



# *Progress for Protection*



**Historic Endangered Species Act Settlement Concludes  
2011-2016 Report**





"Nothing is more priceless and more worthy  
of preservation than the rich array of animal life  
with which our country has been blessed.  
It is a many-faceted treasure, of value to scholars,  
scientists, and nature lovers alike,  
and it forms a vital part of the heritage  
we all share as Americans."

~RICHARD NIXON,  
STATEMENT ON SIGNING THE ENDANGERED SPECIES ACT OF 1973

A photograph of a group of prairie dogs on a small mound of reddish-brown soil in a grassy field. There are about eight prairie dogs of various sizes, some looking towards the camera and others looking away. The field is filled with green grass and small yellow and red flowers.

safeguard



## EXECUTIVE SUMMARY

WILDEARTH GUARDIANS' five-year-long historic Endangered Species Act (ESA) settlement agreement with the U.S. Fish and Wildlife Service—which addressed the significant backlog of imperiled species awaiting Endangered Species Act protections—largely came to a close on September 30, 2016. The settlement required the agency to make final listing decisions for hundreds of species, many of which had waited decades for protection from extinction. This report shares the successes of the settlement and the challenges that still lie ahead.

In 2011, 252 species were on the ESA's candidate list, meaning they were identified as likely warranting protection but had yet to receive legal safeguards. Some had languished for decades with no protection under the ESA, stuck behind what we called the "listing logjam." Meanwhile, actual listings slowed to a near standstill, even as the threats to imperiled species grew more urgent and severe. Under President George W. Bush, species listings reached a new and enduring low. In one year (2007), no new listings occurred, and other years' listings averaged fewer than 10. The listing program in the early years under President Obama's administration was also generally slow. In 2009, only two species were added to the list. In 2010, 53 species were added to the list, but most of those (50) were in just one state: Hawai'i. The overwhelming majority of candidate species were stuck in regulatory purgatory.

Because of the settlement, all the species which were on the candidate list in 2011 received decisions about whether or not to list them; 160 have since received final listing rules, giving them the full protections of the ESA. Our settlement paved the way to more efficient and timely Endangered Species Act decisions, and though we disagree with some of the decisions against protecting species, at least now the process is moving forward. WILDEARTH GUARDIANS' groundbreaking settlement agreement forced the Service to significantly change its processes and resulted in significant conservation benefits on the ground.



## BACKGROUND

The Endangered Species Act is our nation's most powerful legal tool for protecting imperiled species and their habitats. Passed by an overwhelming bipartisan majority of Congress in 1973 and signed by a Republican president, the law is wildly successful at achieving its primary goal of preventing extinction. More than 99 percent of rare plants and animals protected by the law still exist today. The ESA is especially important as a defense against the current extinction crisis; species are disappearing at a rate much higher than the natural rate of extinction due to human activities. Scientists estimate that 227 species would have gone extinct by 2006 if not for ESA protections. As the impacts of climate change manifest, the ESA will become even more important as a bulwark against extinction for species pushed to the brink by a rapidly changing planet.

### SPECIES WAITING ON THE CANDIDATE LIST

In 2011, at the time we entered into the settlement agreement, many species had already waited decades for a decision. They had no protection under the ESA, even though the Service determined they likely needed listing to escape extinction. Species languishing on the candidate list included:

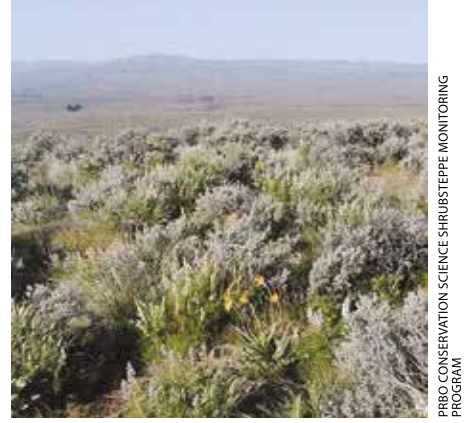
- The **Fickeisen plains cactus** waited on the candidate list for 32 years; it was listed as “endangered” in 2013.
- The **white fringeless orchid** waited on the candidate list for 35 years; it was listed as “threatened” in 2016.
- The **dunes sagebrush lizard** waited on the candidate list for 28 years; though it was proposed for listing as “endangered,” unfortunately the proposal was withdrawn in 2012.
- The **Rio Grande cutthroat trout** waited on the candidate list for 32 years; it was found “not warranted” for listing in 2014.
- The **Gonzales springsnail** waited on the candidate list for 23 years; it was listed as “endangered” in 2013.

The ESA provides no protections, however, until a species is officially listed as “threatened” or “endangered.” If a species is instead found “warranted but precluded,” it is shunted to the “candidate list;” effectively a waiting room of species that deserve listing but are “precluded” by higher priorities and lack of funding. However, the law only allows the agency to make a “warranted but precluded” finding if it is making “expeditious progress” on other priorities. In 2011, when we reached the legal settlement with the Service, that simply was not the case.

To break the listing logjam, WILDEARTH GUARDIANS applied pressure on the Service to address the extinction crisis. We filed over 30 lawsuits to hold the Service accountable for missed deadlines on legally required ESA decisions. The Service came to the negotiation table and together we worked out the details of what would become a historic settlement agreement resolving the backlog over a five-year period.



We entered into the agreement on May 10, 2011, and on September 9, 2011, D.C. District Court Judge Emmet Sullivan approved it. The settlement required the Service to make a decision about Endangered Species Act status for 252 candidate species by the end of fiscal year 2016: September 30, 2016. The settlement did not dictate what decision the Service would make about any species; it simply required a “yes” or “no” decision on listing so that the process could at last move forward.



PRBO CONSERVATION SCIENCE SHRUBSTEPPE MONITORING PROGRAM

The Service also agreed to undertake numerous additional actions, including making 90-day findings on 505 petitioned species, 12-month findings for 100 species, final rules for 20 species, and critical habitat rules or revisions for 201 species. Altogether, the settlement required action of some kind on 1,074 species. In return, GUARDIANS halted our existing deadline lawsuits and agreed not to petition more than 10 species per year and not to sue over any more missed deadlines during the settlement term.

The goals of the settlement were to move species protection forward and to prevent near-constant deadline litigation by creating a decision-making process that was less adversarial and more focused on preserving biodiversity. By creating a timeline for final decisions, the settlement gave stakeholders the ability to plan for the future.

## MOVING SPECIES THROUGH THE LISTING PROCESS

To become listed, a species must go through several stages; after listing is requested via a scientific petition, the U.S. Fish and Wildlife Service has 90 days to decide whether to move forward based solely on the information in the petition itself. The Service can also nominate species for listing internally, though it rarely does so.

Then the process enters the 12-month stage, wherein the Service considers all available information about the species and threats to its survival.

Next, the species is found “warranted,” “not warranted,” or “warranted but precluded” for listing. If a species is warranted, the Service has a year to finalize the listing.

When the final rule is published, the species is added to the list of threatened and endangered species, giving it the full protections of the ESA.

### 423 species

included in the settlement agreement received positive 90-day findings and are awaiting 12-month findings

### 18 species

included in the settlement received “warranted but precluded” 12-month findings and are now candidates for listing

### 193 species

included in the settlement—candidates and others—received final listing rules and are now protected under the ESA

# recovering

## LISTED SPECIES

An incredible diversity of candidate species—174 in total, about 70 percent of the 252 candidates that languished unprotected before we reached the agreement—were proposed for listing (14) or granted the full legal protections of the Endangered Species Act (160) as a result of the settlement agreement. The following are just a few examples:

### THE NEW MEXICO MEADOW JUMPING MOUSE

USFS



This small mammal is a jumping powerhouse; it can leap 10 times the length of its body. The jumping mouse's large back feet may assist it with swimming as well as jumping. It is a water-loving animal, living only along the banks of southwestern streams in New Mexico, Arizona, and a small part of southern Colorado.

The New Mexico meadow jumping mouse has one of the longest hibernation periods of any mammal, sleeping through up to 10 months of the year. GUARDIANS petitioned the Service to list the jumping mouse in 2008, and it received a final listing as “endangered” in 2014. Safeguarding this little critter means protecting healthy streams in the arid southwest from overgrazing, dewatering, and trampling by cattle.

### THE GUNNISON SAGE GROUSE

LOUIS SWIFT



These rare dancing birds are America's most recently discovered avian species: Gunnison sage grouse were not recognized as a distinct species until 2000. They are distinguished from their close cousin, the greater sage grouse, by white bars on their tails and a dense “ponytail” of fine, hair-like feathers on the backs of their heads. Their fascinating mating display is an iconic springtime ritual of the sagebrush steppe, a unique but poorly-protected habitat home to more than 350 recorded vertebrate

species. Sagebrush steppe was once widespread in the Intermountain West, including the Great Basin and the Colorado Plateau. It has become fragmented and degraded due to fire suppression, livestock overgrazing, and invasive species. A coalition of groups petitioned the Gunnison sage grouse for ESA protections in 2000; in 2014, it was listed as “threatened.” Keeping oil and gas in the ground will be crucial for these birds, since they are displaced from ancestral mating grounds (leks) by drilling and development.

# diversity

## THE JEMEZ MOUNTAINS SALAMANDER

GARY NAFIS



The small brown and gold Jemez Mountains salamander is shy and rarely seen. This secretive amphibian lives in fragmented populations in its namesake mountains near New Mexico's Valles Caldera National Preserve.

GUARDIANS petitioned the salamander for listing in 2008, and it was listed as "endangered" in 2013. Protections for

the Jemez Mountains salamander safeguard the Jemez Mountains, preserving large tracts of undisturbed wilderness with vistas of rocky peaks and mountain streams, and unique features such as hot springs, fumaroles, and the Valles Caldera itself, a ring of hills formed from the remnants of several extinct volcanoes.

## THE YELLOW-BILLED CUCKOO

USEFWS



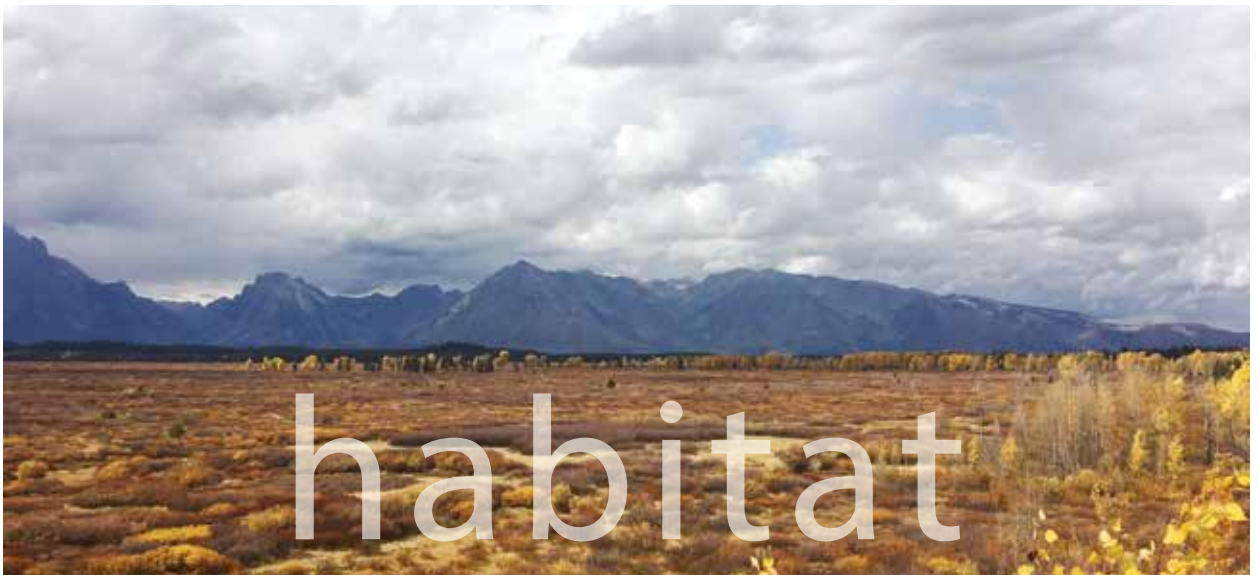
Western yellow-billed cuckoos nest exclusively in streamside stands of cottonwood and willow, and spend winters in South America.

The Center for Biological Diversity petitioned this species for listing in 1998, and the Service concluded that populations west of the Continental Divide made up a Distinct Population Segment (a discrete and significant population) that deserved legal protections.

In 2014, the yellow-billed cuckoo was finally listed as "threatened"

after 13 years on the candidate list. Protecting yellow-billed cuckoos means protecting their habitat, including rivers and streams in nine states. GUARDIANS is working to protect the dynamic flows of the Rio Grande, which nurture the cottonwood forests where yellow-billed cuckoos nest. GUARDIANS' on-the-ground restoration work rehabilitates key streamside habitat.

BETHANY COTTON





## OTHER FASCINATING SPECIES

JEFF SERVOS, USFWS



The **Northern Mexican gartersnake**, a rare gartersnake subspecies found only in wetlands and near rivers in Arizona and New Mexico, was listed as “threatened” in 2014.

ROBERT HEERHILLER



The **Chupadera springsnail**, a tiny snail native to a single spring in New Mexico, was listed as “endangered” in 2012.

LEE HUGHES, BLM



The **Gierisch mallow**, a rare plant only associated with gypsum outcroppings in Arizona and Utah, was listed as “endangered” in 2013.

BRYAN REYNOLDS



The **Dakota skipper**, a butterfly needing undisturbed prairie habitat to survive, was listed as “endangered” in 2014.

NMDCG



The **Zuni bluehead sucker**, a fish once common in the Little Colorado and Zuni River drainages, was listed as “endangered” in 2014.

JILLUTRIIP, USFWS



The **Ozark hellbender**, a huge salamander found in southern Missouri and northeastern Arkansas, was listed as “endangered” in 2011.

HANK JORGENSEN



The **Acuña cactus**, a resident of Organ Pipe Cactus National Monument in Arizona, was listed as “endangered” in 2013.

DANA ROSS



The **Taylor's checkerspot**, a butterfly found in scattered populations in Oregon and Washington, was listed as “endangered” in 2013.



## FAILURE TO LIST

We disagree with a number of the “not warranted” decisions the Service made. The following are examples of species that were wrongfully denied listing despite their imperilment.



**Rio Grande cutthroat trout.** Even though approximately 89 percent of both distribution and abundance of Rio Grande cutthroat trout was lost in the last 50 years, the Service declined to list the species. The main threat to this inhabitant of New Mexican and Coloradan rivers and streams is competition and hybridization with introduced trout species.



### **Morafka's desert tortoise.**

This close relative of the Sonoran desert tortoise, found in Arizona and Mexico, was denied

protections despite threats from development and habitat fragmentation. These slow-moving animals are also vulnerable to off-road vehicle collisions and collection for the pet trade.



**Greater sage grouse.** The Service denied this species the strong protections of the ESA in favor of a patchwork of state and local conservation agreements, some of which fail to preserve the basic habitat requirements for sage grouse persistence. Political pressure from oil and gas lobbyists, livestock growers, and state governments hostile to listing the species undoubtedly played a role in the Service's decision. Threats to greater sage grouse include habitat destruction and modification from fossil fuel development, roads, fences and power lines, wildfires made far worse because of invasive plant species introduced by overgrazing, as well as direct destruction of sagebrush sea habitat by livestock.

# imperiled

## FAILURE TO LIST CONTINUED

ANDREW HOLLANDER



**Gunnison's prairie dog.** Despite acknowledging a population decline of 98 percent from historic numbers, the Service denied listing to this ecosystem engineer. Gunnison's prairie

dogs are key species in their grassland habitat; their burrows turn and aerate the soil, and provide homes for other animals including burrowing owls and swift foxes. Prairie dogs are important prey for numerous carnivores including coyotes, ferruginous hawks, and golden eagles. However, they are also considered a pest species by many livestock growers, which makes protecting them politically fraught.

CHRIS WIRTH



**Coral Pink Sand Dunes tiger beetle.** This insect is found only in the Coral Pink Sand Dunes of Utah, and its habitat is surrounded by off-road vehicle "play areas." Instead of the strong protections of the ESA, the Service decided to leave the survival of the beetle to unproven conservation actions and management plans.

## THE NEXT DECADE

The Service fulfilled its commitments under the settlement. Though we disagree with some of the decisions the Service made, we are gratified that the process is moving forward and many species are at long last gaining the protections they deserve.

In the post-settlement world, much work remains to be done to address the extinction crisis. GUARDIANS is stalwart in our commitment to protecting and restoring our most imperiled wildlife. We will continue our work to counter actions that weaken ESA protections, including:



**GUARDIANS is stalwart in our commitment to protecting and restoring our most imperiled wildlife.**



- **The use of voluntary conservation agreements to avoid the strong protections of listing under the ESA.** For example, in the case of the dunes sagebrush lizard, voluntary conservation agreements with oil and gas companies were used to justify the withdrawal of the proposed listing rule. Data collected by Defenders of Wildlife shows that those agreements have not been followed or enforced, and habitat destruction is continuing.

- **Section 4(d) “special” rules undermining conservation.** For species listed as “threatened,” the Service can implement a section 4(d) rule. Though these rules are meant to further the conservation of the species at issue, the Service is now using them to exempt certain activities from the prohibitions on killing or disturbing listed species. For example, the 4(d) rule for the lesser prairie chicken exempted certain oil and gas drilling projects, even though oil and gas drilling is one of the primary threats to the species.

- **Agency decisions based on politics, not science.** A recent report by the Union of Concerned Scientists found that 70 percent of Service scientists think the level of consideration of political interests in agency decision-making is too high. This concern was borne out in the Service’s recent failure to list the wolverine. GUARDIANS challenged the failure to list the wolverine in the face of significant threats including climate change and habitat fragmentation. In a legal decision overturning the withdrawal of the proposed listing, the Court wondered, “Why did the Service make the decision [to not list the wolverine]?... Based on the record, the Court suspects that a possible answer to this question can be found in the immense political pressure that was brought to bear on this issue, particularly by a handful of western states.”

- **Improper interference in the peer review process.** In the case of the gray wolf peer review, the Service improperly influenced who was selected to be on the first peer review panel; after Public Employees for Environmental Responsibility blasted the Service’s actions, the Service admitted wrongdoing and restarted the process. When the second, unbiased panel released a peer review critical of the Service’s proposal to strip protections from gray wolves, the Service attempted to bury the peer review and still has not withdrawn the flawed proposal despite a commitment to follow the science.

- **Designating a Distinct Population Segments (DPS) or dividing populations into DPSs for the sole purpose of removing protections.** DPSs are meant to protect important isolated segments of species’ populations, not reduce protections for the species or allow for piecemeal removal of protections. A federal court rejected the Service’s attempt to strip gray wolves of protections by





designating, and simultaneously removing protections from DPSs. Ignoring that ruling, the Service is currently (as of October 2016) attempting to designate a Greater Yellowstone Ecosystem grizzly bear DPS for the sole purpose of removing protections from that population. Doing so is clearly counter to the intent of the law.

- **Congressional attacks on the ESA.** Backhanded attacks by anti-conservation lawmakers—often at the behest of the fossil fuel and livestock industries—are on the increase. They come in the form of stand alone bills or non-germane policy riders on must-pass federal legislation that de-fund the Service’s implementation of our agreement, seek to preempt listing, or legislatively strip species of protections. The current omnibus bill contains a rider preventing listing of the greater sage grouse. Over 100 attacks on the ESA, either by anti-ESA legislation or rider on unrelated legislation, were recorded in the current Congress. The Service has done little to speak out against these attacks. Species already being targeted include gray, Mexican, and red wolves, Gunnison and greater sage grouse, the northern long-eared bat, and the New Mexico meadow jumping mouse. Guardians will continue to defend species that come under specific political, agency, or industry attack.

## CRITICAL HABITAT DESIGNATED BECAUSE OF THE SETTLEMENT

Critical habitat is one of the protective designations granted to listed species. Through critical habitat designation, the ESA safeguards areas critical to a species’ conservation. This can include breeding or nesting grounds, areas with key prey populations, and connectivity corridors. It can also include currently unoccupied habitat deemed necessary for the recovery of the species. Critical habitat recognizes that it is not enough to protect just a species itself. For an imperiled plant or animal to recover to the point at which it no longer needs federal protections, ensuring protections for the habitat on which it depends is essential.

**Total critical habitat designated as a result of the settlement agreement :**

**2,713,154.7 acres (4,239.3 square miles),** an area larger than Yellowstone National Park, and **6380.4 stream and river miles.** If laid end to end in a straight line these river and stream segments would reach from the U.S. east coast to the west coast and back.



## NOTABLE EXAMPLES OF DESIGNATED CRITICAL HABITAT

USEFWS



**50,635** acres in Colorado for the DeBeque phacelia, a rare plant

WILLIAM LEONARD



**65,038** acres in the northwestern states for the Oregon spotted frog

JOYCE GROSS



**750,926** acres in California for the Yosemite toad

KARL MAGNACCA



**42,804** acres in Hawaii for numerous plant species

USEFWS



**1,494** miles of stream for eight mussel species in Alabama and Florida

KEVIN KASENCHAK



**221,498** acres in California for the mountain yellow-legged frog

CLINTON & CHARLES ROBINSON



**623** river miles in Texas for the sharpnose shiner, a rare fish

## CONCLUSION

The work to ensure that the Endangered Species Act remains strong and effective at achieving its purpose—to ensure the survival and recovery of our country’s most imperiled wildlife—is ongoing. The settlement brought an end to years of deadline lawsuits, but litigation will continue to be an important tool in GUARDIANS’ work going forward as long as the Service continues to undermine the ESA from within.

Renowned conservationist Aldo Leopold once said, “The last word in ignorance is the man who says of an animal or plant, ‘What good is it?’... To keep every cog and wheel is the first precaution of intelligent tinkering.” As the settlement concludes, many more of the cogs and wheels that make up functioning ecosystems are protected, and dozens of species on the brink of extinction are safeguarded, making it far more likely they will survive into the future. The settlement was successful in driving the agency responsible for protecting our country’s wildlife to at last fulfill its duties to plants and animals in peril. Ultimately, our hope is that we as a nation and a world will embrace GUARDIANS’ belief in nature’s inherent right to exist and thrive.

JANICE ST. MARIE





## DEDICATION

Jay Tutchton and Nicole Rosmarino

were the architects of this historic agreement during their tenure at WILD EARTH GUARDIANS.

Though they are no longer on GUARDIANS' staff, "once a GUARDIAN, always a GUARDIAN."

Their tireless labor and fierce advocacy made a huge difference for the  
wild animals and plants of the United States.

We extend our deep gratitude.





## MISSION

WILDEARTH GUARDIANS protects and restores  
the wildlife, wild places, wild rivers, and health of the American West.

## VISION




We believe in nature's right to exist and thrive. We act on this belief with compassion and courage by preserving the wild world. We defend wildness, empower life, end injustice, and stand for healthy, sustainable ecosystems and human communities. We embrace conflict, and cooperate without compromising our values. We execute our campaigns strategically and decisively, we mobilize, inform and inspire others, and we work to heal wounded landscapes. Our enduring and fierce advocacy leads us to success. We are A FORCE FOR NATURE.



### WILDEARTH GUARDIANS

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