sage-grouse, although greatly reduced from historical numbers, is still widespread, and listing would affect an entire ecosystem even larger than the old-growth forests of the Pacific Northwest: the sage lands of the Intermountain West.

In 2002 and 2003, FWS received three petitions to list the sage-grouse, and in 2004 FWS made a positive ninety-day finding and initiated a status review.<sup>230</sup> At the conclusion of the status review, FWS found that listing was not warranted.<sup>231</sup> The Western Watersheds Project (WWP) successfully challenged this finding in *Western Watersheds Project v. U.S. Forest Service*.<sup>232</sup> Judge Winmill, in a highly critical opinion, held that FWS's finding was arbitrary and capricious, and remanded to FWS.<sup>233</sup>

On remand, FWS determined that listing the sage-grouse was warranted but precluded.<sup>234</sup> The species was given a relatively low listing priority number (eight),<sup>235</sup> suggesting that it could be many years before the species was actually proposed for listing. WWP again filed suit, and was eventually joined by Guardians and CBD.<sup>236</sup> This case was pending when settlement discussions in the MDL case began.

Meanwhile, FWS was also frustrated by its inability to allocate listing resources to proposed rules for candidate species. While the environmental groups plowed familiar ground by using litigation to attempt to force progress on candidates, FWS also plowed familiar ground: it sought yet

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228. See, e.g., Margot Roosevelt, *Payback Time for the Cock of the Prairie*, CNN (Dec. 6, 2004), [http://articles.cnn.com/2004-12-06/politics/sagegrouse.tm\\_1\\_mark-salvo-timber-industry-endangered-species-act?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2004-12-06/politics/sagegrouse.tm_1_mark-salvo-timber-industry-endangered-species-act?_s=PM:ALLPOLITICS) (discussing the difficulty of getting federal protection for sage grouse).

229. *Id.*

230. Endangered and Threatened Wildlife and Plants; 90-Day Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 69 Fed. Reg. 21,484-01 (Apr. 21, 2004) (codified at 50 C.F.R. pt. 17).

231. Endangered and Threatened Wildlife and Plants; 12-Month Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 70 Fed. Reg. 2243 (Jan. 12, 2005).

232. 535 F. Supp. 2d 1173 (D. Idaho 2007). Note that the court erroneously substituted the Forest Service for FWS in the case name.

233. *Id.*

234. Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910-01 (Mar. 23, 2010) (codified at 50 C.F.R. pt. 17).

235. *Id.* at 14,008.

236. *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, No 10-cv-229, 2011 WL 22690430 (D. Idaho July 9, 2011).

another budget cap to try to keep one aspect of the listing program from cannibalizing the rest of the program. With separate caps on both critical habitat designations and petition findings, FWS might then be able to use the remainder of its budget to work on biologically important but legally disadvantaged proposed listing rules. Thus, FWS requested in February 2011 a petition subcap for FY 2012;<sup>237</sup> Congress included the language in the FY 2012 appropriations law.<sup>238</sup>

INTERLUDE: “OVER THERE!” FOREIGN SPECIES LITIGATION AND SUBCAP

“Armed forces abroad are of little value unless there is prudent counsel at home.”

Cicero

On its face, section 4 makes no distinction between foreign and domestic species. FWS has traditionally assigned application of the ESA to foreign species to its foreign affairs office rather than its ESA office. Thus, for much of the forty years of the ESA, foreign species have not been in direct competition with domestic species for section 4 resources. (This is no longer the case, as in 2010, FWS transferred foreign section 4 work to the Endangered Species Office.)

Like the domestic listing program, the foreign listing program has suffered from inadequate resources in comparison to its workload. The foreign listing program’s situation is potentially more dire from an administrative perspective: the number of foreign species that technically meet the definition of “threatened species” or “endangered species” is likely orders of magnitude greater than the number of domestic species meeting those criteria. Because the protections that apply to foreign species are largely limited to prohibitions on import or export, FWS has understandably focused primarily on species in active trade (as opposed to species imperiled due to, for example, habitat destruction in foreign countries).<sup>239</sup> Perhaps because of this, it took longer for deadline litigation to strike the foreign listing program. Interestingly though, it was in this context that FWS lost on the issue of “expeditious progress.”<sup>240</sup>

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237. U.S. FISH & WILDLIFE SERV., BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION, (2012), *available at* <http://www.fws.gov/budget/2012/FWS%202012%20Budget%20Justifications.pdf>.

238. Consolidated Appropriations Act, 2012, Pub. L. 112-74, 125 Stat. 988 (2011).

239. U.S. Fish and Wildlife Service, *Branch of Foreign Species, Endangered Species Program*, FWS.GOV (Apr. 2011), [http://www.fws.gov/endangered/esa-library/pdf/foreign\\_species.pdf](http://www.fws.gov/endangered/esa-library/pdf/foreign_species.pdf).

240. *Ctr. for Biological Diversity v. Kempthorne*, 2008 U.S. Dist. Lexis 4866, at \*21–25 (N.D. Cal. Jan. 23, 2008).

In 2006, CBD sued FWS for its failure to list foreign candidate species, including many that had been candidates for over twenty-five years. In a January 2008 decision, *Center for Biological Diversity v. Kempthorne*, referred to as the “foreign candidate case,” the court held that FWS was not making expeditious progress.<sup>241</sup> In doing so, the court stated that:

[I]t is difficult to ignore the fact that some of the species for which Plaintiffs have standing are related to petitions that date as far back as 1980, over 25 years ago. If the Service were allowed to continue at its current rate, it is hard to imagine anytime in the near or distant future when these species will be entitled to listing. Such delay hardly qualifies as “expeditious progress” and conflicts with the purpose of the ESA . . . .<sup>242</sup>

With the loss of the foreign candidate case, things looked very grim for FWS in the CNOR case. Judge Kessler, however, continued to refrain from ruling throughout 2008, 2009, and 2010. In the meantime, FWS recommended to Congress yet another cap, this time on foreign listings. That was also put in place in FY 2012.<sup>243</sup>

## VII. PEACE? THE MULTI-DISTRICT LITIGATION SETTLEMENTS

“Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”

Thucydides, *The History of the Peloponnesian War*

In 2003, Mr. Patlis identified three possible sources of resolution for the mismatch between the duties imposed on FWS and the resources Congress made available to it, with each source corresponding to one of the three branches of government: administrative action by the FWS, judicial action by the courts, and legislative action by Congress.<sup>244</sup> Mr. Patlis correctly concluded that there was little room for optimism that administrative action alone could solve the problem,<sup>245</sup> and little in the succeeding eight years changed the accuracy of that conclusion. FWS has struggled to become more efficient in its use of available resources, as well as to produce

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241. *Id.* at 21–25.

242. *Id.* at 22–23.

243. *See* Consolidated Appropriations Act, 2012, Pub. L. 112-74, 125 Stat. 988 (2011) (imposing a \$1,500,000 spending cap for implementing provisions of the Endangered Species Act for species not indigenous to the United States).

244. Patlis, *supra* note 12 at 315–22.

245. *Id.* at 315–17.

decisions better able to withstand judicial scrutiny (thus minimizing the expense of additional remands). These goals are, of course, in some degree of tension, as streamlining can increase legal risk. In any case, FWS simply does not have the authority to make changes sufficient to solve the problem.

Perhaps Congress has been more helpful than those of us in the trenches recognized at the time. Although a legislative silver bullet was never forthcoming,<sup>246</sup> Congress has taken two types of action that have turned out to be crucial. First, Congress put hard limits on particular types of actions via the listing cap and critical habitat subcap.<sup>247</sup> Although these limits have never been put to the ultimate test in court, they may have given the government enough additional leverage in negotiations with environmental groups to allow parties to settle on schedules for many overdue or remanded actions. Second, the listing budget grew substantially during the 2000s.<sup>248</sup> The budget increases allowed FWS to make significant progress on the backlog of critical habitat designations and petition findings. As a result, by the late 2000s FWS could contemplate (at least prior to the impact of the mega-petitions) significantly increasing the number of proposed listing rules to address the backlog of candidate species.

With respect to judicial action, Mr. Patlis argued for a sea change in judicial willingness to address the listing morass with equitable discretion.<sup>249</sup> That has not occurred. The government has prevailed in some cases in ways that facilitate compliance with the requirements of section 4. For example, several Ninth Circuit cases hold the potential for reducing the sting of the “Third Law of Critical Habitat”—that designations will be expensive because of the scope of the required consideration of economic impacts.<sup>250</sup> Nonetheless, the biggest judicial contribution to the possible end of the Listing Wars was made by the judges involved in the Multi-District Litigation.

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246. Possible substantive legislative solutions included changing the applicable deadlines (such as tying critical habitat designation to recovery plans rather than listing), congressional codification or approval of a prioritization system, and revision of the citizen-suit provision.

247. See generally Patlis, *supra* note 12, at 306–11 (describing listing cap execution).

248. U.S. FISH & WILDLIFE SERV., FISCAL YEAR 2013 BUDGET JUSTIFICATION: ECOLOGICAL SERVICES (2013), available at <http://www.fws.gov/budget/2013/PDF%20Files%20FY%202013%20Greenbook/5.%20Endangered%20Species.pdf>; see also Goldman, *supra* note 210 (describing the listing budget for 2001 of around 6.4 million dollars); see also U.S. FISH & WILDLIFE SERV., *supra* note 248, at 77 (2008) (describing the listing budget for 2007 of around seventeen million dollars).

249. Patlis, *supra* note 12, at 319–20, 323–37.

250. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (upholding use of incremental economic analysis for the Mexican spotted owl); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010) (upholding use of incremental economic analysis for the vernal pool species).

*A. The Case*

“I have traveled a long road from the battlefield to the peace table.”

Moshe Dayan

After the CNOR case was briefed, there were occasional discussions between the parties about the possibility of a large-scale settlement. Ultimately, those discussions trailed off. And even with the transition to the Obama Administration, widely perceived as more inclined to faithfully implement the ESA,<sup>251</sup> there was not an obvious, immediate change in the productivity of the listing program.<sup>252</sup> In frustration at the perceived continued lack of progress during the first year of the Obama Administration, CBD and Guardians filed a new flurry of petitions and deadline lawsuits. Guardians attempted to create a media event out of its activities, referring to them as the “BioBlitz.”<sup>253</sup>

Rather than attempt to settle the individual cases piecemeal, as it had in the past, the government took a different approach. On March 29, 2010, the Department of Justice (DOJ) filed a motion with the Judicial Panel on Multidistrict Litigation.<sup>254</sup> The government asked the panel to transfer

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251. For example, shortly after taking office, President Obama issued a memorandum effectively countermmanding regulations, promulgated three months before by the outgoing Bush Administration, that narrowed the circumstances under which section 7 consultation was required. 50 C.F.R. § 402.01 (2012).

252. See Allison Winter and Patrick Reis, *Obama Admin Confronts ‘Candidate Species’ Backlog*, GREENWIRE (Sept. 8, 2009), <http://www.eenews.net/public/Greenwire/2009/09/08/3>. This fact supports the conclusion that the Listing Wars were not merely the result of alleged political interference by the Bush Administration, and instead are due to substantial structural problems not easily cured by a change in administrations. Which is not to say that policy decisions made at a political level cannot exacerbate the problem.

253. Press Release, WildEarth Guardians, Conservation Group Celebrates Year of Biodiversity with ‘BioBlitz’ (Dec. 28, 2009), *available at* [http://www.wildearthguardians.org/site/News2?news\\_iv\\_ctrl=-1&page=NewsArticle&id=5938](http://www.wildearthguardians.org/site/News2?news_iv_ctrl=-1&page=NewsArticle&id=5938).

254. The MDL Panel was created by 28 U.S.C § 1407.

The job of the Panel is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings.

The purposes of this transfer or “centralization” process are to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary. Transferred actions not terminated in the transferee district are remanded to their originating transferor districts by the Panel at or before the conclusion of centralized pretrial proceedings.

twenty cases from seven districts seeking 121 allegedly overdue petition findings, and assign them to a single district, the United States District Court for the District of Columbia. Those cases comprised all of the deadline lawsuits filed by CBD and Guardians during the previous three months. DOJ argued that these cases (and any similar deadline cases that the same groups might file subsequently) met the statutory requirements for such a transfer: the actions involved common questions of fact, transfer would promote the just and efficient conduct of the actions and serve the convenience of the parties, and transfer would avoid the possibility of inconsistent pretrial orders.<sup>255</sup> More importantly, from the government's perspective, centralization of these cases might force a single judge to consider the tradeoffs inherent in a circumstance of limited resources and essentially infinite demands on those resources.<sup>256</sup>

Guardians opposed the centralization of the cases. It argued, among other things: (1) that transfer is only appropriate for pretrial proceedings, and that the main basis for the government's motion was concern about conflicting remedies; and (2) that transfer would slow down rather than facilitate settlement of the individual cases.<sup>257</sup> CBD took a different tack, dismissing all three of its cases; it then joined the government's request to delete those cases from the transfer motion (as the motion was now moot with respect to the dismissed cases).<sup>258</sup> At the same time, however, CBD filed a new case in the District Court for the District of Columbia that in effect consolidated its previous cases.<sup>259</sup>

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*Overview of Panel*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, <http://www.jpml.uscourts.gov/panel-info/overview-panel> (last visited Mar. 14, 2013).

255. Federal Defendants' Brief in Support Motion to Transfer Actions at 1, *In re: Endangered Species Act Section 4 Deadline Litig.* (*In re: Deadline Litig.*), No. 2165 (J.M.P.L. April 2, 2010). Note that referring the cases to the MDL Panel at this point was more attractive than it had been at the outset of the Listing Wars: several intervening decisions of the MDL panel have interpreted 28 U.S.C. § 1407 quite broadly, including in the ESA context. See *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003) (stating that the transferred actions "involved common questions of fact, and that centralization would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation"); *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litig.*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008) (ordering the centralization of the actions and explaining the efficiencies to be gained in so doing).

256. As discussed *supra* in the text accompanying notes 138–140, a judge faced with a single overdue action will often just order FWS to take the action immediately without consideration of the broader context.

257. WildEarth Guardians' Response to Federal Defendants' Motion to Transfer Actions at 10–11, *In re Deadline Litig.*, 277 F.R.D. 1 (J.P.M.L. Apr. 23, 2010).

258. Ctr. for Biological Diversity's Resp. to Fed. Defendants' Motion to Transfer Actions at 1, *In re Deadline Litig.*, 277 F.R.D. 1 (J.P.M.L. Apr. 22, 2010).

259. See Federal Defendants' Reply Brief in Support Motion to Transfer Actions at 3, *In re Deadline Litig.*, 277 F.R.D. 1 (J.P.M.L. 2010).

On June 8, the Panel granted the government's motion, predicting "substantial benefits for judicial economy and more consistent rulings as a consequence of centralization."<sup>260</sup> Between settlements, dismissals, and new filings, the transfer order applied to twelve cases from four districts.<sup>261</sup> Included in the transfer order was the new, consolidated CBD case. The cases were assigned to Judge Emmet Sullivan in District of the District of Columbia.<sup>262</sup>

Judge Sullivan was arguably a good draw for the government. He had substantial experience handling ESA litigation—in fact, he was currently handling the challenges to the listing of the polar bear and related cases that were transferred by the MDL Panel.<sup>263</sup> He was also a relatively energetic judge, and it seemed likely that if a global settlement was reached, he would likely take some ownership of it and be willing to accept additional transfers to guard against inconsistent rulings from other courts. And, he was young enough to likely be on the bench throughout the life of a long-term settlement.

On August 3, 2010, Judge Sullivan referred the case to the court's mediation program with consent of the parties. He ordered that the mediation be completed by October 5, 2010.<sup>264</sup>

### *B. The Mediation*

"To jaw-jaw is always better than to war-war."  
Sir Winston Churchill

Modern life has many advantages over ancient Greece. Modern medicine, for example (as Thucydides recounts, the plague in Athens during the Peloponnesian War may have led to Athens' eventual downfall), and high-quality optics (I'm a birder). Thucydides, however, had one advantage as a historian: no court-imposed confidentiality rules. In contrast, I cannot disclose the communications that took place during the mediation.<sup>265</sup> Pity. But at least I can describe what is in the public record concerning the mediation, without elaboration or analysis.

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260. *In re*: Deadline Litig., 716 F. Supp. 2d 1369, 1369 (J.P.M.L. 2010).

261. *Id.*

262. *Id.* at 1370.

263. *In re* Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig., 588 F. Supp. 2d 1376, 1378 (J.P.M.L. 2008).

264. *In re* Endangered Species Act Section 4 Deadline Litig. (MDL No. 2165), No. 1:10-mc-00377-EGS (D.D.C. June 10, 2010).

265. D.D.C. LOCAL CIV. R. 84.9(a) (2010), *available at* [http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/2010MARCHLOCALRULESREVISED\\_February2012.pdf](http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/2010MARCHLOCALRULESREVISED_February2012.pdf).

Due to various delays, the parties held their first mediation session on September 24, 2010.<sup>266</sup> Thereafter, the mediation and the associated stay of the litigation were extended a number of times.<sup>267</sup> The parties ultimately held three all-day in-person meetings and dozens of telephone conferences and e-mail exchanges.<sup>268</sup> The mediation closed on April 13, 2011 without a settlement, but on April 20, 2011, the parties sought to extend the stay for an additional month for additional settlement discussion.<sup>269</sup>

### C. *The Settlements*

“If you want to make peace with your enemy, you have to work with your enemy. Then he becomes your partner.”

Nelson Mandela

On May 10, 2011, nine months after the case entered the court’s mediation program, FWS and Guardians filed a settlement agreement with the court.<sup>270</sup> This settlement was much broader in scope than the cases covered by the MDL. Instead, it purported to comprehensively address the workload of the listing program, focusing in particular on clearing the backlog of candidate species.<sup>271</sup>

The Guardians settlement had a number of key provisions. First, FWS agreed to take a wide variety of specific listing actions in FY 2011 and FY 2012, including petition findings for over 600 species.<sup>272</sup> Second, for each of the 251 species that had been identified as candidates in the November 2010 Candidate Notice of Review, FWS agreed either to make a not-warranted finding or to issue a proposed listing rule prior to the end of FY 2016.<sup>273</sup> Third, FWS agreed to make particular determinations for six

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266. Joint Status Report and Joint Motion for Stay of Proceedings, *In re* Deadline Litig., Misc. Action No. 10-377 (EGS) (D.D.C. Apr. 20, 2011) [hereinafter Status Report].

267. *Id.*

268. Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Guardians’ Claims at 13–14, *In re* Deadline Litig., Misc. Action No. 10-377 (EGS) (D.D.C. May 10, 2011) [hereinafter Joint Motion for Approval of Settlement Agreement].

269. Joint Status Report, *supra* note 266, at 1.

270. Joint Motion for Approval of Settlement Agreement, *supra* note 268; see also Press Release, U.S. Dept. of the Interior, Fish & Wildlife Service Announces Work Plan to Restore Biological Priorities and Certainty to Endangered Species Listing Process (May 10, 2011), available at <http://www.fws.gov/mountain-prairie/pressrel/DC11-24.htm> (discussing a work plan agreed upon by FWS and Guardians); Press Release, WildEarth Guardians, Hope for Endangered Species Act Candidates (May 10, 2011), available at [http://www.wildearthguardians.org/site/News2?news\\_iv\\_ctrl=1&page=NewsArticle&id=6829](http://www.wildearthguardians.org/site/News2?news_iv_ctrl=1&page=NewsArticle&id=6829) (mentioning the settlement agreement).

271. Glitzenstein, *supra* note 103, at 1–2.

272. Stipulated Settlement Agreement, Exhibit 1, ¶ 1, *In re* Endangered Species Act Section 4 Deadline Litig., Misc. Action No 10-377 (EGS) (D.D.C. May 10, 2011).

273. *Id.* ¶ 2.

species during the stated fiscal years (including a not-warranted finding or proposed listing rule for the greater sage-grouse by the end of FY 2015).<sup>274</sup> Fourth, FWS agreed to make final listing determinations on any proposed listing rules in accordance with the statutory deadlines.<sup>275</sup> Fifth, FWS stated its non-binding intent to designate critical habitat concurrently with any final listing rules.<sup>276</sup> Sixth, Guardians agreed not to bring any deadline litigation (or challenges to warranted-but-precluded findings) prior to March 31, 2017.<sup>277</sup> Seventh, Guardians agreed not to file petitions to list more than a total of ten species each fiscal year through FY 2016.<sup>278</sup> Eighth, FWS and Guardians agreed to file joint motions to dismiss all five existing cases challenging warranted-but-precluded findings to which Guardians was a party, including the CNOR case and the greater sage-grouse case.<sup>279</sup> Ninth, the settlement also included a number of provisions geared towards protecting FWS (and the agreement) from future litigation by third parties that could undermine the implementation of the settlement and efficient management of the listing program.<sup>280</sup> And tenth, the settlement included various termination provisions, including the unilateral right of FWS to terminate the agreement (1) if any of the five warranted-but-precluded cases were not dismissed, or any other challenge to a warranted-but-precluded finding for one of the 251 candidate species was not dismissed as moot, or (2) if FWS determined that the level of deadline litigation had not been significantly reduced below the levels occurring between 2008–2010.<sup>281</sup>

FWS and Guardians moved to dismiss all of the Guardians suits from the centralized case. CBD was not a party to the Guardians Settlement, but because the Guardians Settlement resolved CBD's claims FWS indicated that it would move to dismiss CBD's remaining case as moot, or, if CBD was amenable, file a stipulation of dismissal.<sup>282</sup> CBD was not amenable. In a response filed the next day CBD asserted that it had only learned on the day that the Guardians Settlement was filed that FWS and Guardians had been conducting negotiations without CBD.<sup>283</sup> CBD requested that the court stay a ruling on the joint motion until it had an opportunity to evaluate the

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274. *Id.* ¶¶ 2–5, 7.

275. *Id.* ¶ 7.

276. *Id.* ¶ 8.

277. *Id.* ¶ 9.

278. *Id.* ¶ 11.

279. *Id.* at 4, 8.

280. *Id.* ¶ 13.

281. *Id.* ¶ 15.

282. Joint Motion for Approval of Settlement Agreement, *supra* note 268, at 3.

283. Response of Plaintiff Ctr. for Biological Diversity to Joint Motion of WildEarth Guardians & Federal Defendants for Approval of Settlement Agreement and Order of Dismissal of Guardians' Claims at 1, *In re* Deadline Litig., Misc. Action No. 10-377 (EGS) (D.D.C. May 11, 2011).

Guardians Settlement thoroughly and respond substantively.<sup>284</sup> On May 12, 2011, Judge Sullivan issued a minute order, scheduling a status hearing for May 17 and ordering the parties to file by May 16 their proposed recommendations for further proceedings.<sup>285</sup> The same day, Guardians filed a response to CBD's May 11 filing.<sup>286</sup>

In its May 16, 2011 filing, CBD stated that it had "many concerns" about the Guardians Settlement.<sup>287</sup> First, "the Center does not believe that the obligations imposed on Federal Defendants are enforceable, and therefore, the agreement is illusory."<sup>288</sup> Second, CBD asserted that the Guardians Settlement was contrary to public policy and illegal because it undermined other purposes of the listing program and "its overall effect would be to stymie petitions and lawsuits to enforce the ESA's statutory deadlines."<sup>289</sup> CBD noted that it remained willing to negotiate a resolution to its claims.<sup>290</sup> After the hearing, Judge Sullivan ordered the parties back into mediation. In a subsequent press release, CBD described the Guardians Settlement as "deeply flawed."<sup>291</sup>

On July 12, 2011, FWS and CBD filed a settlement agreement with the court.<sup>292</sup> This settlement was substantially less ambitious than the settlement with Guardians in that it did not require FWS to address all of the outstanding candidates, nor did it impose as many restrictions on the future actions of CBD. In it, FWS agreed to take a number of specified actions by stated fiscal years.<sup>293</sup> As with the Guardians agreement, FWS

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284. *Id.* at 2.

285. *In re* Deadline Litig., minute order, Misc. Action No. 10-377 (EGS) (D.D.C. May 12, 2011).

286. WildEarth Guardians' Rep. to Ctr. for Biological Diversity Resp. to Guardians' & Federal Defendants' Joint Motion Seeking Approval of Settlement Agreement, *In re* Deadline Litig., Misc. Action No. 10-377 (EGS) (D.D.C. May 12, 2011).

287. Recommendation of Ctr. for Biological Diversity for Further Proceedings at 4, *In re* Deadline Litig., Misc. Action No. 10-377 (EGS) (D.D.C. May 16, 2011).

288. *Id.*

289. *Id.* at 4–5.

290. *Id.* at 7.

291. Press Release, Center for Biological Diversity, Judge Halts Settlement Over Hundreds of Endangered Species, Orders Parties Back to Negotiations (May 17, 2011), *available at* [http://www.biologicaldiversity.org/news/press\\_releases/2011/839-species-05-17-2011.html](http://www.biologicaldiversity.org/news/press_releases/2011/839-species-05-17-2011.html).

292. Joint Motion for Approval of Settlement Agreement & Order of Dismissal of the Center's Claims, *In re* Deadline Litig., No. 10-377 (D.D.C. July 12, 2011); *see also* Press Release, U.S. Fish and Wildlife Service, Fish and Wildlife Service Strengthens Work Plan to Restore Biological Priorities and Certainty to Endangered Species Listing Process (July 12, 2011), *available at* <http://www.fws.gov/midwest/News/release.cfm?rid=433> (discussing the agreed upon work plan); Press Release, Center for Biological Diversity, Historic Agreement Moves 757 Imperiled Species Toward Endangered Species Act Protection (July 17, 2011), *available at* [http://www.biologicaldiversity.org/news/press\\_releases/2011/species-agreement-07-12-2011.html](http://www.biologicaldiversity.org/news/press_releases/2011/species-agreement-07-12-2011.html) (mentioning the settlement agreement).

293. Joint Motion for Approval of Settlement Agreement & Order of Dismissal of the Center's Claims, *supra* note 292, at ¶¶ B.1–4.

agreed to make final listing determinations on any proposed listing rules in accordance with statutory deadlines.<sup>294</sup> In return, CBD agreed (1) not to oppose the Guardians Settlement;<sup>295</sup> (2) to use its best efforts to obtain the agreement of its co-plaintiffs to dismiss the warranted-but-precluded cases, and, failing that, to withdraw from the cases;<sup>296</sup> and (3) to extend most of the deadlines contained within the settlement agreement to fiscal year 2016 if its deadline litigation exceeds certain bounds.<sup>297</sup> In addition, FWS could terminate the CBD Settlement if the court did not approve the Guardians Settlement.<sup>298</sup> Thus, the CBD Settlement can be viewed as an addendum to the agreement with Guardians.

After the motions to approve the settlement agreements were filed, Safari Club International moved to intervene for the purpose of opposing approval of the settlements.<sup>299</sup> On September 9, 2011, Judge Sullivan denied Safari Club's motion to intervene and approved both settlements.<sup>300</sup> Safari Club appealed. On appeal, Safari Club argued that the settlements illegally prevented FWS from continuing to make warranted-but-precluded findings on the candidates.<sup>301</sup> The D.C. Circuit affirmed. First, the court held that Safari Club could not intervene as of right because it lacked standing.<sup>302</sup> The court reasoned that Safari Club lacked standing both because the ESA does not require FWS to make a preclusion finding before proposing listing and because the petition provisions were designed to facilitate, rather than delay, listing.<sup>303</sup> Second, the court declined to find that the district court had abused its discretion in denying permissive intervention.<sup>304</sup>

Meanwhile, on December 17, 2012, the National Association of Homebuilders filed a new complaint collaterally attacking the settlements on grounds similar to those argued by Safari Club.<sup>305</sup> Interestingly,

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294. *Id.* ¶ B.5.

295. *Id.* ¶ B.6.

296. *Id.* ¶ B.9.

297. *Id.* ¶ B.10. This provision is the subject of an ongoing dispute between the parties.

298. *Id.* ¶ B.6.

299. The previous year, the Tejon Ranch Company had moved to intervene in one of the centralized cases; Judge Sullivan denied that motion before the mediation began. *In re Deadline Litigation*, 270 F.R.D. 1, 7 (D.D.C. 2010).

300. *Id.*

301. *In re Endangered Species Act Section 4 Deadline Litig.*—MDL No. 2165, 704 F.3d 974, 977 (D.C. Cir. Jan. 4, 2013).

302. *Id.*

303. *Id.* at 974–980.

304. *Id.* at 979–980.

305. Complaint for Declaratory and Injunctive Relief, *Nat'l Assoc. of Home Builders v. Salazar*, No. 02013-EGS (D.D.C. Dec. 17, 2012).

Homebuilders filed this case in the D.C. federal district court, where it was assigned to Judge Sullivan. It is not clear why Homebuilders thinks that it will obtain a better result with a collateral attack making similar arguments in the same forum, particularly when its suit was filed after the oral argument of the Safari Club appeal (which did not go well for Safari Club).<sup>306</sup>

#### *D. Debriefing*

“A conqueror is always a lover of peace.”

Karl von Clausewitz, *On War*

What was it that allowed Guardians, CBD, and FWS to reach this point? The most important factor was that all of the parties shared some basic common interests. First, all three parties wanted FWS to implement section 4. In particular, they all wanted FWS to be able to resolve the conservation status of the candidate species—this same commonality is presumably what allowed for the *Fund for Animals* settlement almost twenty years ago. Second, the parties recognized that litigation, although sometimes providing useful torque to the gears of the listing program, had an even greater potential to act as sand in those same gears. The more time FWS spent responding to litigation, the more resources it had to spend on litigation support, even if FWS ultimately prevailed in the litigation. And when FWS did not prevail, it was often forced to re-juggle its resources, further reducing the overall efficiency of the listing program.

Historically, distrust prevented the parties from acting on these common interests. Environmental groups often did not believe that the leadership of FWS would take any controversial listing actions (or any actions at all) in the absence of litigation. For its part, the leadership of FWS doubted the ability of the environmental groups to be realistic and, in particular, to accept the limitations under which FWS must operate. The participation of Gary Frazer and Michael Bean was another contextual factor that facilitated this settlement. Gary Frazer has done two tours as the Assistant Director for Endangered Species at FWS: from 1999 to 2004, and from 2009 until now.<sup>307</sup> The fact that Mr. Frazer had been reassigned from this position partway through the Bush Administration may have increased his standing with Guardians and CBD. Michael Bean, Counselor to the

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306. Lawrence Hurley, *Court Cool on Hunters' Bid to Shoot Down Major Listing Settlement*, GREENWIRE (Nov. 20, 2012), <http://www.eenews.net/Greenwire/2012/11/20/4>.

307. *Assistant Director of Endangered Species Program: Gary Frazer*, FWS.GOV, <http://www.fws.gov/offices/gfrazer1.html> (last updated Aug. 3, 2009).

Assistant Secretary for Fish and Wildlife and Parks beginning in 2009, had previously worked for decades at the Environmental Defense Fund (EDF).<sup>308</sup> Although EDF is a more middle-of-the-road environmental organization than either Guardians or CBD, Mr. Bean brought credibility to the government negotiating team (in addition to being an acknowledged innovator in ESA matters).

Another factor central to these settlements was the unique procedural setting, with the MDL panel transferring all of the cases to one judge. The sweeping scope of the settlements was a much better fit in an MDL proceeding than it would have been in any single deadline case. This made it more likely that the court would approve a comprehensive settlement. Moreover, FWS could have more confidence in the effectiveness of provisions in the settlements that were designed to make collateral attacks on the settlements more difficult. For example, a judge in an MDL proceeding would be more likely to accept the transfer of additional cases to ensure that they would not conflict with the MDL settlements. Similarly, other courts should be more likely to defer to a settlement achieved under the imprimatur of an MDL proceeding than simply a settlement in one of many deadline cases.

A final factor that facilitated settlement was the fact that both parties had some degree of leverage. FWS, of course, had violated the deadlines at issue in the consolidated cases. More importantly given the scope of the eventual settlements, FWS had significant vulnerability on the issue of “expeditious progress” with respect to its warranted-but-precluded findings (notwithstanding the fact that it listed a number of species in the period immediately preceding the settlements). All of these gave Guardians and CBD significant leverage. On the other hand, by succeeding in getting the existing cases centralized, the government had a reasonably good chance of getting one judge to consider the big picture, minimizing the likelihood of draconian and conflicting court orders. This was a position that FWS had been hoping to achieve for many years, and it gave FWS a degree of leverage previously unattainable.

A related point is that each of the parties could offer concessions in the context of a settlement agreement that the opposing parties could not easily obtain (or could not obtain at all) through litigation. Thus, notwithstanding the existence of the CNOR case, it would be difficult in contested litigation for Guardians or CBD to obtain court orders requiring FWS to resolve the

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308. Press Release, U.S. Dep’t of Interior, Assistant Sec’y of the Interior Tom Strickland Announces Appointment of Renowned Wildlife Law Expert Michael Bean as Counselor (May, 11, 2009), *available at* [http://www.doi.gov/news/pressreleases/2009\\_06\\_11\\_releaseA.cfm?renderforprint=1&](http://www.doi.gov/news/pressreleases/2009_06_11_releaseA.cfm?renderforprint=1&).

entire candidate list by a date certain.<sup>309</sup> And FWS certainly would not have been able to obtain from a court any kind of cease-fire or restraint on the filing of additional deadline cases or petitions.

What about the substance of the settlements themselves? I can offer a few observations. First, and most significantly, the settlement agreements went far beyond the substance of the cases at issue. Much like the Constitutional Convention at Philadelphia, the ostensible purpose of the negotiations was relatively humble (amendments to the Articles of Confederation; settlement of a number of petition deadline cases), but the outcome was much more ambitious (the U.S. Constitution; a codification of the priorities for the program—and a reduction in litigation—for six-plus years). On the other hand, the MDL context seems like the perfect vehicle for such a broad settlement.

Second, the MDL settlements have the potential to significantly improve FWS's ability to implement section 4. The settlements largely codify FWS's own priorities. In so doing, these settlements correct an unintended consequence of Congress's effort to provide FWS with a little flexibility. In the circumstances that have prevailed in the past fifteen years, the ability to make warranted-but-precluded findings has had the perverse effect of making it all but impossible to issue proposed listings. By enshrining the duty to propose species for listing in these court-approved settlements, FWS has succeeded in giving proposals equal standing with petition findings and critical habitat designations. Moreover, although these settlements focus on resolving the status of candidate species, they are not simply a rehash of the *Fund for Animals* settlement. Matters had grown more complicated since 1993. The issue now was not just slow progress by FWS in the face of inadequate resources—deadline litigation had itself become a major barrier to listings. Therefore, the settlement had to address ways to decrease litigation.

Third, the fact that there were two plaintiffs in the centralized cases had consequences.<sup>310</sup> On the one hand, negotiating with multiple parties makes things more complex. Here, it resulted in two separate settlements, which may make compliance more challenging. From a different perspective, the settlements suffer from the fact that there are only two plaintiffs (albeit the

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309. Even if this result could be obtained in court, jamming it down FWS's throat would make an unpredictable congressional response more likely. See Dep't of Def. and Full-Year Continuing Appropriations Act of 2011, Pub. L. 112-10, § 1713, 125 Stat. 38, 150 (2011) (requiring FWS to reissue a rule that had the effect of partially delisting the gray wolf, after that rule had been vacated by a court) (a constitutional challenge to this statute was rejected in *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1175 (9th Cir. 2012)).

310. It is also relevant that there is only one defendant—the National Marine Fisheries Service, which makes listing determinations with respect to marine species, is unaffected.

most prolific in the listing-deadline arena): these settlements do not bind other parties, whose actions may also make compliance more challenging. Other environmental groups, industry groups, states, and tribes can all file petitions, make deadline challenges, and seek remedies in successful merits challenges that conflict with the principles or details of the settlements. As mentioned above, some provisions in the Guardians Settlement may help address these possibilities.

Fourth, the settlements in no way limit the ability of Guardians and CBD to file merits challenges to section 4 actions. FWS can no doubt handle some continuing merits challenges, but if deadline litigation is simply replaced by additional merits litigation, then the settlements will have been a failure.

Fifth, the Guardians Settlement included important provisions allowing FWS to terminate the agreement. If not unenforceable, as CBD once claimed, neither is it guaranteed to survive.

Lastly, the settlements may de-intensify a heretofore harmfully adversarial relationship.<sup>311</sup> Whatever differences the parties have had in the past, reducing distrust and improving communication among these parties may lead to better implementation of section 4. This is not, however, a uniformly held position: some may worry that the government negotiating team played the role of Neville Chamberlain at Munich—appeasing an irreconcilably hostile power that will take what is given, and continue to seek more, until the onset of the inevitable conflagration. The truth should become apparent over time.

## VIII. SWORDS INTO PLOWSHARES

“The only good part of a war is its ending.”

Abraham Lincoln

As the dust settles, the staff at FWS, and those who represent them, are crawling out of their foxholes and cautiously surveying the landscape. It has been about two years since the settlements were signed and it is now possible to make some observations and draw some tentative conclusions. First, the settlements have survived thus far. The agreement with Guardians included a number of termination provisions relating to budget and

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311. See Phil Taylor, *Obama Settlement with Green Groups Sparked Major Change in Listing Decisions*, GREENWIRE (Jan. 11, 2013), <http://www.eenews.net/Greenwire/2013/01/11/3> (quoting a representative of Guardians as stating that its relationship with FWS “has never been better” and noting that a CBD representative “stopped short of praising” the Obama administration’s implementation of the ESA in the first term).

litigation issues: none of them have been triggered. And, as discussed above, the D.C. Circuit rejected Safari Club's attempt to challenge the settlements.

Second, FWS has been able to comply thus far. It has met all of the requirements for FYs 2011 and 2012 (with the exception of a few rules for which FWS obtained unopposed short-term extensions from the court).<sup>312</sup> Thus, the pace of issuing new proposed and final listing rules has increased significantly, and the candidate backlog is already significantly lower.<sup>313</sup> In some sense, this is not a surprise, as the Guardians Settlement essentially codified what had been FWS's anticipated work plan. That said, as von Moltke observed, no battle plan survives contact with the enemy: in the past, FWS has often been unable to follow through on its plans, and new contingencies (court orders, petitions, and emergency listings) arise. Thus, completing the first stage of the settlement should be considered a major accomplishment. Time will tell whether changes in FWS's budget situation (which can only be uncertain in the current political and economic climate) or other contingencies will impede compliance in future fiscal years. The imposition of the budget "sequester" on March 1, 2013, is certainly not helpful.

Third, to maximize its chances of being able to continue to deliver what it has promised, FWS will need to redouble its efforts to make the listing program as efficient and effective as possible. In addition to the efficiency gains that directly resulted from reduction in litigation caused by the MDL settlements, improving the effectiveness of the listing program will require investing considerable effort in streamlining the decision-making process. It may also require developing substantive policies that will take some of the uncertainty, and therefore legal risk, out of the decisions FWS makes.<sup>314</sup>

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312. Allison Winter, *Endangered Species: Petitions for New Species Protection Wobble Balance in FWS Settlement, Agency Says*, GREENWIRE (Aug. 7, 2012), <http://www.eenews.net/Greenwire/print/2012/08/07/3>.

313. Taylor, *supra* note 311; Michael Wines, *Endangered or Not, But at Least No Longer Waiting*, N.Y. TIMES (Mar. 6, 2013), [http://www.nytimes.com/2013/03/07/science/earth/long-delayed-rulings-on-endangered-species-are-coming.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/07/science/earth/long-delayed-rulings-on-endangered-species-are-coming.html?pagewanted=all&_r=0); see Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 77 Fed. Reg. 69994 (Nov. 21, 2012) (noting that as of November 2012, candidate list had been reduced to 192 species—including new candidates added since the November 2010 CNOR).

314. The productivity of the listing program has also suffered from the analog of "defensive medicine." The plethora of merits challenges have caused FWS to vastly increase the size, complexity, and expense of its section 4 determinations. Although to some degree this may be a good thing, leading to better and more transparent decision-making, there is also the danger that FWS's analyses resembles a medical practice in which doctors drive up the cost of health care by ordering unnecessary tests as a hedge against possible malpractice claims. The ability to develop generic policy may ameliorate this effect.

These sorts of investments, however necessary, were hard to justify when the listing program was living hand to mouth, with FWS desperately trying to avoid contempt of court. Thus, the Listing Wars had the effect of substantially stunting policy development for fifteen years. In the last couple of years, however, FWS has made some progress on this front. On May 1, 2012, FWS and NOAA amended the regulations governing critical habitat designation to change the way in which critical habitat is delineated; this has the potential of saving hundreds of thousands of dollars per year in Federal Register and Code of Federal Regulations (C.F.R.) publication costs.<sup>315</sup> FWS and NOAA have also published a draft policy interpreting “significant portion of its range,” a crucial term in the ESA’s definitions of “endangered species” and “threatened species.”<sup>316</sup> A number of other policy initiatives are now in the works.

Fourth, the signing of the settlements appears to be having conservation benefits beyond simply potentially speeding up listing determinations (and therefore applying the ESA’s regulatory protections to some species more quickly). By providing concrete deadlines for listing determinations for all 251 candidates—but deadlines that for the most part are distant enough to allow conservation action to be taken before a final determination is made—the settlements can encourage federal, state, and private actors to take conservation measures in the interim to reduce the likelihood that the species will ultimately be listed.<sup>317</sup> Thus, for the greater sage-grouse, there have been numerous announcements about new conservation initiatives that have expressly cited the impending deadline set in the settlements.<sup>318</sup>

Fifth, the existence of the settlements helped secure, at least for the time being, a major litigation victory for FWS in a different case. As mentioned above, the settlements required Guardians and CBD to either move to dismiss or withdraw from the existing challenges to warranted-but-precluded cases. As a result, all of those cases except one were promptly dismissed. The exception was the greater sage-grouse case. There, WWP was also a plaintiff, and it refused to drop the case.<sup>319</sup> CBD withdrew; the

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315. 50 C.F.R. § 424.12 (2012).

316. 76 Fed. Reg. 76987, 76987-88-01 (Dec. 9, 2011).

317. Taylor, *supra* note 311.

318. *E.g.*, Instructional Memorandum No. 2012-044, Bureau of Land Mgmt., BLM National Greater Sage-Grouse Land Use Planning Strategy (Dec. 27, 2011), *available at* [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2012/IM\\_2012-044.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-044.html) (detailing instructions for considering greater sage-grouse conservation measures, noting that FWS is scheduled to make a new listing decision in FY 2015).

319. Western Watersheds had been informed of the fact of the MDL negotiations, and had agreed to extend the briefing schedule in the sage-grouse case during that period, but had not been a party to the negotiations and did not approve of the 2015 deadline for removing the sage-grouse from the candidate list. W. Watersheds Project’s Response/Reply Brief in Support of Motion for Summary

government and Guardians moved to dismiss the case as prudentially moot, and the government and WWP cross-moved for summary judgment. Judge Winmill, who had vacated FWS's last twelve-month finding for the sage-grouse in a strongly worded opinion, ruled for FWS, by the narrowest of margins. Although he rejected the argument that the case was moot, he declined to hold that the finding was arbitrary and capricious, despite "troubling aspects of the FWS decision process."<sup>320</sup> He indicated that he would have found that FWS was not making "expeditious progress" but for its commitment in the MDL, stating:

The Director also had to certify that the FWS is making expeditious progress on its ESA duties in order to place the sage grouse in the warranted-but-precluded category. Congress originally intended that this category be used sparingly and that it not become a bottomless pit where controversial species are dumped and forgotten. There are now over 250 species in this category, and the average time spent there is about 19 years. Species have gone extinct while waiting for listing rules. By no common sense measure of the word "expeditious" has the FWS made expeditious progress in its ESA duties. While the FWS blames these delays on a lack of funding by Congress, some of the agency's financial woes are self-inflicted. In the past, the FWS's parent agency—the Interior Department—has refused to seek sufficient funds from Congress and has actively sought caps on ESA spending.

Nevertheless, as discussed above, the FWS has recently committed to reducing the backlog, and has made specific commitments regarding the sage grouse. These commitments are the only reason the Court will uphold the agency's certification that it is making expeditious progress. If those commitments prove unreliable, the Court will quickly revisit its findings here upon prompting from any party.<sup>321</sup>

The blunt statements in Judge Winmill's opinion demonstrate the usefulness of the settlements in defending against other litigation. Still, it

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Judgment at 4, *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, No. 10-cv-229-BLW (D. Idaho Nov. 17, 2011).

320. *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, No. 4:10-CV-229-BLW, 2012 U.S. Dist. Lexis 13771, at \*7 (D. Idaho Feb. 2, 2012).

321. *Id.* at \*6–7. WWP filed a motion to alter or amend judgment, which the court denied. *W. Watersheds Project v. U.S. Fish and Wildlife Serv.*, No. 4: CV 10-229-BLW, 2012 U.S. Dist. Lexis 140969 (D. Idaho Sept. 26, 2012). WWP did not appeal.

remains to be seen whether the continuing jurisdiction of Judge Sullivan will be an effective check to additional inconsistent court orders.

Sixth, thus far, deadline litigation has decreased.<sup>322</sup> Of course, the Guardians settlement prohibits that group from filing deadline litigation during the period of the settlement agreement, so it has not filed any. Notwithstanding the hope that the settlement agreements would de-intensify a historically adversarial relationship, CBD appears to be determined to push the envelope. CBD filed deadline suits during fiscal year 2012 seeking to have the Service make twelve-month findings for three additional species in the following year,<sup>323</sup> the maximum allowed under the CBD settlement without triggering automatic extensions of deadlines in that agreement.<sup>324</sup> These cases were filed in the D.C. federal district court and assigned to Judge Sullivan. CBD wanted to resolve the cases before the end of FY 2012 because of the language in the automatic-extension provision. The parties did not settle prior to that time. Unfortunately for the government, Judge Sullivan granted CBD summary judgment during the last week of FY 2012. In an order not accompanied by a written opinion, he directed the parties to negotiate deadlines for the three findings, and instructed that those dates occur during the period covered by the CBD settlement in the MDL case.<sup>325</sup> The parties were subsequently able to settle the cases.<sup>326</sup> In any case, the continued pressure from CBD in the form of litigation and new petitions may hinder, rather than encourage (as CBD hopes) the efficiency of the listing program, and could eventually jeopardize the Service's ability to comply with the settlements.<sup>327</sup> But even with these cases, deadline litigation with CBD is greatly reduced from prior years. More importantly, no other group has stepped forward to fill this void: exactly one other listing deadline case has been filed since the settlements were approved.<sup>328</sup>

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322. Taylor, *supra* note 311.

323. Complaint for Declaratory and Injunctive Relief, Ctr. for Biological Diversity v. Salazar, Nos. 1:12-cv-00861, 01073, 01091 (D.D.C.).

324. Joint Motion for Approval of Settlement Agreement & Order of Dismissal of the Center's Claims, *supra* note 292, at 5.

325. Ctr. for Biological Diversity v. Salazar, Nos. 1:12-cv-00861, 01073, 01091, slip op. 1–2 (D.D.C. Sept. 25, 2012).

326. Stipulated Settlement Agreement, Ctr. for Biological Diversity v. Salazar, Nos. 1:12-cv-00861, 01073, 01091 (D.D.C. Feb. 14, 2013).

327. See Winter, *supra* note 312 (quoting the FWS as having difficulties arising from limited resources and increasing demands).

328. Complaint for Declaratory and Injunctive Relief at 1–2, Ctr. for Env'tl. Sci. Accuracy & Reliability v. Salazar, No. 1:12-cv-01311-JEB (D.D.C. filed Aug. 7, 2012) (challenging FWS's alleged failure to make a timely 12-month finding on a petition to list the American eel); see Declaration of Paul Souza ¶ 34, Ctr. for Biological Diversity v. Salazar, No. 1:12-cv-00861 (D.D.C. filed July 27, 2012) (explaining the state of deadline litigation after the MDL settlement).

A reduction in litigation, particularly deadline litigation, may also have the indirect benefit of improving the listing program by improving the morale of FWS personnel. These good folks trained for years because they want to do biology and work on conservation; they do not want to be glorified paralegals providing litigation support while being pilloried from all sides for trying to do their jobs in challenging circumstances. Thus, a reduction in litigation may help the listing program attract and retain the most talented staff.

Seventh, some members of Congress have expressed concern over the settlements as a part of a larger criticism of the ESA. On December 6, 2011, the House Committee on Natural Resources held an oversight hearing on ESA litigation.<sup>329</sup> In the associated press release, the Committee made specific reference to the MDL settlements as support for its assertion that “the ESA has become taken over by lawsuits, settlements and judicial action.”<sup>330</sup> There was a particular interest in the attorneys’ fees that the government would pay to Guardians and CBD as a result of the MDL settlements. These fees were the subject of many questions at the hearing, which included representatives of both groups, as well as a letter from the Committee to the Department of Justice requesting information.<sup>331</sup> More recently, ESA critics appear to be operating from a new set of talking points, stating emphatically that the settlements were the result of an allegedly inappropriate “closed-door” process.<sup>332</sup> A bill has even been introduced in the Senate to amend the ESA to require detailed public process prior to filing a settlement, and to give States and counties a veto over possible settlements.<sup>333</sup> This criticism ignores the reality that settlement discussions of any sort are almost always conducted behind

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329. *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts*, Before House Committee On Natural Resources, HOUSE.GOV (2011), <http://naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=270315> (showing hearing schedule for December 6, 2011).

330. Press Release, Excessive Endangered Species Act Litigation Threatens Species Recovery, Job Creation and Economic Growth (Dec. 6, 2011), available at <http://naturalresources.house.gov/UploadedFiles/12.06.11-ESAHearingRecap.pdf>.

331. Letter from Rep. Doc Hastings, Chairman, Comm. on Natural Res., U.S. House of Representatives, to Ignacia S. Moreno, Assistant Attorney General, Envtl. & Natural Res. Div., U.S. Dep’t of Justice (Mar. 19, 2012), available at <http://naturalresources.house.gov/UploadedFiles/LtrToMorenoOnESA03.19.12.pdf>.

332. Taylor, *supra* note 311 (quoting Rep. Hastings as complaining about closed-door settlements); Sen. David Vitter, *Endangered Species Act’s Hidden Costs*, WASH. TIMES (Feb. 8, 2013), <http://www.washingtontimes.com/news/2013/feb/8/endangered-species-acts-hidden-costs> (arguing that the MDL settlements were the result of a grossly unfair secret process); Editorial Board, *Fishing for Wildlife Lawsuits*, WALL ST. J. (Mar. 11, 2013), <http://naturalresources.house.gov/blog/?postid=323235> (complaining that government used sue-and-settle tactics with friendly green groups to impose the MDL settlements with no public input).

333. Taylor, *supra* note 311.

closed doors, and those discussions are generally confidential, as are the agreements themselves until filed in court. Of course, as a practical matter, the bill described would effectively prohibit all settlements covered by its terms.

There seems to be a suggestion that the settlements are some kind of inappropriate collusion between FWS and the environmental groups. This may be a more extreme version of the appeasement concern mentioned above—that the settlements are the equivalent of the Molotov-Ribbentrop Pact.<sup>334</sup> Of course, this is simply incorrect. FWS's relationship with these groups has been strongly, even bitterly, adversarial since the groups formed, through Democratic and Republican administrations alike. Moreover, the settlements require nothing more than better implementation of the existing law. It seems odd to criticize an agency for trying to do the job mandated by Congress.

A more reasonable criticism is that with 1,391 domestic species already listed as endangered or threatened,<sup>335</sup> FWS's resources would be better spent on recovery actions for those species than to list hundreds more that FWS will struggle to conserve. Regardless of the merits of that view, it is not a tradeoff allowed under current law. FWS learned in the beginning of the Listing Wars that courts will not allow these sorts of tradeoffs even among the different types of listing actions given the express commands of the ESA. Congressional critics of the MDL settlements sit in the body with the power to adjust the legal mandates. It remains to be seen whether the MDL settlements will result in any substantive congressional response, as the *Fund for Animals* settlement may have contributed to the moratorium in 1995–1996.<sup>336</sup>

The upshot is that a combination of luck, good judgment, risk taking, and the logic of the situation allowed these parties to step out of the rut that they had created. Rather than holding out for total victory, or the intervention of a *deus ex machina*, they took responsibility for coming up

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334. The Molotov-Ribbentrop Pact was a short-lived agreement by which Nazi Germany and Stalin's Soviet Union divided Eastern Europe. It was signed on August 23, 1939, a week before Germany invaded Poland, initiating World War II, and was broken when Germany invaded the Soviet Union on June 22, 1941.

335. *Summary of Listed Species Listed Populations and Recovery Plans*, U.S. FISH & WILDLIFE SERVICE (Jan. 29, 2013), [http://ecos.fws.gov/tess\\_public/pub/boxScore.jsp](http://ecos.fws.gov/tess_public/pub/boxScore.jsp).

336. During the height of the Listing Wars, there were several efforts at ESA reform legislation that would have addressed the listing and critical-habitat-designation processes. Most notable were S. 1180, 106th Cong. (1999), which would have delayed designation of critical habitat to the recovery-planning stage, and what is sometimes referred to as the "Pombo Bill," Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (2005). The latter, which among many other changes would have eliminated critical habitat entirely and required economic analyses for listing, passed the House in 2005. See generally Brian E. Gray, *The Endangered Species Act: Reform or Refutation*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2007) (describing the Pombo Bill).

with a compromise solution that acknowledged their common interests, and sought to manage the areas in which their interests diverged. (Perhaps there is a lesson here for Congress . . .) Thus far, the results have been encouraging. No doubt there will be challenges; even if we have achieved a sort of peace, the problems of peace can be so daunting that war can seem like an attractive alternative. Therefore, it will take commitment, compromise, restraint, and hard work from all of the parties to keep from responding to the drums of war.

I, for one, am ready for this war to end. It has been counterproductive in the extreme, although it has certainly kept me gainfully employed. It is my hope that all interested parties can get to the hard work of trying to develop productive solutions to the “problems of peace” with respect to the ESA. In any case, as much as I would like to say that “I ain’t gonna study war no more,”<sup>337</sup> the role of Cincinnatus<sup>338</sup> will have to wait. There are many important substantive issues in section 4 that have yet to be resolved. Litigation will no doubt be required to resolve some of them, but at least those are fights worth having.

As Mr. Patlis might say, “Curtain.”

“Peace is not only better than war, but infinitely more arduous.”  
George Bernard Shaw

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337. *Down by the Riverside*, lyrics available at [http://en.wikipedia.org/wiki/Down\\_by\\_the\\_Riverside](http://en.wikipedia.org/wiki/Down_by_the_Riverside).

338. Cincinnatus was a hero of early ancient Rome. He was given dictatorial powers during a military crisis, which he immediately gave up after leading the Roman army to victory, and returned to his life as a simple farmer. I do not mean to suggest that my role has been any more comparable to Cincinnatus than it has been to Thucydides, but perhaps it will one day be analogous to the role of those American Revolutionary War officers who joined the Society of the Cincinnati, resolving to follow the example of Cincinnatus. See THE INSTITUTION OF THE SOCIETY OF THE CINCINNATI, THE SOCIETY OF THE CINCINNATI, <http://societyofthecincinnati.org/institution.htm> (last visited Feb. 12, 2013) (describing the Institution’s principle guiding document and founding tenets).

