LETHAL LOOPHOLE

How the Obama Administration Is Increasingly Allowing Special Interests to Endanger Rare Wildlife

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EXECUTIVE SUMMARY

The Endangered Species Act ("Act") is one of the world's most effective laws for protecting biodiversity, preventing the extinction of 99 percent of protected species and putting dozens on the road to recovery.[1] But more and more, the protections of the Act are being fought by powerful special interests, such as big agriculture, the oil and gas industry, developers and ranchers. In recent years, the financial and political influence of industries opposed to wildlife protections has paid off in a little-known way, resulting in the protection of special interests over the protection of imperiled species. In response to political pressure from such special interests, the U.S. Fish and Wildlife Service ("Service") has used an obscure provision of the Act to subvert the law's intent and green-light many of the very activities putting species at risk.

The provision of the Act the Service now routinely misuses to sidestep the law's conservation requirement is named for its place in the statute — the "4(d) provision." Key to its use is the fact that it applies to threatened but not endangered species,[2] a limitation that encourages the Service to protect species only as "threatened," even when their own scientists recommend they be protected as "endangered." The 4(d) provision mandates the Service to issue regulations that are "necessary and advisable to provide for the conservation" of threatened species in an effort to prevent them from becoming endangered.[3] The clear intent of the provision is to provide the Service with the necessary tools to halt activities that are harmful to the species, such as banning most ivory imports as it did in 1978 to protect African elephants. The 4(d) provision also gives the Service flexibility to authorize activities that do not pose a threat to the species, such as scientific research or catch and release fishing.

But in recent years the Service has escalated use of the 4(d) provision to sanction actions that are clearly harmful to the conservation of threatened species. For example, ranching is a major threat to the California tiger salamander. But in protecting the salamander in 2004, the Service exempted all ranching activities — including the use of rodenticides and herbicides — even though the only part of ranching operations that sometimes benefits the salamanders are stock ponds. In 2008 the Service used the 4(d) provision to exempt activities that cause greenhouse gas emissions and the resulting loss of sea ice habitat – the primary threat to the polar bear's survival.

In this review, the Center for Biological Diversity determined that of the 75 domestic 4(d) rules the Service has issued since the Act was passed, 19 include major loopholes allowing activities such as logging, oil and gas development and other forms of habitat destruction known to be detrimental to the survival and recovery of the species. Indeed, in most cases the exempted activities are the very threats that contributed to the need to protect the species under the Act in the first place.

We found that eight of those 19 decisions (42 percent) were issued by the Obama administration. In fact, no other presidential administration has used this detrimental loophole so often.

The Obama administration's 4(d) decisions include:

- A 2014 decision allowing oil and gas, wind and ranching industries to harm or kill lesser prairie chickens;
- A 2013 rule authorizing airport and agricultural activities that harm imperiled streak horned larks and destroy prime habitat;
- A 2016 rule allowing virtually all habitat-impacting activities to proceed in northern long-eared bat habitat even though the species is being decimated by disease and needs intact forests to survive.

The Fish and Wildlife Service also proposed two other major 4(d) rules under the Obama administration, for the American wolverine and bi-state population of sage grouse, but rather than protecting these species under the Act, the agency caved to considerable political pressure and withdrew protection altogether; thus those two 4(d) rules were never finalized.

CONCLUSION: Our review finds that since the Act was passed, nearly every administration has used 4(d) rules in questionable ways to exempt practices harmful to species; however, the Obama administration has greatly accelerated the practice. If animals and plants under the care of the Endangered Species Act are going to survive and thrive, the Service must stem its use of such detrimental loopholes.

INTRODUCTION

The Endangered Species Act of 1973 differed from previous endangered species laws by "broaden[ing] [the] concept of 'endangered species'" to include "threatened species," meaning they are not currently in danger of extinction, but are likely to become so in the foreseeable future.[4] When the Service lists a species as "endangered," a "take" prohibition automatically goes into effect, making it illegal to kill, injure, harass or otherwise harm the species, including habitat modification that causes injury or death.[5] In contrast, when a species is listed as threatened, the agency must enact 4(d) rules that are "necessary and advisable to provide for the conservation" of the species, but it may — or may not — extend the prohibitions in section 9.[6] The Service took the precautionary step of automatically extending the take prohibition to all threatened species in 1978, issuing a commendable rule that remains in place today.[7]

However, the Service also did not waste time in attempting to use the 4(d) provision to exempt activities that are clearly harmful, namely early attempts to allow sport hunting of the gray wolf and grizzly bear, which were both overturned by the courts.[8] In the case overturning the wolf rule, a court agreed the Service has discretion whether to include a take prohibition against hunting and trapping gray wolves, but it stressed this discretion "is limited by the requirements that the regulations … must provide for the *conservation* of threatened species."[9] Looking to the Act's definition of "conservation," it found regulated take is only allowed "*in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved* …."[10] A court echoed these findings in the case overturning grizzly bear hunting, and in doing so, it specified that "population pressures" are limited to ecological considerations such as the carrying capacity of an ecosystem — not social factors like conflicts between bears and people, as the Service tried to claim.

After the Service failed in its early efforts to allow hunting of threatened species under 4(d), the agency started tinkering with ways to use it to give industry exemptions for politically controversial species. This began with a 1984 4(d) rule allowing take of up to 5,000 Utah prairie dogs on private lands under a state permit,[11] followed by a 1993 rule allowing development in habitat for the California gnatcatcher.[12] The Service issued three more harmful 4(d) rules before releasing its most controversial one to date: a 2008 rule for the polar bear designed not for conservation purposes, but instead, explicitly to exempt take from climate change — the greatest threat to the polar bear's survival.[13]

The 2008 polar bear 4(d) rule ended up being an ominous presage of what was to come: a proliferation of destructive rules in which the Service specifically allows activities that threaten wildlife but provides minimal, if any, measures to conserve the species. Indeed the Obama administration has issued a steady stream of problematic 4(d) rules for species, particularly when the species' protection garnered opposition from states and industry. The lesser prairie

chicken, northern long-eared bat, wolverine and streaked horned lark discussed below all demonstrate how the agency is undermining the survival and recovery of imperiled species with the passage of faulty 4(d) rules. Conversely, the African lion proposal discussed below illustrates the proper use of a 4(d) rule to help conserve a species.

There can be no question that Congress did not intend the Act's 4(d) provision to exempt threats compromising the conservation of species. Congress gave the Service flexibility on when and where to apply take prohibitions for threatened species so that it would not have to prosecute citizens engaged in conservation or activities with minimal and unintentional impacts, like recreational fishing.[14] The 4(d) provision thus provides the Service with "almost an infinite number of options" to conserve threatened species and prevent them from becoming endangered, but it does not allow the Service to create rules that will further imperil species.[15]

The Endangered Species Act does contain a specific provision for allowing actions that harm individuals of a listed species, but it isn't found in section 4(d). Congress added section 10 to the Act in 1982, which allows permits for take of listed species for scientific and enhancement purposes, as well as for "incidental take" if a "habitat conservation plan" ("HCP") is developed for the species.[16] Unlike 4(d) rules, HCPs must include provisions to monitor, minimize and mitigate impacts — provisions that become binding and enforceable.[17] Even in the cases where 4(d) rules have contained helpful measures — albeit limited, in exchange for allowable take — these rules lack the notice, monitoring, and reporting requirements of permits, and thus provide no measurement of whether or not the harmful activities are, in fact, helping to push a species toward extinction.

We reviewed all domestic 4(d) rules issued by the Service since passage of the Act and identified 19 that exempted threats identified as contributing to the endangerment of the species.[18] Of these 19 rules, eight (42 percent) have come under the Obama administration. Two other major 4(d) rules, for the American wolverine and bi-state population of sage grouse, were proposed by the Service under the Obama administration, but rather than listing these species, the agency caved to considerable political pressure and withdrew protection altogether; thus the 4(d) rules were never finalized. The harmful rules include one allowing oil and gas, wind and ranching interests to take lesser prairie chickens under a state plan the Service itself found did not adequately address threats to the species; one authorizing airport and agricultural activities that strike and mow over imperiled streak horned larks; and one allowing all but a short list of activities in northern long-eared bat habitat even though the species is being decimated by disease and needs intact forests.

This report highlights some of the worst 4(d) rules issued to date, illustrating the ways 4(d) is increasingly being misused to create a loophole that severely limits the Endangered Species Act's ability to conserve and recover protected species.

THE DANCE OF THE LESSER PRAIRIE CHICKEN

The name of the lesser prairie chicken belies the importance of this charismatic bird as a keystone species that reflects the health of sustainable prairie ecosystems, as well as its central role in some Native American cultures. The charismatic bird's elaborate, highly competitive courtship rituals feature males raising tufts of feathers over their heads, making distinctive "booming" sounds from inflated air sacks on their necks and rapidly stomping their feet. The unique mating behaviors are celebrated in traditional stories and war dances of Arapaho and Cheyenne tribes and attract bird-watchers from around the world. But the natural prairie habitat critical to the survival of the lesser prairie chicken is highly coveted by agricultural, ranching and energy industries. And those industries successfully lobbied for the sweeping 4(d) rule now in place that strips away critical protections and severely undermines the ability of the Endangered Species Act to prevent the bird's extinction.

Lesser prarie-chicken photo by Kevin Rolle / Flickr CC BY-NC-SA

Dramatic Declines in Lesser Prairie Chicken Population Go Unchecked

Once common across the southern Great Plains, the lesser prairie chicken is thought to have numbered up to 2 million birds, ranging across more than 180,000 square miles in Colorado, New Mexico, Kansas, Oklahoma and Texas. The remaining prairie habitat in this region has been severely fragmented by agriculture and industry. Wind turbines, oil and gas wells and associated roads and transmission lines are now also spreading across the landscape. The lesser prairie chicken survives in just 8 percent to 16 percent of its historic range today,[19] and its population has plummeted as a result — dropping 37 percent between 2003 and 2015 — with an all-time low of just 17,616 birds in 2013.[20]

It's not hard to see why the lesser prairie chicken is in such trouble. According to the Service, it needs large areas of intact native prairie land to maintain self-sustaining populations — often larger than 20,000 acres.[21] However, the agency found that 99.8 percent of all suitable habitat is in patches less than 5,000 acres in size, and even the few remaining large patches are not "intact."[22] The Service identified just 71 patches in all five states that are at least 25,000 acres, and it says every one of these have "fragmenting features" such as oil and gas wells and wind turbines.[23] Not surprisingly, lesser prairie chicken numbers have been tanking in recent years, dropping from more than 80,000 birds in the early 2000s to fewer than 30,000 birds in the last five years (Figure 1). This decline is in part caused by drought, but this provides little solace

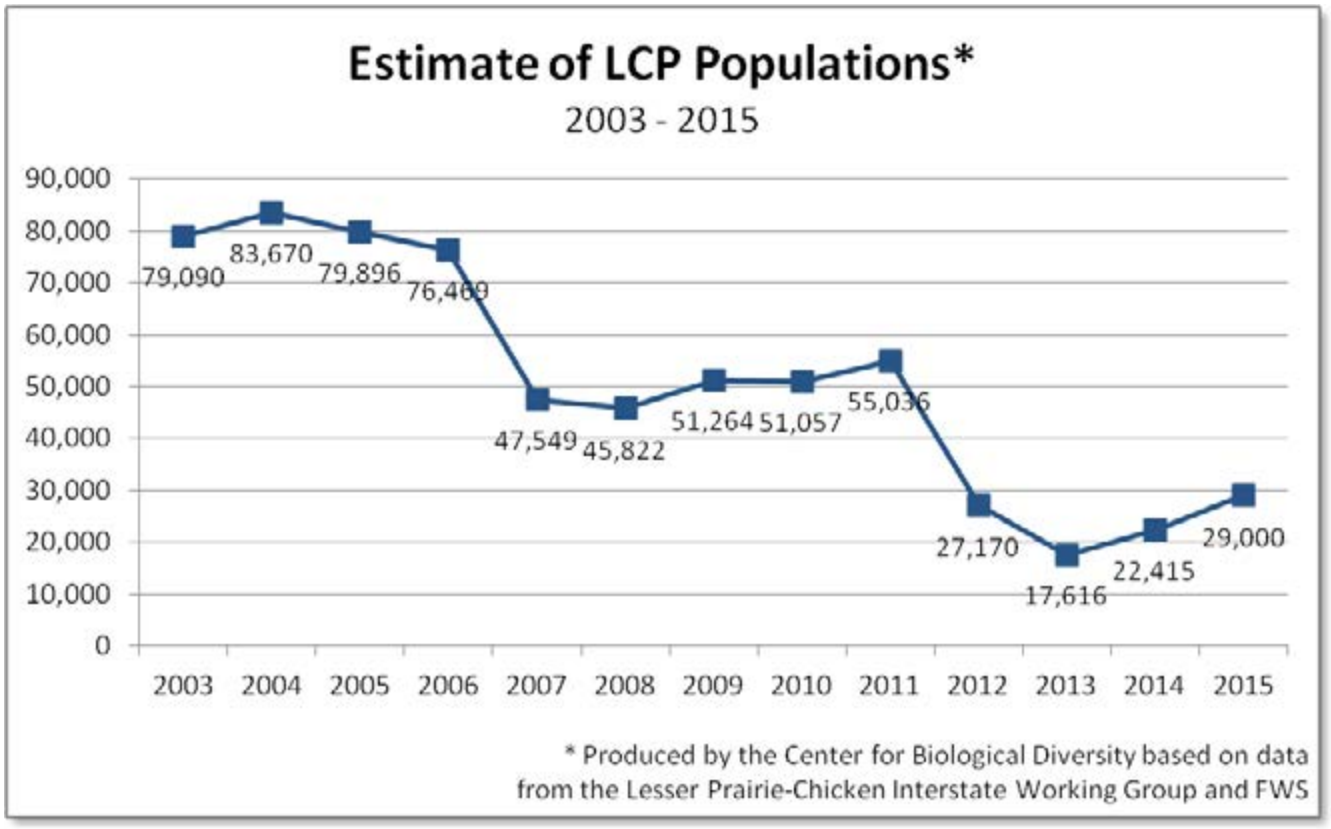

Figure 1. Lesser prairie chicken population numbers since 2003.

because climate change threatens to make future droughts more frequent and intense, and together with continuing habitat destruction, a drought could be the final deathblow for the species.

The effort to protect the lesser prairie chicken under the Act began two decades ago, when the Biodiversity Legal Foundation, now subsumed in the Center for Biological Diversity, filed a formal listing petition with the Service in October 1995.[24] Following a subsequent lawsuit to force an initial decision on the petition, the Service determined the lesser prairie chicken needed protection in June 1998, but it declared these protections were precluded by other priorities — putting the species in regulatory limbo as a "candidate" species for the next 14 years.

By 2008 the Service found that threats to the lesser prairie chicken had reached the highest possible level, primarily due to the major proliferation of wind turbines and oil and gas drilling during the preceding ten years. However, the agency continued to drag its feet until a court-ordered settlement agreement forced it to either propose or withdraw listing.[25] When the Service finally made this decision in December 2012, it issued a proposed rule to protect the species as only threatened.[26] At the same time, the Service invited industries and states to develop a voluntary plan for the species, saying it would consider authorizing that industry-friendly plan under a 4(d) rule.[27]

Aerial surveys the next spring showed the total population collapsed by an alarming 50 percent just between 2012 and 2013, revealing just how close the species is to extinction. Nonetheless, the Service finalized a threatened listing in April 2014 instead of

protecting the species as endangered, and approved one of the most damaging 4(d) rules to date.[28]

The 4(d) Rule

Industries worked to delay endangered species protections for the lesser prairie chicken for as long as possible, using the time to push their version of a "rangewide conservation plan." Finalized in October 2013, the rangewide plan covers practically every imaginable human activity that could impact lesser prairie chickens, including agriculture, wind turbines, cell and radio towers, oil and gas drilling, road construction, OHV use and hunting.[29] The Service found the plan "has not eliminated or adequately reduced the threats" to the species,[30] but it embraced the plan unchanged in the final 4(d) rule, essentially approving — *for the next three decades* — any destructive activity enrolled under the rangewide plan.[31]

In so doing the Service used a "net conservation benefit" standard.[32] This concept is from section 10 permitting and when the proper monitoring, reporting and mitigation are in place the Service authorizes activities using this standard. But with 4(d) rules, like the lesser prairie chicken rule, there is no monitoring, no reporting, and no attempt to quantify the rule's impacts. This rule is a prime example of a black box into which an imperiled species falls and may never return.

Much of the plan simply reiterates existing laws, regulations and programs — the very things the Service found to be inadequate to protect the lesser prairie chicken.[33] These requirements are based on voluntary measures, only "encouraging" industries to avoid impacts "where feasible."[34] Similarly, the rangewide plan encourages industries to avoid habitat destruction in "focal areas," "connectivity zones," or within 1.25 miles of known breeding grounds. But industries can simply write a check for "mitigation" and construct a new wind turbine, oil well, or road in these areas "when complete avoidance is not possible."

The rangewide plan estimates more than 1,000 lesser prairie chickens will be killed under the plan every year, or roughly six percent of the total population.[35] This equates to more than 31,000 birds over 30 years — more than the number of lesser prairie chickens living in the wild today. This estimate does not include the number of birds that will be killed by agriculture, industrial development, or hunting, as well as the on-going take of the species from existing infrastructure. Due to its questionable assumptions, the estimate is likely much lower than what will actually occur.

Despite getting 4(d) coverage for a plan that "facilitat[es] continued and uninterrupted economic activity throughout the entire five-state LPC range,"[36] industry groups and states are attempting to remove the lesser prairie chicken from the threatened list completely with four separate lawsuits that aim to delist the species. At least two legislative riders in 2014 and five riders in 2015 also aimed to knock out or delay protections for the species. The Center and partners filed a lawsuit in June 2014 seeking endangered status for the species and to overturn the 4(d) rule — determined to ensure the next dance of the lesser prairie chicken is not its last.

NORTHERN LONG-EARED BAT

The northern long-eared bat is a small to medium-sized bat with a relatively long tail, wide wingspan, and, as its name suggests, lengthy ears, making it specially adapted to fly through mature forests while mating, roosting and foraging. The species is wide-ranging — documented from Florida to Newfoundland and Louisiana to British Columbia — but it lives in small, scattered populations, with the core of its range centered in the northeastern United States. Well known and loved for their bug-eating propensities, these bats provide essential ecosystem services throughout their range.

Northern long-eared bats live in forests and migrate to caves and abandoned mines (called hibernacula) during the winter months to hibernate. The bats mate on the wing in the fall and the females give birth (or pup) the following summer while in roost trees.

A deadly disease called white-nose syndrome is putting northern long-eared bats on a fast-track toward extinction, causing their numbers to plummet by as much as 99 percent in some areas in just the eight years since the disease was first found in the United States. In spite of these alarming statistics, the Service backpedaled from its original proposal to list the northern long-eared bat as endangered,[37] bowing to industry pressure by giving the bat less protection as a threatened species and simultaneously issuing an interim 4(d) rule green-lighting activities that kill and harm the species.[38]

Northern long-eared bat courtesy USFWS

White-nose Syndrome

First discovered in the United States in 2006 in New York, white-nose syndrome ("WNS") has quickly spread to 28 states and the District of Columbia, killing millions of bats. The disease is caused by a fungus that infects bats as they hibernate, covering their wings and muzzles with a white, fuzzy substance that penetrates deep skin tissues. The effects are devastating: Bats awaken and stir more often during hibernation, causing them to burn up critical fat reserves, leading ultimately to starvation and death. The disease can wipe out an entire colony in just one winter. It is believed to be spread from bat to bat and by humans who carry the fungus between caves. And it is fatal to northern long-eared bats and at least seven other bat species, with no known cure. The disease leaves surviving bats weakened and at great risk to "[o]ther sources of mortality [that] could further diminish the species' ability to persist as it experiences ongoing dramatic declines."[39]

Northern long-eared bats are particularly hard-hit by the disease; for example, the Service noted that in a study of 103 caves, "68 percent of the sites declined to zero northern long-earedbats" after WNS hit.[4041] In Vermont, where the northern long-eared bat was the second most common bat species before the disease hit, the Service found "it is now one of the least likely to be encountered."[42] The same level of decline is expected to occur throughout the species' range as the disease expands across the continental United States, putting it at imminent risk of extinction.

Protecting Special Interests Instead of Bats

The Center petitioned the Service to protect the northern long-eared bat in January 2010, detailing the devastating impacts of white-nose syndrome and documenting threats from logging, fracking and other activities that destroy or significantly damage the interior forest habitat the bats need. The Service finally concluded in June 2011 that the petition showed protection may be warranted and agreed in a 2011 multi-species settlement with the Center to make a decision on the petition in fiscal year 2013.

When the Service finally made this determination in October 2013, it proposed to list the northern long-eared bat as endangered, finding that a less-protective threatened listing was "not appropriate … because the threat of WNS has significant effects where it has occurred and is expected to spread rangewide in a short timeframe."[43] The Service also found that such things as habitat modification, climate change and contaminants may have a significant effect when combined with the impacts of white-nose syndrome, further warranting an endangered listing.

It didn't take long for special interests — primarily the logging and energy industries — to mount a vicious attack against the proposal along with a handful of states. At least six legislative riders were proposed in 2015 pertaining specifically to limiting or preventing federal protections for northern long-eared bats. The Service subsequently delayed its final listing decision four times — by well over a year — and signaled that it was going to renege on its proposed endangered listing.[44] It did just that in April 2015, finalizing a rule to list the northern long-eared bat as a threatened species — after previously finding the designation insufficient and despite ever- declining bat numbers.[45] The threatened listing was accompanied by an interim 4(d) rule that exempted a host of activities known to be harmful to the bat from the prohibition against killing or harming the species.[46]

The 4(d) Rule

As with the interim 4(d) rule for northern long-eared bats, the final rule does nothing to try to prevent or reverse the spread of white-nose syndrome.[47] Instead the rule authorizes the continuation of virtually all activities that negatively impact the bat and its habitat.

First, the rule prohibits "purposeful" take of the bats but then provides six exceptions, including for public health; hazardous tree removal; removal from a human structure; permitted capture until May 2016; by agency or state officials; and permitted take.[48] In every one of these six instances, direct and purposeful take of the species is allowed.

But the rule's most significant shortcoming is its failure to protect northern long-eared bat habitat. The rule allows all "incidental" take of northern long-eared bats in areas outside the white-nose syndrome buffer areas. In other words, logging, housing developments, energy development, and the like can all proceed.

In areas affected by the disease, and for a 150-mile buffer around them, incidental or unintentional take is *only* prohibited in four very limited instances: within known hibernacula; in the entrance or interior environment of known hibernacula; tree removal within 1/4 mile of a known hibernacula; and from June 1 to July 31 removal of known roost trees or trees within a 150-mile radius of known roost trees. No other activities that impact the bats or their habitat are prohibited.

Outside of activities prohibited around a hibernacula or a roost tree in the summer, it is business as usual. And nothing prevents the logging of known roost trees from August 1 to May 31. Moreover, the hibernacula or roost tree has to be *known* for the incidental take prohibition to apply. This *does not* mean surveying to discern whether the bats are there. Instead, a state official must be contacted to get whatever GIS data is available on northern long-eared bat hibernacula and/or roost trees. Roost trees are hard to survey for and much scientific information is still lacking on this species, thus failing to require bat surveys is another big loophole.
In sum, throughout most of the range of the northern long-eared bat, and for most activities that threaten the species beyond or in addition to white-nose syndrome, it is as though the species was never protected under the Endangered Species Act. Given the severity of the disease and the rapid decline in northern long-eared bat populations, the loss of each additional individual bat can have a considerable, harmful effect. This means habitat loss and other threats could cause the bats to become even less resilient to, and unable to recover from, white-nose syndrome —becoming the final tipping point on the path to the species' extinction.

The northern long-eared bat is a classic example of a species that should be protected as endangered, but the Service downgraded it to a threatened listing specifically to appease industry interests and then created a 4(d) rule broad enough to drive a logging truck and wind turbine through.

Ignoring Climate Change Under 4(d)

The plight of the polar bear captured the world's attention when images of drowning and starving bears began to appear, becoming a tragic, graphic illustration of the accelerating effects of climate change as its sea ice habitat melts away. Under current greenhouse gas emissions and climate change projections, the U.S. Geological Survey predicts two-thirds of the world's polar bear population will likely go extinct within the next 35 years — including all polar bears in the United States. Despite these urgent threats, the Service finalized a 4(d) rule for the polar bear in 2008 that among other things exempts take from greenhouse gas emissions.

This created a pattern for species plagued by our changing climate whereby the Service either exempts the primary threat to the species under 4(d) — greenhouse gas emissions — or denies the species protections under the Act entirely. Following the polar bear came the American pika, Kittlitz's murrelet and wolverine. The Service has entirely stepped away from using our most effective tool for protecting biological diversity — the Endangered Species Act — to address climate change, even though this threat is growing all the time and pushing more and more species to the brink of extinction.

STREAKED HORNED LARKS

Identified by its distinctive tufts of feathers that look like horns when raised, the streaked horned lark is a small, ground-dwelling songbird that lives in native prairies and coastal areas west of the Cascades in the Pacific Northwest. It once ranged from British Columbia to southwest Oregon, and while historic population estimates are not available, the bird was described as common and abundant 100 years ago in places like Puget Sound and the Rogue, Umpqua and Willamette river valleys. Largely paved or plowed over, native prairies in this region are now one of the rarest ecosystems in the United States — with less than 5 percent remaining. Streaked horned larks have disappeared along with this prairie habitat, and it is estimated that a total of only 1,100 to 1,600 individuals remain in the world today.[49]

Streaked horned lark courtesy USFWS

The species has been lost entirely from much of its range, including Canada, the San Juan Islands, Oregon coast and Umpqua and Rogue valleys.[50] Only a small fraction of remaining lark habitat is in protected hands, and most of the remaining, scattered lark populations are clinging to survival in places that are far from ideal. Five of six nesting sites left in the Puget lowlands are next to airports and military airfields, and four nesting sites are found at municipal airports in the Willamette Valley.[51] This includes the single biggest nesting population, which is just 75 to 100 pairs, found at the Corvallis Municipal Airport.[52] The largest amount of potential winter habitat is in Oregon's Willamette Valley where agriculture is the dominant land use,[53] and this land has never been surveyed for larks or had specific areas prioritized for long-term conservation efforts.

An Endangered Species Act Listing That Includes Virtually No Protections

Streaked horned larks were placed on the candidate list for protection in 2001 due to their small population size and loss of all but about 1 percent of their native habitat.[54] The Center and allies petitioned the Service to protect streaked horned larks under the Endangered Species Act in December 2002 due to their declining populations and habitat loss. The Service agreed in a 2011 multi-species settlement with the Center 2011 to make a decision on the petition in fiscal year 2012.

The Service proposed to list streaked horned larks as threatened with a 4(d) rule in October, 2012.[55]

In listing the streaked horned lark, the Service found the birds "face a combination of several high-magnitude threats," saying the threats are "significant," "immediate," and occur throughout its range.[56] Despite these conclusions, the small size of the lark's population and its drastic contraction, the Service listed the lark as threatened and not endangered.

The 4(d) Rule

The threatened listing of the lark included a 4(d) rule that exempts: all agricultural activities in Oregon's Willamette Valley; all airport activities at non-federal airports; and noxious weed control on non-federal land.[57] Ironically, mowing to reduce hazards to aviation and some agricultural practices (particularly grass seed production) create open grasslands and bare patches that the birds prefer. Unfortunately these and other activities also put the birds directly in harm's way.

Larks are routinely struck and killed by aircraft. One military base documented the loss of seven larks from a 26-lark population during an eight-year period.[58] Mowing during the breeding season tramples the birds, their young and their nests. Other agricultural activities, such as plowing and planting of crops, are highly detrimental to the species. Planting blueberries or grapes for wine instead of grass seed, does not benefit the species or create potential habitat. These threats could and should have been prohibited when the Service finally protected the streaked horned lark under the Endangered Species Act. Instead, the Service did nothing to tailor the exempted activities to benefit the species. Thus, the activities authorized by the 4(d) rule are not necessarily beneficial to larks, let alone activities that will conserve the species.

Nor did the Service design the broad exemptions it created to benefit larks. For example, the Service pointed out that the timing of mowing and other vegetation management is critical — it is beneficial to maintain grasslands during parts of the year but it destroys nests and drives away adults when done in the breeding season.[59] The rule is also devoid of any requirements for monitoring the number of birds killed from the 4(d) rule or reporting on the effects it has on lark populations.[60] The Center has notified the Service about these concerns to ensure that these prairie birds have the chance they deserve to survive and recover.

Foreign Listed Species

In addition to protecting native biological diversity, the Endangered Species Act also implements the United States' commitments under the Convention on Trade in Endangered Species of Flora and Fauna, or CITES.[63] That international agreement protects species by placing them on one of three appendices that specify relevant trade requirements providing the greatest protections for Appendix I species and few protections for those species listed on Appendix III.[64]

The prohibition on take in the Act only applies within the United States and on the high seas, but 4(d) rules still must be for a conservation purpose, which includes an admonishment against regulated taking.[65] Nevertheless, the Service often uses 4(d) rules for foreign threatened species to allow trade through quotas and other mechanisms under CITES. Thus species such as the leopard, straight-horned markhor, and beluga sturgeon all have elaborate 4(d) rules that allow take and trade of the species subject to certain conditions.[66] These rules raise serious questions given the definition of conservation in the Act.

WOLVERINE

Wolverine photo by Manfred Werner Tsui / Flickr CC-BY-SA

The original ruler of the high country, wolverines range across steep, rugged mountains and rely on areas that remain covered in snow through the spring months to cache food, den and rear their pups. Males have wide ranges and cover substantial ground in pursuit of females and new habitat. But roads, human developments and winter recreation facilities all hamper this species' ability to roam. The largest land-dwelling species in the mustelid family, the wolverine is also famous for its daring and tenacity. Members of the species have been known to prey on animals as big as moose, and there are many reports of mountain lions, bears and wolves retreating from their kills at a wolverine's approach. But despite their ferocious reputation, wolverine populations in the United States have dwindled to roughly 250-300 animals.

Skirting Endangered Species Act Protections

Since 1995 the Center and others have sought endangered species protections for the wolverine. The Service agreed, in our multi-species settlement of 2011, to either finally propose to list the wolverine under the Act or make a not-warranted finding. The 2013 proposal to protect wolverines as a threatened species focused on the loss of their snowy habitat due to climate change.[61] While scientists also identified roads, human developments, resource extraction, winter recreation and poaching as threats to the species, the Service wholly ignored these threats in its listing proposal.

Making matters worse, the Service poised itself to ignore the effects of climate change — the single threat it identified — with a proposed 4(d) rule that would not "regulate greenhouse gas emissions."[62] The Service recognized that wolverines need spring snow to successfully rear their young, yet it did nothing to spur action to protect this essential habitat. Instead the 4(d) rule would have directly authorized *all* incidental take of wolverine except from trapping and hunting. The 4(d) rule would have allowed road-building, human developments and resource extraction to continue unfettered despite the large body of scientific evidence showing all these activities threaten the species.

Unfortunately the controversy caused by the Service's reluctance to address climate change under the Act led the agency to pull the wolverine listing proposal altogether, even with the incredibly lax standards it would have imposed. To accomplish this about-face, the Service had to ignore its own scientists' conclusions regarding the impacts of our changing climate on wolverines, which is precisely

what the agency did. The Center and its allies are challenging this decision in federal court, seeking adequate Endangered Species Act protections for this disappearing species

AFRICAN LION

When an American dentist killed Cecil the lion in a trophy hunt in Zimbabwe in summer 2015, he not only sparked international outrage but also shed light on a little-known fact: Hundreds of lion "trophies" are exported each year, and more than half of them come to the United States. In 2013 alone, 630 lion trophies and 237 other parts were imported into the United States from Africa, which includes claws, bones and other body parts and does not necessarily represent the total number of lions killed.[67]

Scientists estimate that around 100,000 lions lived in Africa in 1960, but as few as 22,000 to 32,000 remain in the wild today — a decline of at least 68 percent. With ever-growing human populations, lions are also facing drastic habitat reductions and are often confined to parks.[68] An endangered listing is warranted given these low numbers and the growing threats confronting African lions, but once again, the Service proposed only to list the lion as threatened under the Act in October 2014.[69] But this time the Service broke its trend and proposed a 4(d) rule that "provide[s] for the conservation" of African lions by tightening trade requirements.[70]

In December 2015 the Service protected African lions under the Act recognizing that two subspecies exist and protecting one as endangered (in northern, western and central Africa) and the other subspecies as threatened (in southern and eastern Africa).[71]

African lions photo by Mark Dumont / Flickr CC-BY-NC

The 4(d) rule finalized for the threatened subspecies (*Panthera leo melanochaita*) requires an Endangered Species Act permit for trade in threatened lions and their parts, even though such threatened species that are listed on Appendix II of CITES often are exempt from such requirements.[72] This means the Service must determine that importing the "trophy" will enhance the survival of the species for the trade to be authorized.[73] The rule will provide the public with notice and the opportunity to comment on African lion imports into the United States while ensuring that the trade is beneficial to the species' survival.[74] This 4(d) rule will add protections that are "necessary and advisable for the conservation" of the species, rather than stripping them away.

This is a rare case of the Service making wise conservation use of its authority under 4(d), and proves the agency understands its obligation to conserve threatened species. It is too late to save Cecil, but his death highlighted the need for additional protections for lions from the significant trade in this species in which the United States engages.

Conclusion

If the Endangered Species Act is to continue to protect our biological diversity and save species from extinction, it is critical that threatened species receive necessary protections — not broad exemptions. Without those protections the Act will fail to provide for threatened species' recovery, leading to either the need for more endangered listings or species' extinctions. If the Act fails to work, it will open it up to further challenges by congressional members and industry. Likewise, by deciding to list politically controversial species as threatened, instead of endangered, the Service is failing to adhere to the Act's requirements and congressional intent, which will only increase the number of court battles the agency has on its hands.

The current rash of 4(d) rules containing major loopholes raises serious concerns about implementation of the Act. Without a direct change in agency policy, the Service is setting up the Act to fail and our biological diversity to be lost along with it.

(ENDNOTES)

[1] Endangered Species Act, 16 U.S.C. §§ 1531-1544; *TVA v. Hill*, 437 U.S. 153, 176 (1978).

[2] 16 U.S.C. § 1533(d).

[3] 16 U.S.C. § 1533(d).

[4] S. Rep. No. 93-307, 93d Cong., 1st Sess. 3, 8 (1973) .

[5] 50 C.F.R. § 17.3(defining harm).

[6] 16 U.S.C. § 1533(d); *Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993) *overruled on other grounds* 515 U.S. 687 (1995).

[7] Final rule, 43 Fed. Reg. 18,181 (Apr. 28, 2978), *codified* at 50 C.F.R. §§ 17.31(a), 17.21 (these regulations only apply to species that the Service lists as threatened, not those listed by the National Marine Fisheries Service)

[8] *Sierra Club v. Clark*, 755 F.2d 608, 612-13 (8th Cir. 1985) (wolf); *Fund for Animals, Inc. v. Turner*, Civ. No. 91-2201, 1991 U.S. Dist. LEXIS 13426 (D.D.C. Sept. 27, 1991) (grizzly bear).

[9] *Sierra Club v. Clark*, 755 F.2d at 612-13 (emphasis in original)

[10] *Sierra Club v. Clark*, 755 F.2d. at 613 (quoting 16 U.S.C. § 1532(3) (emphasis in original)).

[11] 50 C.F.R. § 17.40(g).

[12] 50 C.F.R. § 17.41(b).

[13] 50 C.F.R. § 17.41(q).

[14] Compilation of ESA Legislative History at 367-8.

[15] H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 12 (1973).

[16] 16 U.S.C. § 1539(a)(1)(B).

[17] 16 U.S.C. §§ 1539(a)(2)(B), 1539(c).

[18] *See* Enclosed Chart.

[19] Final Rule, 79 Fed. Reg. 20,074, 20,008 (Apr. 10, 2014) (lesser prairie chicken 4(d) rule).

[20] 79 Fed. Reg. at 20,011.

[21] 79 Fed. Reg. at 20,017.

[22] 79 Fed. Reg. at 20,022

[23] Proposed Rule, 77 Fed. Reg. 73,828, 73,856 (Dec. 11, 2012) (threatened listing lesser prairie chicken).

[24] The Biodiversity Legal Foundation later became part of the Center for Biological Diversity.

[25] Orders Granting Motions for Settlement, *In re Endangered Species Act Section 4 Deadline Litigation*, MDL 2165, No.10-00377 (Sept. 9, 2011) (ECF Nos. 55, 56)

[26] 77 Fed. Reg. 73,828-888.

[27] 77 Fed. Reg. at 73,837.

[28] Final Rule, 79 Fed. Reg. 19,974 (April 10, 2014) (threatened listing); Final Rule, 79 Fed. Reg. 20,074 (April 10, 2014) (final 4(d) rule).

[29] Van Pelt, W.E., et al. 2013. The Lesser Prairie chicken Range-wide Conservation Plan. Western Association of Fish and Wildlife Agencies. Cheyenne, Wyoming. (available at: http://www.wafwa.org/Documents%20and%20Settings/37/Site%20Documents/Initiatives/Lesser%20Prairie%20Chicken/2013LPCRWPfinalfor4drule12092013.pdf) (hereafter "Range-Wide Plan").

[30] 79 Fed. Reg. at 19,980.

[31] 50 C.F.R. § 17.41(d); 79 Fed. Reg. at 20,084-85.

[32] 79 Fed. Reg. at 20,077.

[33] 79 Fed. Reg. at 20,061-64.

[34] Range-Wide Plan at 108, 109, 198, 199, 211.

[35] The plan estimates that over 30 years, 10,778 prairie chickens will be killed from oil and gas drilling; 2,755 from wind turbines and vertical structures; 1,734 from electrical transmission lines; 5,954 from roads; and 10,050 from habitat improvement projects. Range-Wide Plan at 139, 145, 148,149.

[36] Range-Wide Plan at 1.

[37] Proposed rule; 12-month finding, 78 Fed. Reg. 61,046 (Oct. 2, 2013).

[38] Final Rule; Interim 4(d) Rule, 80 Fed. Reg. 17,974 (Apr. 2, 2015).

[39] U.S. Fish and Wildlife Service, Northern Long-Eared Bat Interim Conference and Planning Guidance, USFWS Regions 2, 3, 4, 5 & 6 (2014) at 4.

[40] 80 Fed. Reg. at 17,996.

[41] CITE

[42] 80 Fed. Reg. at 17,997, 17,978.

[43] 78 Fed. Reg. at 61,076.

[44] Proposed rule; extension of comment period, 78 Fed. Reg. 72,058 (Dec. 2, 2013); Proposed rule; reopening of the comment period, 79 Fed. Reg. 36,698 (June 3, 2014); Proposed rule; reopening of comment period, 79 Fed. Reg. 68,657 (Nov. 18, 2014).

[45] 80 Fed. Reg. at 17,974.

[46] 80 Fed. Reg. at 18.032-33.

[47] 81 Fed. Reg. 1900-22 (Jan. 13, 2016).

[48] 50 C.F.R. § 17.40(o).

[49] Final rule, 78 Fed. Reg. 61,451, 61,458 (Oct. 3, 2013) (lark final listing rule).

[50] 78 Fed. Reg. at 61,457.

[51] 78 Fed. Reg. at 61,457-458.

[52] 78 Fed. Reg. at 61,458.

[53] 78 Fed. Reg. at 61,458.

[54] Notice of review of species which are candidates or proposed for listing, findings on recycled petitions, and progress on listing actions, 66 Fed. Reg. 54,808, 54,810 (Oct. 30, 2001).

[55] Proposed Rule, 77 Fed. Reg. 61,938, 62,007 (Oct. 11, 2012).

[56] 78 Fed. Reg. at 61,496.

[57] 78 Fed. Reg. at 61,496.

[58] This does not account for recruitment.

[59] 78 Fed. Reg. at 61,468.

[60] 50 C.F.R. § 17.41(a).

[61] Proposed rule, 78 Fed. Reg. 7864, 7890 (Feb. 4, 2013).

[62] 78 Fed. Reg. at 7887

[63] 16 U.S.C. §§ 1531(a)(4)(F), 1538(c); CITES, T.I.A.S. No. 8249 (1973).

[64] CITES, Art.III-IV.

[65] 16 U.S.C. § 1532(3).

[66] 50 C.F.R. § 17.40(f)(leopard); Resolution Conf. 10.14 (leopard); 50 C.F.R. § 17.40(d)(straight horned markhor);Resolution Conf. 10.15 (markhor); 50 C.F.R. § 17.44(y) (beluga sturgeon); Resolution Conf. 12.7 (sturgeon).

[67] CITES UNEP–WCMC database (available at: http://trade.cites.org/)

[68] Final rule, 80 Fed. Reg. 80,000, 80,007 (Dec. 23, 2015) (lion listing and 4(d) rule for threatened subspecies).

[69] Proposed rule and 12-month finding, 79 Fed. Reg. 64,490 (Oct. 29, 2014).

[70] 79 Fed. Reg. at 64,500-501.

[71] 80 Fed. Reg. at 80,002.

[72] 80 Fed. Reg. at 80,043-44.

[73] 16 U.S.C. § 1539(a)(1)(A).

[74] 16 U.S.C. § 1539(c) (requiring notice and comment for all Section 10 permits).