

NOVEMBER 20, 2007

Politics undercut species act, suits say

In a twist, an Interior Department investigation provides much of the grist for the legal action.

By MARK CLAYTON*Staff Writer*

Wiped out across most of its range in the American Southwest, the Mexican garter snake was considered a shoo-in for listing under the Endangered Species Act. It got nothing.

Neither did the Mississippi gopher frog. Though listed as endangered in 2001, the now-rare amphibian got not a single acre of habitat set aside on its behalf. The loach minnow, once common in Arizona and New Mexico rivers, saw 143,680 acres of proposed critical habitat chopped by more than half.

In each case, Bush administration political appointees overrode federal scientists' recommendations, with little or no justification, ac-

ording to six lawsuits filed Thursday by the Center for Biological Diversity (CBD), an endangered species advocacy group.

The Bush administration is no stranger to being sued under the Endangered Species Act (ESA). But in a tack that could signal a major new legal challenge, last week's suits mark one of the few times Interior Department officials have been sued not merely for bureaucratic foot-dragging, but because of deliberate political interference with the ESA, observers say.

“This wave of lawsuits is different – and what makes them so different is that the agency itself and its inspector general have provided a lot of compelling evidence of political interference with the proper

functioning of the act,” says J.B. Ruhl, a law professor at Florida State University in Tallahassee and an expert on the ESA.

A big factor in the CBD's legal fustillade hinges on the April release of a scathing report by the Interior Department's inspector general on the actions of Julie MacDonald, the department's former deputy assistant secretary for fish and wildlife and parks. The report found numerous questionable actions on endangered species and criticized her release of internal documents to outside groups opposed to the ESA.

After Ms. MacDonald resigned in May, agency officials reviewing her work identified at least eight species cases that may have been affected. But the CBD claims documents show a pattern of ESA interference affecting many more cases – and by other officials besides MacDonald.

Though declining to comment on the lawsuits, an Interior Department spokesman says they are part of an ongoing wave of litigation by activists that dates back more than a decade.

“These guys sue us all the time, and I don't doubt they would accuse this administration of political

**Mississippi gopher frog:**

Although it was listed as endangered in 2001, the rare amphibian has had no habitat set aside on its behalf.

Glen Johnson/U.S. Fish and Wildlife Service

interference,” says the Interior’s Hugh Vickery. “It’s part of the whole history of the [ESA]. The provisions aren’t working. They’re just a litigation magnet.”

The six lawsuits last week are the first of 55 the group expects to file – one for each species denied protection for which CBD says it can supply documentation of improper political intervention. In all, the group says, the 55 species were denied 8.7 million acres of critical habitat and other protections.

Legal experts say the latest suits could represent a widening of the scope of cases brought for judicial review – and are supported by precedents in environmental law.

“If the CBD can prove that political appointees interfered with the work of the biologists, ordered certain findings, or reversed scientists’ decisions, well, they’ve got a pretty solid line of environmental cases that would support invalidating those decisions,” says Patrick Parenteau, a law professor and ESA expert at Vermont Law School in South Royalton.

One CBD lawsuit describes the plight of the Santa Ana sucker, a southern California fish listed as threatened in 2000. Two Interior officials overruled federal scientists who had proposed 23,719 acres of critical habitat protection. The fish got 8,305 acres.

After that decision, however, an internal document dated Dec. 22, 2004, reveals agency staff grouching that the decision at headquarters made no sense and warned of “how difficult this one will be when it comes to straight-facing it with the public and the press.”

Political interference is part of a pattern in the Bush administration, the CBD claims. The Bush presidency has seen 58 species listed as endangered, fewer than during any presidency since the law was enacted in 1973. By contrast, 522 were listed under President Bill Clinton and 231 under President George H.W. Bush.

Mr. Vickery at Interior counters that environmental groups won’t talk about the tangle of lawsuits they’ve brought, and how those, combined with limited budgets and manpower at the department’s US

Fish and Wildlife Service, have slowed the agency’s ability to get species listed and critical habitat designated.

“We have inherited years of this stuff,” he says. “There’s a practical problem of how to list species when you don’t have the staff you need.”

Legal experts aren’t so sure. While agreeing that lawsuits are slowing the ESA process, they say the Bush administration should be making its complaint to Congress – not violating the law and provoking more suits.

“The courts have said you can’t use the excuse that you don’t have the resources,” Professor Parenteau says. “The real fault isn’t with the CBD, it’s with the administration and Congress. They should change ESA requirements if they don’t believe them to be truly justified.”