

The dilemma of rediscovered 'extinct' species

BY STEPHEN GIDIERE AND JEFF WOOD

If you haven't heard about the rediscovery of the ivory-billed woodpecker, then you are probably living in a remote, hard-to-reach swamp. Believed extinct in the United States since the 1940s and worldwide since the 1980s, the ivory-billed woodpecker (or at least one of them) has reportedly been spotted in the Cache River National Wildlife Refuge in Arkansas. This widely publicized rediscovery has captured the hearts and imaginations, not just of bird enthusiasts, but of millions of Americans concerned with conservation.

The ivory-billed woodpecker is not the first "extinct" species to be rediscovered in the United States. In 1994, Yadkin River goldenrod (a flowering plant growing among river rocks) was rediscovered in North Carolina after vanishing for more than 100 years. Similarly, in Hawaii, searchers rediscovered the shrubby *Gouania meyenii* (a flowering shrub found on rocky ridges, cliffs and gulch slopes) after a 50-year hiatus. In Alabama, The Nature Conservancy, which played a central part in the search for the ivory-billed, recently announced the rediscovery of the Cahaba pebblesnail at the Cahaba River National Wildlife Refuge.

But the ivory-billed stands out from these other rediscovered species. It is a colorful and attractive symbol and, to many, a legend. News of its rediscovery has inspired and drawn attention to efforts to rediscover other species believed to be extinct or nearly so. After all, if one of the world's largest woodpeckers — with a wingspan stretching 3 feet — can go undetected for almost 60 years, it is very possible that more obscure species believed to be extinct (such as mussels or snails) are also still around. In all, more than 500 species are currently considered to be extinct or missing in the United States, with Hawaii, Alabama and California collectively accounting for more than 350 extinct species. The ivory-billed, however, is one of just six North American bird species believed to have gone extinct since 1880.

The rediscovery of an extinct species, while certainly good news, may present a variety of regulatory challenges and dilemmas. Within months of the announcement of the ivory-billed's rediscovery, for example, a controversy ensued over the effect this rare bird might have on a proposal before the U.S. Army Corps of Engineers (Corps) to drain water from the White River to irrigate crops in Arkansas. Environmentalists argue that the proposal would adversely affect ivory-billed habitat, while the rice farmers and the Corps disagree.

Nonetheless, the federal Endangered Species Act (ESA) offers no protection for "extinct" species. The ESA only protects "endangered" or "threat-

ened" species, which are defined as species "in danger of extinction" not as species that already are. 16 U.S.C. § 1532(6) and (20). This is only logical because resources should not be expended to protect species that simply do not exist. Thus, the U.S. Fish & Wildlife Service (Service) delists species (or drops them from its candidate list) once they are determined to be extinct. See 50 C.F.R. § 424.11(d) (authorizing the Service to delist a species because of "extinction").

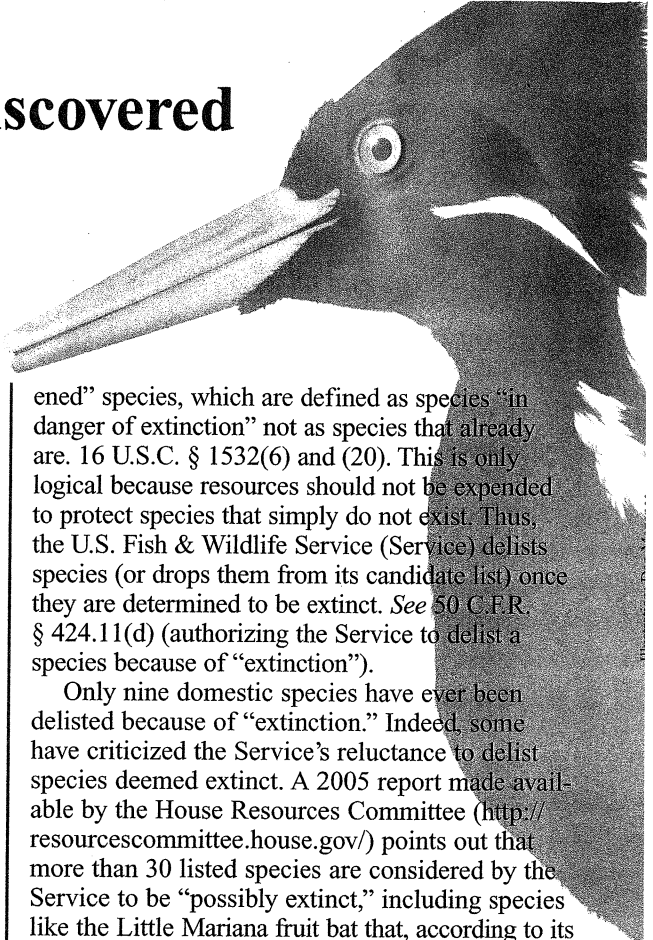
Only nine domestic species have ever been delisted because of "extinction." Indeed, some have criticized the Service's reluctance to delist species deemed extinct. A 2005 report made available by the House Resources Committee (<http://resourcescommittee.house.gov/>) points out that more than 30 listed species are considered by the Service to be "possibly extinct," including species like the Little Mariana fruit bat that, according to its recovery plan, was last spotted in 1968. Fortunately for the ivory-billed, it remained on the list of endangered species, but other species may not be so lucky, having either been delisted or never listed at all.

So, when an "extinct" species is rediscovered, it may have no legal protection under the ESA; ironically, at least for a period of time, the most vulnerable species may be the least protected. Some species will have protection from other federal or state laws. For example, if the species is rediscovered on federal lands (like a national wildlife refuge or national park), then federal regulations likely protect the species from direct harm or removal and the federal land use planning process will take the protection of the species into account. But species on private lands won't have these protections and, in either case, the over arching restrictions in the ESA, including its consultation requirement, do not exist for unlisted species.

To gain or regain ESA protections, the rediscovered species will have to go through the listing process under Section 4 of the ESA. This might prove difficult for a newly rediscovered species. One reason is because the ESA mandates that listing decisions be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). If the best available science previously indicated that a species was extinct, the Service will have the burden to produce new science demonstrating that the species does in fact exist.

That might be simple in the case of a stationary plant, but more difficult for a fish, bird or other mobile species. (In fact, some scientists have challenged the evidence used to support the rediscovery of the ivory-billed, arguing that the bird spotted in

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the refuge was likely the relatively common pileated woodpecker.) Further, if arguments arise that the extinct species is actually a subspecies or distinct population segment of another species, then the issue often becomes even more difficult and contentious.

Even if a rediscovered species eventually garners federal protection under the ESA, the listing process may take years. The Yadkin River goldenrod, for example, was only recently included on the Service's roster of candidate species and, more than 10 years after its rediscovery in 1995, this plant remains unlisted. Some might advocate the use of the "emergency" listing process to protect these recently discovered species. See 16 U.S.C.

§ 1533(b)(7). Emergency listings are no panacea, however. They are relatively uncommon and, more important, provide only temporary protection (they can last for only 240 days). *Id.*

Fortunately, the Service has implemented several initiatives under the ESA to encourage voluntary conservation efforts to protect and expand populations of sensitive, but unlisted, species that fall outside the regulatory prohibitions in the statute. For example, the Service operates a Candidate Conservation Agreement with Assurances (CCAAs) program that encourages participating landowners to work for the conservation of so-called "candidate species," meaning those species that remain unlisted but that are likely to be listed in the future.

These agreements may also be used to benefit species likely to become candidates in the near future. By entering CCAAs, landowners are assured that no additional land use restrictions will be imposed as a result of helping a candidate species that later becomes listed as endangered or threatened.

Also in recent years, the Service has awarded millions of dollars in matching grants to landowners across the country under the Private Stewardship Grant Program, which is used to support on-the-ground conservation activities on private lands for the benefit of federally listed, proposed, candidates or other at-risk species. This grant program may benefit unlisted species recognized by states as species of concern and species listed by NatureServe as "critically impaired," "imperiled" or "vulnerable," including rediscovered, formerly extinct species.

These initiatives can fill the gap between rediscovery of an extinct species and its eventual listing (or perhaps eliminate the need for listing altogether). Last year, for instance, the Service provided seven grants for private conservation activities aimed at enhancing red-cockaded woodpecker habitat across the Southeast. These grants provided substantial funds to private landowners to restore longleaf pine habitat and install hundreds of artificial cavities.

Also, where scientific information regarding the status of a species is sparse, resulting in a decision not to list the species, the species is not always entirely unprotected. The Service may join with state and local wildlife agencies, citizen groups and private landowners to develop effective voluntary conservation

plans that may, in some situations, provide extensive protections for these species.

For example, in Alabama, the Mobile River Basin Coalition (Coalition) includes representatives from the Service; the Corps; other federal, state and local government agencies; businesses; trade associations; and environmental groups. The Coalition provides a forum for these often divergent interests to reach consensus on resource issues. The Coalition's efforts culminated in the "Recovery Plan for the Mobile River Basin Aquatic Ecosystem," which details objectives, criteria and tasks for the recovery of 15 freshwater species in the Mobile River Basin.

Depending on the other relevant factors, the Service is authorized by the ESA to forego listing a species where extensive conservation arrangements exist that provide sufficient protections for a particular species. See 16 U.S.C. § 1533(b)(1)(A) (requiring the Service, when listing a species, to "tak[e] into

account those efforts, if any, being made by any state . . . or any political subdivision of a state . . . to protect such species").

Other voluntary conservation programs can play an important part in recovering rediscovered species once they make it onto the federal list. Safe Harbor Agreements (SHAs) provide participating landowners with assurances that no additional land use restrictions will be imposed as a result of taking voluntary conservation actions to benefit listed species. In fact, a portion of the \$10 million recently proposed by the departments of the Interior and Agriculture for the protection of the ivory-billed woodpecker is targeted toward the development of SHAs.

With the rediscovery of the ivory-billed woodpecker, as with other listed yet believed to be extinct species, a flurry of activity generally ensues on rediscovery, centering on the development of a "recovery plan." Section 4(f) of the ESA, 16 U.S.C. § 1533(f), requires the Service to develop recovery plans for each listed species that include "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list."

These recovery plans, however, are seldom developed until many years after the final listing of the species. Nonetheless, the Service has begun the process of developing a recovery plan for the ivory-billed, which is slated for completion by the summer of 2007 and may cover the bird's extensive historic range, including the Big Woods corridor of central Arkansas, eastern Texas' Big Thicket, Louisiana, Mississippi, Alabama, Florida, southern Georgia and the Carolinas.

With the implementation of a sound recovery plan and the use of other tools like SHAs and other conservation agreements, the ivory-billed woodpecker can be a symbol not just of what can be *rediscovered*, but of what can be *recovered* through cooperation and creative thinking.

The rediscovery of an extinct species, while certainly good news, may present a variety of regulatory challenges and dilemmas.

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