No. 18-36030, 18-36038, 18-36042, 18-36050,
18-36077, 18-36078, 18-36079, 18-36080

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants,

and

SAFARI CLUB INTERNATIONAL and the NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*
Intervenors-Defendants-Appellants.

ON APPEAL THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
No. 17-89, 17-117, 17-118, 17-119, 17-123, 18-16 (DLC)
Honorable Dana L. Christensen

OPENING BRIEF OF INTERVENORS-DEFENDANTS-APPELLANTS SAFARI CLUB INTERNATIONAL AND THE NATIONAL RIFLE ASSOCIATION OF AMERICA

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CORPORATE DISCLOSURE STATEMENT
SAFARI CLUB INTERNATIONAL

Under Fed. R. App. P. 26.1(a), Intervenor-Defendant-Appellant Safari Club International ("Safari Club") submits the following Corporate Disclosure Statement.

Safari Club is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the Internal Revenue Code. Safari Club is not publicly traded and has no parent corporation. There is no stock issued, so there is no publicly held corporation that owns 10 percent or more of its stock.

DATED this 21st day of June, 2019.

/s/ Jeremy E. Clare
Jeremy E. Clare
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CORPORATE DISCLOSURE STATEMENT
NATIONAL RIFLE ASSOCIATION OF AMERICA

Under Fed. R. App. P. 26.1(a), Intervenor-Defendant-Appellant the National Rifle Association of America ("NRA") submits the following Corporate Disclosure Statement.

NRA is a nonprofit membership association incorporated in the state of New York. NRA is not publicly traded and has no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

DATED this 21st day of June, 2019.

/s/ Michael T. Jean
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GLOSSARY

APA	Administrative Procedure Act
Chao2	The population estimator currently used to estimate grizzly bear populations
DMA	Demographic Monitoring Area
DPS	Distinct Population Segment
ESA	Endangered Species Act
Fed E.R.	Federal Appellants' Excerpts of Record
2016 Conservation Strategy	2016 Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem (Dec. 2016)
2017 Final Rule	Final Rule Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 82 Fed. Reg. 30502-01 (June 30, 2017)
FWS	U.S. Fish and Wildlife Service
GYE	Greater Yellowstone Ecosystem
GYE DPS or GYE grizzly bear DPS	Greater Yellowstone Ecosystem Distinct Population Segment of grizzly bears
ID E.R.	Idaho's Excerpts of Record
NRA	The National Rifle Association of America
Proposed Rule	Proposed Rule Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 81 Fed. Reg. 13174 (Mar. 11, 2016)
Safari Club	Safari Club International
SCI/NRA	Safari Club International and the National Rifle Association of America collectively
SCI/NRA E.R.	Safari Club International and the National Rifle Association of America's Excerpts of Record

JURISDICTIONAL STATEMENT

1. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the plaintiffs' claims arose under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.
2. The district court's judgment was final because it granted all the plaintiffs' motions for summary judgment and vacated the rule under review. Fed. E.R. 1, 48-49. This Court has jurisdiction under 28 U.S.C. § 1291.
3. The district court entered judgment on October 23, 2018. Fed. E.R. 1. Safari Club and the NRA ("SCI/NRA") filed a notice of appeal on December 13, 2018. Fed. E.R. 76-79. The appeal is timely under Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES

In this brief, SCI/NRA present the following issues:

1. Whether the district court erred in holding that the ESA requires the U.S. Fish and Wildlife Service ("FWS") to conduct a "comprehensive analysis of the entire listed species" to determine the conservation status of a listed Distinct Population Segment ("DPS") and consider the "functional" effect of delisting a DPS on the remaining listed entity.

2. Whether the district court erred in holding that the Greater Yellowstone Ecosystem ("GYE") grizzly bear DPS is not threatened by the lack of a recalibration provision in the 2016 Conservation Strategy.
3. Whether the district court erred in holding that the FWS did not provide a reasoned explanation and impermissibly substituted its scientific judgment for the FWS's in finding that the FWS arbitrarily concluded that the GYE grizzly bear DPS is not threatened by insufficient genetic diversity.

STATEMENT REGARDING ADDENDUM

An addendum reproducing relevant statutes, regulations, and other authorities is at the end of this brief.

STATEMENT OF THE CASE

SCI/NRA adopt the Federal Appellants' Statement of the Case. Dkt. 45, Fed. Br. at 3-13.

SUMMARY OF THE ARGUMENT

The district court's summary judgment in favor of the plaintiffs should be reversed in its entirety. The court erred in holding that the FWS's rule that delisted the GYE grizzly bear DPS ("2017 Final Rule") was arbitrary and capricious for three primary reasons.

First, the district court misread the D.C. Circuit's holding in *Humane Society of the United States v. Zinke*. That case addressed completely different facts, which led the district court to conflate two separate issues: the "legal effect" of delisting a DPS on populations of the species that remain listed, and the "functional effect" of delisting on those remaining populations. Here, the FWS sufficiently considered the "legal effect" of delisting the GYE grizzly bear DPS on still-listed grizzly bear populations. That consideration is clear in the 2017 Final Rule, as well as the history of grizzly bear recovery planning. The district court also erroneously extended Section 4(c) of the ESA in requiring that the FWS conduct a "comprehensive analysis" of the entire species when delisting a DPS. The language cited by the district court plainly applies only when the FWS conducts five-year status reviews of listed species—and the GYE grizzly bear DPS was not delisted as part of any such review. Thus, a "comprehensive analysis" is not required.

Second, the district court erred in vacating the FWS's determination not to require a "recalibration" provision in the 2016 Conservation Strategy. The district court misapplied the ESA's requirement that delisting determinations be made on the best scientific and commercial information available. The court lost focus on the primary issue: whether the FWS's conclusion that the GYE grizzly bears are not threatened by inadequate regulatory mechanisms was supported by the best

data available. That question can only be answered affirmatively, because the states' agreement to manage GYE grizzly bears using the most conservative population estimator for the "foreseeable future" provided greater protections than the recalibration provision. Moreover, the FWS reasonably concluded that it would likely be impossible to recalibrate the population estimate because doing so would require data that do not exist. Accordingly, the FWS's conclusions are reasonable, and the district court's decision should be reversed.

Lastly, the district court failed to follow this Court's precedent and impermissibly substituted its judgment for the FWS's scientific findings with respect to whether the GYE grizzly bear DPS is threatened by insufficient genetic diversity. When the FWS changes position from a prior policy, this Court requires only a "reasoned explanation" for the change, and that reasoned explanation can be based on new scientific information that downplays a previously identified threat. The 2017 Final Rule reasonably explained how recent research shows that the GYE grizzly bears' genetic health is excellent and that genetic concerns do not pose a long-term threat to the species. Under this Court's precedent, the district court should have deferred to the FWS's scientific conclusions and not sought to substitute its analysis of the scientific literature in place of the FWS's.

Accordingly, the district court's judgment should be reversed, and the 2017 Final Rule upheld as a reasonable application of the FWS's analysis of the best scientific and commercial information available.

STANDARD OF REVIEW

SCI/NRA adopt the Federal Appellants' Standard of Review. Fed. Br. at 14-15.

ARGUMENT

A. The district court's holding should be reversed because the FWS sufficiently considered the impacts of delisting the GYE grizzly bears on the remaining lower-48 bears.

SCI/NRA agree with the Federal Appellants that neither the ESA nor caselaw requires the FWS to conduct a "comprehensive review" of the remaining parts of a listed species when it delists a DPS. Fed. Br. at 23-28. Like Idaho, SCI/NRA also disagree with the district court's conclusions that the FWS must determine the "functional effect" of the DPS delisting on the remaining listed entity and the FWS insufficiently explained that the rest of the lower-48 grizzly bears remain listed as threatened. Dkt. 63, Idaho Br. at 13-19. This Court should reverse the district court's entire ruling on this issue.

i. The FWS is not required to consider the "functional effect" of the GYE grizzly bear DPS delisting on the remaining lower-48 bears.

The district court erroneously read Section 4 of the ESA and the D.C. Circuit's holding in *Humane Society of the United States v. Zinke* as requiring the FWS to consider the "legal and functional effect" that the delisting of the GYE grizzly bear DPS might have on the remaining lower-48 grizzly bears. Fed. E.R. 28-32. The court's opinion is unclear about what is meant by the "functional effect," but it gave one directive to the FWS that suggests that "functional" is equivalent to "biological." The court stated, "the [FWS] must consider how the delisting affects other members of the listed entity, the lower-48 grizzly bear, because decreased protections in the [GYE] necessarily translate to decreased chances for interbreeding." Fed. E.R. 30.[1] The district court's interpretation of *Humane Society* and the ESA is wrong.

[1] An alternative interpretation of the word "functional" could simply be that the district court was reiterating its erroneous conclusion that a "comprehensive" review is required. If this Court agrees with this alternative interpretation, SCI/NRA's arguments similarly apply to any alleged requirement for a comprehensive review. Additionally, because the FWS has accepted the district court's remand to "consider the legal and functional effect of the delisting" but opposes the comprehensive review requirement, the meaning of "functional" remains unclear. Fed. Br. at 15. Thus, SCI/NRA are compelled to address the requirement to consider the functional effect as a separate requirement from the comprehensive review requirement.

When read as a whole, rather than selectively quoting particular sentences or phrases, the D.C. Circuit's opinion in *Humane Society* does not require consideration of the functional or biological effect of the DPS delisting on the remaining listed species. In *Humane Society*, the court was concerned with an entirely different scenario than the one considered by the Montana district court in this case—one in which the court questioned whether the FWS could delist an entity due to the lack of any population of a species. In *Humane Society*, the D.C. Circuit addressed the legal status of the so-called remnant population of wolves that remained after the FWS delisted the Western Great Lakes DPS. The FWS had already delisted the Northern Rocky Mountains DPS, and when the Western Great Lakes wolves were delisted, essentially no wolf populations remained. The Western Great Lakes DPS and Northern Rocky Mountains DPS accounted for all the on-the-ground wolf populations in the lower-48—none existed anywhere in what the *Humane Society* court referred to as the "remnant." Because no populations of wolves anchored the remaining lower-48 listing, the Western Great Lakes DPS delisting created an "orphan to the law," an arguably unlistable entity. *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 600-03 (D.C. Cir. 2017).

According to the D.C. Circuit, creating an "orphan to the law" was arbitrary and capricious because the essentially non-existent remnant would not meet the ESA's definition of a protectable species. *Id.* at 602. The Court required "the

[FWS] . . . make it part and parcel of its segment analysis to ensure that the remnant, if still endangered or threatened, remains protectable under the Endangered Species Act." *Id.* at 602. In other words, the FWS must consider "the legal status" of the remnant population and determine "whether the remnant itself remains a species." *Id.* at 600. Whether the remnant constitutes a species, i.e. is even eligible for listing under the ESA, is a different question than whether the remnant is endangered or threatened. The D.C. Circuit did not conclude that the FWS must also conduct a biological or functional review to make a new determination as to the remnant's biological status.

The district court, citing *Humane Society*, also erroneously interpreted Section 4 of the ESA to require the FWS to conduct a five-factor analysis for the all grizzly bears in the lower-48 when determining whether the GYE grizzly bear DPS is no longer threatened or endangered. Fed. E.R. 28-30 (citing 16 U.S.C. § 1533(a)(1)). As the Federal Appellants explained, the D.C. Circuit in *Humane Society* and the district court below are wrong because the ESA plainly requires an analysis of the "species" being considered, which in this case is a DPS, not the remaining lower-48 bears. Fed. Br. at 23-28 (also explaining the D.C. Circuit's incorrect reasoning related to Solicitor's Opinion M-37018 and the FWS's DPS Policy). Building on the Federal Appellants' analysis, Wyoming explained why the FWS's interpretation of these ESA provisions is entitled to deference. Dkt. 59,

Wyoming Br. at 46-50. SCI/NRA agree that this Court should defer to the FWS's reasonable interpretation of the provisions in Section 4 of the ESA. SCI/NRA also offer another reason why the district court's analysis should be reversed and why this Court should avoid the mistakes made by the D.C. Circuit.

A plain reading of Section 4 shows that the five-factor analysis does not apply to all listing and delisting actions affecting DPSs of the originally listed species. Both the D. C. Circuit in *Humane Society* and the district court interpret Section 4 incorrectly, because both courts found that Section 4(c)(2)(A) indicates that the FWS's review must cover the entire lower-48 population, as previously listed, and not just the newly designated GYE grizzly bear DPS. Fed. E.R. 29 ("[t]hat review must cover the '***species included in a list***'") (emphasis added); *Humane Soc'y*, 865 F.3d at 601 (same). These interpretations extend Section 4(c)(2), which explicitly applies ***only*** when the FWS conducts five-year status reviews of listed species. 16 U.S.C. § 1533(c)(2) ("The Secretary shall—(A) conduct, at least once every five years, a review . . . and (B) determine on the basis of such review. . . ."). Both courts ignored the fact that the FWS did ***not*** delist the GYE grizzly bear DPS as a result of a five-year status review, and that the ESA otherwise gives the FWS the authority to designate the GYE grizzly bear DPS and delist it without conducting a five-year status review and does ***not*** contain the relevant language that these courts found determinative.

A plain reading of Section 4(c)(1) does not obligate the FWS to conduct a full five-factor analysis for the "already listed" lower-48 bears, nor do the other subsections of Section 4. *Compare* 16 U.S.C. § 1533(c)(1) *with* Fed. E.R. 29. Although the district court correctly noted that Section 4(c) incorporates Section 4(a)—the five-factor analysis provision—Section 4(c)(1) does ***not*** suggest that the analysis required encompasses the "species included in a list" prior to the designation of a DPS. 16 U.S.C. § 1533(c)(1). The D.C. Circuit and the district court erroneously read language from one inapplicable provision of the ESA into another.[2]

The ESA never requires the FWS to review the "functional" effect of the DPS delisting on the remaining listed species (or conduct a "comprehensive review"), when it delists a population outside of the five-year status review process. Thus, the Court should reverse the district court's ruling on this entire issue.

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[2] SCI/NRA do not agree that the relevant language in Section 4(c)(2)—"species included in a list"—imposes the obligation to conduct a five-factor analysis for the entire, previously listed entity after designation of a DPS, but this Court does not need to resolve this issue to reverse the district court's ruling.

ii. The FWS sufficiently considered the legal effect of the GYE grizzly bear delisting on the still-listed lower-48 grizzly bears.

Contrary to the district court's conclusions, the FWS's consideration of and conclusion regarding the legal effect of the GYE grizzly bear DPS delisting on the lower-48 grizzly bears still listed under the ESA was sufficient. The FWS determined that the remaining grizzly bears, anchored by the Northern Continental Divide population as well as smaller the Selkirk and Cabinet Yaak populations, would remain listed ***and listable*** as a threatened species. The FWS did not reopen the 1975 listing. The lower-48 grizzly bears remain subject to the same recovery efforts as before the GYE grizzly bear DPS was delisted. Thus, unlike in *Humane Society*, the FWS took "the second step of determining whether both the segment and the remainder of the already-listed [species] would have mutually independent statuses as species." 865 F.3d at 602. Unlike in *Humane Society*, the remaining lower-48 bears are not in legal limbo or an orphan to the law. The FWS made this clear.

Throughout the 2017 Final Rule, the FWS noted that the lower-48 bears outside the GYE grizzly bear DPS would remain listed as threatened. *See, e.g.*, Fed. E.R. 84, col. 2 ("Identifying the GYE grizzly bear DPS and removing that DPS from the List of Endangered and Threatened Wildlife ***does not change the threatened status of the remaining grizzly bears in the lower 48 States***, which

remain protected by the Act.") (emphasis added); *see also id.* at 127, col. 2 (reiterating bears outside the GYE will remain listed as threatened). The FWS also explained that the GYE grizzly bear DPS delisting and maintaining the rest of the lower-48 bears as threatened were consistent with the 1993 Grizzly Bear Recovery Plan. *Id.* at 139, col. 3 to 140, col. 1 ("Our recognition that the GYE grizzly bear population qualifies as a DPS and its separate listing or delisting ***is also consistent with the 1993 Recovery Plan's (which predates the Service's 1996 DPS policy) stated intention to delist each of the remaining populations as they achieve their recovery targets*** and an associated five factor analysis under section 4 of the Act indicates that they no longer meet the definition of a threatened or endangered species.") (emphasis added); *see also id.* at 204, col. 2; *id.* at 204, col. 3 to 205, col. 1 (FWS is "committed to pursuing grizzly bear recovery in the five remaining Recovery Zones").

The FWS also discussed some of the different administrative and regulatory actions it has taken related to the other five "recovery ecosystems" identified in the 1993 Recovery Plan. *See, e.g.*, *id* at 133, col. 1 (discussing (1) a 2017 draft Environmental Impact Statement regarding the bears in the Northern Cascades Ecosystem, (2) warranted but precluded findings to reclassify the bears in the

Cabinet-Yaak and Selkirk ecosystems as endangered between 1993 and 1999,[3] (3) the 2014 reclassifications of both the Cabinet-Yaak and Selkirk populations as threatened, and (4) publication of a 2013 Conservation Study for the Northern Continental Divide Ecosystem bears).

The district court faults the FWS for stating that "the management and potential status of other grizzly bear populations is outside the scope of [the] final rule." Fed. E.R. 25 (citing Fed. E.R. 133). But this does not contradict, as the district court claims, the FWS's express statement that the lower-48 bears remain listed. The "management" of the lower-48 bears remains the same. And their threatened "status" remains. The FWS and relevant states will continue to manage those bears to achieve the objectives of the 1993 Recovery Plan. The bears are not in legal limbo.

The lower-48 grizzly bears were originally listed as threatened in 1975, when the ESA's former definition of a "species" was still in effect. Fed. E.R. 441. That definition allowed the FWS to list "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when

[3] Some of the plaintiffs-appellees in this litigation previously petitioned the FWS to individually reclassify some of the grizzly bear populations from threatened to endangered. *See, e.g.*, 58 Fed. Reg. 8250 (Feb. 12, 1993) and 64 Fed. Reg. 26725 (May 17, 1999) (The Fund for Animals); 63 Fed. Reg. 30453 (June 4, 1998) (Humane Society of the United States). Those plaintiffs-appellees apparently used to agree with the FWS's population-by-population management approach.

mature." Pub. L. 93-205, § 3(11), 87 Stat. 884, 886 (1973). Thus, the fact that the lower-48 grizzly bears are listed as a "species" is a historical artifact of the ESA.[4] Because the FWS did not reopen the 1975 listing of the lower-48 bears and maintained the bears' historic status as a "species," the lower-48 bears are a listable entity. Furthermore, the delisting of the GYE grizzly bear DPS, as one of the recovery ecosystems, has been the FWS's intention since the bears were originally listed.

According to the 1982 Grizzly Bear Recovery Plan, one recovery objective for the entire lower-48 was to recover at least three "grizzly bear ecosystems in order to delist the species in the conterminous 48 states." SCI/NRA E.R. 2. Later in the plan, when explaining GYE-specific criteria, the FWS stated that "[t]he population will be judged recovered (***eligible for delisting***) when it is determined to be viable at [a certain population size]." *Id.* at 3 (emphasis added). Similarly, the 1993 Recovery Plan, which modernized the recovery objectives from the 1982 Recovery Plan to reflect new available scientific information and best management practices, continued this population-by-population approach to recovery. It stated that the recovery objective was "[d]elisting of each of the remaining populations

[4] The entire lower-48 population, including the GYE grizzly bear DPS, might not meet the definition of a "species" if the FWS were to start its review from scratch. *See* 16 U.S.C. § 1532(16). The lower-48 bears are not an entire species or subspecies and may not qualify as a single DPS. But, any legal challenge to the lower-48 listing now would be well outside the statute of limitations.

by population as they achieve the recovery targets," and further that "[e]ach individual population will remain listed until its specific recovery criteria are met." Fed. E.R. 431. Thus, it was no surprise when the FWS concluded that the recovery and delisting of the GYE grizzly bear DPS had no legal effect on the remaining populations. In fact, this action has been contemplated since the original listing. A conclusion otherwise would have contradicted the multiple recovery plans and could have been arbitrary and capricious. *See* 16 U.S.C. § 1533(f) ("The Secretary shall develop and implement [recovery] plans . . . [with] criteria which, when met, would result in a determination . . . that the species be removed from the list"); *Conservation Cong. v. George*, No. 14–cv–01979, 2015 WL 2157274, *4 (N.D. Cal. May 7, 2015) ("consistency with such [recovery] plans is a factor to consider in determining whether approval of an agency action was arbitrary or capricious") (citing *Cascadia Wildlife v. Thraikill*, 49 F. Supp. 3d 774, 787 (D. Or. 2014); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012)).

In short, this Court should reverse the district court's erroneous holding that the FWS did not consider the legal effect of the GYE DPS delisting on the remaining lower-48 grizzly bears.

B. The GYE grizzly bears are not threatened by the absence of a commitment to recalibrate a new population estimator in the future.

Each of the state appellants addressed the recalibration issue in their opening briefs.[5] *See* ECF 56, Montana Br. at 17-23; Idaho Br. at 19-29; Wyoming Br. at 23-44. SCI/NRA agree with the state appellants and incorporate their arguments by reference. SCI/NRA supplement their arguments with the following.

The district court held that the delisting was arbitrary and capricious because the absence of a recalibration provision was not based on the best available scientific and commercial data. Fed. E.R. 4. The court further held that without the recalibration provision, there were inadequate regulatory mechanisms in place, and the GYE grizzly bears remained threatened. Fed. E.R. 35. Both of these holdings are wrong. The court misapplied the ESA's requirement that listings and delistings be made on the best available scientific and commercial data. Moreover, the states agreed to manage the GYE grizzly bears based on the Chao2 population estimator for the "foreseeable future," which provides greater protections than a recalibration provision. Therefore, the district court erred in holding that inadequate regulatory mechanisms are in place.

[5] Recalibration means "the mechanism by which estimates generated by a new population estimator, if adopted, would be brought in line with those generated by the current estimator." Fed. E.R. 32.

i. The district court misapplied the ESA's requirement that listings and delistings be based solely on the best available scientific and commercial data.

The district court held that in dropping a recalibration requirement, "the [FWS] illegally negotiated away its obligation to apply the best available science in order to reach an accommodation with the states of Wyoming, Idaho, and Montana." Fed. E.R. 4. The court further held that dropping the recalibration requirement "was made not on the basis of the best available science as demanded by the ESA, but rather as a concession to the states in order to reach a deal." Fed. E.R. 32-33. The court misunderstood how the ESA's best-scientific-and-commercial-data-available requirement works. The district court never considered whether omitting the recalibration requirement actually threatened the GYE grizzly bears, but rather incorrectly focused on what it deemed to be the FWS's decision-making process.

"A species may be delisted on the basis of recovery only if the best scientific and commercial data available ***indicate that it is no longer endangered or threatened***." 50 C.F.R. § 424.11(d)(2) (emphasis added). "*Recovery* means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act." 50 C.F.R. § 402.02. Those criteria are:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;

> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). This determination must be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). This standard '"merely prohibits [the agency] from disregarding available scientific evidence that is in some way better than the evidence it relies on."' *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 924 (9th Cir. 2018) (citations omitted). Thus, the question is not whether the decision to drop the recalibration provision was based on the best scientific and commercial data available—as the district court applied the requirement. Fed. E.R. 4, 32-33. Instead, the question is whether the best scientific and commercial data available indicate that the GYE grizzly bears are threatened by the inadequacy of existing regulatory mechanisms, specifically, the lack of a recalibration provision. 50 C.F.R. § 424.11(d)(2); *see also Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1036 (9th Cir. 2011) ("[T]he agency must explain why these laws and regulations constitute adequate regulatory mechanisms for grizzly protection."). Put simply, the question is not whether the district court disagrees with the FWS's methods in evaluating the adequacy of existing regulatory mechanisms, but whether the FWS's conclusions that the GYE grizzly bears are not threatened by

the inadequacy of existing regulatory mechanisms are supported by the best scientific and commercial data available—as they are here.

Accordingly, the district court misapplied the ESA, and the court's holding that the FWS negotiated away its obligations to apply the best available scientific and commercial data should be reversed.

ii. GYE grizzly bears are not threatened by the absence of a recalibration provision because adequate regulatory mechanisms are in place to monitor and protect their continued existence.

The district court further erred in holding that the GYE grizzly bears remain threatened by the absence of a recalibration provision. In doing so, the court relied heavily on the fact that dropping the provision was highly debated. Fed. E.R. at 39 (calling the decision a "capitulation"). But the debate surrounding recalibration does not make the decision to drop it arbitrary and capricious. Rather, "an agency's decision may be based on the best scientific evidence available even if the administrative record contains evidence for and against its decision . . . so long as it is not arbitrary and capricious." *Trout Unltd. v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009) (citation omitted); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). The district court is charged only with evaluating whether the FWS drew "a rational connection between facts found and conclusions made." *Friends of Santa Clara River*, 887 F.3d at 920 (internal quotation and citation omitted). Here, the decision to drop the recalibration requirement and continue to apply Chao2 for the foreseeable future was adequately explained and based on the best available evidence before the FWS.

Chao2 is a population estimator that approximates "the total number of female grizzly bears with cubs-of-the-year, derived from the frequency of single sightings or double sightings of unique females with cubs-of-the-year." Fed. E.R. 213.[6] Because Chao2 is based on "sightings" (both aerial and ground, Fed. E.R. 94), bears never actually seen do not get factored in. Fed. E.R. 213. And because those unseen bears are not factored in to the estimator, "[a]s the grizzly bear population has increased, the model-averaged Chao2 population estimates have become increasingly conservative (i.e., prone to underestimation)." Fed. E.R. 94.

Despite Chao2's proclivity to underestimate, it is still the best available scientific method for estimating the total population because it appropriately detects trends, which are important for understanding the health of a species'

[6] Independent male bears are added into the total population at a 1:1 ratio of independent female bears. Fed. E.R. 143.

population. Fed. E.R. 142. In contrast, the Mark-Resight estimator "is much closer to the true population size than the Chao2 estimate" but is "unable to accurately detect population trend." Fed. E.R. 191. DNA sampling would likewise "result in greater precision and lower bias." Fed. E.R. 143. But those data are currently not available and would cost an estimated $11 million per year to obtain. *Id*. Moreover, DNA sampling would have the same logistical problems that sighting-based population estimators do: it is difficult to see bears, let alone collect DNA samples, "in remote and inaccessible areas such as the GYE." Fed. E.R. 147.

Using Chao2, the FWS found that the GYE grizzly "population had stabilized during the period of 2002-2014, and the mean model-averaged Chao2 population estimate over that time period was 674." Fed. E.R. 95. This stability suggests that grizzly bears have reached density dependency and are "approaching carrying capacity."[7] *Id*. The stabilized population data allowed the

[7] Density dependency means that the species is so densely populated that other problems occur, such as "(1) [d]ecreased yearling and cub survival due to increases in intraspecific killing (i.e., bears killing other bears), (2) decreases in home range size, (3) increases in generation time, (4) increases in age of first reproduction, and (5) decreased reproduction." Fed. E.R. 88 (citations omitted). Carrying capacity "is the maximum number of individuals a particular environment can support over the long term without resulting in population declines caused by resource depletion." *Id*. at 87 (citation omitted).

FWS to calculate sustainable total mortality levels.[8] Fed. E.R. 96 (Table 2). And with 674 bears, "the best available science shows" that "[a] total mortality limit of 7.6 percent for independent females" would "result[] in population stability." Fed. E.R. 111. Based on this figure, the FWS determined sustainable, annual mortality rates for bears at different population levels. *See* Table 2, Fed. E.R. 96; Table 3, Fed. E.R. 112 (breaking down the total mortality limits by sex and percentage of total population). Discretionary mortality is not allowed if the population falls below 600, unless it is necessary for human safety. Table 2, Fed. E.R. 96.

The initial concern about a recalibration provision was that a new more-accurate population estimator, one that did not underestimate the population, would be adopted. Dan Ashe, then-Director of the FWS, feared that this would make "200-300 bears[, about the number by which Chao2 currently underestimates the population,] available for harvest." ID E.R. 29. In an email written on October 28, 2016, Director Ashe initially indicated that dropping the recalibration provision was "an absolute show-stopper." ID E.R. 37; Fed. E.R. 37. Director Ashe was in a position to stop the show. But he did not. Instead, on November 16, 2016, he explained why the show went on:

> the states['] reluctance to discuss "recalibration" is really to the bears' advantage. Chao2 is a very conservative estimator, so locking it in as the estimator actually will under-allocate harvest. And if/when the

[8] "Total mortality" includes "mortalities from all causes," whereas "discretionary mortality" only includes "hunting or management removals." Fed. E.R. 213.

> population grows, the harvest targets will become proportionately smaller. It's not a big effect, but it works in favor of the bears.

ID E.R. 48. Director Ashe credited the states' commitment to manage the bears within their boundaries based on the Chao2 estimator for the foreseeable future. Fed E.R. 147; 262. Any change would "require[] approval by the [Yellowstone Grizzly Coordinating Committee] and a public comment period." Fed. E.R. 147. Director Ashe explained that because Chao2 underestimates the total number of bears and mortality limits are percentages of that underestimation, the mortality limits are necessarily lower than what the population can sustain. For this reason, he changed his mind and determined that managing the bears with Chao2 for the foreseeable future was to the bears' benefit, and recalibration was not required to ensure conservative offtakes. ID E.R. 48. This decision reflects a rational connection between facts and conclusions, to which the district court should have deferred.

Moreover, the FWS explained that it removed the recalibration language because it was "too prescriptive": it would require data from 2002-2014, the period from which the current population trends were measured, that likely were not collected such as DNA samples too expensive to obtain. Fed. E.R. 147. Without that data, it is not possible to recalibrate Chao2 or any other population estimator. The FWS further explained why the other methods, DNA and Mark-Resight, could not be used. Fed. E.R. 191, 143. And the states' commitments to

manage their bears using the Chao2 numbers offered adequate regulatory protections because it benefits the bears by subjecting them to lower total mortality rates. ID E.R. 48. Thus, the decision to drop the recalibration requirement was sufficiently explained and based on the best scientific data available to the FWS. It was not arbitrary and capricious. *Friends of Santa Clara River*, 887 F.3d at 920.

In addition, the grizzly bears will not become threatened if another, more-accurate estimator is used without recalibration—even if it is possible to recalibrate the new estimator with Chao2. Demographic Recovery Criterion 1 states that the grizzly bears are recovered when they "[m]aintain a minimum population of 500 grizzly bears and at least 48 females with cubs-of-the-year" in the demographic monitoring area ("DMA").[9] Fed. E.R. 95.[10] That minimum population is not based on Chao2. *Id*. It can be calculated by any estimator "established in published, peer-reviewed scientific literature and calculated by the [Interagency Grizzly Bear Study Team] using the most updated Application Protocol," because it is based on the size of the DMA, and the best available data indicate that 500 bears represent the minimum number of bears to ensure short-term genetic health

[9] The DMA is "[t]he area of suitable habitat plus the potential sink areas within which the GYE grizzly bear population is annually surveyed and estimated and within which the total mortality limits apply." Fed. E.R. 213; *see also id*. at 85 Figure 1.

[10] Data from 2002-2014 show that average grizzly bear population in the DMA was 674. Fed. E.R. 93.

in that area. *Id*. Maintaining a population above 500—as the states have agreed to do at 600 bears, Fed. E.R. 173—will "ensure that genetic issues are not a detriment to the short-term genetic fitness of the GYE grizzly bear population." *Id*. Moreover, this Court previously found adequate regulatory mechanisms were in place for the GYE grizzly bear population when the recovery plan required maintaining a total of 500 bears. *Greater Yellowstone Coal.*, 665 F.3d at 1021. Accordingly, adequate regulatory mechanisms are in place to keep the population above 600 bears, which is above what the best available data show is necessary for recovery.

The FWS's conclusions are '"supported by adequate and reliable data"' to which the Court must "be 'most deferential' [because] the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science.'" *Friends of Santa Clara River*, 887 F.3d at 921 (citation omitted). Here, the FWS's conclusions meet this standard. They were thoroughly explained and were based on the best scientific and commercial data available. They are not arbitrary and capricious, and the district court's findings to the contrary should be reversed.

C. The district court's holding should be reversed because the FWS provided a reasoned explanation for the conclusion that lack of genetic diversity is not a current threat to the GYE grizzly bear DPS.

This Court should reverse the district court's finding because the FWS's conclusion that lack of genetic diversity is not a threat to the GYE grizzly bear

DPS was supported by recent genetic analysis.[11] The 2016 Conservation Plan's change to a genetic trigger instead of the year 2020 for translocating bears is sufficiently explained in the 2017 Final Rule. The district court's erroneous holding to the contrary runs counter to this Court's recent precedent, which requires only that the FWS "provide a reasoned explanation" for changing the circumstance that triggers translocation.

In *Center for Biological Diversity v. Zinke*, the plaintiffs challenged the FWS's 2014 decision not to list the arctic grayling under the ESA. 900 F.3d 1053, 1058 (9th Cir. 2018). The FWS's 2014 decision differed from its 2010 determination that listing was warranted but precluded. *Id.* at 1061-63. Applying the highly deferential APA standard of review, this Court required the FWS only to provide a "reasoned explanation" for changing its factual findings and conclusions from the 2010 determination. *Id.* at 1067-68. This Court upheld the 2014 listing decision in part and remanded it in part for further explanation. This Court remanded the listing where the FWS "ignored" available biological data and failed to "provide a reasoned explanation for FWS's change in position" in interpreting a study differently in 2014 than in 2010. *Id.* at 1068-70.

[11] SCI/NRA agree with and incorporate the arguments of the Federal Appellants (Fed. Br. at 29-37) and Montana (Montana Br. at 23-30) on this point.

On the other hand, this Court upheld the FWS's assessment that a previously-identified threat from warming water no longer existed for one grayling population. *Id.* at 1071. In 2010, the FWS had found that insufficient cold water refugia in one area of the range threatened the species' long-term viability. *Id.* In 2014, however, new evidence indicated that cold water refugia existed in this area, and this indication was borne out by the fact the grayling population was increasing. *Id.* The new information "provide[d] a sufficient reasoned explanation" for the FWS to change its position with respect to this threat and to support the finding that listing was not warranted. *Id.* at 1071-72 (internal quotation and citation omitted). Additionally, this Court held that the FWS reasonably determined that the arctic grayling was no longer threatened by small population sizes. *Id.* at 1073-74. In 2010, the FWS determined that grayling population levels fell below those "presumed to provide the genetic variation necessary to conserve long-term adaptive potential." *Id.* at 1073. But in 2014, the FWS reviewed new scientific literature and concluded that breeding adult numbers were high enough to protect the species' genetic health. *Id.* Because the FWS explained its analysis and explicitly relied on "[u]pdated genetic information that was not available in 2010," this Court found the FWS "provided a reasoned explanation for why it did not view lack of genetic diversity as a threat." *Id.* at

1073. The Court ultimately rejected the plaintiffs' arguments and deferred to the FWS's assessment of the best available science. *See id.* at 1074.

In this case, the district court correctly concluded that the FWS relied on the best available scientific information. Fed. E.R. 42. The district court erred in holding that the FWS's determination that genetic isolation is not a threat to the species was arbitrary and capricious. *Id.* Contrary to the "highest deference" owed to the FWS's decisions in an area involving "a high level of technical expertise," *Ctr. for Biological Diversity*, 900 F.3d at 1067, the district court improperly "substitute[d its] judgment for the agency's." *Friends of Santa Clara River*, 887 F.3d at 921.

In determining that a hard-and-fast deadline for translocation was not required and that translocations should only trigger if robust genetic monitoring indicates a decline in the GYE grizzly bears' genetic health, the FWS relied on updated scientific and genetic information that was not available in 2007. Fed. E.R. 116-17. Based on a recent (2016) paper, the FWS found that "current levels of genetic diversity are capable of supporting healthy reproductive and survival rates." *Id.* at 116. Comparing data points from 1998 through 2010, the FWS noted that "current levels of genetic diversity and heterozygosity values have increased slightly over the last few decades," indicating "no immediate need for new genetic material." *Id.*

As in *Center for Biological Diversity*, the FWS discussed scientific literature regarding effective population sizes including "recent work" not available in 2007, which found an effective GYE grizzly bear DPS of 469, four times the minimum effective population size previously suggested. *Id.* at 116-17, 191-92 (specifically comparing the Miller and Waits and Kamath studies). The FWS acknowledged that one to two migrations from other grizzly bear populations would benefit the GYE grizzly bears' genetic health. *Id.* at 117, 191. However, the FWS indicated that these migrations were not required by a certain date because "the current effective population size is sufficiently large to avoid substantial accumulation of inbreeding depression, thereby reducing concerns regarding genetic factors affecting the viability of GYE grizzly bears." *Id.* at 117 (citing Kamath et al. (2015), Fed. E.R. 410). Put differently, based on updated scientific information the FWS concluded that genetic concerns were not as pressing as the data suggested in 2007, and no longer posed a long-term threat to the species. As in *Center for Biological Diversity*, the FWS provided a reasoned explanation for why it no longer views lack of genetic diversity as a pending threat to the GYE grizzly bear DPS. And as in *Center for Biological Diversity*, that finding should be upheld. The district court erred in substituting its evaluation of the scientific evidence in place of the FWS's.

CONCLUSION

SCI/NRA request that the Court reverse the district court's ruling and remand with instructions to reinstate the 2017 Final Rule.

DATED this 21st day of June 2019.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 21, 2019.

I certify that I served the foregoing brief on this date by third-party commercial carrier for delivery within three calendar days, and by email, to the following unregistered case participant:

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Respectfully submitted,

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STATEMENT REGARDING RELATED CASES – CIRCUIT RULE 28-2.6

Counsel for Intervenors-Defendants-Appellants Safari Club International and the National Rifle Association of America are unaware of any related cases.

Dated this 21st day of June 2019.

Respectfully submitted,

/s/ Michael T. Jean
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ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the brief or addendum of Federal Appellants and other intervenors-appellants.

16 U.S.C. § 1533 ..... ADD-1

Pub. L. 93-205, § 3(11), 87 Stat. 884-86 (1973) ADD-8

throughout all or a significant portion of its range.

(21) The term ''United States'', when used in a geographical context, includes all States.

(Pub. L. 93–205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub. L. 94–359, § 5, July 12, 1976, 90 Stat. 913; Pub. L. 95–632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub. L. 96–159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97–304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub. L. 100–478, title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

REFERENCES IN TEXT

Reorganization Plan Numbered 4 of 1970, referred to in par. (15), is Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

1988—Par. (13). Pub. L. 100–478, § 1001(a), amended par. (13) generally. Prior to amendment, par. (13) read as follows: ''The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.''

Par. (15). Pub. L. 100–478, § 1001(b), inserted ''also'' before ''means the Secretary of Agriculture''.

1982—Par. (11). Pub. L. 97–304 struck out par. (11) which defined ''irresolvable conflict'' as, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in section 1536(a) of this title, completion of such action would violate section 1536(a)(2) of this title.

1979—Par. (11). Pub. L. 96–159 substituted ''action would violate section 1536(a)(2) of this title'' for ''action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat''.

1978—Pars. (1) to (4). Pub. L. 95–632, § 2(1), (7), added par. (1) and redesignated former pars. (1) to (3) as (2) to (4), respectively. Former par. (4) redesignated (6).

Par. (5). Pub. L. 95–632, § 2(2), (7), added par. (5). Former par. (5) redesignated (8).

Par. (6). Pub. L. 95–632, § 2(7), redesignated former par. (4) as (6). Former par. (6) redesignated (9).

Par. (7). Pub. L. 95–632, § 2(3), (7), added par. (7). Former par. (7) redesignated (10).

Pars. (8) to (10). Pub. L. 95–632, § 2(7), redesignated former pars. (5) to (7) as (8) to (10), respectively. Former pars. (8) to (10) redesignated (13) to (15), respectively.

Pars. (11), (12). Pub. L. 95–632, § 2(4), (7), added pars. (11) and (12). Former pars. (11) and (12) redesignated (16) and (17), respectively.

Pars. (13) to (15). Pub. L. 95–632, § 2(7), redesignated former pars. (8) to (10) as (13) to (15), respectively. Former pars. (13) to (15) redesignated as (18) to (20), respectively.

Par. (16). Pub. L. 95–632, § 2(5), (7), redesignated former par. (11) as (16) and substituted ''and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature'' for ''and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature''. Former par. (16) redesignated (21).

Par. (17). Pub. L. 95–632, § 2(7), redesignated former par. (12) as (17).

Par. (18). Pub. L. 95–632, § 2(6), (7), redesignated former par. (13) as (18) and substituted ''fish, plant, or wildlife'' for ''fish or wildlife''.

Pars. (19) to (21). Pub. L. 95–632, § 2(7), redesignated pars. (14) to (16) as (19) to (21), respectively.

1976—Par. (1). Pub. L. 94–359 inserted '': *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.'' after ''facilitating such buying and selling''.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

§ 1533. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior; who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 1538 of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7[1] to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substan-

[1] So in original. Probably should be paragraph ''(7)''.

tial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5 (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the

publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases

The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as ''recovery plans'') for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable—

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan—

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Rep-

resentatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) Monitoring

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section.

(2) The Secretary shall make prompt use of the authority under paragraph 7[2] of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

(Pub. L. 93–205, § 4, Dec. 28, 1973, 87 Stat. 886; Pub. L. 94–359, § 1, July 12, 1976, 90 Stat. 911; Pub. L. 95–632, §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; Pub. L. 96–159, § 3, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97–304, § 2(a), Oct. 13, 1982, 96 Stat. 1411; Pub. L. 100–478, title I, §§ 1002–1004, Oct. 7, 1988, 102 Stat. 2306, 2307; Pub. L. 108–136, div. A, title III, § 318, Nov. 24, 2003, 117 Stat. 1433.)

REFERENCES IN TEXT

Reorganization Plan Numbered 4 of 1970, referred to in subsec. (a)(2), is Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, which is set out in the Appendix to Title 5, Government Organization and Employees.

The Federal Advisory Committee Act, referred to in subsec. (f)(2), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5.

AMENDMENTS

2003—Subsec. (a)(3). Pub. L. 108–136, § 318(a), designated existing provisions as subpar. (A), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, and added subpar. (B).

Subsec. (b)(2). Pub. L. 108–136, § 318(b), inserted ''the impact on national security,'' after ''the economic impact,''.

1988—Subsec. (b)(3)(C)(iii). Pub. L. 100–478, § 1002(a), added subcl. (iii).

Subsec. (e). Pub. L. 100–478, § 1002(b), substituted ''regulation of commerce or taking,'' for ''regulation,'' in introductory provisions.

Subsec. (f). Pub. L. 100–478, § 1003, amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: ''The Secretary shall develop and implement plans (hereinafter in this subsection referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.''

Subsecs. (g) to (i). Pub. L. 100–478, § 1004, added subsec. (g) and redesignated former subsecs. (g) and (h) as (h) and (i), respectively.

1982—Subsec. (a)(1). Pub. L. 97–304, § 2(a)(1)(B), (D), inserted ''promulgated in accordance with subsection (b) of this section'' after ''shall by regulation'' in introductory provisions preceding subpar. (A), and struck out provision following subpar. (E), which directed the Secretary, at the time regulations were proposed, to specify any habitat of a species considered to be a critical habitat but that such specification of critical habitats not apply to species listed prior to Nov. 10, 1978.

Subsec. (a)(1)(A). Pub. L. 97–304, § 2(a)(1)(A), redesignated subpar. (1) as (A).

Subsec. (a)(1)(B). Pub. L. 97–304, § 2(a)(1)(A), (C), redesignated subpar. (2) as (B) and substituted ''recreational,'' for ''sporting,''.

Subsec. (a)(1)(C) to (E). Pub. L. 97–304, § 2(a)(1)(A), redesignated subpars. (3), (4), and (5) as (C), (D), and (E), respectively.

[2] So in original. Probably should be paragraph ''(7)''.

Subsec. (a)(3). Pub. L. 97–304, §2(a)(1)(E), added par. (3).

Subsec. (b). Pub. L. 97–304, §2(a)(2), completely revised subsec. (b) by, among other changes, requiring the Secretary to base determinations regarding the listing or delisting of species ''solely'' on the basis of the best scientific and commercial data available, streamlining the listing process by reducing the time periods for rulemaking, consolidating public meetings and hearing requirements, and establishing virtually identical procedures for the listing and delisting of species and for the designation of critical habitat, and altering the evidentiary standard which petitioners must satisfy to warrant a status review of the species proposed for listing or delisting.

Subsec. (c)(1). Pub. L. 97–304, §2(a)(3)(A), struck out '', and from time to time he may by regulation revise,'' after ''Federal Register'' and inserted provision directing the Secretary to revise from time to time each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

Subsec. (c)(2). Pub. L. 97–304, §2(a)(3)(B), (C), redesignated par. (4) as (2). Former par. (2), directing the Secretary, within 90 days of the receipt of the petition of an interested person under section 553(e) of title 5, to conduct and publish in the Federal Register a review of the status of any listed or unlisted species proposed to be removed from or added to either of the lists published pursuant to paragraph (1) of this subsection, but only if he made and published a finding that such person had presented substantial evidence which in his judgment warranted such a review, was struck out.

Subsec. (c)(3). Pub. L. 97–304, §2(a)(3)(B), struck out par. (3) which had provided that any list in effect on Dec. 27, 1973, of species of fish or wildlife determined by the Secretary of the Interior, pursuant to the Endangered Species Conservation Act of 1969, to be threatened with extinction be republished to conform to the classification for endangered species or threatened species, as the case might be, provided for in this chapter, but until such republication, any such species so listed was to be deemed an endangered species within the meaning of this chapter, and that the republication of any species pursuant to this paragraph did not require public hearing or comment under section 553 of title 5.

Subsec. (c)(4). Pub. L. 97–304, §2(a)(3)(C), redesignated par. (4) as (2).

Subsec. (d). Pub. L. 97–304, §2(a)(4)(A), substituted ''section 1535(c) of this title'' for ''section 1535(a) of this title''.

Subsec. (f). Pub. L. 97–304, §2(a)(4)(B), (C), (D), redesignated subsec. (g) as (f) and substituted ''recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2)'' for ''recovery plans,''. Former subsec. (f), relating to the promulgation of regulations, was struck out.

Subsec. (g). Pub. L. 97–304, §2(a)(4)(C), (E), redesignated subsec. (h) as (g), substituted reference to subsection (b)(3) of this section for reference to subsection (c)(2) of this section in par. (1), substituted ''under subsection (a)(1) of this section'' for ''for listing'' in par. (3), and substituted ''subsection (f) of this section'' for ''subsection (g) of this section'' in par. (4). Former subsec. (g) redesignated (f).

Subsec. (h). Pub. L. 97–304, §2(a)(4)(C), (F), added subsec. (h) and redesignated former subsec. (h) as (g).

1979—Subsec. (b)(1). Pub. L. 96–159, §3(1), required the Secretary's determinations to be preceded with a review of the status of the species.

Subsec. (f)(2)(B)(i). Pub. L. 96–159, §3(2), required publication of summary of text rather than of the complete text of proposed regulation specifying any critical habitat and inclusion of a map of the proposed critical habitat.

Subsec. (f)(2)(B)(iv)(II). Pub. L. 96–159, §3(3), substituted ''if requested within 15 days after the date on which the public meeting is conducted,'' for ''if requested,''.

Subsec. (f)(2)(C). Pub. L. 96–159, §3(4), (5), inserted in introductory text '', subsection (b)(4) of this section,''; and in cl. (ii), included reference to significant risk to wellbeing of any species of plants, inserted in item (II) reference to regulation applicable to resident species of plants, extended the statutory period to a ''240-day period'' from a ''120-day period'', and provided for withdrawal of an emergency regulation without substantial evidence to warrant it, respectively.

Subsec. (h). Pub. L. 96–159, §3(6), added subsec. (h).

1978—Subsec. (a)(1). Pub. L. 95–632, §11(1), inserted provision requiring the Secretary, at the time a regulation is proposed, to specify by regulation any habitat of the species involved which is considered a critical habitat providing the species was listed subsequent to Nov. 10, 1978.

Subsec. (b)(4). Pub. L. 95–632, §11(7), added par. (4).

Subsec. (c)(1). Pub. L. 95–632, §11(2), struck out ''and shall'' after ''if any'' and inserted '', and specify any critical habitat within such range'' after ''endangered or threatened''.

Subsec. (c)(2). Pub. L. 95–632, §11(6), substituted ''within 90 days of the receipt of'' for ''upon'' and ''conduct and publish in the Federal Register a review of the status of'' for ''conduct a review of'' and inserted a provision requiring that the review and findings be made and published prior to initiation of any procedures under subsec. (b)(1) of this section.

Subsec. (c)(4). Pub. L. 95–632, §11(3), added par. (4).

Subsec. (f)(2)(A). Pub. L. 95–632, §11(4)(A), substituted ''Except as provided in subparagraph (B), in'' for ''In''.

Subsec. (f)(2)(B), (C). Pub. L. 95–632, §11(4)(B), (C), added subpar. (B), redesignated former subpar. (B) as (C), and as so redesignated, substituted ''Neither subparagraph (A) or (B)'' for ''Neither subparagraph (A)''.

Subsec. (f)(3). Pub. L. 95–632, §13, substituted ''a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulations'' for ''a statement by the Secretary of the facts on which such regulation is based and the relationship of such facts to such regulation''.

Subsec. (f)(4), (5). Pub. L. 95–632, §11(4)(D), added pars. (4) and (5).

Subsec. (g). Pub. L. 95–632, §11(5), added subsec. (g).

1976—Subsec. (f)(2)(B)(ii). Pub. L. 94–359 substituted ''subsection (b)(1)(A)'' for ''subsection (b)(A), (B), and (C)''.

EFFECTIVE DATE OF 1982 AMENDMENT

Section 2(b) of Pub. L. 97–304 provided that:

''(1) Any petition filed under section 4(c)(2) of the Endangered Species Act of 1973 [subsec. (c)(2) of this section] (as in effect on the day before the date of the enactment of this Act [Oct. 13, 1982]) and any regulation proposed under section 4(f) of such Act of 1973 [subsec. (f) of this section] (as in effect on such day) that is pending on such date of enactment [Oct. 13, 1982] shall be treated as having been filed or proposed on such date of enactment under section 4(b) of such Act of 1973 [subsec. (b) of this section] (as amended by subsection (a)); and the procedural requirements specified in such section 4(b) [subsec. (b) of this section] (as so amended) regarding such petition or proposed regulation shall be deemed to be complied with to the extent that like requirements under such section 4 [this section] (as in effect before the date of the enactment of this Act) were complied with before such date of enactment.

''(2) Any regulation proposed after, or pending on, the date of the enactment of this Act [Oct. 13, 1982] to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 [this section] (as amended by subsection (a)) for regulations proposing revisions to critical habitat instead of those for regulations proposing the designation of critical habitat.

''(3) Any list of endangered species or threatened species (as in effect under section 4(c) of such Act of 1973 [subsec. (c) of this section] on the day before the date of the enactment of this Act [Oct. 13, 1982]) shall remain in effect unless and until determinations regarding species and designations and revisions of critical habitats that require changes to such list are made in accordance with subsection (b)(5) of such Act of 1973 [subsec. (b)(5) of this section] (as added by subsection (a)).

''(4) Section 4(a)(3)(A) of such Act of 1973 [subsec. (a)(3)(A) of this section] (as added by subsection (a)) shall not apply with respect to any species which was listed as an endangered species or a threatened species before November 10, 1978.''

ABOLITION OF HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES

Committee on Merchant Marine and Fisheries of House of Representatives abolished and its jurisdiction transferred by House Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995. Committee on Merchant Marine and Fisheries of House of Representatives treated as referring to Committee on Resources of House of Representatives in case of provisions relating to fisheries, wildlife, international fishing agreements, marine affairs (including coastal zone management) except for measures relating to oil and other pollution of navigable waters, or oceanography by section 1(b)(3) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Resources of House of Representatives changed to Committee on Natural Resources of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

§ 1534. Land acquisition

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended [16 U.S.C. 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C. 661 et seq.], and the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.], as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended [16 U.S.C. 460*l*–4 et seq.], may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

(Pub. L. 93–205, § 5, Dec. 28, 1973, 87 Stat. 889; Pub. L. 95–632, § 12, Nov. 10, 1978, 92 Stat. 3766.)

REFERENCES IN TEXT

The Fish and Wildlife Act of 1956, as amended, referred to in subsec. (a)(1), is act Aug. 8, 1956, ch. 1036, 70 Stat. 119, as amended, which is classified generally to sections 742a to 742d and 742e to 742j–2 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 742a of this title and Tables.

The Fish and Wildlife Coordination Act, as amended, referred to in subsec. (a)(1), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

The Migratory Bird Conservation Act, referred to in subsec. (a)(1), is act Feb. 18, 1929, ch. 257, 45 Stat. 1222, as amended, which is classified generally to subchapter III (§ 715 et seq.) of chapter 7 of this title. For complete classification of this Act to the Code, see section 715 of this title and Tables.

The Land and Water Conservation Fund Act of 1965, as amended, referred to in subsec. (b), is Pub. L. 88–578, Sept. 3, 1964, 78 Stat. 897, as amended, which is classified generally to part B (§ 460*l*–4 et seq.) of subchapter LXIX of chapter 1 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 460*l*–4 of this title and Tables.

AMENDMENTS

1978—Subsec. (a). Pub. L. 95–632, among other changes in text preceding par. (1), inserted reference to the Secretary of Agriculture with respect to the National Forest System and substituted the establishment and implementation of a plan to conserve plants for the establishment and implementation of a plan to conserve plants which were concluded in Appendices to the Convention.

§ 1535. Cooperation with States

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 715s of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation

Public Law 93-205

December 28, 1973
[S. 1983]

AN ACT

To provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes.

Endangered Species Act of 1973.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Endangered Species Act of 1973".

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FINDINGS, PURPOSES, AND POLICY

SEC. 2. (a) FINDINGS.—The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

56 Stat. 1354.

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

1 UST 477.

(D) the International Convention for the Northwest Atlantic Fisheries;

4 UST 380.

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements.

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the

Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife.

(b) PURPOSES.—The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) POLICY.—It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling.

(2) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(3) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(4) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

(5) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(6) The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(7) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any

place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(8) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(9) The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(10) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term means the Secretary of Agriculture.

84 Stat. 2090.
5 USC app. II.

(11) The term "species" includes any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.

(12) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(13) The term "State agency" means the State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish or wildlife resources within a State.

(14) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(15) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(16) The term "United States", when used in a geographical context, includes all States.

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

(2) overutilization for commercial, sporting, scientific, or educational purposes;

(3) disease or predation;

(4) the inadequacy of existing regulatory mechanisms; or

(5) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or