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## **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**

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# **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**

**Timothy Bechtold\***

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## **I. INTRODUCTION**

On June 5, 1998, Secretary of the Interior Bruce Babbitt stood at the banks of the Blackfoot River near Clearwater Junction in western Montana and announced that the United States Fish and Wildlife Service (USFWS) was listing all bull trout populations in the Columbia and Klamath basins as a threatened species under the Endangered Species Act (ESA). Babbitt refused to answer queries from the media about why it took six years and the pressure of lawsuits filed by conservationists to coerce the USFWS to protect bull trout under the ESA. "I'm not a historian," he said, "People who want to talk about the past can. I am here to say the sun rose today and the future is full of possibilities."<sup>1</sup>

In addition to media, Babbitt's media team had invited about a score of people to the event, including outfitters, conservationists, and industry representatives. During the event, Babbitt praised federal and local agencies and citizenry for working together to improve bull trout viability in the Blackfoot basin.<sup>2</sup> Noticeably absent from the Secretary's invitation list however, were representatives from the Alliance for the Wild Rockies (AWR) and Friends of the Wild Swan (FOWS), two Montana conservation organizations that had set the listing process in motion with a petition

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1. Sherry Devlin, *Babbitt: Listing bull trout won't hurt fishing*, MISSOULIAN, June 6, 1998, at A1, A9.

2. *Id.*

to USFWS to list the bull trout for protection under the ESA in October 1992.<sup>3</sup> AWR and FOWS followed the petition with several lawsuits against USFWS to encourage the agency to expedite the listing process. By June of 1998, after battling almost six years of stalling and delaying tactics by the USFWS, the conservationists had finally forced USFWS into a legal corner which left the agency no other option but to list the bull trout under the ESA.<sup>4</sup>

When deciding whether to list a species for protection under the ESA, USFWS is directed to use only the "best scientific and commercial data available"<sup>5</sup> and thus carry out the purpose of the ESA to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."<sup>6</sup> The clear purpose of Congress in enacting the ESA was "to halt and reverse the trend toward species extinction, whatever the cost."<sup>7</sup>

The process of listing the bull trout under the ESA demonstrates, however, that the agency employs a myriad of delay tactics in attempting to avoid listing species under the ESA: The agency did not protect bull trout under the Act, even though its scientific status review found the fish "likely to be at extreme risk of extinction."<sup>8</sup> Further, once the bull trout was proposed for listing, the USFWS assigned bull trout to a "warranted, but precluded" category to avoid a listing under the Act.<sup>9</sup> Finally, the agency devoted funding to fighting lawsuits filed by advocates of bull trout protection rather than to propose protection measures for the fish and its habitat.<sup>10</sup> Advocates of protection for an imperiled species such as the bull trout must overcome these types of agency reluctance with persistent prodding and pushing in order to afford a species its necessary and warranted legal protection under the ESA.<sup>11</sup>

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3. Petition from the Alliance for the Wild Rockies, Friends of the Wild Swan and Swan Valley Coalition for a Rule to List the Bull Trout (*Salvelinus confluentus*) as Endangered to Assistant Secretary of the Interior (Oct. 27, 1992) [hereinafter 1992 Petition]. The petition documented population declines and habitat degradation of the bull trout, outlined the status of the fish in states and provinces of its historic range, and recommended that USFWS designate critical habitat "in all areas where [the bull trout] is currently extant." *Id.* at 36. Swan View Coalition, who joined AWR and FOWS on the petition, was a plaintiff in only the suit to force a twelve-month finding, but none of the subsequent litigation.

4. Sherry Devlin, *Babbitt Says He'll List Bull Trout*, MISSOULIAN, June 3, 1998, at B1, B7.

5. 16 U.S.C. § 1533(b)(1)(A) (1994).

6. § 1531(b).

7. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

8. Memorandum from Regional Director USFWS Region 1 on Warranted, But Precluded Administrative 12-month Finding on a Petition to List the Bull Trout under the Endangered Species Act to Director of USFWS, (June 8, 1994, at 3 [hereinafter 1994 Finding].

9. *Id.* at 26.

10. See Clark Statement, *infra* note 119, at 3.

11. Several commentators have discussed aspects of the USFWS reluctance to implement ESA.

This Comment reviews the process the bull trout endured in order to gain protection under the ESA, including the methods employed by the conservationist-plaintiffs to attain a listing, and the methods employed by the USFWS attempting to circumvent a listing. Part II provides information about the bull trout itself; Part III provides background about the ESA and USFWS regulations in implementing ESA's listing provisions; Part IV provides a case-by-case history of the suits filed by the conservation organizations to force the USFWS to take action on the bull trout under the ESA; and Part V summarizes the methods employed by the agency to avoid listing the fish and offers implications of how the bull trout is illustrative of a larger process in which the USFWS is avoiding its duty under the ESA.

## II. BULL TROUT

The bull trout (*Salvelinus confluentus*) is a char that has only recently been recognized as a taxonomically distinct species from the Dolly Varden char (*Salvelinus malma*).<sup>12</sup> Based on the morphometric, meristic, osteological, and distributional evidence presented by researchers, the American Fisheries Society recognized bull trout and Dolly Varden as two distinct species in 1980.<sup>13</sup> As the common name for *S. confluentus* suggests, char are salmonids<sup>14</sup> and share general morphological characteristics with salmon and trout. Native bull trout populations are distributed in the states of Washington, Oregon, Nevada, Idaho, Montana, and Alaska, as well as the provinces of British Columbia and Alberta.<sup>15</sup> A former population in the McCloud watershed in California has been extirpated, and is now extinct.<sup>16</sup>

Bull trout have four distinct life-history strategies: resident, fluvial,

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They include: Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569 (1995); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993); Holly Doremus, *Listing Decisions under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029 (1997); and Ivan J. Lieben, *Political Influences on USFWS Listing Decisions under the ESA: Time to Rethink Priorities*, 27 ENVTL. L. 1323 (1997).

12. Bruce E. Rieman & John D. McIntyre, *Demographic and Habitat Requirements for Conservation of Bull Trout*, USDA FOREST SERVICE INTERMOUNTAIN RESEARCH STATION GENERAL TECHNICAL REPORT, Sept. 1993, at 1-2.

13. 1994 Finding, *supra* note 8, at 2. "Morphometric" evidence relates to the size and shape of the fish, "meristic" to the geometric relation of body parts, "osteological" to the bone size and structure, and "distributional" to the range and distribution of the fish.

14. Rieman & McIntyre, *supra* note 12, at 4.

15. 1994 Finding, *supra* note 8, at 3.

16. *Id.*

adfluvial, and anadromous.<sup>17</sup> Further, this species has "complex age structures, behavior, and maturation schedules."<sup>18</sup> Resident bull trout forms spend their entire lives in the small headwaters streams in which they hatched. Migratory forms, meanwhile, live in the streams in which they hatched for several years before swimming downstream to either larger rivers (fluvial form) or lakes (adfluvial form) or the ocean (anadromous form), where they grow to maturity.<sup>19</sup> Growth rates and size of the bull trout vary dramatically based on the form: resident adult fish range from 150-300 millimeters in length, while migratory forms commonly exceed 600 millimeters, and the growth rate of the resident and migratory forms diverge only after the migratory forms leave their natal streams for larger bodies of water.<sup>20</sup> Researchers thus posit that forage availability is an important influence on growth rate and eventual size of the bull trout.<sup>21</sup>

Bull trout spawn in the fall, from August through November, in redds, or spawning nests, in the substrate of a stream.<sup>22</sup> Water quantity and quality, cover, and substrate composition are important components of spawning site selection.<sup>23</sup> Bull trout tend to spawn in zones of groundwater upwellings, where water temperature and flow may be more stable and less subject to short-term variation than other reaches of a stream.<sup>24</sup> Bull trout excavate their redds and lay their eggs up to 25 centimeters below the streambed in the substrate.<sup>25</sup> Fertilized eggs incubate over the winter and hatch in late winter or spring. Alevins may then remain within the gravel for an extended time after hatching in order to feed and grow before emerging into the stream flow.<sup>26</sup> Small bull trout eat terrestrial and aquatic insects and macrozooplankton; larger bull trout may be almost exclusively piscivorous.<sup>27</sup> Some research suggests that distribution of fluvial bull trout populations may shadow the distribution of prey fish such as whitefish and sculpins.<sup>28</sup>

Bull trout begin to spawn when they mature at five to seven years of age. Unlike anadromous salmon, bull trout are capable of spawning each

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17. *Id.* at 2; Rieman & McIntyre, *supra* note 12, at 2.

18. Rieman & McIntyre, *supra* note 12, at 2.

19. *Id.*; 1994 Finding, *supra* note 8, at 3.

20. Rieman & McIntyre, *supra* note 12, at 2.

21. *Id.*

22. *Id.*

23. Memorandum from Montana Bull Trout Scientific Group on the Relationship Between Land Management Activities and Habitat Requirements of Bull Trout to the Montana Bull Trout Restoration Team 5 (1998).

24. *Id.* at 7.

25. *Id.*

26. Rieman & McIntyre, *supra* note 12, at 2.

27. *Id.* at 3.

28. *Id.*

year of their adulthood. Researchers believe resident populations spawn each year, while the migratory populations return only sporadically to spawn.<sup>29</sup> Because the migrants do not seem to return to spawn on a given schedule, the returning migrant spawners are of various ages.<sup>30</sup> Further, the various life strategies seem to spawn with each other; thus fluvial forms may spawn with adfluvial, anadromous, and resident forms, for example.<sup>31</sup> This variation in timing of out-migration and spawning between forms increases the complexity of bull trout distribution patterns as well as the genetic variation.<sup>32</sup> Because bull trout are also generally loyal to their natal streams, increased genetic diversity has developed between populations of different natal streams, which further increases the complexity of genetic variation of the species.<sup>33</sup> Having both spatial and temporal complexity in life history strategies confers stability and resiliency to the species by spreading the risks.<sup>34</sup> Because the genetic sources for one spawning stream are dispersed, at any one time, from residents in that stream to larger rivers downstream to lakes downstream, a catastrophic event in any one of these locations will not wipe out the population.

Bull trout have more specific habitat requirements than other salmonids.<sup>35</sup> Though bull trout may be present throughout a basin, spawning and rearing fish are often found only in a small portion of the stream reaches of the basin.<sup>36</sup> The habitat characteristics that are most important to maintaining strong populations of bull trout are channel and hydrologic stability, substrate composition, stream cover, water temperature, and the presence of migration corridors.<sup>37</sup> Stable channels and relatively stable stream flows favor persistence of bull trout populations, while increases in fine sediments in the substrate decrease success of embryo survival, fry emergence, and overwinter survival. Bull trout population densities decline with the removal of cover from the overstory, in-channel wood, boulders, pools, and undercut banks; the fish seem to prefer a complex stream cover regime. Further, optimum incubation temperatures for bull trout range from two to four degrees Celcius, and bull trout often select the coldest streams in a basin to spawn. Available migration corridors allow migrant forms to return to spawn in natal streams and maintain

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 4.

36. *Id.*

37. *Id.* at 5.

the genetic diversity of a population.<sup>38</sup> Because of their relatively specific habitat requirements (which have been characterized as the four Cs: clean, cold, complex, and connected habitat<sup>39</sup>), bull trout populations are susceptible to habitat disruption and fragmentation.<sup>40</sup>

Bull trout distribution has been "significantly reduced" since European settlement.<sup>41</sup> "Highly migratory, fluvial populations have been eliminated from the largest, most productive river systems across the range. Most river systems now contain only isolated, remnant populations of resident fish restricted to the headwater areas of a few remaining suitable tributaries. These remnant populations have lost their migratory life-history forms, exist in isolation, and are likely to be at extreme risk of extinction."<sup>42</sup> The USFWS determined in 1994 that "almost all populations in the coterminous United States face numerous risks" and "the species is likely to decline within the foreseeable future as a result of these threats."<sup>43</sup> In its 1994 Finding, the USFWS determined that almost "every bull trout population within the coterminous United States is threatened by a wide variety of land and water management practices."<sup>44</sup> Of land management practices, the USFWS cited forest management practices as the primary cause of bull trout decline and extirpation, followed by agriculture, grazing, hydropower developments, and mining.<sup>45</sup>

Forest management practices have led to increased sediment delivery to bull trout streams, loss of stream cover, seasonally increased stream flow, and increased water temperatures. Agricultural impacts, particularly irrigation and water storage activities, have impacted bull trout by removing stream cover, increasing sediment delivery to streams, and by adding both point source and non-point source pollution to streams. Grazing, meanwhile, affects bull trout by reducing streamside vegetation, increasing erosion, and changing stream morphology. Mining effects include poisoning streams with toxic chemicals and heavy metals, increasing sediment delivery, and of course, changing stream morphology by dredging and hydraulic mining. Hydropower and storage dams without adequate fish passage devices have created barriers to migratory bull trout and isolated populations of bull trout. Dams also create reservoirs of relatively warmer

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38. *Id.* at 5-7.

39. Rick Stern, *Debate over Charismatic Mega-fish Spawns Odd Alliances*, MISSOULA INDEPENDENT, Aug. 28, 1997, at 8; *see generally*, U.S. FISH AND WILDLIFE SERV., BULL TROUT INTERIM CONSERVATION GUIDANCE (1998).

40. Rieman & McIntyre, *supra* note 12, at 7.

41. 1994 Finding, *supra* note 8, at 3.

42. *Id.* (citing Rieman & McIntyre, *supra* note 12).

43. *Id.*

44. *Id.* at 23.

45. *Id.* at 17.

water and degrade forage bases for bull trout.<sup>46</sup>

The USFWS also found that bull trout have been an historically re-viled species of fish by anglers and agencies "because of its piscivorous habits," and the species has been subject to both legal and illegal intense overharvest.<sup>47</sup> Both anglers and agencies believed that bull trout were eating other more desirable species of fish, such as rainbow trout, before anglers could catch them. As George Weisel, a retired ichthyologist from the University of Montana remembered, he "had a friend who used to go into the Bob Marshall and catch bull trout, and then he'd pile them up like cordwood right on the side of the river. He thought he was doing a great benefit to the fish population in the South Fork [of the Flathead River]." <sup>48</sup>

Introduction of non-native species has also threatened the viability of bull trout: bull trout hybridize with introduced brook trout to produce sterile offspring; brook trout displace and out-compete bull trout in the same habitat niches because they mature more quickly and have a higher reproduction rate than bull trout; introduced lake trout displace bull trout where they co-exist; and introduced brown trout, which also spawn in the fall, disrupt bull trout spawning.<sup>49</sup>

The USFWS concluded in its 1994 Finding that the "interrelated effects of habitat degradation, hybridization, isolation, and overutilization have significantly impaired metapopulation function and made it impossible for many populations to recover from natural or manmade perturbations. Even without additional habitat losses, most isolated populations are not likely to persist. Even the few remaining 'healthy' bull trout populations are at risk as habitat fragmentation and degradation continues."<sup>50</sup>

### III. THE LISTING PROCESS UNDER THE ENDANGERED SPECIES ACT

Congress passed the ESA in 1973 "to provide a program for the conservation of endangered and threatened species."<sup>51</sup> In order to receive protection under the ESA, however, the Secretary of the Interior or the Secretary of Commerce must list the species as either threatened or endangered.<sup>52</sup> The Secretary of the Interior has delegated listing duties under the ESA for terrestrial and freshwater species to the USFWS and the Secretary of Commerce has delegated listing duties for ocean-dwelling

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46. *Id.* at 17-21.

47. *Id.* at 21.

48. Stern, *supra* note 39, at 8.

49. 1994 Finding, *supra* note 8, at 23.

50. *Id.* at 24 (*citing* Rieman & McIntyre, *supra* note 12).

51. 16 U.S.C. § 1531(b) (1994).

52. § 1633.



and anadromous species to the National Marine Fisheries Service (NMFS).<sup>53</sup> The bull trout is primarily a freshwater species and duties under the ESA thus fall to the USFWS. The ESA defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range," and "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."<sup>54</sup> The Secretary compiles and publishes the actual lists of threatened and endangered species in the Code of Federal Regulations.<sup>55</sup> Once a species is listed, the ESA provides that the delegated agency will designate "critical habitat"<sup>56</sup> and formulate "recovery plans"<sup>57</sup> for the species. Further, once a species is listed, specific ESA protection provisions apply to the species. These provisions prohibit federal agencies from taking actions likely to jeopardize the continued existence of a listed species or to adversely modify its critical habitat,<sup>58</sup> and prohibit any person from "taking" any member of the species.<sup>59</sup>

When it considers whether to list a species under ESA, the USFWS determines whether the species is threatened or endangered

because of any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;

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53. 50 C.F.R. § 402.01 (1997).

54. 16 U.S.C. § 1532(20) (1994).

55. 50 C.F.R. §§ 17.11-12 (1998). There are actually two lists: one for wildlife (§ 17.11) and one for plants (§ 17.12).

56. 16 U.S.C. § 1532(5)(A) (1994). Critical habitat is defined as follows: (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. The ESA's language seems to indicate that critical habitat will normally be designated when a species is listed as threatened or endangered under ESA. *Id.*

57. § 1533(f). Recovery plans provide that the Secretary shall develop and implement plans "for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species." *Id.*

58. § 1536(a)(2).

59. § 1538(a)(1)(B). The term "take" is defined at 16 U.S.C. § 1532(19) as "harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting." In addition, the USFWS has added "adverse habitat modification" to its definition of "take." 50 C.F.R. § 1402 (1998). The U.S. Supreme Court upheld this interpretation of "take" in *Babbitt v. Sweet Home*, 515 U.S. 687 (1995).

- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.<sup>60</sup>

In making listing determinations, the Secretary is required to rely "solely on the basis of the best scientific and commercial data available to him,"<sup>61</sup> and may not consider any economic nor any "non-biological" factors in the decision.<sup>62</sup>

Under the ESA, the USFWS, acting on its own initiative, can propose a species for listing, or a citizen or a non-federal government entity can petition the agency to list a species.<sup>63</sup> After receipt of a citizen petition to list a species, the USFWS must make a finding within ninety days whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted."<sup>64</sup> If the USFWS determines that the petition does present substantial information, the ESA allows the agency twelve months to conduct a status review of the species and to determine whether the petitioned action is warranted, not warranted, or warranted but precluded.<sup>65</sup> If the agency decides listing is warranted, the Secretary publishes a proposed rule in the Federal Register that identifies the species as threatened or endangered and asks for public comment on the proposed rule.<sup>66</sup> The Secretary also must notify appropriate parties and schedule a hearing if any person requests one.<sup>67</sup> The agency then has twelve months to issue a final rule to list the species for protection under the ESA or to decide not to list the species, though the decision may be postponed for up to six months to collect additional data.<sup>68</sup>

#### A. U.S. Fish & Wildlife Service Priority Guidelines

Congress added time limits in its 1982 amendments to the ESA to force the USFWS to respond more quickly to petitions and to decide more quickly whether to list a species.<sup>69</sup> Additionally, Congress also required the agency to "utilize a scientifically based priority system to list and

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60. § 1533(a)(1).

61. § 1533(b)(1)(A).

62. H.R. CONF. REP. NO. 97-835, at 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860. Congress added these provisions to speed the listing process, while acknowledging the importance of the listing process to the overall success of ESA. H.R. CONF. REP. NO. 97-835, at 19.

63. § 1533(b)(3)(A).

64. *Id.*

65. § 1533(b)(3)(B). Immediate listing may be precluded by "pending proposals to determine whether any species is an endangered species or a threatened species," when "expeditious progress is being made to add *qualified* species to either of the lists." *Id.* (emphasis added).

66. § 1533(b)(5).

67. *Id.*

68. § 1533(b)(6)(A)-(B)(i).

69. H.R. CONF. REP. NO. 97-835, at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2861-62.

delist species, subspecies, and populations based on the degree of threat.”<sup>70</sup> To comply with these Congressional directives, the USFWS developed a numerical ranking scheme based on three criteria: 1) whether the magnitude of threat to the species is “high,” or “medium to low”; 2) whether the immediacy of the threat is “imminent” or “non-imminent”; and 3) whether the taxonomic level of the proposed species is monotypic genus, species, or sub-species.<sup>71</sup> The agency ranks the species one through twelve. A ranking of “one” in this system assigns a species the highest priority, and a ranking of “twelve” is the lowest priority.<sup>72</sup>

To arrive at a ranking number for a species, the USFWS combines the three criteria using the following methodology: First, if the magnitude of threat to the continued existence of a species is high, the USFWS will assign a ranking between one and six; if the threat is moderate to low, the USFWS will assign a ranking between seven and twelve.<sup>73</sup> Next, the agency will consider the immediacy of the threat to the species in order to assign it a more specific rank. If the species faces “actual, identifiable threats,” it will merit a higher rank over a species faced by “potential” threats.<sup>74</sup> Thus if a species faces a high magnitude of threat (and therefore qualifies for a ranking between one and six) and the threat is actual and identifiable, it qualifies for a ranking between one and three. A species facing a high magnitude of threat that is only potential or non-imminent qualifies for a ranking between four and six.<sup>75</sup> Once the agency narrows the range of options by classifying the threat to the species, the agency assigns the final specific rank of a species by applying the taxonomic status of the species.<sup>76</sup> The more distinctive and isolated gene pools which a species represents, the higher priority the USFWS will accord it.<sup>77</sup> Species of a monotypic genus will be assigned the lowest number in the range (either a one, a four, a seven, or a ten), while multi-speciated genres will be assigned the middle number (either a two, a five, an eight, or an eleven), and populations and subspecies, which are accorded equal weight in this system, will be assigned the highest number (either a three, a six, a nine, or a twelve).<sup>78</sup> Thus, “a monotypic genus

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70. *Id.* This “ranking system” requirement is codified at 16 U.S.C. § 1533(g) (1998).

71. 48 Fed. Reg. 43,098, 43,102-03 (1983).

72. *Id.* at 43,103

73. *Id.*

74. *Id.*

75. *Id.* Similarly, a species with a moderate to low magnitude of threat to its continued existence (which qualifies for a ranking between seven and twelve in this system) which has an actual, identifiable threat then qualifies for a ranking between seven and nine, while such a species with a non-imminent, potential threat qualifies for a ranking between ten and twelve. *Id.*

76. *Id.*

77. 1994 Finding, *supra* note 8, at 25.

78. 48 Fed. Reg. at 43,103.

facing a high magnitude and imminent threat receives a rank of '1'; a sub-species facing a moderate-to-low magnitude and non-imminent threat receives a rank of '12.'"<sup>79</sup>

This ranking system allows the USFWS a means to develop relative priorities between individual species.<sup>80</sup> It also allows significant agency discretion, since the agency's regulations do not specify factors for the agency to consider when it assigns numbers assessing the magnitude and immediacy of threat.<sup>81</sup> "Despite this obscurity and indeterminacy in the ranking process, a species' priority level effectively determines whether or not it is listed under the ESA"<sup>82</sup> because the USFWS gives priority to species facing a high magnitude of threat.<sup>83</sup> Thus the USFWS gives priority to species with a ranking of one through six when considering whether to list under the ESA.<sup>84</sup> The USFWS will find that listing a species will be "warranted" when it assigns that species a rank of one through six, and a species of a rank of seven through twelve will be "warranted, but precluded" from listing.<sup>85</sup>

A finding of warranted, but precluded means that even though the species warrants protection biologically under the ESA, the agency and Secretary will not currently propose it for listing.<sup>86</sup> Congress developed the warranted, but precluded category in recognition that the agency might not be able to comply with the strict time requirements of the ESA,<sup>87</sup> and thus created the category as a relief mechanism so the agency could have opportunities to deal with higher priority species first.<sup>88</sup> When it lists a species as warranted, but precluded, however, the USFWS must show that it is actively working on other higher priority listing or delisting proposals, and it must also show that it is making "expeditious progress" on these listing and delisting decisions.<sup>89</sup> The agency must also "implement a system to monitor effectively" the species precluded from listing, and it must "make prompt use of the authority under [the emergency regulations] to prevent a significant risk to the well-being of any such species."<sup>90</sup> Addi-

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79. *Friends of the Wild Swan, Inc. v. USFWS*, 945 F. Supp. 1388, 1391 (D. Or. 1996) [hereinafter *FOWS III*].

80. 48 Fed. Reg. at 43,099.

81. *FOWS III*, 945 F. Supp. at 1391.

82. *Id.*

83. *Id.*

84. 1994 Finding, *supra* note 8, at 25.

85. *See id.*; *FOWS III*, 945 F. Supp. at 1391.

86. 16 U.S.C. § 1533(b)(3)(B)(iii).

87. H.R. CONF. REP. NO. 97-835, at 21-22 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2860, 2862-63.

88. *Id.* at 21.

89. *Id.* at 22.

90. *FOWS III*, 945 F. Supp. at 1393 n.5 (citing 16 U.S.C. § 1533(b)(3)(C)(iii)).

tionally, the agency must re-analyze the status of a warranted, but precluded species each year and re-issue a status finding each year.<sup>91</sup> Congress also directed courts to review challenges to warranted, but precluded findings to "separate justifications grounded in the purposes of the Act from the footdragging efforts of a delinquent agency."<sup>92</sup>

Regardless of the intent of Congress, the warranted, but precluded category "has become a black hole for unlisted endangered species."<sup>93</sup> Species found warranted, but precluded for listing often remain under this designation for years before the USFWS takes any action on listing.<sup>94</sup> A 1992 Government Accounting Office report found that 105 species had been declared warranted, but precluded for more than two years, while fifty-six of these species had been found warranted, but precluded for more than eight years.<sup>95</sup> This delay is in clear contravention of the dictates of the ESA. The warranted, but precluded category, however, was not intended to allow the USFWS "to delay commencing the rulemaking process for any reason other than the existence of pending or imminent proposals to list species subject to a greater degree of threat."<sup>96</sup>

In addition to warranted, not warranted, or warranted, but precluded findings, the USFWS can also issue temporary emergency listings and management directives that remain in effect for 240 days when a situation arises that poses "a significant risk to the well-being of any species of fish or wildlife or plants."<sup>97</sup> Unlike the normal listing process, the rulemaking provisions of the Administrative Procedures Act do not apply to the emergency listing process.<sup>98</sup> However, the USFWS must "publish an explana-

91. 16 U.S.C. § 1533(b)(3)(C)(i).

92. H.R. CONF. REP. NO. 97-835, at 22.

93. Houck, *supra* note 11, at 286. "Warranted" means that the species deserves protection under the ESA because it is in danger of extinction, while "precluded" is an administrative term, not a scientific term.

94. *Id.*

95. *Id.*

96. H.R. REP. NO. 97-567 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2821.

97. 16 U.S.C. § 1533(b)(7).

98. *Id.*; *FOWS III*, 945 F. Supp. at 1394-5. In his decision in *FOWS III*, District Judge Robert Jones discussed the interplay between the Administrative Procedures Act (APA) and the ESA regarding whether a citizen could file a petition asking only for an emergency listing: "the right to petition arises from the APA, 5 U.S.C. § 553(e). See 15 U.S.C. § 1533(b)(3)(A). Section 553 of the APA supplies rulemaking procedures. 5 U.S.C. § 553. The ESA's emergency listing provision explicitly provides that 5 U.S.C. § 553 does not apply to it. 16 U.S.C. § 1533(b)(7). However, the Act also provides that 5 U.S.C. § 553 applies 'to any regulation promulgated to carry out the purposes of this chapter' and does not exempt the emergency listing section from that statement. On its face, therefore, the Act contains ambiguities regarding this issue." *FOWS III*, 945 F.Supp. at 1395 n.8. Judge Jones did not rule on the issue, but suggested the ESA indicates that a citizen cannot use the petition process solely to request an emergency listing. *Id.* at 1395. An emergency listing request must then be part of a normal petition, and would seek, presumably, interim protection for a species while its status undergoes review.

tion of its reasons for issuing the emergency regulation and must give actual notice of the regulation to the states in which the species occurs.”<sup>99</sup> As with the normal listing process, the agency may act on its own volition, or may act in response to a petition from a citizen.<sup>100</sup>

### B. *Congress and the Endangered Species Act*

The ESA, first passed in 1973, has been tinkered with several times by Congress.<sup>101</sup> Congress has revised the ESA seven times since 1973, but each time made only minor changes to the Act.<sup>102</sup> Recent changes in the composition of Congress, particularly after the 1994 elections, led to a more hostile congressional view of the ESA, and reauthorization bills have been introduced to drastically weaken the species protection provisions of the Act.<sup>103</sup> To date, however, no ESA reauthorization bill has been approved into law, so agencies continue with uncertain directives and priorities.<sup>104</sup>

Congress also has exercised its authority over annual funding allocations to the USFWS to influence how the ESA is implemented by the agency.<sup>105</sup> On April 10, 1995, for example, the newly-elected Republican majority in Congress rescinded \$1.5 million in funding that the USFWS had intended to use for listing determinations of petitioned species, and forbade use of any other funds by the agency to make any final determinations to list a species.<sup>106</sup> The USFWS listing program was funded minimally by a series of continuing resolutions, each of which continued the moratorium against final listing and curtailed the funding available for the entire listing program.<sup>107</sup> The USFWS reassigned listing staff to other areas, so the listing program was “essentially shut down” from October 1, 1995 until April 26, 1996.<sup>108</sup> President Clinton eventually waived the

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99. *FOWS III*, 945 F. Supp. at 1394.

100. *Id.* at 1395.

101. *See, e.g.*, Pub. L. No. 94-359, 90 Stat. 913 (1970); Pub. L. No. 96-159, 93 Stat. 1225 (1979); and Pub. L. No. 97-304, 96 Stat. 1420 (1982).

102. *See* Doremus, *supra* note 11, at 1051-56.

103. *See* Lieben, *supra* note 11, at 1333-34.

104. *See, e.g.*, Memorandum from Subcommittee Majority Staff to Members of Subcommittee on Fisheries Conservation, Wildlife and Oceans (of U.S. House of Representatives Committee on Resources) BH-51 (March 1, 1999) [hereinafter Subcommittee Memo]. The USFWS anticipated that it would have to address “new procedural requirements under a reauthorized” ESA. *Id.*

105. *See id.*

106. 61 Fed. Reg. 24,722, 24,722-23 (1996). Public Law 104-6, which took effect April 10, 1995, rescinded \$1.5 million from USFWS’ 1995 listing appropriation of \$7.999 million and “stipulated that the remaining listing funds could not be used to make final listing or critical habitat designations.” *Id.*

107. 61 Fed. Reg. 64,475, 64,476 (1996).

108. *Id.*

funding impasse on April 26, 1996, with the Omnibus Consolidated Re-scissions and Appropriations Act of 1996, which restored \$4 million to the USFWS for listing determinations, but a large backlog of species to be listed had amassed during the moratorium.<sup>109</sup>

When the moratorium ended, USFWS issued new rules to guide it in dealing with the backlog of species proposed for listing because budget appropriations from Congress were not large enough to allow the agency to deal with all the species in the backlog.<sup>110</sup> The new rules, which were adopted on a temporary basis, delineated new USFWS listing priorities.<sup>111</sup> Under these new listing regulations, the agency would afford highest priority to "processing emergency listing rules for any species determined to face a significant threat to its well being."<sup>112</sup> The next highest priority would be processing final listings on species already proposed to be listed.<sup>113</sup> The third priority would be "processing new proposals to add species to the lists and processing administrative findings on petitions to add species to the lists."<sup>114</sup> Lowest priority would go to designating critical habitat and processing proposed delistings and reclassifications.<sup>115</sup> The USFWS would still follow the 1983 Priority Guidelines to determine the order to proceed on listing activities, but within the tighter strictures of the new 1996 guidelines.<sup>116</sup>

Congress authorized a \$5 million listing budget for the USFWS in 1997, but this amount was less than the USFWS felt was needed to deal with the backlog of proposed species.<sup>117</sup> Listing appropriations have hovered near this amount since then, most recently with about \$5.2 million in 1998 and \$5.7 million in 1999.<sup>118</sup> USFWS has requested \$7.5 million for listing determinations in 2000,<sup>119</sup> but appropriated amounts in all recent years are still much lower than the 1992 amount of \$8.1 million, the 1993 amount of \$9.7 million,<sup>120</sup> or the 1994 amount of \$7.999 million.<sup>121</sup>

109. *Id.*

110. *Id.* at 64,479. The USFWS felt that the "backlog and the funding shortfall underscore the need to maintain program-wide biologically sound priorities to guide the allocation of limited resources. Absent such priorities, existing and threatened litigation could overwhelm the limited resources the Service received in FY 1997." *Id.* at 64,476.

111. *Id.* at 64,475. The effective dates of the guidelines were proposed to run from Dec. 5, 1996, until Sept. 30, 1997. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* The bull trout was a third priority species under this regime.

115. *Id.*

116. *Id.*

117. 61 Fed. Reg. at 64,476.

118. Subcommittee Memo, *supra* note 104, at BH-50.

119. *Id.* at BH-50-51; Jamie Clark, Director, USFWS, Statement before the U.S. House of Representatives Resources Committee, Subcommittee on Fisheries Conservation, Wildlife and Oceans at 2-3 (March 4, 1999) [hereinafter Clark Statement].

120. Houck, *supra* note 11, at n.115. The USFWS asked for only \$8.5 million in 1993, but Con-

The USFWS has not yet worked through the backlog that has accumulated. As of September 30, 1998, 162 species were candidates for listing under the ESA.<sup>122</sup> The USFWS has requested additional funds from Congress to process the listing backlog, but the USFWS needs these funds particularly to defend litigation over its handling of species proposed for listing.<sup>123</sup> As the case of the process to list the bull trout under the ESA demonstrates, the agency has been willing to expend funds from its listing budget in litigation to avoid listing a species that needs the protection of the ESA than to expend funds to list and protect an imperiled species.

#### IV. LISTING THE BULL TROUT

By 1992, the bull trout had disappeared from over half of its historic range, and faced high risks of extinction in the stream reaches that it still inhabited.<sup>124</sup> Some fisheries biologists believed that "the plunge to extinction wouldn't take much of a push" for the bull trout.<sup>125</sup> The conservation groups that filed the petition to list the bull trout in October 1992 believed the primary cause of the decline in bull trout populations was the cumulative impacts to water quality in bull trout habitat, particularly land-use activities causing sedimentation.<sup>126</sup> The petitioners summarized research on the populations that indicated that over ninety percent of populations in Montana, over eighty-three percent of populations in north Idaho, and over fifty-four percent of populations in Oregon were at a moderate to high risk of extinction.<sup>127</sup> The petitioners asked the USFWS to not only consider the bull trout for listing under the ESA, but also requested the agency to consider emergency listing for the bull trout in twenty-six aquatic systems and waterbodies.<sup>128</sup>

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gress appropriated \$9.7 million. *Id.*

121. 61 Fed. Reg. at 24,722.

122. Subcommittee Memo, *supra* note 104, at 2. One hundred and seventeen of these are from USFWS Region 1, the Pacific Northwest states. *Id.*

123. Clark Statement, *supra* note 119, at 3. Clark noted that the agency was faced with 24 Notices of Intent to Sue under the ESA, involving 151 species. The agency expects to list 100 species during fiscal year 2000. *Id.*

124. 1992 Petition, *supra* note 3, at 3-4

125. Greg Lakes, *Bull trout flounder in Bitterroot*, MISSOULIAN, April 13, 1992, at A-1.

126. 1992 Petition, *supra* note 3, at 10.

127. *Id.* at 3-4. A petition requesting the USFWS to list a species under the ESA does not have to include exhaustive research or a literature summary in order for the agency to begin a 90-day status review, petitioners included specific research and data summaries in order to help speed the agency process. Interview with Mike Bader, executive director of AWR, in Missoula, Mont. (April 16, 1999).

128. 1992 Petition, *supra* note 3, at 5. Specifically, the petitioners requested emergency listings in the following aquatic systems: Flathead Lake and Flathead River Basin; Bitterroot River; Blackfoot River; Clark Fork River; Lake Pend Oreille; Priest Lake; Coeur d'Alene River; Kootenai River; Fisher River; and Yaak River. Petitioners also requested emergency listings for the following waterbodies:



The petitioners considered the bull trout to be an "indicator species" of ecosystem health: "Bull trout are sensitive to water quality," so declining populations show that "the water is becoming polluted."<sup>129</sup> The petitioners also found a strong correlation between healthy bull trout populations and "undeveloped, substantially roadless areas."<sup>130</sup> The petition to list the bull trout asked the USFWS to protect the remaining roadless area habitat of the bull trout because "bull trout are highly intolerant of any human-caused modification of their native habitat," and are therefore "in critical need of stringent habitat protection measures" that were not in place.<sup>131</sup> The petition also asked the USFWS for "aggressive efforts" to restore lower elevation habitat that had already been developed, and to remove migration barriers that prevented genetic interchange.<sup>132</sup>

Under the ESA, the USFWS had ninety days to issue a finding after the conservation groups filed their petition with the agency.<sup>133</sup> The agency took over six months to issue its ninety-day finding, in which it concluded that the petition presented substantial information that listing of the bull trout might be warranted.<sup>134</sup> The next obligation under the ESA for the USFWS was to conduct a status review of the species and issue a twelve-month finding by October 28, 1993.<sup>135</sup> This date came and went with no action by the agency, so petitioners filed a sixty-day notice of intent to sue the USFWS on December 1, 1993, for failure to publish a twelve-month finding.<sup>136</sup> The petitioners eventually sued the USFWS on February 8, 1994, to force it to issue a twelve-month finding.<sup>137</sup> After negotiations, the government and the petitioners reached a settlement agreement on April 12, 1994, in which the USFWS agreed to release the twelve-month finding before June 8, 1994, and agreed that the plaintiffs were the prevailing party in the action and were due reasonable attorney's fees.<sup>138</sup> All other claims were dismissed without prejudice, and the agen-

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Flint Creek; Middle Fork of the Willamette River; Trailbridge Reservoir; Clear Branch of the Hood River; Boulder and Dixon Creek tributaries to the Klamath River; Coyote Creek tributaries to the Sycan River; Cherry and Sun Creek tributaries to Upper Klamath Lake; Odell Lake; Granite Boulder and Big Creek tributaries to the John Day River; Middle Fork of the Malheur River; Eagle Creek tributary to the Powder River; Wenatchee River basin; Entiat River basin; Yakima River basin; Naches River basin; and Jarbidge River basin. *Id.*

129. *Government Protection Sought for Bull Trout*, NEW YORK TIMES, November 1, 1992.

130. 1992 Petition, *supra* note 3, at 4.

131. *Id.*

132. *Id.*

133. 16 U.S.C. § 1533(b)(3)(A). See *supra* text accompanying notes 59-63.

134. 58 Fed. Reg. 28,849 (1993).

135. 16 U.S.C. § 1533(b)(3)(B).

136. ESA requires that citizen plaintiffs provide a sixty-day notice before filing suit against the government. 16 U.S.C. § 1540(g).

137. *Alliance for the Wild Rockies v. Babbitt*, No. 94-0246-JLG (D.D.C. 1994).

138. *Id.* at 2-3. ESA provides that prevailing parties in a suit against the government are entitled

cy finally did release its twelve-month finding (1994 Finding) on June 6, 1994, seven and a half months late.<sup>139</sup>

The 1994 Finding concluded that the listing of the bull trout under the ESA was warranted, but precluded.<sup>140</sup> The agency arrived at this conclusion by assessing the fish under its three-part priority listing system.<sup>141</sup> First, the USFWS found that the threat to the bull trout's existence was moderate, "because of its widespread range, the existence of populations in protected areas, and ongoing management changes [e.g., Forest Plans] that are expected to benefit some populations."<sup>142</sup> Because the USFWS assessed the threat as moderate, the bull trout priority rank could fall only between six and twelve, depending on the two remaining factors, imminency of threat and taxonomy. The USFWS found that the threat to bull trout was imminent, due to "current population declines and present threats from continuing, ongoing activities,"<sup>143</sup> thus the ranking was narrowed to the six through nine range. Finally, the USFWS handled the bull trout as a subspecies because "[d]istinct vertebrate population segments are treated the same as a subspecies in the Service's priority system."<sup>144</sup> Subspecies are accorded the lowest priority in the ranking system, so the USFWS assigned the bull trout a final priority ranking of nine. Thus the agency found the bull trout, with its ranking of nine, was warranted for listing, but precluded by the agency's need to address higher priority species with rankings of one through six.<sup>145</sup> If, however, the USFWS had found that the threat to the continued survival of the bull trout was high, instead of moderate, the agency would have assigned the fish a priority ranking of three, and the fish would have been found warranted for listing under the ESA.

Before the USFWS Region One director assigned the bull trout a ranking of three, the agency's own bull trout status review team, comprised of bull trout biologists, had assigned the bull trout a priority ranking of two, indicating a high and imminent threat of extinction.<sup>146</sup> The

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to an award of the costs of litigations as well as reasonable attorneys fees. 16 U.S.C. § 1540(g)(4).

139. 12-Month Petition Finding on the Bull Trout, USFWS (June 6, 1994). The USFWS stated that the "period of the Service's status review was extended due to insufficient staff." *Id.* at 3.

140. 1994 Finding, *supra* note 8, at 26.

141. *Id.*

142. *Id.* at 25.

143. *Id.* at 25-26.

144. *Id.* at 26.

145. *Id.* at 25.

146. Memorandum from Carolyn Scafidi, USFWS Bull Trout Status Review Team Leader, to Ron Rhew, Lori Nordstrom, Wade Fredenberg, John Grettenberger, Bob Hallock, and Jim Esch, USFWS Bull Trout Status Review Team members, Preliminary Briefing and Update 1 (Feb. 28, 1994). Included in the court record as Plaintiff's Exhibit E in *FOWS III*. Interestingly, the USFWS chose to redact (that is, blacken out) the portions of this and other memos from the status review team that

agency biologists found that not only was the threat to survival imminent and high, but that no bull trout populations had "shown a longterm steady rate of increase due to the elimination of threat factors. It is clear to me that we know how to 'protect' bull trout habitat, but we don't know how to 'fix' it once it has degraded. The management of the watersheds has been geared towards threshold limits, and we have now reached the point where secure habitat across the entire range of this species has been pushed to the threshold. Without any viable tools to fix the problems, I find the future of this species to be at great risk."<sup>147</sup> The status review team recommended that "the bull trout be considered warranted for listing as threatened rangewide . . . . The cumulative and synergistic effects of multiple threats facing isolated bull trout populations are serious and support this determination."<sup>148</sup>

AWR and FOWS knew that the warranted, but precluded finding "could leave bull trout in administrative limbo for years," and because they believed the administrative record supported an immediate listing as an endangered species, they filed a sixty-day notice as required by the ESA to seek judicial review within a week of the 1994 Finding.<sup>149</sup> After receiving no response from USFWS, the conservation groups then filed suit on November 1, 1994, in federal district court in Oregon, arguing that the warranted, but precluded 1994 Finding was arbitrary and capricious and that the agency had failed to address the emergency listing request in the 1992 Petition.<sup>150</sup> The gravamen of the complaint was that the administrative record, including the near unanimous advice of the agency's bull trout experts, demonstrated that the fish should have been proposed for listing in the twelve-month finding.<sup>151</sup>

On January 31, 1995, the USFWS issued a new ranking priority for the bull trout, in which it found that the threats to the bull trout's survival were "high," and thus upgraded its priority ranking from nine to three.<sup>152</sup>

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indicated that the team recommended a priority ranking of two when these documents were submitted to the administrative record before the court in *FOWS III*, apparently to obfuscate that agency biologists had recommended a ranking of two for the bull trout.

147. Memorandum from Wade Fredenberg to Carolyn Scafidi, Listing Priority for Bull Trout 1 (Feb. 23, 1994).

148. Briefing Statement from David C. Frederick, State Supervisor, Ecological Services, Washington State Office, USFWS to Regional Director, USFWS Region 1, Updated Bull Trout Briefing Statement 1 (Feb. 22, 1994).

149. Plaintiff's Memorandum in Support of Motion for Expedited Review at 3 [hereinafter Expedited Review Memo]; *Friends of the Wild Swan, Inc. v. USFWS*, 81 F. 3d 168, 1996 WL 155143, No. 95-36916 (9<sup>th</sup> Cir. 1996) [hereinafter *FOWS II*].

150. *Friends of the Wild Swan, Inc. v. USFWS*, No. CV-94-01318-REJ (D. Or. 1995) [hereinafter *FOWS I*].

151. Expedited Review Memo, *supra* note 149, at 3.

152. *FOWS II*, 1996 WL 155143 at \*1. The USFWS explained that, "[b]ased on the most recent status review, there was a consensus among biologists that a vast majority of the remaining bull trout

The agency, however, continued to classify the bull trout as warranted, but precluded, despite the priority ranking of three.<sup>153</sup> AWR and FOWS then moved for summary judgment on March 27, 1995, asserting that the switch from nine to three supported their claim that the ranking of nine in the 1994 Finding was arbitrary.<sup>154</sup> The USFWS moved the court to dismiss the case as moot, since the plaintiffs had no reason to seek judicial relief once the bull trout had been granted a priority ranking of three.<sup>155</sup> The USFWS also asked the court at least to issue a stay until the USFWS released its new status review of the bull trout, which was due in June 1995.<sup>156</sup> The court granted the stay until the USFWS released the new status review of the bull trout on June 12, 1995 (hereinafter 1995 Finding).<sup>157</sup> The 1995 Finding returned the priority ranking of the bull trout to nine and retained its warranted, but precluded status.<sup>158</sup> The agency explained that in January 1995 there was uncertainty about pending state and federal management actions, and the USFWS concluded that threats previously considered moderate in several watersheds were now of high magnitude and the majority of the populations “were subject to imminent threats of high magnitude” so the agency elevated the priority ranking for the bull trout to three.<sup>159</sup> By June 1995, however, the USFWS found that state and federal agencies had initiated activities that would reduce the magnitude of threats to bull trout.<sup>160</sup> The USFWS believed “that these actions will provide the foundation for implementation of conservation actions and management strategies that should recover and sustain sub-populations of threatened, endangered, or sensitive species, including bull trout.”<sup>161</sup>

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populations are subject to threats meeting listing priority 3 criteria.” *Id.* at \*3 n.4.

153. *Id.* at \*1.

154. Expedited Review Memo, *supra* note 149, at 3.

155. *Id.* at 3-4.

156. *FOWS II*, 1996 WL 155143 at \*1. When the agency makes a warranted, but precluded finding, it must treat the petition as resubmitted, and must issue another twelve-month finding on the status and priority ranking of the species. 16 U.S.C. § 1533(b)(3)(C)(i). See *supra* text accompanying notes 89-90. The 1994 Finding had been issued in June, 1994, so the agency had twelve months from that warranted, but precluded finding to complete another status review and issue a finding.

157. *FOWS II*, 1996 WL 155143 at \*1.

158. Memorandum from Regional Director, USFWS Region 1, to Director of USFWS, Recycled Petition Finding on a Petition to List the Bull Trout under the Endangered Species Act (May 31, 1995) [hereinafter 1995 Finding], summarized at 60 Fed. Reg. 30,825 (1995).

159. *Id.* at 2.

160. *Id.* at 18.

161. *Id.* The agency status review team did not share the regional director’s optimism and faith in the conservation efforts of states and industry groups. In the briefing statement prepared for the 1994 Finding, the status review team reminded the regional director that it was “likely that federal and state agencies, as well as industry groups, will immediately discontinue any conservation efforts once the one-year finding is published and listing is no longer imminent or likely.” Briefing Statement from David C. Frederick, State Supervisor, Ecological Services, Washington State Office, USFWS to Re-

Soon thereafter, on June 22, 1995, the court issued a *sua sponte* ruling that declared the plaintiff's challenge to the 1994 Finding moot, and the court instructed the plaintiffs to amend their complaint to challenge the 1995 Finding if they so desired.<sup>162</sup> The plaintiffs moved the court to reconsider the mootness finding, and rule on the merits of the case presented for summary judgment, but the court denied the motion on July 31, 1995.<sup>163</sup>

FOWS and AWR, however, chose to appeal the decision to the Ninth Circuit, which found on April 2, 1996, that the conservation organizations' challenge fell "within the exception to the mootness doctrine for claims that are capable of repetition yet evading review,"<sup>164</sup> and sent the case back to Judge Robert Jones at the district court in Oregon to resolve the case on its merits.<sup>165</sup> The Ninth Circuit ruled that "the major question here—whether listing the bull trout as a threatened species is warranted—is reasonably likely to recur. In fact, its recurrence is mandated; the FWS is required by the ESA to make a new determination every twelve months if it finds listing the bull trout warranted but precluded."<sup>166</sup> The reason that the findings fall within the exception is that it must be published annually, and if publishing a new finding would moot the old finding, as the USFWS claimed, it would "put the plaintiffs on a never-ending treadmill" because the suit on the old finding would never be decided before the new finding would come out.<sup>167</sup>

Judge Jones then considered plaintiffs' claims that the USFWS had acted arbitrarily and capriciously in its 1994 Finding. In his November 13, 1996, ruling, the judge first determined that even though the USFWS acknowledged plaintiffs' request for emergency listing in the 1994 Finding, the agency "made no explicit findings regarding emergency listings for any subpopulation, nor did it explain why it did not make those findings."<sup>168</sup> The lack of explanation why the USFWS denied plaintiffs' requests for emergency listing was enough to make the agency decision

gional Director, USFWS Region 1, Bull Trout One-Year Finding 1 (May 25, 1994).

162. *FOWS II*, 1996 WL 155143 at \*1.

163. Expedited Review Memo, *supra* note 149, at 4.

164. *FOWS II*, 1996 WL 155143 at \*1. The court ruled that the "duration of the challenged action in this case clearly is too short to permit full litigation before it ceases. A finding is generally effective for twelve months . . . [W]e have consistently held, in cases similar to this one, that one year or less is too short a time period to allow for full litigation." *Id.* at \*2.

165. *Id.* at \*1.

166. *Id.* at \*2.

167. Interview with Jack Tuholske, attorney for AWR and FOWS, in Missoula, Mont. (May 19, 1999).

168. *FOWS III*, 945 F. Supp. at 1396. For an explanation of judicial review under the arbitrary and capricious standard, see *infra* text accompanying notes 209-220.

arbitrary and capricious.<sup>169</sup> Then the judge analyzed whether the agency finding of warranted, but precluded was arbitrary and capricious. The court looked at the factors the agency considered in ascertaining that the bull trout was faced with only moderate threats: that the bull trout has a widespread range, exists in protected areas, and that the management plans of other agencies would lessen any threats.<sup>170</sup> The court limited its review to the “propriety of [the agency’s] reliance on these factors.”<sup>171</sup>

The court found that the USFWS had “repeatedly emphasized the loss of the migratory life form as an important factor creating that risk of extinction. Therefore, its reliance on the species’ widespread range—a range consisting largely and increasingly of isolated subpopulations—as a reason for viewing the threat as ‘moderate’ is internally inconsistent.”<sup>172</sup> Further, the court pointed to evidence in the record that indicated the threats of extirpation of bull trout in protected habitats by non-native species such as brook trout and lake trout.<sup>173</sup> The USFWS did not cite to anything in the record, nor could the court “find anything in that record, that supports [the USFWS] conclusion that the presence of bull trout in protected areas reduces the magnitude of the threat to the species.”<sup>174</sup> Judge Jones thus found that the reliance on the presence of bull trout in protected areas was an explanation that “ran counter to the evidence before the agency,” and was therefore arbitrary and capricious.<sup>175</sup>

Finally, the court found that reliance on other agencies’ future management plans was arbitrary and capricious for four reasons. First, the USFWS stated that it relied on perceived ameliorations of the Clinton Forest Plan to find only a moderate threat, but this Plan was not part of the administrative record for the 1994 Finding, so the agency should not have relied on it.<sup>176</sup> Next, because the USFWS was required to base listing decisions on analyses of existing threats, it could not “rely upon its own speculations as to the future effects of another agency’s management plans to put off listing a species . . .”<sup>177</sup> Third, the USFWS found past and present regulatory mechanisms by other agencies inadequate in its 1994 Finding, but then relied on future regulatory mechanisms to avoid listing the bull trout.<sup>178</sup> Finally, the USFWS reliance on the plans of oth-

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169. *FOWS III*, 945 F. Supp. at 1396.

170. *See supra* text accompanying note 126.

171. *FOWS III*, 945 F. Supp. at 1397.

172. *Id.*

173. *Id.* at 1398.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1398-99.

er federal agencies was "contrary to the provisions and purposes of the ESA," since the ESA "imposes conservation duties on all federal agencies only *after* FWS has taken the initial step of listing the species as endangered or threatened."<sup>179</sup>

Judge Jones went on to inform the USFWS that the 1995 Finding was subject to the same infirmities as the 1994 Finding, since it too had relied on management strategies of other federal agencies to find a moderate threat to bull trout, rather than a high threat.<sup>180</sup> Further, the 1995 Finding made no findings regarding the plaintiff's request for an emergency listing, and the judge found this "insufficient as a matter of law."<sup>181</sup> The USFWS argued that the 1995 Finding superceded the 1994 Finding and therefore the plaintiffs were only entitled to declaratory relief. Judge Jones, however, reminded the agency that if the agency had completed the 1994 Finding properly and found a high threat, there would have been no reason to complete a 1995 Finding. If the agency had made a warranted, but precluded finding in 1994, they would still have to complete a status review each year, and the USFWS had issued no twelve-month review of bull trout subsequent to the June 1995 Finding—even though it was then November 1996—contrary to the ESA.<sup>182</sup> Judge Jones then remanded the 1994 Finding back to the USFWS for further consideration limited to the record before the agency in 1994 with instructions to incorporate any determination that the bull trout faced a high threat in 1994 into its current listing priorities.<sup>183</sup>

With this fairly unfavorable decision in hand, the USFWS issued a revised 1994 Finding on March 12, 1997, in which it found that the bull trout warranted a priority ranking of three.<sup>184</sup> Then on June 17, 1997, the USFWS issued a rule proposal that delineated five distinct population segments of bull trout: "(1) Coastal/Puget Sound; (2) Klamath River; (3) Columbia River; (4) Jarbidge River; and (5) Saskatchewan River."<sup>185</sup> The 1997 Proposed Rule proposed to list the Klamath River population segment as endangered under the ESA and the Columbia River population segment of the bull trout as threatened under the ESA.<sup>186</sup> FOWS and

179. *Id.* at 1399.

180. *Id.* at 1400.

181. *Id.*

182. *Id.* (citing *FOWS II*, 1996 WL 155143 at \*2 (citing 16 U.S.C. §§ 1533(b)(3)(B) and 1533(b)(3)(C)(i))).

183. *Id.* at 1401.

184. Memorandum from Regional Director, USFWS Region 1, to Director of USFWS, 12-Month Petition Finding on a Petition to List the Bull Trout as Threatened or Endangered 2 (March 11, 1997) [hereinafter Revised 1994 Finding].

185. 62 Fed. Reg. 32,268, 32,269 (1997) (to be codified at 50 C.F.R. pt. 17) (proposed June 13, 1997).

186. *Id.* at 32,268

AWR again filed suit in Judge Jones' court, because the "USFWS never considered whether the entire species warranted listing under the ESA. Instead, USFWS identified five significant and distinct population segments and made its listing decisions only with regard to those five subpopulations."<sup>187</sup> Further, the plaintiffs claimed that the USFWS did not identify critical habitat for the Klamath River and Columbia River population segments that it proposed for listing, finding that the "determination of critical habitat is not determinable for these distinct population segments based on the 1994 administrative record," and "the biological needs of the species in the two population segments are not sufficiently well known to permit identification of areas of critical habitat in 1994 administrative record. Specifically, no information was available in the 1994 record on the number of individuals required for a viable population throughout the distinct population segment."<sup>188</sup>

The 1994 Finding had found listing the bull trout throughout its range warranted for listing,<sup>189</sup> but the Revised 1994 Finding found that only two populations segments warranted listing.<sup>190</sup> The court found that the USFWS's failure to consider the petitioners' request to consider listing the bull trout throughout its range in the Revised 1994 Finding was a failure to address the scope of the petition, and therefore arbitrary and capricious.<sup>191</sup> The court thus remanded the Revised 1994 Finding back to the agency to determine whether the whole species throughout its range warranted listing under the ESA.<sup>192</sup> Judge Jones did find that analyzing bull trout viability in separate population segments held merit as a second tier of analysis.<sup>193</sup> Finally, the court ruled that the USFWS finding that the Puget Sound population segment was not warranted was arbitrary and capricious because the agency "depart[ed] from its precedent without giving good reason."<sup>194</sup> The judge could not find arbitrary and capricious behavior in the USFWS decisions that the Jarbidge and Saskatchewan River population segments did not warrant listing.<sup>195</sup>

A year after the USFWS issued the 1997 Proposed Rule, Bruce Babbitt made his June 5, 1998, appearance on the banks of the Blackfoot

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187. *Friends of the Wild Swan, Inc. v. USFWS*, 12 F. Supp. 2d 1121, 1124 (D. Or. 1997) [hereinafter *FOWS IV*].

188. 62 Fed. Reg. at 32,281.

189. 1994 Finding, *supra* note 8, at 26.

190. Revised 1994 Finding, *supra* note 184, at 2.

191. *FOWS IV*, 12 F. Supp. 2d at 1134.

192. *Id.*

193. *Id.*

194. *Id.* at 1135 (quoting *Northern California Power Agency v. F.E.R.C.*, 37 F.3d 1517, 1522 (D.C. Cir. 1994)).

195. *Id.* at 1136.



River to announce the listing of the Columbia and Klamath River population segments of the bull trout.<sup>196</sup> This listing covered approximately seventy-five percent of the bull trout range in the coterminous United States.<sup>197</sup> A few days later, the USFWS proposed to list the Coastal Puget Sound, Jarbidge River, and St. Mary-Belly River populations as threatened.<sup>198</sup> A month later, in July 1998, the Elko County (Nevada) Road Department decided to conduct unauthorized repair of the Jarbidge Canyon Road. Elko County created about 275 meters of new road by dumping rough fill from the adjacent hillsides into the Jarbidge River and channelizing the river.<sup>199</sup> The construction created a sediment plume 5.6 kilometers downstream and "completely destroyed all aquatic habitat in this area."<sup>200</sup> The State of Nevada and the U.S. Army Corps of Engineers issued cease and desist orders to Elko County on July 24, 1998, but significant harm had already been done to bull trout habitat in the Jarbidge River.<sup>201</sup> Finding that "[a]n emergency posing a significant risk to the well-being and continued survival of the Jarbidge River bull trout exists as a result of channel alteration associated with unauthorized road construction, and the substantial risk that such construction will continue," the USFWS listed the Jarbidge River bull trout as endangered under the emergency provisions of the ESA on August 11, 1998.<sup>202</sup> Emergency listings are valid for 240 days, so this emergency listing expired on April 8, 1999. On the day the emergency listing expired, the USFWS listed the Jarbidge River population as threatened under the ESA.<sup>203</sup> Decisions to list the Coastal Puget Sound and the St. Mary-Belly River populations as threatened are expected in June 1999.<sup>204</sup>

Thus the listing process that began with a petition filed in 1992 that asked the USFWS to make emergency listing determinations because of the dire situation faced by the bull trout throughout its range finally may result in the listing of the species as threatened throughout its range in 1999.<sup>205</sup>

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196. See *supra* note 1. The agency has not yet designated critical habitat for these population segments, nor has it designated critical habitat for the Jarbidge River population segment. 64 Fed. Reg. 17,110, 17,121 (April 8, 1999).

197. See, 62 Fed. Reg. 32,268.

198. 63 Fed. Reg. 31,693 (1998) (to be codified at 50 C.F.R. pt.17) (proposed June 10, 1998). The St. Mary-Belly River population is the U.S. portion of the Saskatchewan River drainage population.

199. 63 Fed. Reg. 42,757, 42,760 (1998) (to be codified at 50 C.F.R. pt. 17) (proposed August 11, 1998).

200. *Id.*

201. *Id.* at 42,760-761.

202. *Id.* at 42,760. See *supra* text accompanying note 97.

203. 64 Fed. Reg. 17,110 (1999) (to be codified at 50 C.F.R. pt. 17) (proposed April 8, 1999).

204. *Id.* at 17,112.

205. The listing is scheduled to be published in June 1999, and although it is very likely that the Puget Sound and Saskatchewan populations will be listed, as of this writing it is not certain that the

## V. STALL AND DELAY

The ESA provides stringent time requirements for the USFWS to respond to citizen petitions: after a petition is filed, the agency has ninety days to determine whether a status review is warranted, and twelve months to issue a finding of whether the species warrants protection under the ESA.<sup>206</sup> Unless a citizen petitioner files a sixty-day notice of intent to sue, however, the agency has virtually no impetus to act on a petition in a timely fashion, and may stall the process until the threat of a lawsuit looms, or even until a court orders compliance. The agency can gain still more delay time by issuing a warranted, but precluded finding. Thus even though the species may be found warranted for protection under the Act, the agency can stall the process by claiming that budgetary concerns force it to consider other, higher priority species first. This forces petitioners to take the agency to court, where petitioners must overcome the significant procedural standard posed by the arbitrary and capricious standard of review. In court, the agency again can stall and delay by using procedural methods to string the suit out as long as possible.

As the case of the bull trout has shown, the USFWS attempts to avoid its responsibilities under the ESA by trying to delay and avoid listing species rather than attempt to conserve and restore populations of imperiled species. The goal of the agency regarding bull trout, as pronounced by Assistant Secretary of the Interior for Fish, Wildlife, and Parks George Frampton, was to avoid implementing and complying with the ESA: "You can avoid listings. . . . it is an example of what we think is a right approach to the ESA, not the wrong approach; and that is, to try to work together to avoid listings, head off listings, and avoid listings and not get the ESA's regulatory provisions involved at all, if we can stay away from them."<sup>207</sup>

The USFWS did not issue a ninety-day finding for the bull trout until more than six months after the petitioners filed the 1992 Petition. Subsequently, the agency only issued its twelve-month finding, due in October 1993, in June 1994 under terms of a court settlement after the petitioners sued the agency to force compliance with ESA deadlines. These procedural stalling mechanisms are not unique to the case of the bull trout. The USFWS took six years, coerced along the way by two lawsuits, to issue a positive ninety-day finding on the northern goshawk.<sup>208</sup> The agency also

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bull trout will be protected throughout its range.

206. See *supra* text accompanying notes 63-67.

207. George Frampton, Assistant Secretary of the Interior for Fish, Wildlife, and Parks, testimony before U.S. Senate Committee on Natural Resources Subcommittee on Forests and Public Land Management (Apr. 26, 1995). Ironically, perhaps, Frampton was the executive director of the Wilderness Society before entering the Clinton administration bureaucracy.

208. 62 Fed. Reg. 50,892 (1997) (to be codified at 50 C.F.R. pt. 17) (proposed Sept. 29, 1997).

needed the helping hand of a lawsuit to issue a positive ninety-day finding on black-tailed prairie dogs only four months tardy.<sup>209</sup> Unless a concerned and determined petitioner is willing and able to sue the agency to force it to comply with the ESA, the agency has shown a persistent habit of dawdles and delays in making ninety-day findings.

After petitioners finally elicit a finding, the USFWS enables itself to arrive at warranted, but precluded findings by making sure it does not have adequate funding in its listing budget to process the species petitioned for listing. The USFWS has attempted to shift blame to funding mechanisms in Congress and budgetary constraints for its intransigence and delay, but the agency has placed listing imperiled species near the bottom of its funding priorities. The USFWS has been reluctant to request the appropriate amount of money it needs for listing activities, because listing is a "lower priority activity" and because "any significant increase in the number of species being listed each year . . . would require a commensurate increase in funding for recovery, consultations, law enforcement, research and related sub-activities."<sup>210</sup> The USFWS has refused to ask Congress for more money "because it then would have to become more active in the conservation and restoration of endangered species—the very purpose of the ESA."<sup>211</sup> USFWS Director Jamie Clark, for example, requested only \$7.5 million for USFWS listing activities in 2000, out of a total budget request of \$1.58 billion for the USFWS in 2000.<sup>212</sup> In the same budget request, Clark asked Congress to allocate an increase of \$23 million over 1999 levels for "successful ESA reforms," including candidate conservation agreements, which "assure non-federal landowners that they will not have to incur additional conservation measures if species are listed in the future," and safe harbor agreements, which "enable landowners to pursue economic development without jeopardizing critical habitat

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The court found that USFWS refusal to issue a positive ninety-day warranted finding was arbitrary and capricious first in *Southwest Center for Biological Diversity v. Babbitt*, 926 F. Supp. 920 (D. Ariz. 1996), then a second time in *Southwest Center for Biological Diversity v. Babbitt*, 980 F. Supp. 1080 (D. Ariz. 1997). The USFWS then issued a negative twelve-month finding for the goshawk. 63 Fed. Reg. 35,183 (1998) (to be codified at 50 C.F.R. pt.17) (proposed June 29, 1998). Petitioners filed suit on Feb. 25, 1999, claiming that this decision, too, was arbitrary and capricious.

209. Jonathan Proctor, *Predator Project Files Suit to Force Prairie Dog Decision*, THE HOME RANGE (Predator Project, Bozeman, Mont.) Winter/Spring 1999, at 15. The National Wildlife Federation filed a petition to list the black-tailed prairie dog on July 31, 1998, and Predator Project filed a petition to list the black-tailed prairie dog on Aug. 26, 1998. Predator Project filed a notice of intent to sue on Dec. 1, 1998, and filed suit against the USFWS on Feb. 10, 1999. The USFWS issued its ninety-day finding on March 25, 1999. 64 Fed. Reg. 14,424 (1999).

210. Houck, *supra* note 11, at 293-94 (quoting a memorandum from the Nature Conservancy to USFWS).

211. *Id.* at 294.

212. Subcommittee Memo, *supra* note 104, at 2.

of threatened or endangered species.”<sup>213</sup>

Rather than devote the limited amount of funding available in the listing budget to the staff necessary to conduct status reviews and process the listing of petitioned imperiled species, the USFWS views the line item appropriation as a source of funds to litigate challenges of its stall and delay tactics: “For the Listing program, we need an additional \$1.2 million to address the increasing number of listing actions and litigation caseloads. Currently, we have 24 Notices of Intent to Sue, involving 151 species.”<sup>214</sup>

The USFWS and Department of Justice probably spent hundreds of thousands of dollars defending the USFWS decisions to prevent and preclude listing the bull trout under the ESA against the various suits brought by FOWS and AWR.<sup>215</sup> The agency is willing to spend money to prevent listing of imperiled species, but unwilling to devote those same funds in its listing budget to processing the listing petition and proceeding to list species that qualify for the protections of the ESA.

Once the lawsuits are filed against the USFWS, the agency can depend on a high standard of judicial review that lays a heavy burden on plaintiffs to show that agency scientific policy decisions were arbitrary and capricious. Under the ESA, listing decisions must be made solely on the basis of the best available scientific and commercial information.<sup>216</sup> Basing conservation policy choices in science is attractive because it promises objective answers to the natural world, but answers to scientific questions are not always objective or reliable.<sup>217</sup> Science itself has both procedural and substantive elements: “Procedurally, science is a formalized system for gathering and evaluating information about the world. Its essential steps are observation, communication, informed criticism, and response . . . . Substantively, science is the body of knowledge produced by this process.”<sup>218</sup> Thus, the best available scientific information may not be abso-

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213. Clark Statement, *supra* note 119, at 2.

214. *Id.* at 3.

215. The author sent Freedom of Information Act requests to the USFWS and Department of Justice to ascertain the amount of money the agencies spent on litigating the claims brought by AWR and FOWS. The Department of Justice indicated in Freedom of Information Act responses that the agencies do not “maintain case-specific accounting systems,” and do not “routinely calculate costs associated with individual cases,” and therefore could not provide a response indicating the amount of money spent by the governmental agencies in these cases. Letter from Louise Milkman, Assistant Chief, U.S. Dept. Justice Environment and Natural Resources Division to author 1 (Jan. 8, 1999). Jack Tuholske, attorney for FOWS and AWR in this series of cases, estimates that the agencies spent at least \$500,000 in litigating the cases. Interview with Jack Tuholske, in Missoula, Mont. (Jan. 17, 1999).

216. 16 U.S.C. § 1533(b)(1)(A).

217. Doremus, *supra* note 11, at 1065.

218. *Id.* at 1057.

lutely certain or finalized with absolute rigor, and various scientists may interpret the same scientific information differently. Agency scientists are often called upon to make scientific decisions, such as assigning a petitioned species a priority ranking under the ESA, without absolute scientific knowledge.<sup>219</sup>

Courts review scientific decisions made by agency personnel pursuant to the ESA under the Administrative Procedures Act (APA).<sup>220</sup> Under the APA, courts may overturn an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>221</sup> Agencies believe that they are entitled to a high degree of deference under this standard, which affords the agency's action a presumption of validity.<sup>222</sup> Whenever a decision requires a "high level of technical expertise," courts defer to "the informed discretion of the responsible federal agencies."<sup>223</sup> When a court reviews an agency decision to determine whether it was arbitrary and capricious, it must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."<sup>224</sup> The court must take a "thorough, probing, in-depth review" of the agency's decision,<sup>225</sup> but the standard of review is narrow, and a court may not substitute its judgment for the agency's judgment.<sup>226</sup> "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."<sup>227</sup>

Although the arbitrary and capricious standard grants the USFWS some deference under judicial review, the review is not entirely pro forma. A decision can be arbitrary and capricious if the agency relied on factors that Congress had not intended that it consider, failed to consider important aspects of the problem, offered explanations that run counter to the evidence, or if the decision is so implausible that it cannot be ascribed to differences in expert interpretations.<sup>228</sup> An agency decision may also be found arbitrary and capricious if the court determines that no rational connection between the facts and the decision exists.<sup>229</sup> Also, an agency

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219. See *id.* at 1075-76.

220. 5 U.S.C. § 706(2)(A) (1994).

221. *Id.*

222. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

223. *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 377 (1989) (*quoting Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

224. *Overton Park*, 401 U.S. at 415-16.

225. *Id.*

226. *FOWS III*, 945 F. Supp. at 1394.

227. *Marsh*, 490 U.S. at 378.

228. *FOWS III*, 945 F. Supp. at 1394.

229. *Id.*

must consider all relevant factors and explain its reasoning.<sup>230</sup> In general, however, when a court reviews scientifically-based decisions by the agency, it will defer to the expertise of the agency's scientific methodologies and conclusions.<sup>231</sup> Thus a plaintiff who brings an action against the agency for failure to list a species faces a significant barrier to prevailing in the suit because he must show, as plaintiffs in the bull trout litigation did, that the agency acted arbitrarily and capriciously.

In addition to this deferential standard of review, the USFWS can also depend on an overburdened court schedule to assure that even if a court finds that the agency acted arbitrarily and capriciously, the court process will take months, and perhaps years, to complete. As a case in point, the court issued its first substantive decision in the bull trout litigation on November 13, 1996, more than four years after petitioners asked the USFWS for an emergency listing.<sup>232</sup> Further, the agency can use standard procedural delays, such as motions to change venue and request time extensions for submitting briefs, to slow the schedule even more. In *FOWS II*, for example, the agency delayed six months before filing the administrative record.<sup>233</sup> Plaintiffs in the bull trout litigation repeatedly encountered extension requests tendered by the USFWS and had to encourage the court to expedite proceedings.<sup>234</sup>

The USFWS strategy to stall and delay the listing of a warranted species has not been limited to the bull trout. During the same several years that the bull trout litigation was proceeding, other plaintiffs were experiencing the same USFWS stalling tactics in suits to gain protection for the Barton Springs salamander and the Canada lynx, among other species.<sup>235</sup> In the salamander case, the court found that the USFWS had repeatedly missed its statutory deadlines under the ESA,<sup>236</sup> and had succumbed to political pressures when deciding not to list the salamander,<sup>237</sup> which USFWS biologists had found was warranted for protection under the Act.<sup>238</sup> In the lynx case, similarly, the court found that the agency ignored its own biologists when it arrived at a decision not to list the

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230. *Id.*

231. Doremus, *supra* note 11, at 1077.

232. *See, FOWS III*, 945 F. Supp. 1388.

233. Expedited Review Memo, *supra* note 149, at 4 n.4. Plaintiffs actually moved for summary judgment a month before USFWS filed the administrative record. *Id.*

234. *See, e.g.*, Expedited Review Memo, *supra* note 149.

235. *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997). *See also* *Biodiversity Legal Foundation v. Babbitt*, 943 F. Supp. 23 (D.D.C. 1996); *Southwest Center for Biological Diversity v. Babbitt*, 939 F. Supp. 49 (D.D.C. 1996).

236. *Save Our Springs*, 27 F. Supp. at 741-42.

237. *Id.* at 745.

238. *Id.* at 742.

lynx.<sup>239</sup> The agency acted arbitrarily and capriciously in each of these cases, and in so doing managed to delay listing of these species for several years.<sup>240</sup> But sometimes the delay method works for the agency: when plaintiffs seeking ESA protection for the coastal cactus wren challenged the USFWS refusal to list the bird as arbitrary and capricious and improperly influenced by political considerations, the court upheld the agency's finding.<sup>241</sup> Given the stated directive of the agency to avoid listing species,<sup>242</sup> these cases show that the USFWS is willing to ignore its biologists and attempt to delay ESA protection for imperiled species as long as possible, and take its chances with the courts.

## VI. CONCLUSION

As Assistant Secretary Frampton testified before a Senate subcommittee, the USFWS is committed to circumventing the purposes of the ESA and delaying and preventing qualifying imperiled species from being added to the threatened and endangered species lists.<sup>243</sup> Without determined plaintiffs to push litigation through the court system, the USFWS will prevent imperiled species, particularly those whose protection may have wide-reaching ramifications for land management, from gaining the protection of the ESA. The agency has deliberately placed itself in this position by refusing to request the funds necessary to process listing petitions so that it may prevent listing through warranted, but precluded findings. Even when determined plaintiffs are on hand, as with the bull trout, the agency still can take advantage of an overburdened court, a deferential standard of review, and procedural delays to prevent listing as long as possible.

The USFWS stalls the listing process not only to put off making an adverse decision, but also with hopes of pre-empting listing--the longer the agency stalls the listing process, the more likely it is that listing can be prevented or staved off even longer by state recovery plans and landowner Habitat Conservation Plans (HCPs). Essentially, the USFWS attempts to buy time to allow state plans to be enacted so that the USFWS may rely on the state plans and HCPs to reduce the imminency of threat to the species when conducting a status review. With the imminency thus reduced, the agency assigns a lower priority number to the species, and finds it to be warranted, but precluded. Essentially, the agency buys time for a "paper recovery," and the species thus does not gain the protections

239. *Defenders*, 958 F. Supp. at 682-83.

240. *Id.*

241. *Southwest Center for Biological Diversity v. Babbitt*, 141 F.3d 1179, 1998 WL 141321 (9<sup>th</sup> Cir. 1998).

242. *See supra* text accompanying note 204.

243. *See supra* text accompanying note 204.

of the ESA, and humans may continue to degrade its habitat.

Stalling and delay is also a clear attempt by the agency to drive up costs for plaintiffs who file suit under the ESA to force the USFWS to comply with the law, and to discourage other potential plaintiffs from filing similar enforcement actions. No conservation organization or citizen has the resources and funding that the USFWS can marshal to defend its decisions not to list a species, so a plaintiff's decision to sue is often heavily dependent on whether he has the resources to take on such a Goliath.<sup>244</sup> As the bull trout litigation indicates, the USFWS has driven up the costs for such an enforcement suit, and potential plaintiffs will think long and hard before committing resources—administrative, personnel, and financial—to starting what will most likely turn into a multi-year, multi-suit endeavor.

As Secretary Babbitt decried,<sup>245</sup> the future is full of possibilities for the bull trout, because citizens can demand the protections of the ESA for the fish from landowners and land management agencies. However, those imperiled species that become extinct while waiting for the protections of the ESA will be consigned to history and known only to historians, a fate that Secretary Babbitt and his agency endorse by stalling and delaying listing until forced into compliance by determined citizens.

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244. Interview with Mike Bader, executive director of AWR, in Missoula, Mont. (April 16, 1999).

245. See *supra* text accompanying note 3.



