

THE RANCHER'S REVENGE

When environmentalists attacked, rancher Jim Chilton used the best ammunition he could find — and it came from his enemy

BY SARAH FENSKE

Jim Chilton doesn't just admire cowboy values. He believes in them. And, like any true believer, he's eager to share the gospel in well-rehearsed sound bites, whenever the situation allows.

Ask him, for example, why he decided to sue one of the West's most prominent environmental groups. "I laid in bed at night, wondering if I was a cowboy or a wimp," he'll reply. "If you're a cowboy, you stand up and fight for truth, justice, integrity and honor. If you're a wimp, you lay there and go to sleep."

Or, ask about nature. "For a cowboy," he'll tell you, "every day is Earth Day."

That's why Chilton got so mad at the Center for Biological Diversity. The Center tried to make him the bad guy when he, the cowboy, was supposed to be the hero. And that was an attack no cowboy could forgive. (Forgiveness, after all, is for wimps.)

And so he sued -- a switch, given that the Center is normally the one filing the lawsuits. Chilton took the case to trial, and won one of the biggest punitive damage awards Arizona is likely to see this year.

The decision didn't affect his ability to ranch. A previous decision by the Forest Service had taken care of that. But he did win a lot of money. And in the process, he stunned the environmentalists and rankled First Amend-

ment defenders. The Center returned to court this month, asking the judge to throw out the verdict, explaining that Chilton's victory set a dangerous precedent, one that would cripple the rights of anyone in the business of mouthing off to the government. The judge is now considering the Center's request.

To the Center, it's nothing less than a travesty of justice.

"This is a very wealthy California banker, but the jury bought into that good-old-boy rancher thing." says Kieran Suckling, one of the group's founders. "It shows that a bitter little man with a very large bank account can wage war on environmental groups in the courtroom."

Jim Chilton sees it differently. The Center didn't just lobby the government, he argues. It lied. And it was lying about him.

The difference in how the two parties view the matter, in many ways, reflects a fundamental split between the Old West and the New West.

Ranchers like Chilton will tell you that they and their families have been grazing cattle in Arizona for more than 200 years, and even if their ancestors weren't always good to the land, their profession is not intrinsically bad. In fact, they argue, they're doing better than ever before, thanks to heightened environmental pressure, but also because being good to the land is good for the business of ranching.

Meanwhile, groups like the Center have targeted cattle as one of the biggest threats facing Western ecology. They've used the presence of endangered species on federal allotments to push for heightened government regulation.

One goal has been fencing off streams to protect them, and the creatures who live on their banks, from cattle. But ranchers say limited access to water makes ranching economically impossible. They charge environmentalists with using endangered species as a Trojan horse to drum them out completely.

Alexander Thal, director of the Southwest Center for Resource Analysis at Western New Mexico University, says heightened environmental controls have led to the loss of 50,000 cattle in Arizona alone. "The ranchers are holding on, but they've had to sell off property and subdivide their land to stay in business," he says.

Tensions between the two groups are high -- so high that it took just one press release to light the bonfire.

It happened like this:

In April 2002, the U.S. Forest Service announced that it was reissuing the permit that allows Chilton and his wife, Sue, to graze cattle on 21,500 acres of public lands south of Tucson, an area called the Montana Allotment. No fans of grazing, and convinced that endangered species were threatened by the Chiltons' cattle, the

Center for Biological Diversity appealed the decision in June.

But the Forest Service stuck by its decision. Its ranger basically told the Center to get lost.

And so the Center -- "the most important radical environmental group in the country," according to a profile of the group published several years ago in the New Yorker -- posted a press release on its Web site July 2, 2002. The release noted that the group had appealed the Forest Service's decision and included "photographic evidence showing excessive grazing and other problems" on Chilton's allotment. At the bottom, the Center provided a link to its appeal, along with the photographs.

The release itself isn't exactly vivid, but the 21 photos, and their captions, are. Collectively, they give the clear impression that the Chiltons' ranching techniques had turned the acreage into wasteland.

Photo after photo features the barest vegetation, crusty earth, and trampled fences. The captions tell it all. "This bare slope is compacted, crusty and dry," one notes. "New plant growth and vigor is virtually nonexistent."

Most damning, visually, is Photo #18, taken in May 2002: A pair of cows sits on a flat plane of mud, no plants in sight. "California Gulch," the appeal notes, is "completely denuded of forage and severely compacted." The cows look terribly forlorn, as if the conditions on the acreage are upsetting even to them.

The monthly newspaper in the nearest town to the Chiltons' ranch, The Connection, picked up the press release, running a story that included the Web site address for anyone who wanted to check out the pictures. And that's when Jim Chilton saw them for the first time.

To a guy who boasts about how cowboys are "brave, loyal and true" -- and yes, that's an actual quote -- it was too

much. He was convinced he'd been a good rancher. The photos didn't show the acreage he knew.

"It hit me like a kick after I looked at the pictures on their Web site," Chilton says. "I was just angry."

A slender man, with neatly trimmed white hair and gold wire-rimmed glasses, it's much easier to picture him running the Chilton Ranch than running an investment firm in Los Angeles, which is how he made his money and what he still does, weekdays.

Jim Chilton speaks deliberately. But a current of anger runs just below the surface any time he talks about the Center for Biological Diversity and what he terms "their anti-grazing agenda."

He'd loathed the Center for years. This press release, these awful photos, came after four years of the Center's attempts to wipe out his ranch, he says. Chilton had fought back, and fought back hard, every chance he got.

But he'd always been reacting. He was tired of reacting.

A lawyer he knew in Patagonia, Dennis Parker, took a long look at the photos. "Jim," he said, "this is slanderous. You could sue on this."

By his own accounting, Chilton didn't think about it for very long. "Let's do it," he said.

Jim Chilton's lawsuit made hardly a ripple when it was filed, probably because no one gave it a chance in hell. The Center for Biological Diversity is no ragtag band of environmental dogooders. The government has been forced to bend to its will -- frequently. So, even, has Steven Spielberg. What's one angry rancher going to do in the face of that?

Founded in New Mexico in 1989 by a trio of environmentalists with ties to the radical Earth First! movement, the Center, now based in Tucson, started small and quickly grew into a powerhouse.

Its annual revenues now average more than \$1 million, according to its tax returns.

The Center has found its power in the law. While other environmental groups were still stuck on symbolic protests, the Center harnessed the power of the legal roadblock, halting development and curtailing business interests by filing suit after suit.

The Center's members truly believe in their mission. (Even Chilton admits this.) None of them is getting rich; not even close. They're fighting to protect endangered species and preserve wild places, and on the latter front, at least, they've been wildly successful.

The Center's weapon has been the Endangered Species Act, the 1973 law designed to protect vanishing species and their habitat. Under the act, an interested party like the Center can sue the U.S. Fish and Wildlife Service, forcing it to list various animals as endangered. Once the animals are listed, the Center can sue the agency for not sufficiently protecting them. Or to force Fish and Wildlife to designate "critical habitat" -- land that must then be protected for a species' survival.

And that gives the Center tremendous power: the power to stop timber companies. Or housing developers.

The Center has filed lawsuits to stop logging, including one in the 1990s that virtually destroyed the timber industry in Arizona and New Mexico. (That suit was to save an owl.) It's also sued to halt the construction of schools (same owl), golf courses (various lizards and squirrels) and even a DreamWorks complex (a bird called the flycatcher).

The Center doesn't always get what it wants, but by its estimate, the group has won more than 90 percent of its legal actions -- and it puts the number of such actions at more than 300.

"They play a critical role in pushing for protection of endangered species," says Sandy Bahr, who's worked with the group's staffers as conservation

outreach director for the Grand Canyon chapter of the Sierra Club, based in Phoenix. "They're out there gathering good data and trying to get these agencies to take action on something they definitely don't want to take action on.

"Everyone talks about compromise, and that's great . . . but when something is on the precipice of disappearing, or a species so threatened we might not have it anymore, there needs to be people who will stand up. And the Center does that."

The Center for Biological Diversity is not a foe to take on lightly. Even when Jim Chilton found an attorney who specializes in libel cases to handle the lawsuit, the attorney didn't seem too impressed with Chilton's potential for success. Kraig Marton, who practices at the tony Phoenix firm of Jaburg & Wilk, told Chilton he'd take the case, but he didn't offer any false hope.

"He told me I could never get my attorneys' fees back," Chilton recalls.

For all his folksy patter, Jim Chilton came to ranching late. It was while serving on Arizona State University's student government that he met his wife Sue, who was studying Spanish. As the only woman he assigned to his committee, he thought she might want to take notes for the group. Already feisty, she thought differently and made that clear. He was smitten.

After graduating, Chilton earned master's degrees in both political science and economics, worked for the Salt River Project, and was an assistant under U.S. Senator Carl Hayden. He started an investment firm in Los Angeles and did well enough that, he admits, Jamie Lee Curtis was a neighbor.

He didn't get a ranch of his own until 1987, when he purchased a house in a remote part of Pima County, followed by rights to graze cattle on two nearby swaths of land controlled by the Forest

Service. He briefly tried to make a go of it as a full-time rancher, but eventually found himself back in Los Angeles on weekdays, tending the ranch and his half-dozen cowboys on the weekends.

He likes to say he's a fifth-generation rancher. His ancestors arrived in Arizona in 1888, and they came driving cattle. (The family ranch, alas, is now underwater at Roosevelt Lake, thanks to the dam built on the Salt River.) But, on the job, he's learned that ranching has changed since the days his grandfather did it.

Decades ago, it wasn't uncommon for ranchers to put as many cattle on the land as it could support. But today, ranching is science. It's just good business, says C.B. "Doc" Lane, director of natural resources for the Arizona Cattle Growers Association. "The only way a rancher can survive is by taking care of his environment," he says.

And so ranchers develop grazing plans to move cattle from one pasture to another, giving the land recovery time. There's even a formula to determine how many cattle can graze on a certain allotment.

When Chilton bought rights to the Montana Allotment, its previous permit holders had only recently developed a grazing plan, says Duane Thwaits, the Forest Service staffer who supervised ranching for the Nogales district. The land's condition was starting to improve, but it needed time.

Thwaits was impressed with Chilton's dedication. Chilton even flew in the guy who wrote the formula for cattle numbers, Jerry Holecek, hiring him as a consultant. Sue Chilton, who has worked as a bilingual teacher, spent hours walking the allotment with him, taking plant samples and compiling data.

Holecek, a range science professor at New Mexico State University, says he enjoyed being able to "quantitatively document" that grazing could be good for the land. He calls the Montana

Allotment's recovery "one of our greatest success stories." He's published several papers detailing that success in research journals.

Chilton's interest in good science wasn't entirely altruistic. As he explains, "I saw what was happening. That's why I hired Holecek."

After all, the availability of scientific techniques isn't the only thing that's changed about ranching. Government regulation has become much more intense -- and that's partly due to the Center for Biological Diversity.

After the Center's success in halting logging in 1995, ranching was next on its agenda. In 1997, it filed suit against the Forest Service, arguing that the agency needed to consult with U.S. Fish and Wildlife to protect endangered species on the allotments under its control. It cited a total of 92 different ranches.

One of them was Chilton's.

It was the first time that Chilton and the Center for Biological Diversity would find themselves involved on opposite sides of a legal issue, although it certainly wasn't the last.

And this suit was, to some extent, a draw. Everyone involved with the suit claims partial success. The Center got Fish and Wildlife involved on the allotments, which meant, finally, someone was paying attention to the species there.

Meanwhile, after years of litigation, the appellate court ruled that ranchers were exempt from the controls of Fish and Wildlife unless the agency could actually demonstrate that there were, indeed, endangered species on their individual allotments. That was a victory for the cattlemen.

But the ruling only helped the Chiltons so much.

The reason? To their great annoyance, the couple had a minnow on their property: the Sonora Chub. A bunch of minnows, in fact. And while the best guess of fish biologists is that the chub is doing okay in Mexico, it only exists in two streams north of the border, including the California Gulch, a small stream that runs through the Chiltons' allotment.

That tiny range was enough to earn the fish a spot on Fish and Wildlife's "threatened" species list. And just like that, protecting it from the Chiltons' cattle became a government concern.

The files documenting the Forest Service's attempts to balance the Chiltons' grazing rights with the chub's protection are several feet high, but the gist is this: The government fenced off one small area of California Gulch in 1997 and another in 1998. And then, in 1999, it proposed fencing off a much larger area along the gulch.

The Chiltons didn't take to that idea happily. When they bought the grazing rights, they believe, they bought the water rights. And their cattle needed it - without water, they'd have to reduce the number of cattle on the allotment, Chilton says.

So they fought back, sometimes with lawyers, sometimes with letters of their own, as lengthy as they are angry. Once the couple demanded an apology and a retraction after receiving reports that a Forest Service biologist, Jerry Stefferud, said something bad about their grazing practices in a meeting. (Stefferud denies ever saying it.) Another time, the Chiltons penned a nine-page screed against an Arizona Game and Fish employee with a "personal mission to destroy" their ranch.

"Chilton just wanted to fight everything tooth and nail," Stefferud says.

They were paranoid, but, as the adage goes, that didn't necessarily mean people weren't out to get them.

The Forest Service biologist who

supervised the chub studies, Stefferud, has donated money to the Center over the years, as he admits. (New Times found records indicating he gave at least \$200 in 2002 alone.) "There's nothing wrong with contributing to the Center," he says. "For a long time it was on the United Way form and you could contribute as part of your paycheck. A lot of employees did it that way." His wife Sally also worked on the case as a senior fish biologist for U.S. Fish and Wildlife.

Meanwhile, another Forest Service employee penned a report claiming that the Chiltons' ranching was likely to harm the Lesser Long-Nosed Bat, another endangered species. That employee is married to a biologist who also donated to the Center -- a man who even co-authored a research paper on ponderosa pine with one of the Center's founders, Kieran Suckling. (Since no one has ever been able to prove that the bat in question lives on the Chiltons' allotment, that issue eventually went away.)

To the Chiltons, those ties were clear evidence that the government was not a neutral party, simply acting as mediator between their interests and those of the environmentalists. Instead, the government and the environmentalists were one and the same.

"They knew they could turn in sloppy science, and if it advanced the agenda, no one would challenge it," Sue Chilton says.

But the Chiltons, wealthy enough to hire their own consultants, were only too happy to make such challenges.

The question of whether the Forest Service would renew their grazing permit was still up in the air when Fish and Wildlife issued its recommendation in 2001: that ranching would illegally harm the chub unless nearly two miles of the gulch were fenced to keep cattle off.

The Chiltons responded with a 51-page letter. That part of the gulch was dry at

least half the year, they wrote, again and again, sometimes in bold type, sometimes in all caps. The Fish and Wildlife report, they screamed, "NEVER ONCE MENTIONS" that the entire area to be fenced dries up annually -- with or without cattle -- because of weather conditions. Even without grazing, the chub were going to die.

David Harlow, then Fish and Wildlife's field supervisor in Phoenix, insists that his decision to overrule the draft report was not unusual, although Jerry Stefferud disagrees.

Regardless, Harlow's decision was dramatic: Continuing to graze along the gulch, he wrote, overruling his agency's previous report, would not harm the chub.

The Forest Service concurred, reissuing the Chiltons' permit without ordering any more fencing.

And that's when the Center appealed, putting up a Web link to the photos it had taken on the allotment.

And that's when Jim Chilton sued the group and three of its employees for libel.

Cheerful and vaguely rumped, attorney Kraig Marton has the friendly lumber of a bear in a Disney cartoon. But once he starts talking about a case, it's clear he's the sharpest guy in any room.

Chilton was annoyed by the whole press release. But Marton, his new lawyer, understood that the real issue was the 21 photographs. To win any libel suit, he'd have to demonstrate that, even if the photographs were taken on the allotment, they did not reflect its actual condition, accurately or fairly.

A decision by Pima County Superior Court Judge Richard Fields made things even harder. Because Chilton's wife is chairman of the Arizona Game and Fish Commission, and because the Chiltons have been so outspoken on ranching issues, Fields ruled that they were public figures.

That meant Marton would have to prove that the Center didn't just get things wrong, but that it'd done so with "actual malice." There were two possibilities, legally: Prove the Center lied, or demonstrate it acted recklessly, with no regard for the truth.

As Marton researched, he began to see how he could make a case for malice. Chilton explained that four of the photographs weren't even taken on his allotment. They showed his private land, which borders the allotment, and his neighbor's. But not the allotment itself.

And that was only the tip of the iceberg.

Marton and Chilton drove the length of the acreage and determined where each and every photo was taken -- a long, slow process that, eventually, became a PowerPoint presentation and the heart of their case.

As they traversed the ranch, camera in hand, it became clear that the Center photographers had picked the worst spots they could find and focused their shots tightly, Marton says.

And so for each photograph the Center offered, the lawyer took a second photograph. One that showed a bigger, more complete picture.

"Look at this," Marton says, presenting one of the Center's photos of a patch of earth. "They have this captioned, 'Spring trampled to mud.' Well, they looked down. Just look up!"

Then he shows his photograph, a panoramic view of the same spot. "Trees, dense foliage, the land was beautiful. And they just show you this picture!"

Some of the shots were less obvious, but made sense once Chilton explained the history.

For while most of the acreage today is wild, its history is much more complicated. There was once an active mine on the land and four small communities.

At one time, the biggest town, Ruby, had a population of 300. As a journey through the allotment makes clear, traces of human activity are still there today. There's the footprint of a house and old roads only beginning to regrow vegetation.

Plus, because the government owns the land, Chilton is legally required to keep it open to hunters and hikers. The fences on the border to Mexico are frequently cut. Campers stop in for the day or the week.

And so while Forest Service staffers were pleased with the condition of the allotment, not every inch is pristine wilderness -- something reflected in the Center's photographs.

One, captioned to point out that the land has "no grass," is a spot favored by deer hunters, Marton says. Another -- supposedly depicting a "compacted, crusty and dry" slope -- shows an old mining road, Chilton says.

But the biggest revelation proved to be Photo #18. It once seemed so damning, that pair of mournful cows alone on a big flat of mud. With just a little investigation, the powerful image fell apart.

First: The photograph was actually taken on land owned by Chilton's neighbor.

Second: By the time Chilton took Marton to see the spot in question, the area that had been so muddy was no longer muddy at all. It was a lake, a lake that dried up during the spring of 2002 because of severe drought conditions. The picture actually depicted the lake's bottom.

Third: Just days before the Center's cameraman snapped the photo, the dry lake bed had hosted several hundred campers, who were throwing a May Day celebration.

Marton obtained photos from that event. Those photos show trucks, campers, tents, and a virtual platoon of hippies.

"People did this," Marton says. "People. Not cows."

But it wasn't until the Center's photographer, a college student named A.J. Schneller, testified in his deposition that Marton realized just how reckless the Center had been to include Photo #18 in its appeal and press release.

As Schneller conceded, when he took the photograph for the Center, he knew all about the May Day party that had happened on the same spot just days before.

How did he know about it?

Because he'd been there, Schneller admitted. Partying.

Along with Schneller, another Center member visited the Montana and took photographs that proved controversial. This one, Martin Taylor, was no college kid.

An Australian native and a Ph.D. in biology, Taylor also wrote the 20-page appeal criticizing the Forest Service's plan to reauthorize grazing on the Chiltons' allotment.

The appeal is dense and full of acronyms. It argues that continued grazing on the site could kill the endangered Chiricahua Leopard Frog and, of course, the Sonora chub.

It also criticizes current conditions in harsh terms. "Recent site visits" by Center staffers, Taylor writes, found "extreme levels of land abuse, with bare soil the norm and deer grass severely cropped in places resulting in plant death."

You'd assume Taylor had been studying the acreage for years.

But once Marton got Taylor under oath, the scientist explained.

He'd been to the allotment just once before writing the appeal. He'd driven in, taken some photos, camped overnight, left.

He didn't take any notes.

"They took no notes," Chilton crows. "They took no notes!"

Taylor testified in the trial, and the jury found his lack of scientific rigor particularly damning to the Center's case, says Robert Fleckenstein, the jury foreman.

"They were responsible for his actions," Fleckenstein says.

The trial started in January and lasted two weeks. Chilton's lawyers called 20 witnesses. The Center's lawyers called just one -- Howard Frederick, the man who actually owned the land where the May Day celebration took place. (Frederick testified that even he wasn't sure exactly where Chilton's property ended and his began.)

The jury deliberated less than three hours before announcing its verdict: It was 9-1 in favor of Chilton.

And then the jury announced the kicker: They'd voted to award Chilton \$600,000. Of that sum, \$500,000 was in punitive damages, which are only called for when a jury believes that the conduct involved has been so "willful, malicious, or fraudulent" that it goes beyond negligence.

The idea: to punish wrongdoers and deter others from following in their footsteps.

To the Center, it was a shocking decision, says founder Kieran Suckling. "We looked over all the photos and the entire press release, and we double-checked everything," Suckling says. "We made sure we were on solid ground."

Suckling, a dark-haired, charismatic man in his early 40s, is used to being around courtrooms. It's clear that he didn't find his opponents' case all that impressive.

Marton spent a lot of time asking prospective jurors if they were vegetarian, Suckling says. And quoting the Bible.

And talking about a Michael Crichton novel that suggested global warming was a conspiracy on the part of environmentalists.

"We thought, 'He's presented no evidence,'" Suckling says. "We thought, 'Sure, we're going to win this. The jury will see through this.' We were very confident."

Robert Royal, the Tiffany & Boscoe lawyer who represented the Center on the case, is less dismissive, although he agrees that he was shocked by the punitive damages. He acknowledges that the Center's case had some weaknesses, including, particularly, Schneller's testimony.

But, he stresses, the photographs in question hadn't been doctored. And sure, they showed the very worst spots of the allotment, but that's what they were supposed to do. As the Forest Service allows in its evaluation process, the Center had merely been trying to document problem areas. There was no way it had a responsibility to somehow show all 21,500 acres.

Royal also notes that Marton took his photographs more than a year after Center staffers. "The rains had come in," he explains.

Royal acknowledges that Marton did a good job. It certainly helped, though, that Chilton had the money to go all out, he says. "Marton acknowledged to us that his client told him to spend whatever it took," he says, sighing.

Indeed, to the Center, the verdict says more about Chilton's deep pockets than any mistakes on its part.

In a hearing last week, it asked the judge to throw out the verdict -- or, at minimum, to reduce the punitive damages. Judge Fields is expected to rule on that motion in the next month.

At the hearing, the Center's lawyers talked about the First Amendment. They talked about the precedent: What does it mean if activists can get sued for

information from a government appeal? Won't that have a "chilling effect" on people participating in the democratic process? They continue to insist the photos are "substantially true," even if a few details were off.

Maybe, Suckling says later, they should have been more careful with the photo captions. But that's not libel. It's certainly not a mistake worth \$600,000.

As far as miscarriages of justice go, Suckling puts it right up there with O.J. Simpson.

"This was a very expensive, O.J.-like campaign against us," he says. "And the bottom line is, O.J.'s free to play golf today, and Jim Chilton's won his lawsuit."

It makes for a good story, but it's not the way the jury saw it. Fleckenstein, the jury foreman, says it was the pictures that they found truly persuasive.

"I respect them for what they do," he says of the Center. "But they publish thousands of news advisories. They're in the business of bringing suits against the government. It's not like they're innocent schoolboys playing in the big boy's game."

He says the fat damages were, partly, a way of scolding the environmentalists for letting the matter even go to trial.

"They acted irresponsibly, and they should have tried to work it out instead of wasting everybody's time. That's what jurors kept asking: 'Why couldn't they just settle this over a cup of coffee?'"

Jim Chilton celebrated the verdict by putting on his cowboy hat and walking outside the courthouse to talk to the TV cameras. Naturally, the hat was white: Cowboys are the good guys.

He wears that same hat as he shows off his allotment a few months later, a copy of the Center's press release in hand. There's where they took this photograph, he explains. There's that one.

He's confident that the condition of the allotment is the best argument he can make. There are barrel cactus and ocotillo and flowers the color of saffron. Grass grows everywhere, yellow and green and every shade in between.

It looks nothing like the harsh orange dirt depicted in the press release.

"Suckling was quoted saying this will have a chilling effect on the environmental activist movement, and I hope it does," he says. "That was the purpose."

He climbs into his pickup truck, a turquoise-and-white Ford F250, complete with a pro-Bush bumper sticker.

"They can say I have deep pockets, but I just elected to use my retirement money to do what I thought was right," he says. He pauses, as if trying to decide whether to keep talking.

He can't help himself. He adds the kicker. "Cowboys are like that," he says.