

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SAFARI CLUB INTERNATIONAL,)	
)	
Plaintiff,)	1:11-cv-01564-BAH
)	
v.)	
)	
KEN SALAZAR, in his official capacity as Secretary of the U.S. Department of the Interior, <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
OWEN, <i>et al.</i> ,)	
)	1:12-cv-00194-BAH
Plaintiffs,)	(Consolidated Cases)
)	
v.)	
)	
U.S. DEPARTMENT OF THE INTERIOR, <i>et</i> <i>al.</i> ,)	
)	
Defendants.)	
)	
)	

NOTICE OF FILING SECOND SUPPLEMENT TO THE ADMINISTRATIVE RECORD

Notice is provided to the Court and Plaintiffs that Federal Defendants hereby file a second supplement to the administrative record in the above-captioned case. The Service’s certification of this supplement to the administrative record is attached hereto as Exhibit 1. The index of this supplement to the administrative record is attached hereto as Exhibit 2.

Dated: February 29, 2012

Respectfully submitted,

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Environment & Natural Resources Division

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/s/ Meredith L. Flax

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IN THE UNITED STATES DISTRICT COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL,)	
)	
PLAINTIFF,)	NO. 1:11-cv-01564-BAH
)	
v.)	
)	
KENNETH SALAZAR, in his official capacity as)	
Secretary of the U.S. Department of the Interior, <i>et al.</i> ,)	
)	
DEFENDANTS.)	
_____)	
OWEN, <i>et al.</i> ,)	
)	
PLAINTIFFS,)	No. 1:12-cv-00194-BAH
)	(Consolidated Cases)
v.)	
)	
U.S. DEPARTMENT OF THE INTERIOR, <i>et al.</i>)	
)	
DEFENDANTS.)	
_____)	

Declaration of Janine Van Norman

I, Janine Van Norman, declare as follows:

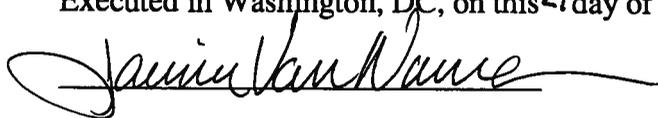
1. I am the Chief for the Branch of Foreign Species within the Endangered Species Program of the U.S. Fish and Wildlife Service (Service), an agency of the U.S. Department of the Interior (Department), located in Washington, DC. In this position, I have custody and control of all documents constituting the official administrative record prepared by the

Service that appear on the Supplemental Index to the Administrative Record that accompany this declaration.

2. On January 18, 2012, the Service filed its Administrative Record in this matter. On February 14, 2012, the Service filed a Supplemental Administrative Record to include two relevant documents that were inadvertently omitted from the original filing.
3. The Service has since been requested by Plaintiffs to add documents related to Plaintiffs' 2010 petitions to delist the U.S. captive populations of scimitar-horned oryx, dama gazelle and addax, and/or to correct the Endangered Species Act listing of these species to specify that only the populations in the portion of their range outside of the United States are classified as endangered. The Service is filing this supplement to reflect those documents. Due to the abbreviated timeframe for filing this supplement, some of the documents the Service included in this supplement are copies provided by Plaintiffs .
4. To the best of my knowledge, the documents filed with the court in this matter as listed on the February 29, 2012 Supplemental Index to the Administrative Record (when combined with the documents listed on the Index to the Administrative Record filed on January 18, 2012, the documents on the February 14, 2012 Supplemental Index, and the documents listed on the Revised Privilege Log which are not filed with the Court) constitute a true and correct copy of all the Service records pertinent to the Service's decisions at issue in this litigation, including the September 2, 2005 *Final Rule to List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered* (70 Fed. Reg. 52319).

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge.

Executed in Washington, DC, on this ~~28~~²⁹ day of February 2012.

A handwritten signature in cursive script, appearing to read "Janine Van Norman", written over a horizontal line.

[Janine Van Norman]

2nd Supplemental Index to the Administrative Record for Safari Club International v. Salazar, et al, Case No. 1:11-cv-**01564-BAH**

DATE	SENDER	RECIPIENT	FORM	DESCRIPTION	TOTAL PAGES	Privileged	BATES NUMBERS
6/28/2010	Lawrence Rudolph, Safari Club International (SCI)	Ken Salazar, DOI and Rowan Gould, USFWS	Letter	Petition for the removal of U.S. captive populations of three antelope species from the endangered species list	13	No	1160-1172
6/29/2010	Nancie Marzulla, Marzulla Law Firm, on behalf of Exotic Wildlife Association (EWA)	Ken Salazar, DOI	Letter	Petition for the removal of U.S. captive populations of three antelope species from the endangered species list	75	No	1173-1247
9/23/2010	Janine Van Norman, Branch of Foreign Species, USFWS	Lawrence Rudolph, SCI	Letter	Response to Petition for the removal of U.S. captive populations of three antelope species from the endangered species list	2	No	1248-1249
9/15/2010	Janine Van Norman, Branch of Foreign Species, USFWS	Nancie Marzulla, Marzulla Law Firm, on behalf of EWA	Letter	Response to Petition for the removal of U.S. captive populations of three antelope species from the endangered species list	2	No	1250-1251
9/22/2010	Anna Seidman, SCI	Amy Brisendine, USFWS	Email	Communication notifying the USFWS that acknowledgement of the petition was sent to the wrong party	2	No	1252-1253

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6/29/2011	Kevin Anderson, SCI	Ken Salazar, DOI and Rowan Gould, USFWS	Letter	60-day NOI to sue over violations of the ESA and the APA in the decision to include US captive populations of the Scimitar-horned oryx, dama gazelle and addax in the listing of these species as endangered on September 2, 2005, and/or the failure to correct the ESA listing to specify that only the populations in the portion of their range outside the US are classified as endangered	15	No	1254-1268
6/30/2011	Nancie Marzulla, Marzulla Law Firm, on behalf of EWA	Ken Salazar, DOI and Rowan Gould, USFWS	Letter	60-day NOI to sue over violations of the ESA and the APA in the decision to include US captive populations of the Scimitar-horned oryx, dama gazelle and addax in the listing of these species as endangered on September 2, 2005, and the failure to classify only the population of these species outside the US as endangered	36	No	1269-1304
7/25/2011	Gina Shultz, USFWS	Kevin Anderson, SCI	Letter	Response to Notice of Intent to Sue	1	No	1305-1306



June 28, 2010

Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C. Street N.W.
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Rowan Gould
Acting Director, U.S. Fish and Wildlife Service
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Petition to Delist the U.S. Captive Populations of Scimitar-Horned Oryx, Dama Gazelle and Addax, and/or to Correct the Endangered Species Act Listing of Scimitar-Horned Oryx, Dama Gazelle and Addax To Specify That Only the Populations in the Portion of Their Range Outside of The United States Are Classified As Endangered

Safari Club International and Safari Club International Foundation (“SCI and SCIF”) file this petition for the removal of U.S. captive populations of three antelope species from the endangered species list. SCI and SCIF seek the delisting of the U.S. populations of scimitar-horned oryx, dama gazelle and addax under the authority of 16 U.S.C. §1533(b)(3)(A), 5 U.S.C. § 553(e) and 50 C.F.R. §424.11(d)(3). This petition for rulemaking is based on the facts that (1) the captive populations of these three antelope species, located in the United States, should never have been included in the endangered listing for the three species and (2) the U.S. Fish and Wildlife Service (“FWS or Service”) erroneously interpreted the facts and law pertaining to their obligations regarding the inclusion of these captive populations when the Service made its decision, on September 2, 2005 to designate the three species as endangered. Because the decision to designate the U.S. captive populations was made in error, the Service can now correct and reverse that decision. The regulations that govern the listing and delisting of species pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, give the Service the authority to delist a listed species if there is data to substantiate that it is not endangered and that investigations subsequent to the listing decision show that the interpretation of the best scientific and commercial data available at the time of the listing decision was made in error.

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Petitioners Safari Club International and Safari Club International Foundation

Safari Club International, a nonprofit IRC § 501(c)(4) corporation, has approximately 53,000 members worldwide, many of whom own, conserve and hunt individual antelope from those captive populations of scimitar-horned oryx, dama gazelle and addax in the United States. SCI's missions, in the United States, and throughout the world, include the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. Safari Club International Foundation is a nonprofit IRC § 501(c)(3) corporation. Its missions include the conservation of wildlife, education of the public concerning sustainable use hunting and its use as a conservation tool, and humanitarian services. More specifically, the conservation mission of SCIF is: (a) to support the conservation of the various species and populations of game animals and other wildlife and the habitats on which they depend; and (b) to demonstrate the importance of hunting as a conservation and management tool in the development, funding and operation of wildlife conservation programs.

SCI and SCIF participated in numerous comment opportunities provided by the Service in its consideration of the listing status of the three species generally as well as the status of the U. S. captive populations of those species. SCI and SCIF also commented on the proposed regulation intended to exempt the U.S. captive populations from ESA take prohibitions and to allow continued hunting of members of the U.S. captive herds and other activities that enhance the propagation and survival of the species. In some of those comments, SCI and SCIF advocated that the FWS was not required to list those captive populations as endangered and that the Service had the authority to treat those captive populations differently from populations of members of the species living in their native ranges. For example, in comments submitted on October 22, 2003, SCI and SCIF advocated that the FWS designate the captive populations of the three species in the United States as "distinct population segments" ("DPSs") and that these DPSs "be given separate consideration" for the purpose of listing. A copy of SCI and SCIF's letter is attached to this Petition as Exhibit "A."

SCI and SCIF also participated in litigation in federal district courts in California and the District of Columbia to defend the Section 4 regulation following its adoption on September 2, 2005. 70 Fed. Reg. 52310. On June 22, 2009, a Judge in the U.S. District Court for the District of Columbia ruled that the regulation violated the ESA because it allowed the take of species listed as endangered without the requirement for individual enhancement of survival permit applications and the commensurate public notice and comment opportunities. *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009). The court remanded the matter to the Service for further proceedings consistent with his ruling, leaving it to the Service to promulgate new regulations that would not violate the ESA. The delisting of the U.S. captive members of these three species would not be inconsistent with the court's ruling. If the Service corrects its erroneous listing of the U.S. captive herds of the three species and consequently delists the U.S. captive herds, the take of members of the U.S. populations would require no exemption from the

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ESA take prohibitions, no permit applications and no need for public notice and comment on individual permit applications.

Appearance and Status of the Scimitar-Horned Oryx, Dama Gazelle and Addax

The three antelope species at issue are not native to the United States and were introduced into this country from populations in their home ranges in various parts of Africa. The status of the species in the wild was well document by the Service in the September 2, 2005 rules listing the species as endangered, and permitting the continuation of activities, including hunting of the species, for the purpose of enhancing the survival of the three species. 70 Fed. Reg. 52310 (September 2, 2005); 70 Fed. Reg. 52319 (September 2, 2005). The scimitar-horned oryx (*oryx dammah*) was historically found in the wild in Algeria, Burkina Faso, Chad, Egypt, Libyan Arab Jamahiriya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sudan, Tunisia, and Western Sahara. It stands about 47 inches [119 centimeters (cm)] tall and weighs around 450 pounds [204 kilograms (kg)]. It is generally pale in color, but the neck and chest are dark reddish brown. Adult animals possess a pair of horns curving back in an arc up to 50 in (127 cm) long. 70 Fed. Reg. 52319 (September 2, 2005). Scimitar-horned oryx have all but disappeared from the wild. There were an estimated 500 Scimitar-horned oryx in Chad and Niger until about 1985, but by 1988 only a few dozen individuals survived in the wild. Since then there have been no confirmed sightings in the wild. <http://www.iucnredlist.org/apps/redlist/details/15568/0>. Captive populations in fenced protected areas can be found in a number of range countries, including Tunisia, Morocco, and Senegal. In 2005, at least 1,550 captive animals were held in managed breeding programs around the world (Gilbert 2005), not including those found on private ranches in the United States. In addition, it is believed that more than 4,000 are kept in a private collection in the United Arab Emirates. *Id.* Captive herds of scimitar-horned oryx are also found in South Africa.

The addax (*addax nasomaculatus*) is generally about 42 inches (106 cm) tall at the shoulder and weighs around 220 pounds (100 kg). It has a grayish white coat and its horns twist in a spiral up to 43 inches (109 cm) long. *Id.* It was originally found in the wild in Chad, Mauritania, Niger, Algeria, Egypt, Libyan Arab Jamahiriya, Sudan, and Western Sahara. Unlike scimitar-horned oryx, some addax can still be found in the wild. The IUCN approximates that there are 300 still living in Niger, Chad and Mauritania.

Today, the only known remaining population survives in the Termit/Tin Toumma region of Niger. However, there are sporadic records of small isolated groups and individuals from eastern Air Mountains/Western Ténéré desert in Niger, and from the Equey region of western Chad (Newby in press). Possible rare vagrants from these areas may be seen in north Niger, southern Algeria and Libya (Newby in press). There are continued rumours of Addax along the Mali/Mauritania border (Majabat Al Koubra), but no confirmed sightings for several years. However, in

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early March, 2007, the fresh tracks of about 15 Addax were seen in central Mauritania, in an area where they had not been reported for over 20 years (R. Vernet in Newby in press).

<http://www.iucnredlist.org/apps/redlist/details/512/0>. In addition to those in fenced populations in their former home ranges in Tunisia and Morocco, some addax have been reintroduced into the wild in these countries. *Id.*

The dama gazelle (*gazella dama*) stands about 39 inches (99 cm) tall at the shoulder and weighs around 160 pounds (72 kg). Its upper body is mostly reddish brown, and the head, rump, and underparts are white. Its horns curve back and up, but are generally less than half the length of those of the scimitar-horned oryx. *Id.* Their historic home range included Chad, Mali, Niger, Libyan Arab Jamahiriya, Mauritania, Morocco, Nigeria, Algeria, Tunisia, Senegal, Sudan and Western Sahara. They are believed to have disappeared from North Africa but some still remain in Mali, Chad and Niger. Some dama gazelle are living in enclosed facilities in their home ranges in Morocco, Tunisia and Senegal. <http://www.iucnredlist.org/apps/redlist/details/8968/0>

Currently, aside from the remaining wild populations of addax and dama gazelle, captive herds of the three species are found both inside and outside the United States. In the United States, captive populations are growing and thriving. In 2004, Dr. Elizabeth Cary Mungall conducted research for the Exotic Wildlife Association (“EWA”) to assess population numbers and habitat conditions for captive populations of the three antelope species. Dr. Mungall reviewed a series of statewide censuses and collected data via a survey of EWA members who owned herds of one or more of the three species. Her research not only revealed significant numbers of each species on ranches in Texas and/or ranches owned by EWA members, but also demonstrated remarkable population increases over a relatively short period of time.

As shown by a series of statewide censuses (1966, 1971, 1974, 1979, 1984, 1988, 1994) in Texas done by the Texas Parks and Wildlife Department, the state wildlife agency, numbers of the three subject species kept in private ownership have been increasing (Ramsey 1967, Cook 1972, Harmel 1975, Harmel 1980, Traweek 1985, Traweek 1989, Traweek, 1995). This census series is further discussed in Mungall and Sheffield (1994). To confirm the situation, a further census was done in 1996 at the request of the Exotic Wildlife Association (EWA) by the Texas Agricultural Statistics Service (anonymous 1996). Dama gazelle numbers were checked again in an October 2003 phone census done by the author for EWA as described in the next section (Mungall 2004).

In summary, starting with the first census in which the species appeared:
Scimitar-horned oryx: 32 in 1979 to 1,006 in 1994 to 2,145 in 1996.
Addax: 2 in 1971 to 587 in 1994 to 1,824 in 1996.

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Dama gazelle: 9 in 1979 to 149 in 1994 to 91 in 1996 to 369 in 2003.

Submission for the Comment Period on Proposed Listing of Scimitar-Horned Oryx, Addax, and Dama Gazelle Under the Endangered Species Act, A technical report prepared for the Exotic Wildlife Association, by Elizabeth Cary Mungall, January 6, 2004, Exhibit "B".¹

Regulations Pertaining to the Three Antelope Species

The FWS listed the scimitar-horned oryx, dama gazelle and the addax throughout the world as endangered on September 2, 2005, after almost 14 years of deliberation over how to deal with the disparate status of the members of the species in the wild as compared to the captive herds in the United States. The Service first proposed an endangered species listing on November 5, 1991. [56 Fed. Reg. 56491](#). After an initial public comment opportunity, the Service re-opened the comment period on November 5, 1991, again on July 24, 2003, [68 Fed. Reg. 43706](#), and then for a third time on November 26, 2003. [68 Fed. Reg. 66395](#).

The Service's protracted deliberation over the listing status of the three species was due in great part to the dilemma of how to protect the species in the wild without severely undermining the pattern of trade and use of the species within the United States that had so benefitted the population numbers and health of the captive herds. An endangered classification would create severe restrictions on the use and trade of such animals. The individual ranchers who own and maintain these herds do so on a strictly voluntary basis. Management and conservation of wildlife cannot occur without financial resources. To generate the funds necessary to feed, raise, breed and care for these exotic animals, many ranchers allow limited hunting of their herds. In addition, owners of these captive herds trade and sell members of their herds in order to bring in new blood lines and maintain genetic diversity and health. As long as the three species were free of federal listing classification, their value remained high, which facilitated an important incentive for the continued volunteer efforts of the U.S. ranchers. A listing as Endangered would severely interfere with the economy and system by which the ranchers had been willing to participate in efforts that significantly increased the U.S. numbers of these animals. The additional burdens, costs and uncertainties introduced by the new restrictions would significantly undermine the value of the animals, and would encourage many ranchers to abandon their conservation efforts.

Ultimately, on September 2, 2005, the Service decided to list the three species, in their entirety, as endangered. The Service did not adopt SCI and SCIF's recommendation to exclude

¹ SCI and SCIF expect that Dr. Mungall will soon be providing the FWS with updated data on the status and numbers of the U.S. captive populations of these three species. However, it is the status of the species at the time that the FWS erred in deciding to list the captive populations as "endangered" that is most relevant to the Service's present obligation to correct that error.

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U.S. captive populations from this listing, instead interpreting the ESA to prohibit disparate listing designations between wild and captive populations of a species. The Service explained that “[i]t would not be appropriate to list captive and wild animals separately.” 70 Fed. Reg. 52319, 52320 (September 2, 2005).

The Service did not ignore the fact that the listing of the three species jeopardized the healthy status and increasing numbers of the U.S. populations. The FWS acknowledged the problem and noted that “scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species.” *Id.* at 52320. To mitigate the impending harm, on the same date that it listed the species as endangered, the Service adopted a regulation that excluded captive U.S. bred scimitar-horned oryx, dama gazelle and addax from certain ESA take prohibitions.

We are amending [50 CFR § 17.21](#) by adding a new paragraph (h), which will apply to U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle. The provision allows for the take; export or re-import; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce of U.S. captive-bred live scimitar-horned oryx, addax, or dama gazelle, including embryos and gametes, and sport-hunted trophies, as long as certain criteria are met.

70 Fed. Reg. at 52317.

The Erroneous Listing of U.S. Captive Herds of the Three Species

Federal regulations provide only three circumstances under which the Service may delist a previously listed species; extinction, recovery and error. The third of these circumstances applies to the scimitar-horned oryx, dama gazelle and addax.

A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

...

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, ***or the interpretation of such data***, were in error.

50 C.F.R. § 414.11(d) (emphasis added).

At the time that it listed the three species as endangered, the Service interpreted each of the three species as a single indivisible unit, and concluded that it was unable to differentiate in

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specifying the listing status of the three species between the captive herds living in the United States and those living outside the United States in their home range. The FWS erroneously characterized the portions of the species that it was asked to evaluate and erroneously interpreted its authority to designate species and/or portions of species.

Error One: A Wild/Captive Classification Was Not Required

The Service refused to specify a different classification for U.S. captive populations on the basis that “[i]t would not be appropriate to list captive and wild animals separately.” 70 Fed. Reg. 52319, 52320 (September 2, 2005). In basing its listing decision on that premise, the Service erroneously failed to take into account the captive populations of the three species that live within and outside of their home ranges in countries other than the U.S., in zoos, private facilities and captive herds.² Had the FWS done so, it could have divided the populations by

² For example, the FWS is aware of captive herds of scimitar-horned oryx, living in South Africa. 74 Fed. Reg. 58977 (November 16, 2009). In addition, the IUCN reports that there are several captive herds of dama gazelle around the world:

Dama Gazelle are present in captivity, but the number of founders is limited (Sausman 1998; Thuesen 1998). Animals from Almeria breeding facility in Spain were introduced to an enclosure (R'mila Royal Reserve) in Morocco (130 present in 2007; Cuzin *et al.* in press) and gazelles from München Zoo (originally bred at Almeria) were released into an enclosure in Souss-Massa N.P. (12 animals in 2006); these semi-captives are intended to form part of a reintroduction programme in Morocco. All of the animals from Almeria stock originate from Western Sahara. Elsewhere, Dama Gazelle were released into the 2,000-ha Bou-Hedma N.P. in Tunisia in the early 1990s (Abaigar *et al.* 1997) where around 17 were present in 2006 (T. Wachter pers. comm.); gazelles have also been reintroduced to Guembeul Faunal Reserve in Senegal (Cano *et al.* 1993) and a reintroduction programme in Ferlo North Reserve is underway (7 animals).

<http://www.iucnredlist.org/apps/redlist/details/8968/0>. The IUCN also reports captive herds of addax located around the world.

There are over 600 Addax in Europe, Libya (Sabratha), Egypt (Giza Zoo), North America, Japan and Australia in managed breeding programmes”

<http://www.iucnredlist.org/apps/redlist/details/512/0>

Safari Club International - Washington DC Office

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international geographical boundaries, rather than separating the species into strictly captive vs. wild designations. The FWS could have specified that the portion of the range for all populations, both captive and wild, living outside the United States, required listing, and that no such listing status was necessary for any members of the species living within the U.S.

Error Two: The FWS Should Not Have Included the Non-native U.S. Captive Populations of the Three Species in the Endangered Listing Classification

The FWS has a history of not including non-native populations of a species when listing the native populations as endangered or threatened. In 1998, the Service issued a Final Rule listing the Arkansas River Basin Population of the Arkansas River Shiner as threatened. 63 Fed. Reg. 64722 (November 23, 1998). Despite listing all Arkansas River basin populations of the fish living in the Canadian River in New Mexico, Oklahoma and Texas and the Cimarron River in Kansas and Oklahoma, the Service chose not to list a non-native, introduced population that occurred in the Pecos River in New Mexico. *Id.* The Service noted that the Arkansas River basin population was discrete from the non-native Pecos River population, based on natural, geographic isolation. *Id.* at 64774. The court found the Arkansas River basin population to qualify as a distinct population segment (DPS), but did not make a similar finding for the Pecos River population. Instead, the Service found that the non-native, introduced Pecos River population was not a listable entity.

Although it is discrete, the Pecos River basin population of the ARS [Arkansas River Shiner] is not significant because it is an introduced population located outside of the species' historic range and, at this time, is not essential for recovery of the species within its historic range. Therefore, the Arkansas River basin population of the ARS is a listable entity under the Act, and the non-native, introduced Pecos River population is not a listable entity under the Act.

Id. The Service took into consideration the Pecos River population's potential for providing additional genetic material to the listed Arkansas River basin population. Nevertheless, the Service found it unnecessary to list the Pecos River population because it could not improve the status of the Arkansas River basin DPS in its historic range. *Id.* The Service also determined that conservation of the non-native population was not required by the ESA.

The purpose of the Act is to conserve threatened and endangered species and the ecosystems on which they depend. Non-native, introduced populations, while possibly useful in recovery/restoration efforts, are not a viable substitute for species conservation in native ecosystems. We do not believe listing or active conservation of the introduced Pecos River population is appropriate nor is such conservation required by the Act.

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Id. at 64778. The disparate non-listed status for the non-native Pecos River population of the Arkansas River Shiner persists today. Consequently, the decision to list the non-native herds of the three antelope species directly contradicts the Service's policy and practice with respect to non-native populations.

The policy to exclude non-native populations from Endangered Species Act listing is not unique to the Arkansas River Shiner scenario. The FWS's sister agency, National Marine Fisheries Service has just issued a 90 day "may be warranted" finding, accepting a petition to delist coho salmon (*Oncorhynchus kisutch*) in coastal counties south of the ocean entrance to San Francisco Bay, California, from the Federal List of Endangered and Threatened Wildlife, on the basis that the salmon at issue may not be native to the distinct population segment in which they have been included, and therefore "do not constitute an important component in the evolutionary legacy of the species." 75 Fed. Reg. 16745, 16746 (April 2, 2010).³

Error Three: A Separate Classification for a Portion of the Species' Range Was Not Precluded

Since listing the three antelope species as endangered in their entirety on September 2, 2005, the FWS has confirmed an interpretation of the ESA to recognize the FWS' authority to specify different listing classifications for different portions of a species' range. In 2007, the Solicitor's Office for the Department of the Interior prepared a Memorandum that closely examined the Service's ESA listing and delisting authorities. The Solicitor clarified the agency's ability to differentiate the listing classifications for different portions of a single species. The Solicitor explained that when the Service determines that a species is in danger of extinction throughout a significant portion of its range (but not necessarily throughout all its range), the Service need specify as endangered only the portion of the species' range in which it is an endangered species. Department of the Interior Solicitor's Memorandum M-37013, The Meaning of "In Danger of Extinction Throughout All or A Significant Portion of Its Range," p.3. ("Solicitor's Memorandum") Exhibit "C." The Solicitor's Memorandum acknowledges the

³ The scenario involving the non-native captive populations of the three antelope species is markedly different than the scenario considered by the Oregon District Court in *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). In that case, the court rejected the NMFS attempt to exclude hatchery born coho salmon from a DPS and listing that included naturally born coho. The hatchery salmon were swimming side-by-side in the same bodies of water with the natural born coho, the NMFS considered the progeny of hatchery born salmon to be "naturally spawned" and the area in which the hatchery and natural born salmon co-existed was the native, historic range of the latter. In the three antelope situation, the U.S. is not the historic range of any of the three species, and the captive members of the three herds do not interact with non-captive, native members of the species. The captive members are isolated both geographically and reproductively, and their location is thousands of miles from the home range of the species.

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significance of language in the Endangered Species Act that obligates the Service to specify that portion of a listed species' range that is to be designated as "endangered" or "threatened." 16 U.S.C. § 1533(c)(1).⁴

Pursuant to this clarification, the FWS should designate the scimitar-horned oryx, dama gazelle and addax as "listed" species based on their status outside the U.S. and should then specify only those portions of the species range where they are to receive "endangered" or "threatened" species classification. In other words, the Solicitor's Memorandum and Section 1533(c)(1) provide the mechanism that the FWS must use when it needs to specify a different listing status for different portions of a species' range. Consequently, pursuant to the Solicitor's Memorandum and 1533(c)(1) the antelope living in the significant portion of their range outside of the U.S., could be classified as "endangered." The Service's error was specify scimitar-horned oryx, dama gazelle and addax as requiring federal Endangered Species Act protections only within the portion of their ranges outside of the United States and failing to leave the captive populations in the United States without such classification or unnecessary federal protection.

The FWS relied on this very reasoning in its decision to remove federal endangered species listing protections from some, but not all of the gray wolves living in the Northern Rocky Mountain Distinct Population Segment. On April 2, 2009, the Service published its decision to delist the wolves of Montana and Idaho and portions of other Rocky Mountain states but not to alter the listing status of the wolves of Wyoming. The Service explained:

Once we determine listing is appropriate, section 4(c) of the Act requires we "specify with respect to each such species over what portion of its range it is threatened." In this case, we are specifying that the protections of the Act remain necessary in Wyoming. Thus, the protections of the Act shall remain in place in the Wyoming portion of its range. The interpretation of the Act advocated by these commenters fails to give sufficient consideration to the import of section 4(c), is inconsistent with legislative history of the Act that strongly supports the view that Congress intended to give the Secretary broad discretion to tailor the protections of the Act with the needs of the species.

Moreover, even before the 2007 Solicitors opinion, we have applied differential levels of protections for species facing differential levels of threats in different parts of their range. For example, in 1978, the gray wolf was protected as endangered in the lower-48 States, except in Minnesota, where it was protected as threatened ([43 FR 9607](#), March 9, 1978). Nor is the listing determination for NRM DPS the only listing determination applying the Solicitor's opinion. In our

⁴ This section is also often referred to as "4(c)."

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2008 [Gunnison prairie dog \(*Cynomys gunnisoni*\) 12-month finding \(73 FR 6660](#), February 5, 2008), we determined that the Gunnison's prairie dog does not warrant the Act's protections throughout its range, but that the significant portion of the species' range located in central and south-central Colorado and northcentral New Mexico does warrant protection under the Act. On July 10, 2008, we determined the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) was not threatened throughout all of its range and the portion of the subspecies' range located in Colorado represented a significant portion of the range where the subspecies should retain its threatened status ([73 FR 39790](#)). Thus, this rule removes the Act's protections in Wyoming while retaining them in Colorado ([73 FR 39790](#), July 10, 2008).

74 Fed. Reg. 15152 (April 2, 2009). The legality of the Service's authority and decision to delist a portion of the Northern Rocky Mountain gray wolf distinct population segment is one of the issues now being considered by a Montana federal district court in the case of *Defenders of Wildlife v. Salazar*, 9:09 –cv-00077(DWM). Several courts have considered whether the Service has the authority to specify for listing portions of range below the species level. To date no appellate court has conclusively ruled on the issue.

A district court opinion in *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001), for example, holds that, at least with respect to portions of a species sharing the same geographic area, the Service may not make listing decisions below that of a subspecies or distinct population segment. *Id.* at 1162. (Court rejected National Marine Fisheries Service's decision to list naturally spawned, but not hatchery born salmon as threatened). Although the Ninth Circuit has considered whether the ESA permits listing distinctions below the DPS level, the appellate court has never directly decided the question. In fact, the Ninth Circuit has purposefully left that matter undecided. In *Trout Unlimited v. Lohn*, 559 F.3d 956 (9th Cir 2009), the Ninth Circuit considered a challenge to the National Marine Fisheries Service's status review of several populations of steelhead trout. The Ninth Circuit avoided the opportunity to conclusively reject the Service's authority to differentiate listings between portions of a species (DPS). Instead the court specifically opened the door to further deliberation as to whether the ESA permits listing distinctions for portions of a species. The court noted that no party in the *Trout Unlimited* case had claimed that the National Marine Fisheries Service had listed anything less than an entire species and speculated that “[i]f NMFS were attempting to list something less than a ESU, the Building Industry's argument *might* have some merit. *Id.* (emphasis added).⁵ The *Trout Unlimited* case is not the first time that the Ninth Circuit chose to avoid directly ruling on the

⁵ The Ninth Circuit also explained that “[i]n this case, no party disputes that when NMFS lists an ESU, it must list the entire ESU-including both hatchery and naturally spawned fish.” *Id.* at 961. The court avoided offering a conclusive statement as to what its ruling would have been such a challenge been included in the case.

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question of whether the ESA authorizes the Service to list portions of a species. In *Oregon Trollers' Association v. Gutierrez*, 452 F.3d 1104 (9th Cir. 2006), the Ninth Circuit explained that it had never reviewed the merits of the Oregon district court's holding in *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D.Or.2001) (prohibiting listing distinctions below that of a distinct population segment) 452 F. 3d at 1119, and then noted that it was purposefully not deciding whether the Alsea district court was correct in its interpretation of the ESA. *Id.*

No legal precedent stands in the way of the Service excluding the healthy and populous captive herds of non-native scimitar-horned oryx, dama gazelle and addax from the endangered classification of other populations of the species, both captive and wild, living in non-U.S. portions of the species' current range. Since listing the U.S. captive portion of the three species' ranges in 2005, the Service has clarified its authority to specify for listing only those portions of a species' range that actually qualify for endangered species protections. The thriving herds living on ranches in the U.S. do not require that level of protection.

Petition Requirements and Agency Response

Upon receiving this petition for a rulemaking correcting the listing classification of the U.S. populations of the three antelope species, the Service must notify SCI and SCIF within 30 days of its receipt of the petition, in writing. The Service has 90 days from receipt to make a finding as to whether the petitioned action "may be warranted." 16 U.S.C. §1533(b)(3)(A). Upon making a "may be warranted" finding, the FWS has one year from the date of receiving the petition to publish a finding on whether the petitioned action is "warranted."

Requested Stay of Rulemaking During Consideration of This Petition

It is SCI and SCIF's understanding that the Service is currently considering regulatory options to respond to the remand of Judge Kennedy in *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2008), and that those options could include withdrawal of the existing regulation, adopted in 70 Fed. Reg. 52319, along with substitution of other regulatory mechanisms for captive members of these species. SCI and SCIF request that the Service stay any such regulatory activity *at least* until the Service makes a finding on whether the action sought in this petition is warranted.

Conclusion

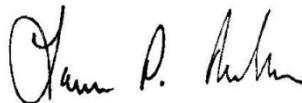
In 2005, the FWS erroneously determined, when establishing the listing status of scimitar-horned oryx, dama gazelle and addax, that the U.S. captive herds of the antelope should be included with portions of the species' range living outside of the United States. Although portions of the three species living in ranges outside of the U.S. may indeed qualify for

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endangered status, the U.S. captive herds should never have been included in that designation. The FWS erred in assuming that excluding the U.S. populations would have resulted in a listing separation based exclusively on a captive/wild distinction. The Service failed to acknowledge that the captive populations in the United States are not the only ones throughout the world and that captive populations outside of the U.S. would also have been encompassed in the endangered listing. The Service also erred in ignoring its own practice and policy of distinguishing the listing status of captive and non-native populations of species and/or excluding non-native populations from listing of native members of the species. Finally, the Service erred in failing to take into account its authority to specify a different listing status for different portions of each species' range. These errors invoke the Service's authority under 50 C.F.R. § 414.11(d) to rectify the incorrect listing and to delist the U.S. captive populations of the three antelope species. SCI and SCIF petition the Service to expeditiously correct those errors and exclude the U.S. populations from the endangered species classification for scimitar-horned oryx, dama gazelle and addax.

Please contact Anna Seidman, Director of Litigation, aseidman@safariclub.org; or Doug Burdin, Litigation Counsel, dburdin@safariclub.org, with any questions about this petition. Thank you.

Sincerely,



Lawrence Rudolph
President,
Safari Club International
Safari Club International Foundation



Rec'd
JUN 29 2010

June 29, 2010

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

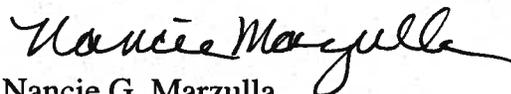
Re: Petition to delist the U.S. captive-bred populations of scimitar-horned oryx, dama gazelle, and addax

Dear Secretary Salazar:

Enclosed is the petition of the Exotic Wildlife Association to remove the U.S. captive-bred populations of the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*) from the endangered species list.

We ask the U.S. Fish and Wildlife Service (FWS) to acknowledge the receipt of this petition within 30 days and then publish a determination in the Federal Register within 90 days, that the petition to delist the U.S. captive-bred populations of scimitar-horned oryx, dama gazelle, and addax is warranted.

Sincerely,


Nancie G. Marzulla

cc: Nicole Alt, Chief, Division of Conservation and Classification, U.S. Fish and Wildlife Service

Encl.

**BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR
AND THE UNITED STATES FISH AND WILDLIFE SERVICE**

**PETITION OF THE EXOTIC WILDLIFE ASSOCIATION TO
REMOVE THE U.S. CAPTIVE-BRED POPULATIONS OF
SCIMITAR-HORNED ORYX, DAMA GAZELLE, AND ADDAX
FROM THE LIST OF ENDANGERED SPECIES**

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Dated: June 29, 2010

**Petition of the Exotic Wildlife Association to Remove the
U.S. Captive-Bred Populations of Scimitar-Horned Oryx,
Dama Gazelle, and Addax from the List of Endangered Species**

Introduction

The Exotic Wildlife Association petitions FWS to expeditiously remove the U.S. captive-bred populations of the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*) from the endangered species list.

In 2005, FWS listed as endangered these three species of antelope native to Africa. These species are either extinct in their native range (oryx) or nearly so (addax and dama gazelle), but they are thriving through captive breeding in the United States. Recognizing this unique circumstance, in a tandem rule published contemporaneously with the listing of these three species, FWS authorized certain otherwise prohibited activities for U.S. captive-bred populations of the three species that enhance the propagation or survival of the species.

But on June 22, 2009, a federal district court invalidated the tandem rule, eliminating the authorized activities that make U.S. captive-breeding programs possible.¹ This ruling threatens to destroy the U.S. captive breeding program in the United States that has enhanced the propagation or survival of the scimitar-horned oryx, addax, and dama gazelle worldwide by rescuing these species from near extinction and providing the founder stock necessary for reintroduction. The scimitar-horned oryx is possibly extinct in the wild; therefore, but for captive breeding, the species might be extinct. Addax and dama gazelle occur in very low numbers in the wild and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively). Threats that have reduced these species' numbers to current levels in the wild continue throughout most of the historic range. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens.

The final rule listing these three antelope as endangered leaves no doubt that the exemption embodied in paragraph (h) was integral to FWS's decision to list the three antelope.² In fact, it is likely that without the exemption FWS would not have listed the three species at all.

Since 2005, the U.S. captive-bred distinct population segments ("DPSs") of the three antelope have continued to thrive, due in large part to the existence of the

¹ *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C 2009).

² Final Rule to List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319, 52,320 (Sept. 2, 2005).

exemption that has allowed these U.S. captive-breeders to continue their conservation activities. As result, a recent informal survey conducted by Exotic Wildlife shows that today there are roughly twice as many of these three species of antelope in the United States as there were even five years ago.³ Therefore, even if the antelope had been properly listed as endangered in 2005, they are certainly fully recovered today.

Accordingly, Exotic Wildlife Association (Exotic Wildlife), petitions FWS to remove the U.S. captive-bred species of scimitar-horned oryx, the addax, and the dama gazelle from the endangered species list.⁴

I. Petitioner

Exotic Wildlife Association is a 501(c)(6) trade organization with headquarters in Ingram, Texas and is registered and licensed to do business in Texas. Formed in 1967, Exotic Wildlife has grown into what is now the oldest and most successful association of its type in North America. Exotic Wildlife's mission is to encourage and expand the conservation of indigenous and non-indigenous hoofstock animals and to help Exotic Wildlife members develop and strengthen the markets for their animals. Exotic Wildlife promotes this mission by protecting the rights of private ranchers to manage and control their own land and the indigenous and non-indigenous hoofstock animals living on it. Exotic Wildlife promotes "conservation through commerce" and articulates the need for "sustainable utilization" of wildlife as a conservation tool and as a viable tool to maintain proper carrying capacity on private property. Exotic Wildlife also works to educate policy makers, the media, and the public through research and advocacy about the exotic wildlife industry and sustainable utilization of wildlife, and serves its members by providing technical support and information to benefit them, their animals, and their industry.

Exotic Wildlife represents and serves members throughout the United States and in several foreign countries that have propagated and protected some of the largest populations of privately owned wildlife. Members own and raise scimitar-horned oryx, dama gazelle, and addax on their private ranches and market them to other ranchers.

Through research and advocacy, Exotic Wildlife has taken action to protect its members' ability to continue to own, raise, and market these three species without unnecessary and burdensome legal restrictions that will detrimentally affect Exotic Wildlife and its members' efforts to conserve these animals. Exotic Wildlife has consulted with experts in exotic wildlife and employs a biologist to study the impact of

³ Dr. Elizabeth C. Mungall, the biologist who performed the initial survey of the U.S. captive-bred antelope for the 2005 listing decision, is in the process of finalizing an updated census report in support of this petition. This updated survey will be furnished to FWS upon its completion.

⁴ See also Exhibit 1, Bibliography.

Exotic Wildlife members' "conservation through commerce" efforts on the health and number of scimitar-horned oryx, dama gazelle, and addax both inside and outside the United States. In response to FWS's Proposed Rule to List these three species under the ESA, Exotic Wildlife submitted comments and supporting research to FWS opposing the listing of these animals as endangered and explaining why the listing would be harmful to the survival of U.S. captive-bred populations of the species.⁵

Exotic Wildlife also commented on the proposed regulation that exempted the U.S. captive-bred populations of these three antelope species from the ESA take prohibitions to enhance their propagation and survival. EWA stated that

If these animals are listed as endangered it will also greatly restrict trade. Restricted trade stands in the way of economic incentive. Without economic incentive there will be no private breeding programs. Eventually, instead of protecting animals born in the US, it will severely impede anyone who wants to breed these animals When it's too much of a hassle and burden to fight for permits, the animal value goes down as does the economic incentive. Then the animals are truly endangered both here and in their land of origin.⁶

A copy of EWA's letter is attached to this petition as Exhibit 2. In addition, Exotic Wildlife also participated in litigation in federal district courts in California and the District of Columbia to defend the Section 4 regulation exempting these three species of antelope from the ESA take prohibitions.⁷ On June 22, 2009, a judge in the U.S. District Court for the District of Columbia held that the regulation violated the APA and was contrary to the ESA because it allowed the take of species listed as endangered without the requirement for individual enhancement of survival permit applications and the commensurate public notice and comment opportunities.⁸ The court remanded the matter to the FWS for further proceedings consistent with his ruling, leaving it to the agency to promulgate new regulations that would not violate the ESA.

II. Factual and Procedural Background

In 2005, FWS lumped together the wild and semi-wild populations of the three antelope in their native African habitat, captive populations in the Middle East and elsewhere around the world, and the substantial captive-bred populations in the United

⁵ A.R. 70-71.

⁶ A.R. 70.

⁷ 70 Fed. Reg. 52,310.

⁸ *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009).

States and listed them all as endangered.⁹ That rule identified dangers to the continued existence of the species in their native African range:

The best available information indicates that the causes of decline of these antelopes are (1) habitat loss through desertification, permanent human settlement, and competition with domestic livestock, and (2) regional military activity and uncontrolled killing. These threats have caused the possible extinction in the wild of the scimitar-horned oryx and the near-extinction of the addax in the wild.¹⁰

But the listing rule identified no danger to the captive-bred U.S. populations of the three antelopes. FWS stated, in fact, that just the opposite is true—that captive breeding has stemmed the decline of the species and provided founders' stock for eventual reintroduction:

Captive breeding is a manmade factor that has stemmed the decline of the three species. It has provided the founder stock necessary for reintroduction, maintenance of otherwise potentially lost bloodlines, and opportunities for research. The scimitar-horned oryx is possibly extinct in the wild and therefore, but for captive breeding, the species might be extinct. For addax and dama gazelle, they occur in very low numbers in the wild, and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively). The SSIG estimates that there are about 4,000–5,000 scimitar-horned oryx, 1,500 addax, and 750 dama gazelle in captivity worldwide. Captive-breeding programs operated by zoos and private ranches have effectively increased the numbers of these animals while genetically managing their herds. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Currently, however, continued habitat loss and wonton killing have made reintroduction nonviable in most cases. *See* 70 FR 5117 for a detailed discussion of the role of captive breeding in the conservation of these species.¹¹

Instead, believing it had the authority to do so, FWS sought to insure the continued success of captive breeding in the U.S. by exempting bona fide captive breeding programs from many of the take prohibitions, subject to certain conditions. The rule listing the three species stated:

⁹ 50 C.F.R. § 17.11(h) (2010); Final Rule to List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319 (Sept. 2, 2005).

¹⁰ 70 Fed. Reg. at 52,319.

¹¹ *Id.* at 52,322.

[T]he Service may authorize otherwise prohibited activities that enhance the propagation or survival of the species, such as captive breeding to increase the population size or improve the gene pool, under section 10(a)(1)(A) of the Act. In response to these comments, on February 1, 2005 (70 FR 5117), we initiated a separate rulemaking by announcing a proposed rule and notice of availability of a draft environmental assessment to add a new subsection, 17.21(h), to govern certain activities with U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle, should they become listed as endangered. The proposed rule covered U.S. captive-bred live specimens, embryos, gametes, and sport-hunted trophies and would authorize certain otherwise prohibited activities that enhance the propagation or survival of the species. The “otherwise prohibited activities” were take; export or reimport; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce. In the proposed rule, we determined that the scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species. Comments were accepted until April 4, 2005. The final rule is published in today’s Federal Register.¹²

FWS may well have declined to list the U.S. captive-bred populations of these three antelope species had it not believed that it had the authority instead to simply adopt a tandem rule treating those populations differently. For FWS understood that it was crucial that the listing of these three species not occur without providing a partial take exemption to provide incentives for the continued propagation and enhancement of the species:

It was critical that development of a rule that provides an incentive to continue captive breeding of these species proceed concurrently with the determination of their legal status under the Act to ensure that no breeding programs would be disrupted by a final listing determination.¹³

So although FWS’s decision to list the U.S. captive-bred populations of these three antelope species as endangered could have made the conservation activities of the private ranches impracticable, the exemption instead encouraged the owners of the U.S. captive-bred populations of thousands of scimitar-horned oryx, dama gazelle, and addax to continue providing the animals with habitats similar to their native homeland and to care for them using first-class animal husbandry practices. And although populations of the

¹² *Id.* at 52,320.

¹³ *Id.* at 52,313.

three species living in the wild outside the United States still plainly do qualify for the endangered status, the U.S. captive-bred populations are certainly no longer endangered, if they ever were.

But the exemption that has allowed the U.S. captive-bred antelope to thrive is now itself extinct. A recent ruling of a federal district court invalidated the exemption rule, thereby destroying the critical balance FWS created when it simultaneously listed the species worldwide while exempting U.S. captive-bred populations from certain take prohibitions. Without the exemption, the crucial incentive for continued captive-bred breeding created by that now-invalidated rule no longer exists, jeopardizing the integrity of the U.S. captive-bred conservation programs. FWS must restore this balance if the species are to be saved.

In short, FWS should invoke its authority under 50 C.F.R. § 424.11(d) to delist the U.S. captive-bred populations of the three antelope species in order to save them from extinction.

A. History of the scimitar-horned oryx, dama gazelle, and addax

The three antelope species are not native to the United States. They were introduced into this country from their native ranges in northern Africa. All three species are extinct or near extinction in their home ranges:

The best available information indicates that the causes of decline of these antelopes are (1) habitat loss through desertification, permanent human settlement, and competition with domestic livestock, and (2) regional military activity and uncontrolled killing. These threats have caused the possible extinction in the wild of the scimitar-horned oryx and the near-extinction of the addax in the wild. All three species are in danger of extinction throughout their ranges. Accordingly, we are listing these three antelopes as endangered.¹⁴

1. The scimitar-horned oryx

The scimitar-horned oryx (*Oryx dammah*) was historically found in the wild in Algeria, Burkina Faso, Chad, Egypt, Libyan Arab Jamahiriya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sudan, Tunisia, and



Scimitar-horned Oryx
Photo by Jessie Cohen for the
Smithsonian National Zoo

¹⁴ *Id.* at 52, 319.

Western Sahara.¹⁵ The scimitar-horned oryx stands about 47 inches [119 centimeters (cm)] tall and weighs around 450 pounds [204 kilograms (kg)].¹⁶ It is generally pale in color, but the neck and chest are dark reddish brown.¹⁷ Adult scimitar-horned oryxes possess a pair of horns curving back in an arc up to 50 in (127 cm) long.¹⁸ Scimitar-horned oryx have all but disappeared from the wild.¹⁹ There were an estimated 500 scimitar-horned oryx in Chad and Niger until about 1985, but by 1988, only a few dozen individuals survived in the wild.²⁰ Since then there have been no confirmed sightings in the wild.²¹

But captive-bred populations in fenced-protected areas can be found in a number of range countries, including Tunisia, Morocco, and Senegal.²² In 2005, at least 1,550 captive-bred animals were held in managed breeding programs around the world,²³ not



Addax

**Photo by Wildlife Archives
(<http://www.wildlifearchives.com>)**

including those found on private ranches in the United States.²⁴ In addition, it is believed that more than 4,000 are kept in a private collection in the United Arab Emirates.²⁵ Captive-bred herds of scimitar-horned oryx are also found in South Africa.²⁶

2. The addax

The addax (*Addax nasomaculatus*) is generally about 42 inches (106 cm) tall at the shoulder and weighs around 220 pounds (100 kg).²⁷ The addax has a grayish white coat and its horns twist in a

¹⁵ IUCN SSC Antelope Specialist Group 2008, *Oryx dammah*, IUCN Red List of Threatened Species 2010.1 (2010), available at <http://www.iucnredlist.org/apps/redlist/details/15568/0> [hereinafter "IUCN Red List"].

¹⁶ *Id.* at 52,319.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ IUCN Redlist, *Oryx dammah*, <http://www.iucnredlist.org/apps/redlist/details/15568/0>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ A.R. 311-12.

²⁷ 70 Fed. Reg. at 52,319.

spiral up to 43 inches (109 cm) long.²⁸ It was originally found in the wild in the desert or semi-desert habitats of the Sahara and the Sahel regions of North Africa.²⁹ They were also originally found in Chad, Mauritania, Niger, Algeria, Egypt, Libyan Arab Jamahiriya, Sudan, and Western Sahara. In fact, there were reports of “immense herds” of addax north of Lake Chad in the 1920s.³⁰

These populations dramatically declined after World War II in their native range. Drought and destruction of their native habitat contributed significantly to the sharp decline of the addax.

But unlike scimitar-horned oryx, some addax can still be found in the wild. The International Union for Conservation of Nature (IUCN) approximates that there are 300 addaxes still living in Niger, Chad, and Mauritania:

Today, the only known remaining population survives in the Termit/Tin Toumma region of Niger. However, there are sporadic records of small isolated groups and individuals from eastern Air Mountains/Western Ténéré desert in Niger, and from the Equey region of western Chad (Newby in press). Possible rare vagrants from these areas may be seen in north Niger, southern Algeria and Libya (Newby in press). There are continued rumours of Addax along the Mali/Mauritania border (Majabat Al Koubra), but no confirmed sightings for several years. However, in early March, 2007, the fresh tracks of about 15 Addax were seen in central Mauritania, in an area where they had not been reported for over 20 years.³¹

In addition to those in fenced populations in their former home ranges in Tunisia and Morocco, some addaxes have been reintroduced into the wild in these countries.³²

3. The dama gazelle

The dama gazelle (*Gazella dama*) stands about 39 inches (99 cm) tall at the shoulder and weighs around 160 pounds (72 kg).³³ The dama gazelle’s upper body is



Dama Gazelle
Photo by Jungle Walk
(<http://www.junglewalk.com>)

²⁸ *Id.*

²⁹ A.R. 3.

³⁰ A.R. 11.

³¹ IUCN Redlist, *Addax nasomaculatus*, <http://www.iucnredlist.org/apps/redlist/details/512/0> (citation omitted).

³² *Id.*

³³ 70 Fed. Reg. at 52,319.

mostly reddish brown, and its head, rump, and under parts is white.³⁴ Its horns curve back and up, but are generally less than half the length of those of the scimitar-horned oryx.³⁵ Their historic home range included Chad, Mali, Niger, Libyan Arab Jamahiriya, Mauritania, Morocco, Nigeria, Algeria, Tunisia, Senegal, Sudan, and Western Sahara.³⁶ They are believed to have disappeared from North Africa but some remain in Mali, Chad, and Niger.³⁷ Some dama gazelle are living in enclosed facilities in their home ranges in Morocco, Tunisia, and Senegal.³⁸

B. The decision to list the three antelope species as endangered included a decision to exempt U.S. captive-bred populations from ESA requirements

On September 2, 2005, FWS listed the scimitar-horned oryx, dama gazelle, and the addax throughout the world as endangered, after almost 14 years of deliberation over how to deal with the disparity between the alarmingly low numbers of the species in the wild as compared to the large numbers in herds on private ranches in the United States. FWS first proposed an endangered species listing on November 5, 1991.³⁹ After an initial public comment opportunity, FWS reopened the comment period on November 5, 1991, again on July 24, 2003,⁴⁰ and then for a third time on November 26, 2003.⁴¹

FWS's protracted deliberation over the listing status of the three species was due largely to the dilemma of how to protect the species in the wild without severely undermining the conservation of the species in the United States that had so benefitted the population numbers and health of the captive-bred herds.⁴² An endangered classification would be accompanied by severe restrictions on the management and trade of these animals.⁴³ The individual ranchers who own and maintain these herds do so on a strictly voluntary basis. Management and conservation of wildlife cannot be carried out without financial resources. Owners of these herds trade and sell members of their herds to bring in new blood lines and to maintain genetic diversity and health. As long as the three species were free of federal listing classification, their value remains high, which facilitates an important incentive for the continued conservation efforts of the U.S. ranchers. A listing as "endangered," without an exemption from the permitting

³⁴ *Id.*

³⁵ *Id.*

³⁶ IUCN Redlist, *Nanger dama*, <http://www.iucnredlist.org/apps/redlist/details/8968/0>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Proposed Endangered Status for Scimitar-horned Oryx, Addax, and Dama Gazelle, 56 Fed. Reg. 56,491 (Nov. 5, 1991).

⁴⁰ Endangered Status for Scimitar-Horned Oryx, Addax, and Dama Gazelle, 68 Fed. Reg. 43,706 (June 24, 2003).

⁴¹ Endangered Status for Scimitar-Horned Oryx, Addax, and Dama Gazelle, 68 Fed. Reg. 66,395 (Nov. 26, 2003).

⁴² 70 Fed. Reg. at 52,311.

⁴³ See 50 C.F.R. § 17.21 (2010).

requirements under the ESA, would severely interfere with the ranchers' ability to participate in efforts that significantly increased the U.S. numbers of these animals.⁴⁴ The additional burdens, costs, and uncertainties associated with listing significantly reduce the value of the animals and forces many ranchers to abandon their conservation efforts.

Ultimately, on September 2, 2005, FWS decided to list the three species as endangered for both the native or wild populations and the U.S. captive-bred populations. FWS did not adopt recommendation to exclude U.S. captive-bred populations from this listing, concluding that "[i]t would not be appropriate to list captive-bred and wild animals separately."⁴⁵

But FWS was aware that listing the three species as endangered could jeopardize the continued healthy status and increasing numbers of U.S. captive-bred populations. FWS acknowledged that

scimitar-horned oryx, addax, and dama gazelle are dependent on captive-bred breeding and activities associated with captive-bred breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species.⁴⁶

Thus, to allow the private conservation ranches to continue their success with the species, and to mitigate the impending harm that would arise from the listing, on the same date that it listed the species as endangered, FWS adopted a regulation that excluded U.S. captive-bred populations of the scimitar-horned oryx, dama gazelle, and addax from certain ESA take prohibitions:

We are amending 50 CFR § 17.21 by adding a new paragraph (h), which will apply to U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle. The provision allows for the take; export or re-import; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce of U.S. captive-bred live scimitar-horned oryx, addax, or dama gazelle, including embryos and gametes, and sport-hunted trophies, as long as certain criteria are met.⁴⁷

⁴⁴ 70 Fed. Reg. at 52,313.

⁴⁵ *Id.* at 52,320.

⁴⁶ *Id.*

⁴⁷ *Id.* at 52,317.

C. As a result of the exemption, the U.S. captive-bred populations of the three antelope are thriving and increasing in numbers

Thanks to FWS's decision to promulgate 50 C.F.R. § 17.21(h), U.S. captive-bred populations of the three species are increasing and thriving.

In 2004, Dr. Elizabeth Cary Mungall conducted research for the Exotic Wildlife Association to assess population numbers and habitat conditions for U.S. captive-bred populations of the three antelope species. Dr. Mungall reviewed a series of statewide censuses and collected data in a survey of Exotic Wildlife members who owned herds of one or more of the three species. Her research not only revealed significant numbers of each species on the ranches owned by Exotic Wildlife members, but also demonstrated remarkable increases in the populations of these three species on these ranches over a relatively short period of time:

As shown by a series of statewide censuses (1966, 1971, 1974, 1979, 1984, 1988, 1994) in Texas done by the Texas Parks and Wildlife Department, the state wildlife agency, numbers of the three subject species kept in private ownership have been increasing. This census series is further discussed in Mungall and Sheffield (1994). To confirm the situation, a further census was done in 1996 at the request of the Exotic Wildlife Association (EWA) by the Texas Agricultural Statistics FWS. Dama gazelle numbers were checked again in an October 2003 phone census done by the author for EWA as described in the next section.⁴⁸

In summary, starting with the first census in which the species appeared:

- Scimitar-horned oryx: 32 in 1979 to 1,006 in 1994 to 2,145 in 1996.
- Dama gazelle: 9 in 1979 to 149 in 1994 to 91 in 1996 to 369 in 2003.
- Addax: 2 in 1971 to 587 in 1994 to 1,824 in 1996.⁴⁹

Recently, Exotic Wildlife conducted a survey of its members to update the data for the U.S. captive-bred populations of the three antelope species, and has retained Dr. Mungall to verify the data. Exotic Wildlife's survey reveals a several-fold increase in the populations of each of the three antelope species, including a 500 percent increase in scimitar-horned addax. Exotic Wildlife's survey shows the following current populations of captive-bred animals in the United States:

⁴⁸ A.R. 326 (citations omitted).

⁴⁹ *Id.*

- Scimitar-horned oryx: 11,032
- Dama gazelle: 894
- Addax: 5,112⁵⁰

D. Litigation that resulted in the invalidation of the exemption

Certain conservation organizations challenged the tandem rule for the three antelope species, and Exotic Wildlife intervened to assist FWS in defense of the rule in federal district courts in California and the District of Columbia.⁵¹ On June 22, 2009, the U.S. District Court for the District of Columbia ruled that the regulation violated the ESA because it allowed the take of species listed as endangered without the requirement for case-by-case permit applications and the commensurate public notice and comment opportunities.⁵² The court remanded the matter to FWS for further proceedings consistent with the ruling, leaving it to FWS to promulgate new regulations that would not violate the ESA.

The delisting of the U.S. captive-bred members of these three species would be consistent with the court's ruling. If U.S. captive-bred populations of the three species are delisted, take of U.S. captive-bred populations would require no exemption from the ESA's take prohibitions, no permit applications, nor any public notice and comment on individual permit applications.

III. Standard of Review

When the Secretary of Interior receives a petition to delist a species from the endangered species list, the Secretary "shall make a finding" within 90 days "as to whether the petition presents substantial scientific or commercial information indicating that the petitioned may be warranted."⁵³

To determine if delisting is warranted, the Secretary must consider whether the petition contains:

1. The administrative measures sought;
2. The common and scientific name of the species;
3. A narrative justifying the measure based upon available information including past and present numbers, distribution and current threats to the species;

⁵⁰ Dr. Mungall is in the process of completing this updated survey, a copy of which will be provided to the Fish & Wildlife Service; *see also supra*, n.3.

⁵¹ *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009); *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 (N.D. Cal. Sept. 30, 2006).

⁵² *Friends of Animals*, 626 F. Supp. 2d at 120.

⁵³ 16 U.S.C. § 1533(b)(3)(A).

4. The status of the species in all or a significant portion of its range; and
5. Supporting documentation such as a bibliography, copies of publications, reports, letters from authorities, and maps.⁵⁴

If the Secretary finds that there is information “that would lead a reasonable person to believe that the measures proposed in the petition may be warranted,”⁵⁵ the Secretary is required to “promptly commence a review of the status” of the species.⁵⁶

Within 12 months of reviewing the species status, the Secretary must issue a finding that the petitioned action is either warranted or not warranted.⁵⁷ If the petitioned action is warranted, the Secretary must promptly publish “a general notice and complete text of proposed regulation to implement such action” or publish a finding that the action is warranted but precluded at that time because of other pending proposals or efforts to change the status of species on the lists.⁵⁸

To make a determination that a petition is warranted under 16 U.S.C. § 1533(b)(3)(B), the Secretary must consider the “best available scientific and commercial information” available for the species.⁵⁹ The scientific and commercial information should consider whether there is a “present or threatened destruction, modification or curtailment of its habitat or range; over utilization for commercial, recreational, scientific, or education purposes; disease or predation”; inadequate existing regulations or other factors that affect the species continued existence.⁶⁰ In addition, the delisting petition and the scientific or commercial information must show that the species has either recovered to the point where protection of the species is no longer required or new information shows that the original data for classification was in error.⁶¹

IV. Reasons why these three species of U.S. captive-bred antelope should be delisted

Federal regulations provide three circumstances under which FWS may delist a previously listed species—extinction, recovery, and error. The second and third of these circumstances applies to the listing of the scimitar-horned oryx, dama gazelle, and addax:

(2) Recovery. The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at

⁵⁴ 50 C.F.R. § 424.14(b)(2).

⁵⁵ 50 C.F.R. § 424.14(b)(1).

⁵⁶ 16 U.S.C. § 1533(b)(3)(A).

⁵⁷ 16 U.S.C. § 1533(b)(3)(B).

⁵⁸ 16 U.S.C. § 1533(b)(3)(B).

⁵⁹ 50 C.F.R. § 424.11(b).

⁶⁰ 50 C.F.R. § 424.11(c).

⁶¹ 50 C.F.R. § 424.11(d).

which protection under the Act is no longer required. 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.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.⁶²

Exotic Wildlife seeks the delisting of the U.S. populations of scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazelle dama*), and addax (*Addax nasomaculatus*) under the authority of 16 U.S.C. § 1533(b)(3)(A), 5 U.S.C. § 553(e), and 50 C.F.R. § 424.11(d)(3) because FWS's interpretation of the original data for the listing was in error and because the U.S. captive-bred populations of the three antelope are recovered.

A. FWS's 2005 interpretation of the data was in error because FWS failed to identify the U.S. captive-bred populations of the three species as separate DPSs that are not endangered

In 2005 when FWS listed the three antelope species as endangered, FWS failed to distinguish between the foreign populations (that are endangered, particularly in their native range) and the U.S. captive-bred population that is not. Today, the best scientific and commercial data available demonstrates that the U.S. captive-bred population of each of the three antelope species is a distinct population segment (DPS) and that these captive-bred DPSs are not endangered. To comply with the ESA, therefore, FWS must delist the U.S. captive-bred populations of each of the three antelope species, but should retain the endangered classification for all populations outside the United States.

1. The U.S. captive-bred populations are DPSs

The Act authorizes the Secretary to list "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."⁶³ In 1996, FWS published its official interpretation of this statutory language in a policy intended to guide its listing, delisting, and reclassification of DPS's of vertebrate species.⁶⁴ Under the 1996 DPS policy, FWS considers three elements during the listing, delisting or reclassification process:

1. Discreteness of the population segment in relation to the remainder of the species to which it belongs;

⁶² 50 C.F.R. § 424.11(d).

⁶³ 50 C.F.R. § 424.11; 50 C.F.R. § 424.02(k).

⁶⁴ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996) (attached as Exhibit 3).

2. The significance of the population segment to the species to which it belongs; and
3. The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered, or threatened?).⁶⁵

Discreteness. The U.S. captive-bred populations of the three antelope species inhabit ranches, zoos, and similar non-native habitats in this country far from their native range. They are discrete because they are markedly separated from other populations of the same species as a consequence of physical, physiological, and ecological factors, and because within the United States these populations are subject to very different protections for species exploitation, management of habitat, conservation status, and regulatory mechanisms than they are outside the United States. Under the DPS policy, a population qualifies as a DPS if it is either physically separated or separated by international boundaries from other populations of the same species:

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions:

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. . . .
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.⁶⁶

Since the U.S. captive-bred populations of all three species meet both the physical and the international boundary tests, they are distinct populations whose listing status FWS should consider separately from that of the African and other non-U.S. populations of the same species.

Significance. Since they represent the largest and most abundant populations in the world, the U.S. captive-bred populations of the three antelope species are significant, meeting the second test set out in the DPS policy. As the DPS policy states, “[b]ecause precise circumstances are likely to vary considerably from case to case, it is not possible

⁶⁵ *Id.* at 4,725.

⁶⁶ *Id.*

to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.”⁶⁷

By any measure, however, the U.S. captive-bred populations of these three species are significant because they produce a surplus of animals for domestic use and for reintroduction to their native range.

Status. Finally, these thriving and well-managed U.S. captive-bred populations of the three species, properly considered as DPSs, simply fail to qualify for listing under the criteria set out in the Act. As the DPS policy explains, “[i]f a population segment is discrete and significant (i.e., it is a distinct population segment) its evaluation for endangered or threatened status will be based on the Act’s definitions of those terms and a review of the factors enumerated in section 4(a). It may be appropriate to assign different classifications to different DPS’s of the same vertebrate taxon.”⁶⁸

The 2005 rule listing the three antelope species as endangered identified only dangers to the continued existence of the African populations:

The best available information indicates that the causes of decline of these antelopes are (1) habitat loss through desertification, permanent human settlement, and competition with domestic livestock, and (2) regional military activity and uncontrolled killing. These threats have caused the possible extinction in the wild of the scimitar-horned oryx and the near-extinction of the addax in the wild.⁶⁹

FWS did not identify any such dangers to the U.S. captive-bred populations but, in fact, to the contrary found that the three species were dependent on U.S. captive breeding efforts for their conservation:

In the proposed rule, we determined that the scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species.⁷⁰

In fact, captive-bred populations of the antelope are only mentioned in the listing to explain why the species are not already extinct:

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 70 Fed. Reg. at 52,319.

⁷⁰ *Id.* at 52,320.

Captive breeding is a manmade factor that has stemmed the decline of the three species. It has provided the founder stock necessary for reintroduction, maintenance of otherwise potentially lost bloodlines, and opportunities for research. The scimitar-horned oryx is possibly extinct in the wild and therefore, but for captive breeding, the species might be extinct. For addax and dama gazelle, they occur in very low numbers in the wild, and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively). The SSIG estimates that there are about 4,000-5,000 scimitar-horned oryx, 1,500 addax, and 750 dama gazelle in captivity worldwide. Captive-breeding programs operated by zoos and private ranches have effectively increased the numbers of these animals while genetically managing their herds. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Currently, however, continued habitat loss and wonton killing have made reintroduction nonviable in most cases. See 70 FR 5117 for a detailed discussion of the role of captive breeding in the conservation of these species.⁷¹

2. There are precedents for treating U.S. captive-bred species as a separate DPS

An excellent precedent for identifying and treating the U.S. captive-bred populations of these three species is found in FWS's 1990 listing of chimpanzees. While listing the wild populations as endangered, FWS explained the circumstances requiring a listing of threatened for the captive-bred populations:

There is controversy regarding the viability and fecundity of over-all captive populations, but management of certain captive breeding groups seems to be becoming more sophisticated and successful. A studbook for *P. troglodytes* has been developed, and proposals to establish a Species Survival Plan are being prepared by members of the American Association of Zoological Parks and Aquariums. These plans are designed to maintain the genetic diversity of the captive population. Approximately 240 *P. troglodytes* are held by the Association's member institutions. . . .

From 1,100 to 1,450 *P. troglodytes* are held by biomedical facilities in the United States. . . . Furthermore, eight institutions hold most of these animals, and all but one currently provide records to the International Species Inventory System. Five of the eight are part of the National Chimpanzee Breeding Program coordinated and supported by the National

⁷¹ *Id.*

Institutes of Health. This program now has about 400 animals. Its immediate goal is to augment the breeding population with half of the offspring (about 35 animals/year). . . .⁷²

B. The three species are not endangered in the portion of their current range that lies within the United States

The Act requires that the Secretary list as endangered “any species which is in danger of extinction throughout all or a significant portion of its range.”⁷³ Although a plain reading of this language would appear to authorize the Secretary to list a species as endangered in only a portion of its entire range, for many years FWS argued that such a listing would be listing a lesser entity than those specified in the definition of “species” in the ESA. In 2001, however, the Ninth Circuit rejected that interpretation.⁷⁴ And at least seven district courts have adopted or followed the Ninth Circuit’s lead.⁷⁵

And in 2007, the Solicitor issued a formal legal opinion to assist FWS in formulating a new policy concerning the meaning of “significant portion of its range” (SPR). The Solicitor’s opinions are entitled to great weight.⁷⁶

In that opinion, the Solicitor concluded that when FWS makes a determination that a species is in danger of extinction throughout a significant portion of its range, FWS should list the species as endangered only in that portion of its range:

[W]henever the Secretary concludes because of the statutory five-factor analysis that a species is “in danger of extinction throughout . . . a significant portion of its range,” it is to be listed and the protections of the ESA applied to the species in that portion of its range where it is specified as an “endangered species”⁷⁷

The Solicitor’s opinion was based primarily on the plain language of the ESA:

⁷² Endangered Status for Chimpanzee and Pygmy Chimpanzee, 55 Fed. Reg. 9129, 9129 (Mar. 12, 1990).

⁷³ 16 U.S.C. § 1532(6); *see also* 16 U.S.C. § 1533.

⁷⁴ *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (flat-tailed horned lizard).

⁷⁵ *See Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) (gray wolf); *Defenders of Wildlife v. Secretary, U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) (gray wolf); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002) (Canada lynx); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 274 Fed. Appx. 542 (9th Cir. 2008) (coastal cutthroat trout).

⁷⁶ *California v. United States*, 438 U.S. 645, 676 n.30 (1978) (citing *Zemel v. Rusk*, 381 U.S. 1 (1965), *Perkins v. Matthews*, 400 U.S. 379 (1971), and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)).

⁷⁷ Department of the Interior Solicitor’s Memorandum M-37013, *The Meaning of “In Danger of Extinction Throughout All or A Significant Portion of Its Range”* 3 (Mar. 16, 2007) (attached as Exhibit 4).

The word is used as part of a phrase—“in danger of extinction”—that is modified by the phrase “throughout . . . a significant portion of its range.” Thus, for purposes of the ESA, a species can be “endangered” even if it is facing extinction only in a significant portion of its range. In other words, a species does not need to be in danger of extinction everywhere—i.e., be in danger of total disappearance—to merit the protection of the ESA. As long as it is in danger of extinction “throughout . . . a significant portion of its range”—i.e., is in danger of disappearing in that significant portion of the range—it must be protected in that portion of its range where, in fact, it is an “endangered species.”⁷⁸

The Solicitor thus concluded that the Secretary must not only determine that a species is in danger of extinction within its range, but must also specify (in appropriate cases) the portions of that range in which the species is endangered:

I conclude that if the Secretary determines that a species is in danger of extinction in a significant portion of its range, he must specify the portion of its range where it is an endangered species and then apply the protections in the Act to the members of the species in that portion of its range.⁷⁹

The Solicitor further noted that FWS had in fact listed several species as endangered only within a portion of their range, rather than throughout all of their range:

Prior to the 1978 Amendments, some listings specified that species were endangered in only part of their range within the United States. Boundaries for these partial range listings varied from the U.S.-Canadian border defining the contiguous United States for such species as the grizzly bear and gray wolf, to a mere three parishes in Louisiana comprising the listed range of the American alligator. Species were also listed as endangered in some states and threatened in others, such as the gray wolf and the bald eagle.⁸⁰

The best available scientific and commercial data do not support a conclusion that the U.S. captive-bred antelope species are, in fact, endangered within the United States, a range separated by geography and political boundaries from their native range in Africa and from various captive breeding programs around the world. For example, in 2004 Dr. Mungall reported that U.S. captive-bred populations of the three antelope species in

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 7.

⁸⁰ *Id.* at 2 n.3 (citations omitted).

Texas had grown markedly since captive breeding programs began in the 1970s.⁸¹ The following chart summarizes Dr. Mungall's population survey results:

Captive Populations in Texas⁸²

Scimitar-horned Oryx			
Year	1979	1994	1996
Population	32	1,006	2,145

Dama Gazelle			
Year	1979	1996	2003
Population	9	91	269

Addax			
Year	1971	1994	1996
Population	2	587	1824

And Dr. Mungall's survey did not count the large numbers of these species bred on in Florida or in zoos across the country so the numbers in captive in the United States are actually higher than shown by Dr. Mungall's study.

Recently, Exotic Wildlife completed a survey to update Dr. Mungall's data.⁸³ That survey demonstrated a several-fold increase in the populations of each species. Scimitar-horned oryxes increased from 2,145 in 1996 to 11,032 in 2010, an increase of 414 percent; dama gazelles increased from a population of 91 in 1996 to 894 in 2010, an increase of 882 percent; and addaxes increased from 1,824 in 1996 to 5,112 in 2010, an increase of 180 percent.

That the species are endangered in their African range does not support listing the captive-bred animals as endangered in the United States. There is, quite simply, no scientific or commercial data on which to conclude that the three antelope species—certainly endangered in their African range—are also in danger of extinction here in the United States. To the contrary, captive breeding here in the United States has produced a surplus population that has supplied individuals for reintroduction to their native range, and even required culling to avoid overpopulation. To comply with the Act, therefore, FWS must identify the portion of its range (Africa and other areas outside the United States) where they are endangered—and delist the populations located in the United States (which are not in danger of extinction). As FWS recently stated:

⁸¹ A.R. 323, Elizabeth Cary Mungall, Ph.D., *Submission for the Comment Period on Proposed Listing of Scimitar-Horned Oryx, Addax, and Dama Gazelle Under the Endangered Species Act* (Jan. 6, 2004).

⁸² *Id.* at 326.

⁸³ *See supra*, n.3, n.50.

[E]ven before the 2007 Solicitors opinion, we have applied differential levels of protections for species facing differential levels of threats in different parts of their range. For example, in 1978, the gray wolf was protected as endangered in the lower-48 States, except in Minnesota, where it was protected as threatened. Nor is the listing determination for NRM DPS the only listing determination applying the Solicitor's opinion. In our 2008 Gunnison prairie dog (*Cynomys gunnisoni*) 12-month finding we determined that the Gunnison's prairie dog does not warrant the Act's protections throughout its range, but that the significant portion of the species' range located in central and south-central Colorado and northcentral New Mexico does warrant protection under the Act. On July 10, 2008, we determined the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) was not threatened throughout all of its range and the portion of the subspecies' range located in Colorado represented a significant portion of the range where the subspecies should retain its threatened status. Thus, this rule removes the Act's protections in Wyoming while retaining them in Colorado.⁸⁴

C. The three species should be delisted because the U.S. populations are recovered

The ESA provides that once a species that has recovered (that is, that is no longer in danger of extinction within the relevant range), it must be delisted.⁸⁵ After all, recovery of the species is the ultimate goal of the Act: "The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required."⁸⁶ Whether recovery has in fact occurred is a fact-specific inquiry based on the unique circumstances of each species:

There are many paths to accomplishing recovery of a species and recovery may be achieved without all criteria being fully met. For example, one or more criteria may have been exceeded while other criteria may not have been accomplished. In that instance, the Service may judge that the threats have been minimized sufficiently, and the species is robust enough to reclassify from endangered to threatened or to delist. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used

⁸⁴ Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,123, 15,152 (April 2, 2009) (citations omitted).

⁸⁵ 50 C.F.R. § 424.11.

⁸⁶ *Id.*

instead of methods identified in the recovery plan. Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Recovery of a species is a dynamic process requiring adaptive management that may, or may not, fully follow the guidance provided in a recovery plan.⁸⁷

The astounding increases in the U.S. captive-bred populations of the three antelope species, coupled with the economic and non-economic incentives that Exotic Wildlife's members, zoos, and others have for continuing to breed these magnificent creatures, portends a bright future for these animals. And that FWS will continue to monitor their progress for five years after delisting⁸⁸ insures that a mid-course correction can be made if for any reason these positive results should reverse. These facts, without more, require delisting.⁸⁹

There is another reason why delisting is necessary at this time: these species have flourished under the traditional animal husbandry efforts of Exotic Wildlife's members precisely because they have been exempt from the take prohibitions and permit requirements of the ESA. Without the exemption that the district court invalidated, the disincentives for continued conservation of these three species on the ranches of EWA's members are severely limited. Already ranchers have avoided breeding new antelope and are selling off existing stocks that are difficult and expensive to feed and care for.

Ironically, a decrease in populations is the inevitable result of applying the prohibitions of the ESA to the unique situation in which the three antelope species are found in the United States. Because it is the strictures of the take provisions of the ESA itself that threaten the continued increase of these healthy and genetically diverse U.S. captive-bred populations, the Secretary should act promptly to delist them—and so save them from decline and possible extinction.

⁸⁷ Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 10,514, 10,520 (Feb. 27, 2008).

⁸⁸ 50 C.F.R. § 424.11(c).

⁸⁹ *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1204 (D. Or. 2003).

Conclusion

The Petitioner therefore asks FWS to invoke its authority under 50 C.F.R. § 424.11(d) to delist the U.S. captive-bred populations of the three antelope species.

Respectfully submitted,



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Dated: June 29, 2010

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EXOTIC WILDLIFE ASSOCIATION

December 16, 1991

Dr. Charles W. Dane, Chief
Office of Scientific Authority
Mail Stop Arlington Square
Room 725
U.S. Fish and Wildlife Service
Washington, DC 20240

RE: Endangered Status of addax, dama gazelle and scimitar horned oryx

Dear Dr. Dane;

The Exotic Wildlife Association strongly urges that the above mentioned animals not be listed as endangered. Such a listing would greatly inhibit current and future private breeding programs. The inhibition would be a direct result from the increased cost and time required to apply for and maintain permits.

If these animals are listed as endangered it will also greatly restrict trade. Restricted trade stands in the way of economic incentive. Without economic incentive there will be no private breeding operations. Eventually, instead of protecting animals born in the US, it will severely impede anyone who wants to breed these animals and thus increase their numbers. When it's too much of a hassle and burden to fight for permits, the animal value goes down as does the economic incentive. Then the animals are truly endangered both here and in their land of origin.

The EWA has over 30 breeders of scimitar horned oryx, near 30 who breed addax and near 15 breeders of dama gazelles. The Exotic Wildlife Association is in the midst of a member survey that when complete will give a much better idea of numbers of herds and numbers of individual animals. We will forward a copy of the survey results when the project is complete.

The EWA is over 25 years old and many of our members have had non-native hoofed animals on their ranches for over 60 years. At present the EWA estimates that its members own well in excess of 250,000 non-native hoofed animals. The EWA believes that its members have the world's largest herds of privately owned hoofed non-native endangered species.

We have developed a very good working relationship with USDA/APHIS/REAC. In fact, we have worked closely with them in drafting non-native animal auction regulations. We are in midst of discussions on disease regulation and control. We, the industry and the Agency people have found that the development of a rapport makes everyone's job a lot easier. Then if and when regulations are needed, they are regulations that everyone can live with.

It is our sincerest desire that the hoofed non-native animal industry and the USDI establish a relationship that is built on cooperation and understanding.

Please consider seriously our position that the listing of these or of any hoofed animal as endangered will have a devastating effect on existing and future breeding operations.

Sincerely,



Chick Rives
Executive Director

61 FR 4722, *

FEDERAL REGISTER

Vol. 61, No. 26

Notices

DEPARTMENT OF COMMERCE (DOC)

National Oceanic and Atmospheric Administration

DEPARTMENT OF THE INTERIOR (DOI)

United States Fish and Wildlife Service (FWS)

Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act

Part IV

61 FR 4722

DATE: Wednesday, February 7, 1996

ACTION: Notice of policy.

[*4722]

SUMMARY: The Fish and Wildlife Service and the National Marine Fisheries Service (Services) have adopted a policy to clarify their interpretation of the phrase "distinct population segment of any species of vertebrate fish or wildlife" for the purposes of listing, delisting, and reclassifying species under the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531 et. seq.*) (Act).

ADDRESSES: The complete record pertaining to this action is available for inspection, by appointment, during normal business hours at the Division of Endangered Species, U.S. Fish and Wildlife Service, in Room 452, Arlington Square Building, 4401 North Fairfax Drive, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service at the above address (703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (301/713-1401).

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (*16 U.S.C. 1531 et. seq.*) (Act) requires the Secretary of the Interior or the Secretary of Commerce (depending on jurisdiction) to determine whether species are endangered or threatened. In defining "species," the Act as originally passed included, "* * * 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." In

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1978, the Act was amended so that the definition read "* * * any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." This change restricted application of this portion of the definition to vertebrates. The authority to list a "species" as endangered or threatened is thus not restricted to species as recognized in formal taxonomic terms, but extends to subspecies, and for vertebrate taxa, to distinct population segments (DPS's).

Because the Secretary must "* * * determine whether any species is an endangered species or a threatened species" (section 4(a)(1)), it is important that the term "distinct population segment" be interpreted in a clear and consistent fashion. Furthermore, Congress has instructed the Secretary to exercise this authority with regard to DPS's "* * * sparingly and only when the biological evidence indicates that such action is warranted." (Senate Report 151, 96th Congress, 1st Session). The Services have used this authority relatively rarely; of over 300 native vertebrate species listed under the Act, only about 30 are given separate status as DPS's.

It is important in light of the Act's requirement to use the best available scientific information in determining the status of species that this interpretation follows sound biological principles. Any interpretation adopted should also be aimed at carrying out the purposes of the Act (i.e., "* * * 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" (section 2(b)).

Available scientific information provides little specific enlightenment in interpreting the phrase "distinct population segment." This term is not commonly used in scientific discourse, although "population" is an important term in a variety of contexts. For instance, a population may be circumscribed by a set of experimental conditions, or it may approximate an ideal natural group of organisms with approximately equal breeding opportunities among its members, or it may refer to a loosely bounded, regionally distributed collection of organisms. In all cases, the organisms in a population are members of a single species or lesser taxon.

The National Marine Fisheries Service (NMFS) has developed a Policy on the Definition of Species under the Endangered Species Act (*56 FR 58612-58618*; November 20, 1991). The policy applies only to species of salmonids native to the Pacific. Under this policy, a stock of Pacific salmon is considered a DPS if it represents an evolutionarily significant unit (ESU) of a biological species. A stock must satisfy two criteria to be considered an ESU:

- (1) It must be substantially reproductively isolated from other conspecific population units; and
- (2) It must represent an important component in the evolutionary legacy of the species.

This document adopts an interpretation of the term "distinct population segment" for the purposes of listing, delisting, and reclassifying vertebrates by the U.S. Fish and Wildlife Service (FWS) and NMFS. The Services believe that the NMFS policy, as described above, on Pacific salmon is consistent with the policy outlined in this notice. The NMFS policy is a detailed extension of this joint policy. Consequently, NMFS will continue to exercise its policy with respect to Pacific salmonids

The Services' draft policy on this subject was published on December 21, 1994 (59 FR 65885) and public comment was invited. After review of comments and further consideration, the Services adopt the policy as issued in draft form.

Summary of Comments and Recommendations

The Services received 31 letters from individuals and organizations commenting on the draft policy. In addition, since publication of the draft policy, the National Academy of Sciences, National Research Council (NRC), has published a report titled "Science and the Endangered Species Act," prepared by a committee appointed by the Academy at the request of several members of Congress. This report in part examines the definition of "species" under the Act, and endorses the recognition of scientifically identified evolutionary units for conservation purposes. It discusses the recognition of DPS's in terms of "distinctiveness," which is consistent with the concept of "discreteness" as presented in the draft policy except that it would not recognize an international political boundary to delimit a DPS. The committee noted that: "Although there can be good policy reasons for such delineations, there are not sound scientific reasons to delineate species only in accordance with political boundaries." The Services agree that the inclusion of international boundaries in determining whether a population segment is discrete is sometimes undertaken as a matter of policy rather than science. Although the committee [*4723] expressed the belief that application of a distinctiveness test (analogous to the standard of discreteness in the policy) would adequately carry out the congressional instruction that the authority to address DPS's be exercised sparingly, the Services continue to believe that a judgement regarding the significance of any unit found to be discrete is necessary to comply with congressional intent.

Respondents presented a wide range of opinion regarding the recognition of DPS's. Some argued that the draft policy would be too restrictive and make it difficult or impossible to protect important elements of biodiversity; others maintained that the draft was not restrictive enough and would allow the Services to extend protection to entities never intended to be eligible for protection under the Act. A few respondents questioned the need for any policy framework and advocated case-by-case determinations of the eligibility of entities for listing under the DPS provision. The Services continue to believe that the Act will be best administered if there is a general policy framework governing the recognition of DPS's that can be disseminated and understood by the affected public.

Several respondents questioned the relationship of the draft policy to the NMFS policy regarding salmonids. The Services believe that the NMFS policy for salmonids is consistent with the general policy outlined in this notice, although the salmonid policy is formulated specifically to address the biology of this group. Several respondents also questioned the use of qualifying words such as "significant" or "markedly" in the policy. The Services intended these words to have their commonly understood senses. At the time any distinct population is recognized or not recognized the reasons for which it is believed to satisfy or not satisfy the conditions of the policy will be fully explained.

Several respondents maintained that a policy of this nature required adoption under rulemaking procedures of the Administrative Procedure Act. The Services disagree, and continue to regard the policy as non-regulatory in nature. Specific recommendations advanced by respondents are paraphrased and responded to below.

Only Full Species are Genetically Distinct From one Another, and Listing Should Only be Extended to These Genetically Distinct Entities.

Restricting listings to full taxonomic species would render the Act's definition of species, which explicitly includes subspecies and DPS's of vertebrates, superfluous. Clearly, the Act is intended to authorize listing of some entities that are not accorded the taxonomic rank of species, and the Services are obliged to interpret this authority in a clear and reasonable manner.

The Services Should Focus on Genetic Distinctness in Recognizing a Distinct Population Segment. Conversely, Some Respondents Believed There Should be No Requirement That a DPS be Genetically Differentiated or Recognizable for it to be Protected Under the Act

There appears to be a diversity of understanding regarding the purposes of the Act, with some individuals viewing it as directed almost exclusively toward the conservation of unique genetic resources while other individuals emphasize its stated intention of conserving ecosystems. This diversity of viewpoints is reflected in comments addressing the role to be played by genetic information in the draft policy. The Services understand the Act to support interrelated goals of conserving genetic resources and maintaining natural systems and biodiversity over a representative portion of their historic occurrence. The draft policy was intended to recognize both these intentions, but without focusing on either to the exclusion of the other. Thus, evidence of genetic distinctness or of the presence of genetically determined traits may be important in recognizing some DPS's, but the draft policy was not intended to always specifically require this kind of evidence in order for a DPS to be recognized. The ESU policy of NMFS also does not require genetic data before an ESU can be identified. Thus in determining whether the test for discreteness has been met under the policy, the Services allow but do not require genetic evidence to be used. At least one respondent evidently understood the draft policy to require that genetic distinctness be demonstrated before a DPS could be recognized, and criticized the draft on that basis. As explained above, this was never intended.

The Elements Describing Reasons for Considering a Population Segment Significant Should be Laid Out Comprehensively, Rather Than Presented as an Open-Ended Set of Examples as in the Draft Policy

The Services appreciate the need to make a policy on this subject as complete and comprehensive as possible, but continue to believe that it is not possible to describe in advance all the potential attributes that could be considered to support a conclusion that a particular population segment is "significant" in terms of the policy. When a distinct population is accepted or rejected for review pursuant to a petition or proposed for listing or delisting, the Services intend to explain in detail why it is considered to satisfy both the discreteness and significance tests of the policy.

In Assessing the Significance of a Potential Distinct Population Segment, the Services Should Focus on its Importance to the Status of the Species to Which it Belongs. Alternatively, the Services Should Emphasize the Importance of a Potential DPS to the Environment in Which it Occurs

Despite its orientation toward conservation of ecosystems, the Services do not believe the Act provides authority to recognize a potential DPS as significant on the basis of the importance of its role in the ecosystem in which it occurs. In addition, it may be assumed that most, if not all, populations play roles of some significance in the environments to which they are native, so that this importance might not afford a meaningful way to differentiate among populations. On the other hand,

populations commonly differ in their importance to the overall welfare of the species they represent, and it is this importance that the policy attempts to reflect in the consideration of significance.

International Boundaries are not Appropriate in Determining That a Population is Discrete in the Draft Policy; Political Boundaries Other Than Those Between Nations may be Appropriate in Some Cases to Delimit DPS's

The Services recognize that the use of international boundaries as a measure of discreteness may introduce an artificial and non-biological element to the recognition of DPS's. Nevertheless, it appears to be reasonable for national legislation, which has its principal effects on a national scale, to recognize units delimited by international boundaries when these coincide with differences in the management, status, or exploitation of a species. Recognition of international boundaries in this way is also consistent with practice under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which is implemented in the United States by the Act. Recognition of other political boundaries, such as State lines within the United States, would appear to lead to the recognition of [*4724] entities that are primarily of conservation interest at the State and local level, and inappropriate as a focus for a national program. The Services recognize, as suggested in some comments, that infra-national political boundaries offer opportunities to provide incentives for the favorable management of species if they were used as a basis for recognizing discrete entities for delisting or for exclusion from a listing. Particularly when applied to the delisting or reclassification of a relatively widespread species for which a recovery program is being successfully carried out in some States, recognition of State boundaries would offer attractive possibilities. Nevertheless, the Act provides no basis for applying different standards for delisting than those adopted for listing. If the Services do not consider entities for listing that are not primarily of conservation interest at a national level, they must also refrain from delisting or reclassifying units at this level.

Complete Reproductive Isolation Should be Required as a Prerequisite to the Recognition of a Distinct Population Segment

The Services do not consider it appropriate to require absolute reproductive isolation as a prerequisite to recognizing a distinct population segment. This would be an impracticably stringent standard, and one that would not be satisfied even by some recognized species that are known to sustain a low frequency of interbreeding with related species.

The Services Should Emphasize Congress' Instruction to use Their Authority to Address DPS's "Sparingly"

The Services believe that application of the policy framework announced in this document will lead to consistent and sparing exercise of the authority to address DPS's, in accord with congressional instruction.

The Occurrence of a Population Segment in an Unusual Setting Should not be Used as Evidence for its Significance

The Services continue to believe that occurrence in an unusual ecological setting is potentially an indication that a population segment represents a significant resource of the kind sought to be conserved by the Act. In any actual case of a DPS recognized in part on this basis, the Services will describe in detail the nature of this significance when accepting a petition or proposing a rule.

The Authority to Address DPS's Should be Extended to Plant and Invertebrate Species

The Services recognize the inconsistency of allowing only vertebrate species to be addressed at the level of DPS's, and the findings of the NRC committee also noted that such recognition would be appropriate for other species. Nevertheless, the Act is perfectly clear and unambiguous in limiting this authority. This policy acknowledges the specific limitations imposed by the Act on the definition of "species."

The Services Should Stress Uniqueness and Irreplaceability of Ecological Functions in Recognizing DPS's

The Services consider the Act to be directed at maintenance of species and populations as elements of natural diversity. Consequently, the principal significance to be considered in a potential DPS will be the significance to the taxon to which it belongs. The respondent appears to be recommending that the Services consider the significance of a potential DPS to the community or ecosystem in which it occurs and the likelihood of another species filling its niche if it should be extirpated from a particular portion of its range. These are important considerations in general for the maintenance of healthy ecosystems, and they often coincide with conservation programs supported by the Act. Nevertheless, the Act is not intended to establish a comprehensive biodiversity conservation program, and it would be improper for the Services to recognize a potential DPS as significant and afford it the Act's substantive protections solely or primarily on these grounds.

Congress did not Intend to Require That DPS's be Discrete. In a Similar Vein, Congress did not Require That a Potential DPS be Significant to be Considered Under the Act

With regard to the discreteness standard, the Services believe that logic demands a distinct population recognized under the Act be circumscribed in some way that distinguishes it from other representatives of its species. The standard established for discreteness is simply an attempt to allow an entity given DPS status under the Act to be adequately defined and described. If some level of discreteness were not required, it is difficult to imagine how the Act could be effectively administered or enforced. At the same time, the standard adopted does not require absolute separation of a DPS from other members of its species, because this can rarely be demonstrated in nature for any population of organisms. The standard adopted is believed to allow entities recognized under the Act to be identified without requiring an unreasonably rigid test for distinctness. The requirement that a DPS be significant is intended to carry out the expressed congressional intent that this authority be exercised sparingly as well as to concentrate conservation efforts undertaken under the Act on avoiding important losses of genetic diversity.

A Population Should Only be Required to be Discrete or Significant, but not Both, to be Recognized as a Distinct Population Segment

The measures of discreteness and significance serve decidedly different purposes in the policy, as explained above. The Services believe that both are necessary for a policy that is workable and that carries out congressional intent. The interests of conserving genetic diversity would not be well served by efforts directed at either well-defined but insignificant units or entities believed to be significant but around which boundaries cannot be recognized.

Requiring That a DPS be Discrete Effectively Prevents the Loss of Such a Segment From Resulting in a Gap in the Distribution of a Species. Essentially, if Distinct Populations are Entirely Separate, the Loss of One Has Little Significance to the Others

If the standard for discreteness were very rigid or absolute, this could very well be true. However, the standard adopted allows for some limited interchange among population segments considered to be discrete, so that loss of an interstitial population could well have consequences for gene flow and demographic stability of a species as a whole. On the other hand, not only population segments whose loss would produce a gap in the range of a species can be recognized as significant, so that a nearly or completely isolated population segment could well be judged significant on other grounds and recognized as a distinct population segment.

The Services Lack Authority to Address DPS's of Subspecies

The Services maintain that the authority to address DPS's extends to species in which subspecies are recognized, since anything included in the taxon of lower rank is also included in the higher ranking taxon. [*4725]

The following principles will guide the Services' listing, delisting and reclassification of DPS's of vertebrate species. Any proposed or final rule affecting status determination for a DPS would clearly analyze the action in light of these guiding principles.

Policy

Three elements are considered in a decision regarding the status of a possible DPS as endangered or threatened under the Act. These are applied similarly for addition to the lists of endangered and threatened wildlife and plants, reclassification, and removal from the lists:

1. Discreteness of the population segment in relation to the remainder of the species to which it belongs;
2. The significance of the population segment to the species to which it belongs; and
3. The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

Discreteness: A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions:

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Significance: If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be considered in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPS's be used " * * * sparingly" while encouraging the conservation of genetic diversity. In carrying out this examination, the Services will consider available scientific evidence of the discrete population

segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following:

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
2. Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,
3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Because precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.

Status: If a population segment is discrete and significant (i.e., it is a distinct population segment) its evaluation for endangered or threatened status will be based on the Act's definitions of those terms and a review of the factors enumerated in section 4(a). It may be appropriate to assign different classifications to different DPS's of the same vertebrate taxon.

Relationship to Other Activities

The Fish and Wildlife Service's Listing and Recovery Priority Guidelines (48 FR 43098; September 21, 1983) generally afford DPS's the same consideration as subspecies, but when a subspecies and a DPS have the same numerical priority, the subspecies receives higher priority for listing. The Services will continue to generally accord subspecies higher priority than DPS's.

Any DPS of a vertebrate taxon that was listed prior to implementation of this policy will be reevaluated on a case-by-case basis as recommendations are made to change the listing status for that distinct population segment. The appropriate application of the policy will also be considered in the 5-year reviews of the status of listed species required by section 4(c)(2) of the Act.

Effects of Policy

This guides the evaluation of distinct vertebrate population segments for the purposes of listing, delisting, and reclassifying under the Act. The only direct effect of the policy is to accept or reject population segments for these purposes. More uniform treatment of DPS's will allow the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to better judge and concentrate their efforts toward the conservation of biological resources at risk of extinction.

Listing, delisting, or reclassifying distinct vertebrate population segments may allow the Services to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range. This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an

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entire species or subspecies. The Services' ability to address local issues (without the need to list, recover, and consult rangewide) will result in a more effective program.

Author/Editor: The editors of this policy are Dr. John J. Fay of the Fish and Wildlife Service's Division of Endangered Species, 452 ARLSQ, Washington, DC 20240 (703/358-2105) and Marta Nammack of the National Marine Fisheries Service's Endangered Species Division, 1335 East-West Highway, Silver Spring, Maryland 20910 (301/713-2322).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (*16 U.S.C. 1531 et seq.*).

Dated: February 1, 1996.

John G. Rogers,
Acting Director, Fish and Wildlife Service.

Dated: February 1, 1996.

Nancy Foster,
Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

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United States Department of the Interior

OFFICE OF THE SOLICITOR

March 16, 2007

M-37013

Memorandum

To: Director, U.S. Fish and Wildlife Service

From: Solicitor

Subject: The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range"

I. INTRODUCTION

Since 1973, the Endangered Species Act (ESA) has defined "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." Endangered Species Act of 1973 § 3(6), 16 U.S.C. § 1532(6) (2006) (ESA/Act). Thirty-three years later, questions continue to be raised about the meaning of the phrase "in danger of extinction throughout ... a significant portion of its range" (SPR phrase/SPR language).

As a result of these continued questions, the Fish and Wildlife Service (Service) is working to develop a policy on how to apply the SPR phrase when determining whether a species is an endangered species under the Act.¹ To facilitate the development of this policy, you have requested this Office's view of the meaning of the SPR phrase. Our office has reviewed the statutory language, the legislative history, relevant court rulings, and Departmental practices. I provide you our most informed view of the general meaning of the SPR phrase and the specific meaning of its component terms, particularly "significant" and "range."

Your effort to develop a policy is prompted, in part, by the 2001 decision of the Ninth Circuit Court of Appeals that rejected the interpretation of the SPR phrase favored by the Department. *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (flat-tailed horned lizard).²

¹ Because the definition of "threatened species" under the ESA includes the SPR phrase—i.e., a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"—the opinion given in this memorandum about the meaning of the SPR phrase also applies when the Service is determining whether a species is a threatened species.

² Seven district courts have essentially adopted or followed the Ninth Circuit's interpretation. See *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) (gray wolf); *Defenders of Wildlife v. Secretary, U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) (gray wolf); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002) (Canada lynx); see also *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 402 F. Supp. 2d 1198 (D. Or. 2005) (coastal cutthroat trout) (following flat-tailed horned lizard case in general, without directly addressing other possible interpretations); *Envtl. Protection Info. Ctr. v. Nat'l Marine Fisheries Serv.*, No. C-02-5401 EDL (N.D. Cal. Mar. 1, 2004) (green sturgeon) (same); *Southwest Ctr. for Biological Diversity v. Norton*, CA

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There, the Ninth Circuit interprets the SPR phrase as a “substantive standard” for determining whether a species is an endangered species. Under the court’s interpretation, there are two situations in which the Secretary must determine a species to be an endangered species: 1) where the Secretary finds that the species is in danger of extinction throughout all of its range; or 2) where the Secretary finds that the species is in danger of extinction throughout a significant portion of its range.

Since approximately 2000, the Department, on the other hand, has interpreted the SPR phrase to mean that a species is an endangered species only when it is in danger of extinction throughout a portion of its current range that is “so important to the continued existence of a species that threats to the species in that area can have the effect of threatening the viability of the species as a whole.” *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1278 (D.N.M. 2005), *appeal pending* (Rio Grande cutthroat trout). Under the Department’s interpretation, there is only one situation in which the Secretary must find a species to be an endangered species—when the Secretary finds that it is in danger of extinction throughout all of its range. Under this interpretation, the Secretary need not demonstrate that there are threats so severe throughout the range that the species is in danger of extinction in every portion of its range. Instead, if the Secretary can demonstrate that the species faces threats in only a portion of its range so severe as to threaten the viability of the species throughout its range, a determination that a species is an endangered species would be justified. In other words, since approximately 2000, the Department has viewed the SPR phrase not as providing another “substantive standard” for determining whether a species is an endangered species, but rather as “clarifying” the evidentiary burden the Secretary must satisfy when making that determination.³ For this reason, the Department’s interpretation of the SPR phrase is sometimes referred to as the “clarification interpretation.” The Department’s interpretation of the SPR phrase was recently upheld by the District Court of New Mexico. *Id.* Only two district courts have upheld the Department’s interpretation, to date.⁴

No. 98-934 (RMU/JMF), 2002 U.S. Dist. LEXIS 13661 (D.D.C. July 29, 2002) (magistrate’s recommendation) (Queen Charlotte goshawk) (same), *adopted in rel. part*, slip op. (D.D.C. May 24, 2004); *Defenders of Wildlife v. Norton*, CA 99-02072 (HHK) (D.D.C. Dec. 13, 2001) (Florida black bear) (same).

³ Prior to the 1978 Amendments, some listings specified that species were endangered in only part of their range within the United States. Boundaries for these partial range listings varied from the U.S.-Canadian border defining the contiguous United States for such species as the grizzly bear, 40 Fed. Reg. 31,376 (July 28, 1975), and gray wolf, 41 Fed. Reg. 17,742 (Apr. 28, 1976), to a mere three parishes in Louisiana comprising the listed range of the American alligator, 40 Fed. Reg. 44,412 (Sept. 26, 1975). Species were also listed as endangered in some states and threatened in others, such as the gray wolf, 41 Fed. Reg. 24,062 (June 14, 1976), and the bald eagle, 43 Fed. Reg. 6230, 6233 (Feb. 14, 1978). However, the determinations therein of endangered species and threatened species do not explain the bases for listing them in only portions of their ranges.

⁴ The District Court of Colorado, citing the District Court of New Mexico’s decision with no additional analysis, also upheld the Department’s interpretation of the SPR phrase. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, CA No. 05-cv-00305-RPM, 2007 U.S. Dist. LEXIS 16175, at *8 (D. Colo. Mar. 7, 2007) (Bonneville cutthroat trout).

For the reasons given below, I conclude that:

1. The SPR phrase is a substantive standard for determining whether a species is an endangered species—whenever the Secretary concludes because of the statutory five-factor analysis that a species is “in danger of extinction throughout ... a significant portion of its range,” it is to be listed and the protections of the ESA applied to the species in that portion of its range where it is specified as an “endangered species”;
2. the word “range” in the SPR phrase refers to the range in which a species currently exists, not to the historical range of the species where it once existed;
3. the Secretary has broad discretion in defining what portion of a range is “significant,” and may consider factors other than simply the size of the range portion in defining what is “significant”; and
4. the Secretary’s discretion in defining “significant” is not unlimited; he may not, for example, define “significant” to require that a species is endangered only if the threats faced by a species in a portion of its range are so severe as to threaten the viability of the species as a whole.

II. ANALYSIS

A. The Language of the SPR Phrase

As the Supreme Court has recently affirmed, “the starting point in every case involving construction of a statute is the language [of the statute] itself.” *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1982); see *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Where the meaning of the language in a statute is plain, that is normally the end of the inquiry. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). To determine the plain meaning, the words in a statutory provision that are not defined by the statute itself are customarily given their ordinary meaning. *BP Am. Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *Williams v. Taylor*, 529 U.S. 420, 431 (2000). However, in determining the plain meaning:

a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”

Food & Drug Admin. v. Brown & Williams Tobacco Co., 529 U.S. 120, 132–33 (2000) (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)).

The SPR phrase has no biologically or scientifically accepted ordinary or technical meaning. Therefore, courts have focused on four words in the SPR phrase as key to interpreting its meaning. Those words are “extinction,” “or,” “range,” and “significant.” The meaning of each is addressed below.

1. “Extinction”

“Extinction” is defined by the dictionary as “the condition or fact of being extinct.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 411 (10th ed. 2000).⁵ The word “extinct,” as used in reference to a plant or animal species, is defined as “no longer in existence,” “having died out or come to an end,” or “having no living members.” *Id.*⁶ A fair, but not necessary, implication from this definition is that to be extinct, a species must have no living members anywhere. In other words, using the dictionary definition, a species that once inhabited the United States, but no longer has any living representatives there, arguably cannot be said to be extinct if there are living representatives elsewhere in the world.

Based on the dictionary definition, the Ninth Circuit concluded that “‘extinction’ suggests total rather than partial disappearance,” and that the phrase “in danger of extinction throughout ... a significant portion of its range” is therefore “inherently ambiguous, as it appears to use language in a manner in some tension with ordinary usage.” *Defenders of Wildlife*, 258 F.3d at 1141. In spite of this conclusion by the Ninth Circuit, it should be noted that “ordinary usage” does not necessarily equate to the dictionary definition. *See Third Nat’l Bank v. Impac, Ltd.*, 432 U.S. 312, 376 (1977) (“As always, the meaning of particular phrases must be determined in context [and] read in context.”). Experience suggests that in ordinary usage, people often refer to an animal or plant as being extinct in one place, even though it may not be extinct in all places. For example, a species such as the California condor may be considered extinct in some States although it persists in others.⁷

Moreover, just because the language in a statutory provision may be in “some tension with ordinary usage” does not mean that it lacks a plain meaning. As noted above, plain meaning can also be supplied from the context in which the words are used. *See id.*; *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (statutory context should be favored over a contrary dictionary definition).⁸ In the context of the SPR phrase as a whole the meaning of “extinction” is clear.

⁵ The dictionary definition of “extinction” from a dictionary contemporary with the enactment of the ESA is similar: “the condition or fact of being extinct or extinguished” or “the process of becoming extinct or extinguished.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 806 (16th ed. 1971).

⁶ The 1971 definition is again similar: “no longer in existence,” “lacking living representatives,” or “lacking survivors.” *Id.*

⁷ Further, no alternative or more specific general or biological term defines the disappearance of a species in only a portion of its range. The term “extirpation” is sometimes used in this manner, but dictionaries generally define “extirpation” in a similar manner to “extinction,” as implying total destruction or disappearance. *See, e.g.*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 411 (10th ed. 2000). Similarly, the 1971 definition of “extirpate” is “to destroy totally,” “wipe out,” “kill off,” or “make extinct,” and “extirpation” is defined as “the act of extirpating or state of being extirpated.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 806 (16th ed. 1971).

⁸ Judge Learned Hand, in this case, stated that “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose

The word is used as part of a phrase—“in danger of extinction”—that is modified by the phrase “throughout ... a significant portion of its range.” Thus, for purposes of the ESA, a species can be “endangered” even if it is facing extinction only in a significant portion of its range. In other words, a species does not need to be in danger of extinction everywhere—i.e., be in danger of total disappearance—to merit the protection of the ESA. As long as it is in danger of extinction “throughout ... a significant portion of its range”—i.e., is in danger of disappearing in that significant portion of the range—it must be protected in that portion of its range where, in fact, it is an “endangered species.”

This understanding of Congressional intent in using the word “extinction” is supported by the way in which the word is used elsewhere in the ESA. In section 2, Congress found that “various species of fish, wildlife, and plants in the United States” that are of considerable “value to the Nation and its people” “have been rendered extinct,” or “are threatened with extinction.” ESA § 2(a)(1)–(3). These findings suggest that Congress viewed the disappearance of a species within the part of its range occurring in the United States as constituting “extinction” in that geographic area, even though the species might be prospering elsewhere. Similarly, section 4(c) of the ESA requires the Secretary, when publishing the list of endangered species, to “specify with respect to each such species over what portion of its range it is endangered,” the clear implication being that the species can be endangered—i.e., in danger of extinction—in one portion of its range without being in danger of extinction throughout its range. ESA § 4(c)(1). Indeed, to read the SPR phrase instead as requiring that a species be in danger of extinction throughout its entire range before it could be considered “endangered” for purposes of the ESA would severely diminish the Secretary’s ability to achieve one of the primary objectives of the ESA, which is to “[safeguard], for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and plants.” ESA § 2(a)(5).

The legislative history of the ESA is consistent with this reading of the word “extinction,” as modified by the SPR phrase. The predecessor statute to the ESA, the Endangered Species Conservation Act of 1969, had defined “endangered species” as follows:

A species or subspecies of fish or wildlife shall be deemed to be threatened with worldwide extinction whenever the Secretary determines, based on the best scientific and commercial data available to him ... that the continued existence of such species or subspecies of fish or wildlife is ... endangered

The Endangered Species Conservation Act of 1969 § 3(a), 83 Stat. 275, 275 (1969). This provision had been interpreted as requiring that a species be threatened with worldwide extinction before it could be protected.⁹ To give the Secretary greater flexibility in his listing decisions, and thus provide greater protection for species, Congress included a new definition of “endangered species” in the ESA of 1973. The House Report on the ESA noted that the new definition of “endangered species” represented “a significant shift in the definition of existing

or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” *Cabell*, 148 F.2d at 739.

⁹ See Appendix at A-4.

law which considers a species to be endangered only when it is threatened with worldwide extinction.” H.R. REP. NO. 93-412, at 10 (1973). This legislative history, coupled with the manner in which “extinction” is used elsewhere in the Act, supports a reading of the term “extinction” to include the disappearance of species in only part of its range.

2. “Or”

“Or” is defined in the dictionary as “a function word to indicate an alternative” or “used in logic as a sentential connective that forms a complex sentence which is true when at least one of its constituent sentences is true.”¹⁰ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 815 (10th ed. 2000). In its analysis, the Ninth Circuit focused on the fact that the definition of “endangered species” includes the disjunctive term “or.” *Defenders of Wildlife*, 258 F.3d at 1141–42. That definition states that a species is endangered if it is “in danger of extinction throughout all or a significant portion of its range.” ESA § 3(6). The Ninth Circuit noted that, where the word “or” is used in a statute, courts must seek to give an independent and separate meaning to the clauses that appear on either side of the word “or”; otherwise, one or the other of the clauses would be surplusage. *Defenders of Wildlife*, 258 F.3d at 1142. This is consistent with “a basic canon of statutory construction” that “a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.” *Dodd v. United States*, 545 U.S. 353, 371 (2005).

The Ninth Circuit rejected the Department’s interpretation of the definition of “endangered species” because it failed to respect this canon of construction. The court reasoned as follows:

The Secretary’s explanation of this odd phraseology is of no assistance in puzzling out the meaning of the phrase, since her interpretation simply cannot be squared with the statute’s language and structure. The Secretary ... interprets the enigmatic phrase to mean that a species is eligible for protection under the ESA if it “faces threats in enough key portions of its range that the entire species is in danger of extinction ...” [The Secretary] therefore assumes that a species is in danger of extinction in “a significant portion of its range” only if it is in danger of extinction everywhere.

If, however, the effect of extinction throughout “a significant portion of its range” is the threat of extinction everywhere, then the threat of extinction throughout “a significant portion of its range” is equivalent to the threat of extinction throughout all its range. Because the statute already defines “endangered species” as those that are “in danger of extinction throughout all ... of [their] range,” the Secretary’s interpretation of “a significant portion of its range” has the effect of rendering the phrase superfluous.

¹⁰ A 1971 dictionary defines “or” in similar terms, as “a function word to indicate an alternative between different or unlike things, states, or actions” or a “choice between alternative things, states, or courses.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1585 (16th ed. 1971).

Such a redundant reading of a significant statutory phrase is unacceptable. When interpreting a statute, we must follow a “natural reading . . . , which would give effect to all of the statute’s provisions.” By reading “all” and “a significant portion of its range” as functional equivalents, the Secretary’s construction violates that rule.

Defenders of Wildlife, 258 F.3d at 1141–42 (footnote and citation omitted). Because the Ninth Circuit keyed on the presence of the disjunctive “or” in the definition, its interpretation is sometimes referred to as the “disjunctive interpretation.”

On the other hand, the New Mexico court, while agreeing with the Ninth Circuit that the SPR phrase is ambiguous, disagreed with the Ninth Circuit’s conclusion that the Department’s interpretation was arbitrary, instead adopting the Department’s interpretation as the “most appropriate and logical way to view this puzzling phrase.” *Ctr. for Biological Diversity*, 411 F. Supp. 2d at 1280. The court accepted the Department’s interpretation and did not independently analyze the meaning of the term “extinction,” standing alone or in context, and did not attempt to give separate and independent meaning to the phrases on either side of the disjunctive word “or.”

Consistent with the Ninth Circuit’s interpretation of “or” and for the reasons discussed below, I conclude that if the Secretary determines that a species is in danger of extinction in a significant portion of its range, he must specify the portion of its range where it is an endangered species and then apply the protections in the Act to the members of the species in that portion of its range.

3. “Range”

The meaning of “range” in the SPR phrase is not disputed. The general dictionary definition of “range” as “the region throughout which a kind of organism or ecological community naturally lives or occurs,” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 964 (10th ed. 2000),¹¹ is clear and has not been questioned or debated by any court. Instead, the debate centers on whether the “range” referred to in the definition of “endangered species” is the historical or the current range of the species.

In addressing this issue, context again is key. Under the definition, a species is “endangered” only if it “is in danger of extinction” in the relevant portion of its range. The phrase “is in danger” denotes a present-tense condition of being at risk of a future, undesired event.¹² Hence, to say a species “is in danger” in an area where it no longer exists—i.e., in its historical range—

¹¹ The 1971 definition of “range” is identical. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1880 (16th ed. 1971).

¹² “Danger” is defined as (among other things) “the state of being exposed to serious loss or injury,” meaning that the loss has not happened yet. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 573 (2002); cf. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 292 (10th ed. 2000) (defining “danger” as “exposure or liability to injury, pain, harm, or loss.” If a species has already been extirpated from an area, it is not in “danger” there; the loss has already occurred. The 1971 definition of “danger” is similar: “the state of being threatened with serious loss or injury.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 573 (16th ed. 1971).

would be inconsistent with common usage. Thus, “range” must mean “current range,” not “historical range.” This interpretation of “range” is further supported by the fact that when determining whether a species is an endangered species, the Secretary must consider the “present” or “threatened” (i.e., future), rather than the past, “destruction, modification, or curtailment” of a species’s habitat or range. ESA § 4(a)(1)(A).

The Ninth Circuit appears to conclude, however, without any analysis or explanation that the “range” referred to in the SPR phrase includes the historical range of the species. The Ninth Circuit concludes its opinion by stating that a species “can be *extinct* ‘throughout ... a significant portion of its range’ if there are major geographical areas in which it is no longer viable but once was,” and then faults the Secretary for not “at least explain[ing] her conclusion that the area in which the species can no longer live is not a significant portion of its range.” *Defenders of Wildlife*, 258 F.3d at 1145 (emphasis added); see *Northwest Ecosystem Alliance v. United States Fish and Wildlife Service*, 475 F.3d 1136, 2007 U.S. App. LEXIS 2296, at *35-36 (9th Cir. Feb. 2, 2007) (“[w]e have recognized that a species can be considered extinct throughout a significant portion of its range ‘if there are major geographical areas in which it is no longer viable but once was.’”). This suggests that, in the view of the Ninth Circuit, the range the Service must analyze in assessing endangerment includes the historical range—i.e., the places where the species was once viable but is no longer.¹³

This interpretation is not supported by the statute. Indeed, it appears to be based on an inadvertent misquote of the relevant statutory language. In addressing this issue, the Ninth Circuit states that the Secretary must determine whether a species is “extinct throughout ... a significant portion of its range.” *Id.* If that were true, the Secretary would necessarily have to study the historical range. But that is not what the statute says, and the Ninth Circuit quotes the statute correctly elsewhere in its opinion. Under the ESA, the Secretary is to determine not if a species is “extinct throughout ... a significant portion of its range,” but if it “is in danger of extinction throughout ... a significant portion of its range.” A species cannot presently be “in danger of extinction” in that portion of its range where it “was once viable but no longer is”—if by the latter phrase the court meant lost historical habitat. In that portion of its range, the species has by definition ceased to exist. There it is not “in danger of extinction”; it is extinct.

To determine whether a species is presently “in danger of extinction throughout ... a significant portion of its range,” the Service must (and currently does) focus on the range in which the species currently exists. Data about the historical range and how the species came to be extinct in that location may be relevant in understanding or predicting whether a species is “in danger of extinction” in its current range.¹⁴ But the fact that it has ceased to exist in what may have been

¹³ It is possible that the court was referring to areas within the current range within which the Service expected the species to become extirpated. However, in a subsequent challenge to the Service’s decision on remand, the district court held that the Ninth Circuit had required the Service to determine “whether the lizard’s lost historical habitat was a significant portion of the range.” *Tucson Herpetological Soc’y v. Norton*, No. CV-04-0075-PHX-NVW, slip op. at 9 (D. Ariz. Aug. 30, 2005).

¹⁴ The New Mexico district court agreed with this construction for the most part, noting that “FWS must take into account the species’ historical range and reductions thereto[, b]ut even with a reduction in range ..., if the remaining core populations ensure the species’ survival throughout its range or a significant portion thereof, then the species is

portions of its historical range does not necessarily mean that it is “in danger of extinction” in a significant portion of the range where it currently exists.

4. “Significant”

As explained above, a species can be determined to be an endangered species for purposes of the ESA even if it is in danger of extinction only in a significant portion of its range. However, the question remains, what portion of its range should be considered “significant.”

Most, if not all, dictionaries list several definitions of “significant.” For example, one standard dictionary defines “significant” as “important,” “meaningful,” “a noticeably or measurably large amount,” or “suggestive.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1088 (10th ed. 2000).¹⁵ If it means a “noticeably or measurably large amount,” then the Secretary, in determining endangerment, would have to focus on the size of the range portion in question, either in relation to the rest of the range or perhaps even in absolute terms. If it means “important,” then the Secretary would have to consider additional factors, other than size, to determine whether the portion of the range in which a species is “in danger of extinction” is “significant.” For example, would the portion of the range be “significant” if it were a key breeding ground of the species, even though the area in question was only a small part of the entire range?

One district court interpreted the term to mean “a noticeably or measurably large amount” without analysis or any reference to other alternate meanings, including “important” or “meaningful.” *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 19 (D.D.C. 2002) (Canada lynx).¹⁶ The court did not explain why the Service could not employ another, equally plausible definition of “significant.” Therefore, I find the court’s interpretation unpersuasive.¹⁷ It is impossible to determine from the word itself, even when read in the context of the entire statute,

not endangered.” *Ctr. for Biological Diversity*, 411 F. Supp. 2d at 1282. Similarly, the court also stated that a species’s “lost habitat may be numerically or geographically large ... but not biologically significant because the species’ survival is not threatened by the shrinkage in habitat.” *Id.* at 1283. The Colorado District Court agreed, finding “persuasive” the New Mexico District Court’s interpretation “that the current range is the relevant context.” *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, CA No. 05-cv-00305-RPM, 2007 U.S. Dist. LEXIS 16175, at *7 (D. Colo. Mar. 7, 2007).

¹⁵ The 1971 definition of “significant” is “having or likely to have influence or effect” or “deserving of consideration.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2116 (16th ed. 1971). Note that this edition did not include a definition similar to “a noticeably or measurably large amount.”

¹⁶ Citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (9th ed. 1990). In a subsequent ruling the court rejected the Service’s finding on remand that equated “significant” with “important,” which the court viewed as contrary to its previous ruling. *Defenders of Wildlife v. Kempthorne*, CA No. 04-1230 (GK), 2006 U.S. Dist. LEXIS 71137, at *36-37 (D.D.C. Sept. 29, 2006) (remanding the listing determination on other grounds).

¹⁷ The Ninth Circuit implicitly agreed, finding that “it is not inconsistent with common usage, nor is it unreasonable, for the Service to construe ... ‘significant,’ in the sense of being notable.” *Northwest Ecosystem Alliance*, 2007 U.S. App. LEXIS 2296, at *20. Analyzing the meaning of “significant,” as it is used in the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, the court later stated that “the term ‘significant’ has ‘its commonly understood meaning, which is important.’” *Id.* at *30-31 (quoting *Nat’l Ass’n of Homebuilders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (citations and internal quotation marks omitted)).

which meaning of “significant” Congress intended. Even if it were clear which meaning was intended, “significant” would still require interpretation. For example, if it were meant to refer to size, what size would be “significant”: 30%, 60%, or 90% of current range? Additionally, would, or should, the size be the same percentage in every case or for each species? Moreover, what factors, if any, would be appropriate to consider in making a size determination? Is size all by itself “significant,” or does size only become “significant” when considered in combination with other factors? On the other hand, if “significant” were meant to refer to importance, what factors would need to be considered in deciding that a particular portion of a species’s range is “important” enough to trigger the protections of the ESA?

Where there is ambiguity in a statute, as with the meaning of “significant,” the official charged with administering the statute, which in this case is the Secretary, has broad discretion to resolve the ambiguity and give meaning to the term. As the Supreme Court has stated:

In *Chevron*, this Court held that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.

Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (internal citations omitted).

In resolving the ambiguity, however, the Secretary does not have unlimited discretion. A court may overturn the Secretary’s interpretation if it is “arbitrary, capricious, ... or otherwise not in accordance with law.” Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In exercising his discretion, the Secretary must be guided, at a minimum, by the following considerations. First, in defining the term, he should do so in a way that is consistent with achieving the purposes of the statute. As a corollary, he may not define the term in a way that would make any other portion of the statute superfluous, and he should strive to define the term in a way that makes sense in the context of the statute as a whole. Second, he should take into account whatever legislative history might be relevant for purposes of determining the intent of Congress. Third, he should take into account any judicial interpretations of the term. Indeed, in those jurisdictions where the ambiguous term has been judicially interpreted, he may be bound by that interpretation, unless he has subsequently issued an authoritative interpretation of the term that differs from what the court found. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. at 983–85. Each of these considerations is discussed below with reference to the meaning of the word “significant” in the SPR phrase.

a. Purpose of the Act

The primary stated purposes of the ESA include “to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered and threatened species.” ESA § 2(b). According to the Act’s findings, such species of fish, wildlife, and plants are worthy of conservation because they are of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” ESA § 2(a)(3). Thus, in defining what portion of a range will be considered “significant,” it is appropriate for the Secretary to consider factors other than just the size of the portion in relation to the current range as a whole. He may define “significant” in such a way as to insure conservation of the species protected by the Act. For example, the Secretary could consider, among other things, the portion of the range in terms of the biological importance of that portion of the range to the species and in terms of the various values listed in the Act that would be impaired or lost if the species were to become extinct in either that portion of the current range or in the current range as a whole.

b. Legislative History

The legislative history addressing the meaning of the word “significant” is sparse. Some of the floor debate and hearing testimony strongly suggest the Secretary has the discretion to divide the range of a species along political boundaries and declare it endangered only in states where the state authorities are not providing adequate protection of the species. Given the language of the final bill, such a division would have to be consistent with his definition of what makes a portion of a species’s range “significant.” For example, in a floor debate on the Senate version of the ESA, Senator Tunney made the following remarks:

[T]he Secretary may list an animal as “endangered” through all or a portion of its range. An animal might be “endangered” in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction. In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills to insure the proper conservation of the species.

A well-known example may serve to illustrate how S. 1983 provides for maximum management and conservation discretion, while insuring absolute protection for species imminently in danger of extinction. ... It is likely that in certain portions of Louisiana, the American alligator may be relisted under this bill as a threatened species [in response to the State of Louisiana allowing the harvest of alligators in one parish to limit habitat destruction caused by overpopulation of alligators]. S. 1983 would permit continued State action to enhance the existence of this species. In other areas the alligator would remain

listed as an endangered species and would be entitled to absolute Federal or State protection

119 CONG. REC. 25,669 (July 24, 1973). The attached appendix contains relevant portions of the legislative history from 1972 and 1973.¹⁸

c. Judicial Interpretations

Many of the courts that have addressed the meaning of the word “significant” have explicitly or by implication acknowledged that its ultimate meaning is ambiguous.¹⁹ In that circumstance, even though a court may have adopted one interpretation or another for purposes of resolving the case before it, the Secretary is not necessarily bound by the court’s interpretation, even in the area of that court’s jurisdiction. As the Supreme Court has explained:

A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.

Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. at 982. I have found no appellate cases that conclude that there is only one possible meaning of “significant.”²⁰ Within certain limits, therefore, the Secretary has the authority to define a reasonable meaning of the word “significant” in the SPR phrase through a listing rule or by amending the rules that govern listing decisions.²¹

The Ninth Circuit, for example, while acknowledging that the Secretary has “a wide degree of discretion in delineating” what portion of a range is “significant,” nonetheless appeared to set

¹⁸ See *The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92nd Cong. 109 (1972) (statement of Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior); *The Endangered Species Conservation Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 93d Cong. 60-62 (1973) (statements of Dr. Earl Baysinger, Assistant Chief, Office of Endangered Species and International Activities, and Douglas Wheeler, Deputy Assistant Secretary for Fish and Wildlife and Parks); see Appendix at A-2-13.

¹⁹ See, e.g., *Defenders of Wildlife v. Norton*, 258 F.3d at 1142-43 (flat-tailed horned lizard) (finding the SPR phrase ambiguous and rejecting both a quantitative approach and the Secretary’s approach based on the clarification interpretation of significance); *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d at 1277 (Rio Grande cutthroat trout) (finding the language of the SPR phrase “puzzling and enigmatic” and questioning whether “significant” may refer to size or biological significance). *But cf.*, *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d at 19 (Canada lynx) (finding that “significant” means a “noticeably or measurably large amount” according to a dictionary definition).

²⁰ One district court has found that there is only one possible meaning of “significant.” *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d at 19 (Canada lynx).

²¹ See Joint Regulations; Endangered Species Committee Regulations, 50 C.F.R. pt. 424. Note that these are joint regulations with the National Marine Fisheries Service, the National Oceanic and Atmospheric Administration, and the Department of Commerce. Consequently, any amendment of these regulations will require coordination with the National Marine Fisheries Service and approval by the Secretary of Commerce.

some outer limits of that discretion—i.e., the point at which an interpretation would be unreasonable or arbitrary. See *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001). On the one hand, it rejected what it called a quantitative approach to defining “significant,” where a “bright line” or “predetermined” percentage of historical range loss is considered “significant” in all cases. *Id.* at 1143. According to the court, there are two problems with such an approach:

First, it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing. A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat. Similarly, a species with an exceptionally small historical range may quickly become endangered after the loss of even a very small percentage of habitat.

Id. The Ninth Circuit concluded, at least with respect to range loss, that what is “significant” must “necessarily be determined on a case by case basis,” and must take into account not just the size of the range but also the biological importance of the range to the species. *Id.* At the other end of the spectrum, the Ninth Circuit rejected what it called “the faulty definition offered by the Secretary,” a definition “flatly inconsistent with the statute” that holds that a portion of a species’s range is “significant” only if the threats present there are severe enough to put the species in jeopardy of worldwide extinction. *Id.* at 1143, 1146. The Ninth Circuit found, in effect, that because such an interpretation would make surplusage out of other words in the definition of endangered species, the interpretation would be unreasonable. It thus appears that within the two outer boundaries set by the Ninth Circuit, the Secretary still has wide discretion, even in the Ninth Circuit, to give the definitive interpretation of the word “significant” in the SPR phrase.

B. Reading the SPR Phrase in Harmony with other ESA Provisions

In interpreting the SPR phrase, the Secretary must do so “with a view to [its] place in the overall statutory scheme.” *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989). I address here questions that have been raised about whether reading the SPR phrase as a substantive standard can be done in harmony with sections 3(16), 4(a)(1), and 4(c)(1) and sections 7 and 9.

1. Determining Whether a Species is an Endangered Species and Specifying Over What Portion of its Range it is Endangered

Section 4 establishes the process the Secretary is to use to determine whether any species is an endangered species because of any of five statutory factors. Section 4(b) establishes the informational basis and the procedure the Secretary is to use to make his determinations. Section 4(c) requires the Secretary to publish a list of all species determined to be endangered species, referring to the species by name, specifying over what portion of its range it is endangered (and hence, an endangered species), and specifying any critical habitat within such range.

The Department has previously argued that reading the SPR phrase as a substantive standard for determining whether a species is an endangered species would lead to a violation of the listing provisions in section 4 of the Act, and that therefore such a reading of the SPR phrase must be in error. According to the argument, such a reading would be inconsistent with the listing provisions in two ways. First, it would improperly allow the Secretary under section 4(a)(1) to determine that something less than a species as a whole is endangered, and, second, it would improperly allow the Secretary under section 4(c)(1) to list as endangered something less than a species as a whole. For example, a recent brief filed on behalf of the Department argued that “[l]isting a species in only the significant portion [of its range] where it is found to be endangered . . . would allow FWS to list a lesser entity than those specified in the ‘species’ definition, which would appear to violate section 4(a)(1).” Defendant’s Supplemental Brief in Response to Court’s June 8, 2005 Memorandum Opinion and Order at 10, *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005) (No. CIV 03-252 LFG/LAM).

The problem with the argument, both with respect to section 4(a)(1) and section 4(c)(1), is that it is a classic case of allowing the tail to wag the dog. Moreover, as discussed in the following section, the argument is inconsistent with the legislative history of the ESA.

With respect to section 4(a)(1), the argument simply assumes a meaning for that section and then uses that meaning to interpret the definition of “endangered species,” instead of settling on a meaning for the definition of “endangered species” and then using that definition when applying section 4(a)(1). The argument assumes that because section 4(a)(1) requires (authorizes) the Secretary to determine whether “any species is an endangered species,” only a species as a whole can be endangered. In other words, it is all or nothing; a species is either endangered in its entirety or it is not endangered. This reading of section 4(a)(1), however, simply begs the question of what it means to be an “endangered species.” Because “endangered species” is a defined term in the Act, one must start with that definition to determine the meaning of section 4(a)(1), rather than vice versa. When the construction of the Act is approached in that manner, section 4(a)(1) can be read in full harmony with a reading of the SPR phrase as a substantive standard.

Section 4(a)(1) requires the Secretary to “determine whether any species is an endangered species.” There are two defined terms in that phrase—“species” and “endangered species.” Section 3(16) defines “species” as including “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” In other words, under the definition, three different groups of organisms expressly qualify as a “species”:

1. a group of organisms comprising all of the organisms in a species;
2. a group of organisms comprising all of the organisms in “any subspecies of fish or wildlife or plants”; or
3. a group of organisms comprising “any distinct population segment of vertebrate fish or wildlife which interbreeds when mature.”

Section 3(6) defines “endangered species” as any species which is in danger of extinction either throughout all of its range or throughout a significant portion of its range. Thus, under section 4(a)(1), the Secretary must examine whether:

1. the members of any group of organisms constituting a “species” are in danger of extinction throughout all of the species’s range; or
2. the members of any group of organisms constituting a “species” that inhabit a significant portion of the species’s range are in danger of extinction.

The Secretary is required to make his determinations in section 4(a)(1)

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.

ESA § 4(b)(1)(A) (emphases added).

The Secretary is thus asked to determine under section 4(a)(1) which members of the species are endangered, either all of the members or only those members that inhabit a significant portion of the species’s range. For example, the Secretary might examine the American alligator as a species, determine that Florida is a significant portion of the American alligator’s range, and conclude that American alligators in Florida are in danger of extinction, even though alligators elsewhere are not.

Having made his determination, the Secretary would then be required to comply with the listing requirements in section 4(c)(1). That section requires him to “publish in the Federal Register a list of all species determined by him ... to be endangered species.” Some have argued that this language means that only a species as a whole can be listed. However, the balance of the language in the section proves otherwise. The section requires, in full, that the list “refer to the species ... by scientific and common name or names, specify with respect to each such species over what portion of its range it is endangered ..., and specify any critical habitat within such range.”²²

²² It has also been questioned whether interpreting the SPR phrase as a “substantive standard” for listing is consistent with the “distinct population segment of any species of vertebrate fish or wildlife.” ESA § 3(16). The argument is that Congress intended that the protections of the Act below the taxonomic category of subspecies be limited to DPSs, thus the protection of a subset of a DPS (in this case a SPR of a DPS) would be inconsistent with this intent. There is, however, no support in the language of the Act or its legislative history for the assertion that Congress included the DPS language to alter or limit the meaning of the SPR phrase. The DPS language was added to the definition of “species” five years after the SPR phrase and replaced earlier language that Congress evidently concluded was too broad. *See* H.R. CONF. REP. NO. 95-1804, at 17 (1978). Moreover, Congress refused twice in 1978 to specifically alter the language of the SPR phrase. *See* Appendix at A-16–17. Instead, the DPS language and the SPR phrase give the Secretary two different tools “to provide a program for the conservation of ... endangered species”—the overarching goal of the Act. ESA § 2(b). In some cases, the results achieved with those tools will

Applying the requirements of section 4(c)(1) to my example of the American alligator, the Secretary would refer to it by its scientific or common name, specify that portion of its range in which it is endangered as Florida, and specify any critical habitat within its range. In so doing, he would not be listing a “lesser entity than those specified in the ‘species’ definition”; rather, he would be doing exactly what section 4(c)(1) requires—identifying the members of the species that are “endangered species” by specifying the portion of the range in which they are in danger of extinction. As a result of such a listing, the public might commonly refer to the American alligator as “endangered,” or as having been “listed”; however, for purposes of the Act, it would only be the alligators in Florida that would be “endangered.” The Ninth Circuit appeared to adopt this approach in the flat-tailed horned lizard case, implying that different portions of a species’s range may require enhanced or different degrees of protection. *Defenders of Wildlife*, 258 F.3d at 1146.²³ Accordingly, section 4 can be read in harmony with a reading of the SPR phrase as a substantive standard.

2. Protecting Listed Species

Similarly, the protections afforded in sections 7 and 9 to endangered species can also be applied in full harmony with a reading of the SPR phrase as a substantive standard.

Section 7 requires federal agencies to insure, in consultation with the Secretary, that their actions are “not likely to jeopardize the continued existence of any endangered species.” It bears highlighting that section 7(a)(2) requirements apply to “endangered species,” not species as a whole. In other words, the section does require consultation on any species that is listed as threatened or endangered. Under our reading of the SPR phrase, an “endangered species” can consist either of all of the members of a species, regardless of where they live, or of all the members of a species that inhabit a significant portion of a species’s range. Thus, when a species is listed pursuant to section 4(c)(1) as endangered throughout all of its range, federal agencies are required to consult about their actions that may affect the species regardless of where they might occur throughout the entire range of the species. By the same token, where a species is listed pursuant to section 4(c)(1) as endangered in only a portion of its range, federal agencies are required to consult about their actions only if they may affect the members of the species inhabiting that portion of its range. In short, if a proposed federal agency action may affect a species within a significant portion of its range where it is classified as an endangered species or a threatened species, the agency must consult with the Service on that action.

overlap—e.g., a DPS might, by definition, inhabit a significant portion of a species’s range, depending on how the Secretary defines “significant.” But this potential for overlap does not mean that the DPS language alters or limits the meaning of the SPR phrase.

²³ The court also extensively quoted the legislative history supporting the view that the protections of the Act are limited to the portion of the species’s range in which it is endangered. *Defenders of Wildlife*, 258 F.3d at 1144–45; see also *Roosevelt Campobello Intl. Park Comm’n v. U.S. Envtl Protection Agency*, 684 F.2d 1041, 1050 n.5 (1st Cir. 1982) (bald eagle) (“[T]he Secretary of the Interior is given the exclusive duty and power to publish a list specifying ‘with respect to each ... species over what portion of its range it is endangered.’ ... We see no reason why the Secretary should not have ... authority to ascertain the appropriate range in which the species is endangered In any case, the legislative history appears to authorize the Secretary to deem a species endangered in the United States, or a portion thereof, even if it is abundant elsewhere”).

Section 9 prohibits any person from taking certain actions “with respect to any endangered species of fish or wildlife.” Once again, it bears repeating that Congress used the term “endangered species,” and not “species” as a whole. For example, it is unlawful to “take” any member of an endangered species of fish or wildlife within the United States. As noted above, under our reading of the SPR phrase, an “endangered species” can consist either of all of the members of a species, regardless of where they live, or of all the members of a species that inhabit a significant portion of a species’s range. Thus, where a species is listed pursuant to section 4(c)(1) as endangered throughout all of its range, it would be unlawful to “take” any member of that species subject to the jurisdictional limitations of section 9. By the same token, where a species is listed pursuant to section 4(c)(1) as endangered in only a portion of its range, it would only be unlawful to “take” a member of the species that inhabits that portion of its range. In the first instance, the Secretary would have specified that the species is endangered in all of its range, while in the second instance the Secretary would have specified the portion of its range where it is endangered. In summary, it would be a violation of section 9(a)(1)(B) of the ESA if a person, while in the United States, “takes” an individual of a fish and wildlife species from a significant portion of its range that has been classified as an endangered species. It is the act of taking a member of an endangered species that establishes the violation—not the taking of a member of the species itself.

Reading the Act to require protection for a species only where it is endangered, as specified in section 4(c)(1), provides precisely the flexibility that the Nixon Administration sought in 1972 and the Congress provided in 1973. In 1972, when responding to a written question from then Senator Spong, who had expressed his understanding that “a species could be declared endangered over part of its range and not declared endangered in other parts,” a Deputy Assistant Secretary responded for the Department in the affirmative. He stated, “[i]t is our hope that this ability to provide selective protections would provide protections to those animals needing it, encourage the agencies which have management and protective authority to exercise that authority and allow the recognition of such efforts.” Appendix at A-6. Embracing such an approach, the Senate Commerce Committee noted, “[b]y providing for the listing of a species endangered throughout a significant portion of its range, the Committee recognized the need for maintaining a viable population of species or subspecies where possible in more than just one portion of the world.” Appendix at A-8. These concepts derived from the legislative history of the Act are subsumed within the provisions of section 4(b)(1), which specifically requires the Secretary to consider the presence of conservation practices and management measures that are in place in various nations or States when making determinations under section 4. By “taking into account ... those efforts being made by any State ... or any political subdivision of a State ... to protect ... species, whether by predator control, protection of habitat and food supply or other conservation practices,” when making his determination of endangerment and then “specify[ing] over what portion of its range” a species is endangered, the Secretary is able to recognize the conservation practices and protection efforts of States and local jurisdictions, while also ensuring the Act’s protections are properly provided.

In 1973, during committee hearings, then Representative John Breaux stated he understood the legislation to allow the Secretary “to designate areas in which the species is endangered and

areas where it is not endangered.” Appendix at A-10. Then Assistant Secretary Reed testified that “[t]he administration’s bill gives the Secretary the power to allow harvest in areas where the animal is not presently threatened with extinction and protect [it] in areas where [it] is in trouble, that is where [it] is likely to become threatened with extinction.” Appendix at A-9. Similarly, the floor debates for the Endangered Species Act of 1973 in both the House of Representatives and the Senate support the ability of the Secretary to provide protections of the Act to a species where it is in danger of extinction, and not doing so for those areas where it is not in danger. Appendix at A-12–13.

An alternative reading—that a species must be protected throughout its entire range even if it is found to be endangered in only a significant portion—would render section 4(c)(1) meaningless, or at least relegate its application to delineating the range of distinct population segments and experimental populations, although neither of these terms existed when Congress prescribed the requirements for listing in section 4(c)(1).²⁴ Moreover, this reading would conflict with the Congressional desire that “the Federal government should protect [endangered or threatened] species where States have failed to meet minimum Federal standards, it should not pre-empt efficient programs.” S. REP. NO. 93-307, at 3 (1973). Finally, the alternative reading would frustrate the import of requiring that the conservation practices within a State, or its political subdivisions, be taken into account when making a determination under section 4(a)(1). A statutory term should not be construed to lead to absurd results. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004).

The protections afforded in sections 7 and 9 to endangered species can also be applied in full harmony with a reading of the SPR phrase as a substantive standard.

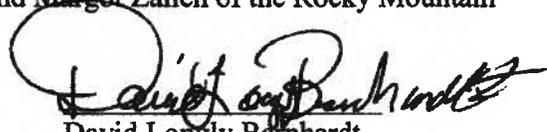
III. CONCLUSION

I trust this memorandum and its conclusions will be helpful to you in developing your SPR policy. The Service, acting for the Secretary, has considerable discretion to consider a number of factors when determining whether a species is endangered in any significant portion of its range. Therefore, my office stands ready to assist you as you seek to explain how that discretion should

²⁴ In 1982, several operative provisions contained in section 4(c) were moved to section 4(b). However, the legislative history does not indicate that Congress intended the amendments to diminish the operative effect of the remaining provisions in section 4(c). In fact, plaintiffs have successfully enforced another provision of section 4(c), the requirement that the Secretary conduct reviews of listed species at least every five years. *See, e.g., California State Grange v. Norton*, No. CIV-S-05-00560 MCE/PAN, slip op. (E.D. Cal. Sept. 20, 2005) (approving settlement agreement in case in which plaintiffs alleged failure to conduct reviews under section 4(c)(2) of 194 listed species; in settlement, dated Sept. 12, 2005, the United States agreed to deadlines for completing reviews of all 194 species). Moreover, this reading is consistent with the definitions of “conserve,” “conserving,” and “conservation” relating to bringing “any endangered species or threatened species to the point where the measures provided pursuant to this Act are no longer necessary.” ESA § 3(3). It is doubtful that Congress would have required the Secretary to specify which portion of a species range is endangered or threatened, if in all instances the entire range was to be specified. Given the context of the Congressional discussion leading to the passage of the ESA in 1973, it is doubtful that Congress would require the measures of protection provided in the Act to apply in those portions of the range where the species is neither endangered or threatened. *See* Appendix at A-4–6 & A-8–13.

be exercised in the Service's listing and delisting decisions. This opinion applies to all instances where the Service is attempting to determine whether a species is an endangered species or a threatened species.

This opinion was prepared with the substantial assistance and contribution of Deputy Solicitor Lawrence J. Jensen and the Division of Parks and Wildlife of the Office of the Solicitor, Deputy Associate Solicitor Barry N. Roth and Assistant Solicitor for Fish and Wildlife W. Michael Young, Philip G. Kline, Benjamin C. Jesup, and John D. Rudolph of the Branch of Fish and Wildlife, Eric W. Nagle of the Pacific Northwest Regional Solicitor's Office, Cheryll F. Dobson of the Pacific Southwest Regional Solicitor's Office, and Margot Zallen of the Rocky Mountain Regional Solicitor's Office.



David Longly Bernhardt

Attachment

APPENDIX: LEGISLATIVE HISTORY

A. Endangered Species Act Precursors and Relevant Legislative History

1. Endangered Species Preservation Act of 1966

The Endangered Species Preservation Act of 1966 (ESPA) represented the first comprehensive federal effort to protect endangered species. The ESPA defined endangered species narrowly:

A species of native fish and wildlife shall be regarded as threatened with extinction whenever the Secretary of the Interior finds, after consultation with the affected States, that its existence is endangered because its habitat is threatened with destruction, drastic modification, or severe curtailment, or because of overexploitation, disease, predation, or because of other factors, and that its survival requires assistance.¹

The Conference Report, as well as the statute state that Congress intended to achieve two goals. First, Congress intended the ESPA to represent “a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction . . .”² To further this purpose, Congress authorized the Secretary of the Interior to “utilize the land acquisition and other authorities of the Migratory Bird Conservation Act . . . the Fish and Wildlife Act of 1956 . . . and the Fish and Wildlife Coordination Act to carry out a program in the United States of conserving, protecting, restoring, and propagating” threatened species.³

Second, Congress declared its policy to be the following:

[the Secretaries of Interior, Agriculture, and Defense,] including the various bureaus, agencies, and services within the Departments, shall seek to protect species of native fish and wildlife threatened with extinction and, where practicable and consistent with their program purposes . . . shall preserve the habitats of such threatened species on lands under their jurisdiction.⁴

Thus, the ESPA operated to protect only ‘native’ fish and wildlife that were directly threatened or whose habitats were faced with the threat of destruction. The narrow focus of the bill led to

¹ The Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, § 1(c), 80 Stat. 926, 926 (1966).

² ESPA § 1(a); H.R. CONF. REP. NO. 89-2205, at 3 (1966); 112 CONG. REC. 26,638 (1966).

³ ESPA § 2(a).

⁴ *Id.* § 1(b).

subsequent legislation three years later.⁵

2. Endangered Species Conservation Act of 1969

When Congress enacted the Endangered Species Conservation Act of 1969 (ESC),⁶ it broadened the definition of ‘endangered species’ to provide that: “*A species or subspecies of fish or wildlife shall be deemed to be threatened with worldwide extinction whenever the Secretary determines, based on the best scientific and commercial data available to him, . . . that the continued existence of such species or subspecies of fish or wildlife is . . . endangered . . .*”⁷ Additionally, consistent with the ESC’s expansion of protection to foreign species, Congress prohibited the importation into the United States of any threatened species of fish or wildlife.⁸

Further, to strengthen the enforcement of endangered species legislation and to assist the States in stopping “illegal traffic in certain protected species of fish and wildlife, such as the alligator, [the ESC made] it unlawful for anyone to knowingly put into interstate commerce or foreign commerce, any such species taken contrary to a Federal, State, or foreign law.”⁹

3. Legislative History Pertaining to the Endangered Species Conservation Act of 1972 and Related Bills

The process of developing and enacting what was to eventually become the Endangered Species Act of 1973¹⁰ began on February 8, 1972, when President Nixon issued an environmental message to the Nation. Both the Senate and the House of Representatives drafted bills responding to the President’s proposal. All of these bills contained SPR language either identical or similar to the language found in the Administration’s proposal, as it related to SPR.¹¹ Thus, the committee hearings and testimony surrounding the Endangered Species Conservation Act of 1972 during the 92nd Congress are relevant.

⁵ The ESPA contained weak enforcement mechanisms. It did not apply to foreign wildlife and the Secretary’s land acquisition authority represented the ESPA’s only means of habitat protection.

⁶ The Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969).

⁷ *Id.* § 3(a) (emphasis added).

⁸ *Id.* § 2; *see also* S. REP. NO. 91-526, at 1 (1969); 115 CONG. REC. 33,568 (1969).

⁹ 115 CONG. REC. 20,166 (1969) (referring to H.R. 11363, 89th Cong. (1969)); *see also* ESC §7(a)-(b).

¹⁰ The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (amended 1978, 1982, 1986, and 1988).

¹¹ H.R. 1311 § (2)(c)(1) (1972); H.R. 13081, 92d Cong. § (2)(c)(1) (1972); S. 3199, 92d Cong. § (2)(c)(1) (1972); *see also* S. 3818, 92d Cong. § (4)(a) (1972) (including flora in the definition of endangered species and including “habitat” in “significant portion of its habitat or range.”).

In his message, President Nixon stated that “we have found that even the most recent act to protect endangered species, which dates only from 1969, simply does not provide the kind of management tools needed to act early enough to save a vanishing species.”¹² As a result, the Nixon Administration proposed the Endangered Species Conservation Act of 1972, which sought “to provide a program for the conservation, protection, restoration, and propagation of selected species and subspecies of fish and wildlife, including migratory birds, that are threatened with extinction, or are likely within the foreseeable future to become threatened with extinction.”¹³

To facilitate this approach, the Nixon Administration proposed a definition for “endangered species,” which introduced the SPR phrase that is currently in force today:

A species or subspecies of fish or wildlife shall be regarded as an endangered species whenever, in his discretion, the Secretary determines, based on the best scientific and commercial data available to him and after consultation, as appropriate, with the affected States, and, in cooperation with the Secretary of State, the country or countries in which such fish and wildlife are normally found or whose citizens harvest the same on the high seas, and, to the extent practicable, with interested persons and organizations, and other Federal agencies, that the continued existence of such species or subspecies of fish or wildlife, in the judgment of the Secretary, is *either presently threatened with extinction or will likely become threatened with extinction, throughout all or a significant portion of its range*, due to any of the following factors . . .¹⁴

The authorizing committees, individual Members of Congress, and representatives from the Department of the Interior and the Department of Commerce invested considerable effort during the 92nd Congress considering the proposed endangered species legislation. Although the legislation was not enacted, the Committee hearings contain interesting discussion of many of the key concepts and terms that would ultimately find their way into the Endangered Species Act of 1973.

In a hearing before the Senate Commerce Committee, a National Oceanic and Atmospheric Administration (NOAA) official, David Wallace, summarized the need for the proposed 1972 legislation. In that testimony, he highlighted the Administration’s view that a central problem with both the 1966 and 1969 Acts was that the Secretary’s ability to list endangered species was too limited:

¹² See President’s Message to Congress Outlining the 1972 Environmental Program, 8 WEEKLY COMP. PRES. DOC. 223-224 (November 8, 1972).

¹³ Endangered Species Conservation Act of 1972, H.R. 1311, 92d Cong. § 2(a) (1972).

¹⁴ *Id.* at § (2)(c)(1) (emphasis added).

The existing Endangered Species Act divides fish and wildlife into “native fish and wildlife” and “other fish and wildlife.” For the present law to have any effect on native species of fish and wildlife, they must be found to be actually “threatened with extinction.”

In the case of “other fish and wildlife,” one must find that a species is “threatened with worldwide extinction.” Once these determinations are made, the Secretary of Interior is given various powers to acquire lands and use funds to conserve, protect, and restore the species. However, his powers to place restrictions on the taking of such species or any trafficking therein are minimal.

As to other species of fish and wildlife, the Secretary’s power is limited to forbidding imports. Clearly this authority is far too limited.

S. 3199 is in sharp contrast with existing law. First, it wipes out the artificial distinction between “native” and “other” fish and wildlife so that maximum protection measures can be applied to both to the extent that the United States can exercise jurisdiction. This clarifies the status of large numbers of species that move in and out of the waters along our coasts. Secondly, while retaining the existing category of animals which are presently “threatened with extinction,” the bill adds a new category of animals which “will likely within the foreseeable future become threatened with extinction.”

Moreover, it provides that action may be taken if either condition exists within a significant portion of the animal’s range and does not require a finding of worldwide endangerment.¹⁵

Additionally, Associate Administrator Wallace explained that listing a species as endangered or threatened under the proposed legislation:

[D]oes not require a finding of worldwide endangerment. *This last modification recognizes the fact that a species or subspecies may be threatened because of events taking place in a very small but significant part of its range. Thus, if a species’ breeding area is being threatened, with the result that its future is in doubt, the species could be placed upon the endangered list, regardless of the fact that the breeding ground is geographically small relative to the whole range of*

¹⁵ *The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 92d Cong. 132 (1972) (statement of David Wallace, Associate Administrator for Marine Resource, National Oceanic and Atmospheric Administration); see Predatory Mammals and Endangered Species: Hearings on H.R. 1311 and 13081 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92d Cong. 190 (statement of Robert White, Administrator, National Oceanic and Atmospheric Administration).*

the species.¹⁶

Similarly, Curtis Bohlen, the Deputy Assistant Secretary for Fish and Wildlife and Parks, in a written response to questions from Senator Spong wrote:

Senator SPONG: As I understand it, a species could be declared endangered over part of its range and not endangered in other parts. Is this correct? If so, how do you plan to enforce it? Specifically, how would you deal with a commercial species which is endangered in part of its range and abundant elsewhere?

Mr. BOHLEN: That is correct.

Although man's present ability to rapidly and drastically alter the environment makes it possible for a species or subspecies to be forced from a secure status to a hazardous one almost overnight, such happenings are the exception rather than the rule. Usually it becomes apparent to scientists that a species is heading for trouble long before it reaches the point at which it is threatened with extinction. It is when such indicators - - unregulated commercial, or other overexploitation; significant reductions in population; significant loss or threatened loss of habitat, etc. - - are detected that an animal would become a candidate for the Endangered Species List.

Quite commonly an animal's status does not deteriorate at the same rate throughout its range. This is especially true for those whose range extends into two or more nations, States, or other political subdivisions. This is so since the well-being of most wildlife now is dependent upon the management and other considerations it receives—or, just as importantly, fails to receive—from the people and governments who control the land upon which it lives.

To more directly answer your question, let's assume a hypothetical situation involving a commercially valuable animal which occurs in three countries. Let's assume, after the appropriate reviews, consultations, etc., that it is determined that

- in country "A" - a good management program exists; adequate unthreatened habitat is present; the population is healthy and produces a surplus which is harvested under a carefully regulated system,
- in country "B" - the animal largely is ignored and neither receives special management or protective attention nor is overexploited,
- in country "C" - no management program exists and the animal is being heavily

¹⁶ *The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 92d Cong. 132 (1972) (statement of David Wallace, Associate Administrator for Marine Resources, National Oceanic and Atmospheric Administration)(emphasis added).*

overexploited.

Thus, this animal would be considered to be in good shape over part of its range (country "A"), holding its own in a second portion (country "B"), and in trouble in a third.

Under our present authority, no assistance could be given this animal, since it is not "threatened with extinction." However, it is obvious that unless something acts on behalf of the animal, its extirpation in country "C" is imminent. Once that occurs, the same forces likely would shift their attention to the animal in country "B," thus making the species' continued existence dependent on the welfare of the remnant population in country "A."

This is a "textbook example" of our concept of a candidate for the "likely to become threatened with extinction" category.

If that same animal were so classified, regulations could be issued that would:

- a. Permit the importation into the United States of lawfully taken specimens from country "A."
- b. Prohibit or restrict the importation of specimens which originated in countries "B" or "C." As programs to manage and protect the animal are implemented in country "B" or "C" and as the animal responds, such prohibitions or restrictions could be relaxed accordingly.

It is our hope that this ability to apply selective protections would provide protection to those animals needing it, encourage the agencies which have management and protective authority to exercise that authority and allow the recognition of such efforts.¹⁷

Senator Spong posed the identical question to Associate Administrator Wallace who responded as follows:

Where a species is presently threatened with extinction over a significant part of its range, the Secretary will enact measures which, for example, would control the

¹⁷ *The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 92d Cong. 109 (1972)* (statement of Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior).

time of taking, the manner of taking, catch limitations, or areas where taking would be prohibited.¹⁸

In Committee hearings in the House of Representatives, Representative Potter questioned Deputy Assistant Secretary Bohlen about whether a discrete population could qualify as a subspecies:

Mr. POTTER: I talked with Mr. Baysinger on the identity of subspecies, as differentiated from population stocks. My question, is this bill, which relates to "species and subspecies," sufficiently fine-tuned to let you reach the situation where somebody goes in, say, and wipes out one entire population, even though it may not be a subspecies?

Mr BOHLEN: There is an added clause in the definition of endangerment, which refers to the status of the species or subspecies throughout all, or a portion of its range.

Mr. POTTER: You feel this gives you the necessary tools to handle discrete populations?

Mr. BOHLEN: Yes, I think it does.¹⁹

Additionally, in a hearing before the Senate, Nathaniel Reed, Assistant Secretary for Wildlife and Fish and Parks, testified that the SPR language authorized the Secretary to regulate a species in one part of its range without regulating the species where it is abundant in other parts of its range.²⁰

The Administration's original 1972 bill limited protection to species and subspecies.

¹⁸ *Id.* at 141 (statement of David Wallace, Associate Administrator for Marine Resource, National Oceanic and Atmospheric Administration). Ralph McMullen, Director of the Michigan Dept. of Natural Resources and President of the International Association of Game, Fish, and Conservation Commissioners, testified that the SPR language should allow the Secretary to designate a species as threatened or endangered in a significant portion of its range without designating that species as threatened or endangered rangewide. Interestingly, Mr. McMullen also interpreted the term "range" to mean the present range of a species, rather than historical range. See *Predatory Mammals and Endangered Species: Hearings on H.R. 13081 and 1311 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong. 321 (1972).

¹⁹ *Predatory Mammals and Endangered Species: Hearings on H.R. 1311 and 13081 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong. 136 (1972) (statement of Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior).

²⁰ Letter from Nathaniel Reed, Assistant Secretary of Fish and Wildlife and Parks, to Senator Ted Stevens (Sept. 25, 1972) (on file with the Solicitor's Office of the Dept. of the Interior) (commenting on S. 3818 § 4(a)).

In 1972, a Senate Report by the Committee on Commerce contained language identical to the Administration's bill. The Senate Report explained the SPR language as follows:

Where the Secretary determines that a species or subspecies of fish and wildlife throughout all or a significant portion of its habitat or range is presently threatened with extinction or is likely within the foreseeable future to become threatened with extinction, he may list such species as an endangered species. By providing for the listing of species endangered throughout a significant portion of its range, the Committee recognized the need for maintaining a viable population of species or subspecies where possible in more than just one portion of the world.²¹

4. The Endangered Species Act of 1973

The enactment of the Endangered Species Act on December 29, 1973²² stemmed directly from two bills introduced in the House and the Senate during the 93rd Congress: S. 1983 and H.R. 37. These two bills incorporated the SPR language and other new provisions introduced in the Administration's 1972 proposal and extended protections to populations of species in addition to species and subspecies. The bills reiterated the focus of the 1972 bills to rectify a perceived shortcoming of the 1969 Act, which required a species to be threatened with worldwide extinction before it could be listed and thereby protected under the 1969 Act.²³

Much of the 1973 Congressional debate centered on amending ESC in two principal respects. First, Congress supported the addition of language that provided the Secretary with the authority to protect species that are likely to become threatened with extinction before that threat is realized. Second, Congress sought to provide the Secretary with the flexibility to protect species that are threatened or endangered in only a portion of their range, rather than requiring worldwide endangerment.

The Senate bill, S. 1983, included the current version of the SPR phrase and the Senate Report noted that "flexibility in regulation is enhanced by a provision which allows for listing if the

²¹ S. REP. NO. 92-1136, at 6 (Sept. 15, 1972).

²² The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (amended 1978, 1982, 1986, and 1988).

²³ However, the interaction between the federal and state government in the administration of the Act, particularly any perceived preemption of state laws, was the primary point of debate and perhaps the most important and contentious issue that Congress dealt with in passage of the 1973 Act. *See, e.g.*, H.R. REP. NO. 93-412, at 7 (July 27, 1973).

animal is endangered over a ‘substantial portion of its range.’²⁴

House committee report language regarding H.R. 37 referenced an early incarnation of the SPR language, which modified the “endangered species” definition from the 1969 Act to include any species in danger of extinction “throughout its entire range, or any portion of its range.”²⁵ The House Committee Report noted that the new “endangered species” definition represented

a significant shift in the definition in existing law which considers a species to be endangered only when it is threatened with worldwide extinction. It includes the possibility of declaring a species endangered within the United States where its principal range is in another country, such as Canada or Mexico, and members of that species are only found in this country insofar as [it exists] only on the periphery of [its] range.²⁶

The House Committee Report also lists the principal changes to be effected by the new legislation, including that “[i]t permits protection of animals which are in trouble in any significant portion of their range, rather than threatened with worldwide extinction.”²⁷

During Committee hearings before the House Subcommittee on Fisheries and Wildlife Conservation, Assistant Secretary Reed, stated:

[W]e find ourselves in a bind. We must [under the 1969 Act] put an animal on the endangered species list to give it protection over all of its range when it could be surplus in part of its range. The alligator, which for instance, in Florida and Louisiana are numerous and coming back may be able to stand a harvest. But, the alligator is in real trouble throughout the rest of its range.

The administration’s bill gives the Secretary the power to allow harvest in areas where the animal is not presently threatened with extinction and protect [it] in areas where [it] is in trouble, that is, where [it] is likely to become threatened with

²⁴ S. REP. NO. 93-307 (July 1, 1973). Note that the Report references the language “*substantial* portion of its range” (emphasis added). However, this is the only reference in the Report to the word “substantial” rather than “significant.” The bill referenced in the same Senate report includes the term “significant” rather than “substantial” as does every other House and Senate report referencing S. 1983.

²⁵ H.R. REP. NO. 93-412, at 10 (July 27, 1973).

²⁶ *Id.* Later Congressional testimony by Representative Price reiterated this reasoning. He stated that “H.R. 37, would protect species threatened in any significant portion of their range, rather than only those threatened with worldwide extinction.” 119 CONG. REC. 30,165 (Sept. 18, 1973).

²⁷ H.R. REP. NO. 93-412, at 2 (note that the introductory remarks inexplicably refer to “significant portion of its range,” whereas the actual definition in the Bill at that time did not include the word “significant”); *see also* 119 CONG. REC. 30,165 (Sept. 18, 1973) (stating identical language in relation to an updated version of H.R. 37 containing the SPR phrase in the current Act).

extinction.²⁸

Later, Assistant Secretary Reed responded to a question from Representative Breaux:

Mr. BREAUX: As I understand this bill, the Department is allowed to designate areas in which the species is endangered and areas where it is not endangered.

How could this effect county lines—where some counties within a State have an endangered species while others do not?

Mr. REED: Both the State and Federal officers would have an awfully hard time dealing with areas as small as some counties. It is possible, but I can hear [the Bureau's law enforcement officer] sitting behind me, shaking right now.²⁹

Howard Pollock, Deputy Administrator of NOAA, responded to the same question in the following manner:

[T]hat action may be taken if either condition [of endangered or threatened status] exists throughout a significant portion of the animal's range and does not require a finding of worldwide endangerment. This last modification recognizes the fact that a species or subspecies may be threatened because of events taking place in a small but significant part of its range.³⁰

In addition, Dr. Earl Baysinger, Assistant Chief, Office of Endangered Species and International Activities and Douglas Wheeler, Deputy Assistant Secretary for Fish and Wildlife and Parks, testified at hearings on S. 1592 introduced by Sens. Magnuson and Hatfield. S. 1592 did not, at that time, contain any definitions of endangered or threatened species. However, administration witnesses stated:

Mr. WHEELER: [F]or the first time, under the authority of this bill, we would be able to fine-tune to the extent that we could prohibit the taking in that area where the condition of endangerment exists, and not in others.

The law presently requires that we find a species to be endangered throughout all its range. We are not able to say that in Florida it exists but in Alaska it does not.

²⁸ *Endangered Species: Hearings on H.R. 37 and 4758 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 93d Cong, 207 (1973) (statement of Nathaniel Reed, Assistant Secretary for Fish and Wildlife and Parks, Department of Interior).

²⁹ *Id.* at 210.

³⁰ *Id.* at 227 (statement of Howard Pollock, Deputy Administrator of NOAA, U.S. Dept. of Commerce).

Dr. BAYSINGER: If we were to find that the whistling swan was threatened within the territory of the United States, under the present law we would have to apply that endangered category to the swan throughout its range wherever it occurs, whether it be Alaska, Utah, or Maryland.

Under the legislation we are talking about today, we would be able to fine tune that and take a look at the swan . . . [I]f this were an animal about which we were concerned, that was obviously getting in trouble in part of its range, for whatever reason, we would be able to sit down, look at the animal, determine with the other agencies with whom we are dealing what actions are needed to prevent that animal from deteriorating to the point where it would become endangered, make the finding that this animal is likely to become threatened over a portion of its range, and then apply such techniques as would be needed to prevent it from deteriorating further within that portion of its range.

We don't have that authority under the existing act.

Senator COOK: In other words, S. 1592 gives you a degree of selectivity that you never had before?

Dr. BAYSINGER: Yes, it gives us a scalpel rather than a broad sword.³¹

The Senate bill, S. 1983, included the current version of the SPR phrase. The Senate Report noted:

The bill provides a broadened concept of "endangered species" by affording the Secretary the additional power to list animals which he determines are likely within the foreseeable future to become threatened with extinction. This give effect to the Secretary's ability to forecast population trends by permitting him to regulate these animals before the danger becomes imminent while long-range action is begun. By creating two levels of protection, regulatory mechanisms may more easily be tailored to the needs of the endangered animals. Flexibility in regulation is enhanced by a provision which allows for listing if the animal is endangered over a "substantial portion of its range."³²

³¹ *The Endangered Species Conservation Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 93d Cong. 60-62 (1973) (statements of Dr. Earl Baysinger, Assistant Chief, Office of Endangered Species and International Activities and Douglas Wheeler, Deputy Assistant Secretary for Fish and Wildlife and Parks).

³² S. REP. NO. 93-307 at 3; *But see id.* at 7 ("Section 3(2) defines an endangered species" as one "which is in danger of extinction throughout all or a significant portion of its range."). Note that the Report references the language "*substantial* portion of its range" (emphasis added). However, this is the only reference in the Report to the word "substantial" rather than "significant" and, therefore, appears to be a mistake or misquote. The bill referenced in the same Senate report uses the term "significant" rather than "substantial" as does every other House and Senate

In floor debate in the House of Representatives, Representative Goodling stated:

[U]nder existing laws, the Federal Government was unable to adequately provide conservation and protection measures to those species which had not yet met the legal and technical definition of “extinct,” but due to a variety of other factors were closely approaching that population level. H.R. 37 broadens the concept of “endangered species” by vesting authority in the Secretary to list those species which are “likely within the foreseeable future to become threatened with extinction.” . . . Greater flexibility is provided while at the same time additional means of protection, conservation, and management is permitted and required.³³

Later, during House consideration of the Bill, Representative Young stated:

By drawing upon and expanding existing areas of authority and competency in the Departments of Interior, Commerce, and Agriculture, the committee has been able to expand greatly our important efforts to protect species threatened with extinction to include those species which may become endangered, whether on a large scale or within a part of their habitat only.³⁴

Senator Tunney, in floor debate, stated:

[U]nder existing law, a species must be declared ‘endangered’ even if in a certain portion of its range, the species has experienced a population boom, or is otherwise threatening to destroy the life support capacity of its habitat. Such a broad listing prevents local authorities from taking steps to insure healthy population levels.³⁵

Senator Tunney went on to explain that

[T]he Secretary may list an animal as ‘endangered’ through all or a portion of its range. An animal might be ‘endangered’ in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where

report referencing S. 1983.

³³ 119 CONG. REC. 30,164 (Sept. 18, 1973); *see also id.* at 30,157.

³⁴ 119 CONG. REC. 30,167 (Sept. 18, 1973).

³⁵ 119 CONG. REC. 25,669 (July 24, 1973).

it was threatened with extinction. In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills to insure the proper conservation of the species.

A well-known example may serve to illustrate how S. 1983 provides for maximum management and conservation discretion, while insuring absolute protection for species imminently in danger of extinction. . . . [I]t is likely that in certain portions of Louisiana, the American alligator may be relisted under this bill as a threatened species [in response to the State of Louisiana allowing the harvest of alligators in one parish to limit habitat destruction caused by overpopulation of alligators]. S. 1983 would permit continued State action to enhance the existence of this species. In other areas the alligator would remain listed as an endangered species and would be entitled to absolute Federal or State protection until a State plan was approved by the Secretary under the provisions of this act.³⁶

B. Congressional Activity After the Enactment of the Endangered Species Act of 1973

Congress has not amended the SPR language since the 1973 Act, therefore the subsequent amendments to the Endangered Species Act of 1973 provide little probative insight into what Congress intended in 1973. However, subsequent actions in Congress, especially in 1979, indicate that Congress was fully aware of the ability of the Secretary to list a species as a threatened species or endangered species in only a portion of its range, not merely a significant portion of its range.

1. Legislative History Pertaining to the 1978 Amendments

Congress did not amend the SPR language when it passed the 1978 amendments to the ESA. However, it did alter the definition of “species” to specifically include “any distinct population segment.” This language remains in the current Act.

During Senate debate of the bill that became the 1978 amendments to the ESA S. 2899, Senator Bartlett introduced a proposal to amend the SPR language in the endangered and threatened definitions by replacing the phrase “a significant portion” with the phrase “the essential portion.”³⁷ Senator Bartlett submitted this amendment in response to the delay of a dam project that purportedly would have reduced the range of a listed fish species by 12%.³⁸ The following colloquy between Senators Bartlett and Wallop discussed the amendment:

³⁶ *Id.*

³⁷ 124 CONG. REC. 21,582-3 (July 19, 1978).

³⁸ 124 CONG. REC. 21,583.

MR. BARTLETT: . . . I believe that this amendment will resolve the confusing application of the Endangered Species Act, and retain sufficient protection to insure that we do not decimate various species.

. . . I feel that this amendment provides the opportunity in the definition for consideration to be given to varying percentages which might be more pertinent and accurate to the situation than would be evident with the language that is now in the two definitions.

MR. WALLOP: The Senator has come across a flaw in the original Act which is minor but, through interpretation, as is sometimes the case, has become major. I ask the Senator if he would basically agree that his definition of “essential” would be that portion of its range that does not necessarily imply that the species must be endangered over the vast majority of its range, or even the most crucial part of its range; in other words, if “essential” means that portion of the range necessary for the continued survival and recovery of the species.

MR. BARTLETT: Yes, I agree with that definition of the word “essential” and I think it is important that that be understood.³⁹

Senator Bartlett’s amendment, was not included in the October 15, 1978 Conference Report that accompanied S. 2899.⁴⁰

Another amendment introduced on the same day by Senator Garn would have amended the SPR phrase by removing the term “significant.”⁴¹ Senator Garn explained: “I would also permit the designation of a species as endangered even in some portion of its range that is less than “significant.” . . . [T]o permit the protection of a major species, such as the alligator, which may be threatened in a restricted geographic locale, but is not over its entire range, or even over a significant part of its range.”⁴² The Senator withdrew the amendment before the Senate acted on the amendment.⁴³

In addition to including the DPS language, Congress also amended section 4(c)(1) to require

³⁹ *Id.*

⁴⁰ An additional amendment to the term “endangered species” was also proposed, but rejected in the Senate. Senator Scott introduced an amendment that would have added the phrase “and which the Secretary has determined is of a substantial benefit to mankind,” thereby instituting an additional limitation on whether a species qualifies as endangered. 124 CONG. REC. 21,358 (July 18, 1978).

⁴¹ 124 CONG. REC. 21,564 (July 19, 1978).

⁴² *Id.* at 21,572.

⁴³ *Id.*

inclusion of critical habitat designations in the lists of endangered and threatened species.

2. Legislative History Pertaining to ESA Reauthorization in 1979

After addition of the current DPS language in the 1978 amendments, the Senate, while deliberating reauthorization and appropriations for the Endangered Species Act in 1979, responded to a General Accounting Office (GAO) Report proposing amendments to the Act.⁴⁴

The Report found that the DPS language “permits the Fish and Wildlife Service to list geographically limited populations of vertebrate species as endangered or threatened even though they may not be endangered or threatened throughout all or a significant portion of their existing ranges or their overall statuses are not known.”⁴⁵ The Report concluded that redefining the “species” definition to limit listings to entire species would require FWS to review the status of species listed in parts of their ranges and to then determine which of these species are threatened or endangered throughout all or a significant part of their ranges.⁴⁶ These species would then be listed throughout their entire ranges.⁴⁷

The GAO Report proposed, among other things, amending the Act so “the term ‘species’ includes any subspecies of fish, wildlife or plants.” As an alternative to this approach, the GAO proposed to modify the term “species” by adding the following sentence: “Distinct population listings must constitute significant portions of the species’ range in terms of total numbers, biological importance, or the need to maintain the species within the United States.”⁴⁸ The GAO Report concluded that the redefined “species” definition from the 1978 amendments only partially corrected the problem by limiting populations to vertebrates.⁴⁹

The GAO Report concludes by proposing an alternative legislative amendment that was “acceptable to FWS officials” and consistent with then contemporary draft FWS guidelines by defining what constitutes a “significant portion” of the range of endangered and threatened species.⁵⁰ According to the Report, those draft FWS guidelines defined “significant portion” as:

⁴⁴ ENDANGERED SPECIES - A CONTROVERSIAL ISSUE NEEDING RESOLUTION, U.S. General Accounting Office, CED 79-65 (July 2, 1979) (GAO Report).

⁴⁵ *Id.*

⁴⁶ *Id.* at 55.

⁴⁷ *Id.*

⁴⁸ *Id.* at 106.

⁴⁹ *Id.* at 51.

⁵⁰ *Id.* at 59. The Report noted that the draft guidelines were “under review within the Office of Endangered Species” at the time. *Id.*

(1) More than half of a species' range, which may include historical as well as recent and anticipated future losses or (2) losses of habitat totaling less than 50 percent of relatively small range, or in other circumstances where the loss may have an inordinately large negative impact on the species' survival.⁵¹

The GAO Report also discussed the Department of the Interior's response to the GAO's similar draft recommendations. The Department was critical of the GAO's first legislative proposal to redefine the "species" definition for two reasons. First, because the draft recommendations concluded that the entire range of a species endangered or threatened in a significant portion of its range must be listed, needless allocation of resources for section 7 consultations and other ESA activities would be required for biologically non-endangered populations of certain species.⁵² Second, the proposed revision may prevent FWS from listing widespread species that are listed solely to protect populations in the coterminous United States.⁵³

In response to the alternative recommendation, Larry Meierotto, the Assistant Secretary of the Interior for Policy, Budget and Administration, stated that "allowing only the listing of 'significant' populations is, however, acceptable and, we would contend simply gives legislative sanction to the reasonable interpretation that we have made of the existing definition."⁵⁴

A Senate Committee did not adopt either of GAO's legislative recommendations as they related to the term "species," stating:

The Committee agrees that there may be instances in which FWS should provide for different levels of protection for populations of the same species. For instance, the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world. Similarly, listing of populations may be necessary when the preponderance of evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations.⁵⁵

⁵¹ *Id.*

⁵² *Id.* at 58.

⁵³ *Id.*

⁵⁴ Letter from Larry E. Meierotto, Assistant Secretary for Policy, Budget, and Administration, Department of the Interior, to Henry Eschwege, Director of the Community and Economic Development Division, General Accounting Office (June 15, 1979).

⁵⁵ S. REP. NO. 96-151, at 6-7 (May 15, 1979). The Senate Report did not address the GAO Report's alternate proposal reciting the draft FWS guidelines for determining "significant portion."

However, the Senate Report cautioned FWS to use the ability to list populations “sparingly.”⁵⁶

3. Legislative History Pertaining to the 1982 Amendments

The 1982 amendments do not directly address the SPR phrase or amend the “species,” “endangered species,” or “threatened species” definitions. However, a Senate Committee Report discussed the Secretary’s failure to recognize differing status of populations of a species in response to testimony regarding game species listed in foreign countries:

The Committee also received testimony stating that “the Secretary has listed some foreign species as endangered throughout their entire range without considering whether their population status varies from country to country.” There may be nations where a combination of a healthy population and effective management programs permit the sport hunting of such species without adversely affecting its status. The failure to recognize this may result in the foreign nations being denied much-needed revenues derived from license fees that are used to fund their wildlife conservation and management programs.

If the Secretary is in receipt of biological information from a foreign nation with respect to a resident game species listed as “endangered,” he should evaluate the status of such species within the country in question.⁵⁷

The 1982 amendments significantly narrowed the discretion available to the Secretaries in the listing process by removing the petition requirements from section 4(c), placing them in section 4(b), and adding several additional requirements and deadlines. The 1982 amendments also allowed direct judicial review of all non-discretionary actions under section 4 by amending the citizen-suit provisions of section 11.⁵⁸

In describing the Conference Report, Representative Breaux, who was a manager of the bill, stated: “This law is not designed to strengthen or weaken the Endangered Species Act, but simply to make it work better.”⁵⁹

⁵⁶ *Id.* at 7. The House and Senate also rejected proposals to further amend the definition of “species” in response to the GAO Report. In the House, Representative Young proposed to amend the “species” definition to exclude invertebrates altogether. 125 CONG. REC. 29,066 (Oct. 25, 1979). In the Senate, Senator Bellmon proposed to amend the “species” definition so that a species could only be listed upon a determination by the Secretary that the species has an aesthetic or economic value. 125 CONG. REC. 14,577 (June 13, 1979).

⁵⁷ S. REP. NO 97-418, at 16 (May 24, 1982).

⁵⁸ Endangered Species Act of 1973, Pub. L. No. 95-632, *amended by* Pub. L. No. 97-304, 96 Stat. 1411 (Oct. 13, 1982).

⁵⁹ 128 Cong. Reg. 26,188 (Sept. 30, 1982).



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AES/DCC/BFS/046129

SEP 23 2010

Anna M. Seidman
Director of Litigation
Safari Club International
501 2nd Street, N.E.
Washington, D.C. 20002

Dear Ms. Seidman:

This letter responds to your petition dated June 29, 2010, submitted on behalf of Safari Club International and Safari Club International Foundation. Your petition requested that the U.S. Fish and Wildlife Service (Service, we) delist the U.S. captive-bred populations of the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*) from the endangered species list pursuant to the Endangered Species Act of 1973, as amended (Act). Your petition was received on June 29, 2010.

Under the provisions of section 4 of the Act, we must first make an initial finding as to whether or not a petition to delist a species presents substantial information indicating that the requested action may be warranted. Section 4(b)(3)(A) of the Act provides that, to the maximum extent practicable, this finding be made within 90 days. If this initial finding concludes that the petition presents substantial information indicating that the requested action may be warranted, then section 4(b)(3)(B) gives the Service one year from the date the petition was received to either: decide that the petitioned action is not warranted; decide that the petition action is warranted, but precluded; or decide that the petitioned action is warranted, and promptly publish a proposed rule.

While we have not made a decision on the whether the petition presents substantial information that the petition action may be warranted, we have looked at the immediacy of possible threats to the species to determine if emergency listing may be necessary at this time. Our initial review of your petition does not indicate that an emergency situation exists.

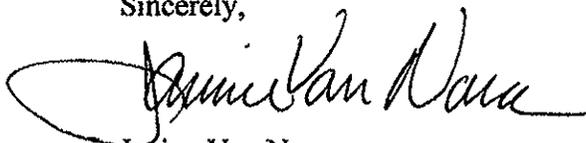
We are currently required to complete a significant number of listing actions in Fiscal Year 2010, including: complying with court orders and court-approved settlement agreements requiring that



petition findings or listing determinations be completed by a specific date, section 4 (of the Act) listing actions with absolute statutory deadlines, and high-priority listing actions. Therefore, we are not able to address your petition at this time. We anticipate making a finding in Fiscal Year 2011 as to whether your petition contains substantial information indicating that the action may be warranted.

If you have any questions concerning this matter, please contact Amy Brisendine, Biologist, in our Branch of Foreign Species, at 703-358-2171 or Amy_Brisendine@fws.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Janine Van Norman". The signature is fluid and cursive, with a large loop at the beginning.

Janine Van Norman
Chief, Branch of Foreign Species
Endangered Species Program



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AES/DCC/BFS/046129

SEP 15 2010

Anna M. Seidman
Director of Litigation
Safari Club International
501 2nd Street, N.E.
Washington, D.C. 20002

Dear Ms. Seidman:

This letter responds to your petition dated June 29, 2010, submitted on behalf of Exotic Wildlife Association, Ingram, Texas. Your petition requested that the U.S. Fish and Wildlife Service (Service, we) delist the U.S. captive-bred populations of the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*) from the endangered species list pursuant to the Endangered Species Act of 1973, as amended (Act). Your petition was received on June 29, 2010.

Under the provisions of section 4 of the Act, we must first make an initial finding as to whether or not a petition to delist a species presents substantial information indicating that the requested action may be warranted. Section 4(b)(3)(A) of the Act provides that, to the maximum extent practicable, this finding be made within 90 days. If this initial finding concludes that the petition presents substantial information indicating that the requested action may be warranted, then section 4(b)(3)(B) gives the Service one year from the date the petition was received to either: decide that the petitioned action is not warranted; decide that the petition action is warranted, but precluded; or decide that the petitioned action is warranted, and promptly publish a proposed rule.

While we have not made a decision on the whether the petition presents substantial information that the petition action may be warranted, we have looked at the immediacy of possible threats to the species to determine if emergency listing may be necessary at this time. Our initial review of your petition does not indicate that an emergency situation exists.

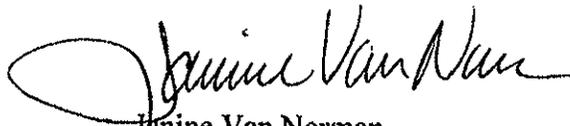
We are currently required to complete a significant number of listing actions in Fiscal Year 2010, including: complying with court orders and court-approved settlement agreements requiring that



petition findings or listing determinations be completed by a specific date, section 4 (of the Act) listing actions with absolute statutory deadlines, and high-priority listing actions. Therefore, we are not able to address your petition at this time. We anticipate making a finding in Fiscal Year 2011 as to whether your petition contains substantial information indicating that the action may be warranted.

If you have any questions concerning this matter, please contact Amy Brisendine, Biologist, in our Branch of Foreign Species, at 703-358-2171 or Amy_Brisendine@fws.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Janine Van Norman". The signature is written in a cursive style with a large, looping initial "J".

Janine Van Norman
Chief, Branch of Foreign Species
Endangered Species Program

Seidman, Anna

From: Seidman, Anna
Sent: Wednesday, September 22, 2010 11:24 AM
To: 'Amy_Brisendine@fws.gov'
Subject: RE: Letter Concerning Delisting Petition for Scimitar Horned Oryx, Dama Gazelle and Addax

Excellent.

Thank you for responding so quickly.

Anna Seidman
Director of Litigation
Safari Club International
202-543-8733
aseidman@safariclub.org

From: Amy_Brisendine@fws.gov [mailto:Amy_Brisendine@fws.gov]
Sent: Wednesday, September 22, 2010 11:23 AM
To: Seidman, Anna
Subject: Re: Letter Concerning Delisting Petition for Scimitar Horned Oryx, Dama Gazelle and Addax

Hi Ms. Seidman,

I apologize for that mistake. Yes, we will get a corrected acknowledgement letter to you.

Best regards,

Amy Brisendine
U.S. Fish and Wildlife Service
Endangered Species Program
Branch of Foreign Species
4401 N. Fairfax Drive, Rm. 431b
Arlington, VA 22203
703-358-2005
703-358-1735 fax

-----"Seidman, Anna" <aseidman@safariclub.org> wrote: -----

To: "Amy_Brisendine@fws.gov" <Amy_Brisendine@fws.gov>
From: "Seidman, Anna" <aseidman@safariclub.org>
Date: 09/22/2010 11:17AM
Subject: Letter Concerning Delisting Petition for Scimitar Horned Oryx, Dama Gazelle and Addax

Dear Ms. Brisendine:

I recently received a letter, dated September 15, 2010, from Janine Van Norman, noting the FWS's receipt of a¹²⁵³ petition filed on behalf of the Exotic Wildlife Association for the delisting of the Scimitar-Horned Oryx, Dama Gazelle and Addax. Although the Exotic Wildlife Association did file their own petition for this purpose, I did not submit that petition to the FWS.

I did submit a delisting petition on behalf of my clients, Safari Club International and Safari Club International Foundation. I assume that the letter that I received from Ms. Van Norman simply confused the two petitions. Could you please arrange to have a new letter sent to me that correctly references the delisting petition submitted by Safari Club International and Safari Club International Foundation?

Please do not hesitate to contact me if you have any questions about this e-mail.

Thank you.

aseidman@safariclub.org

**DEPARTMENT OF THE INTERIOR****TASKING PROFILE**

ACCN #: ESO-00030072 **Status:** Closed **Fiscal Year:** 2011
Document Date: **Received Date:** **Due Date:** **Action Office:** **Signature Level:** **Doc Source:**
06/29/2011 07/01/2011 FWS AA IND

To (Recipient): Salazar, Ken L.

From (Author): Anderson, Kevin

President
Safari Club International

Subject Text: Notice of intent to sue for ESA violations regarding US Captive Populations of Scimitar-Horned Oryx, Dama Gazelle and Addax.

Req. Surnames:

Mail Carrier:

Mail Track #:

Cross Ref:

Copies To: SIO-OES

Status Tracking:

Correspondence Specialist and Phone: SIO-OES Tim Feeney/202-208-6701

Closed

Comments:

Signed:

502975

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2011 JUL -1 AM 11:42
OFFICE OF THE
EXECUTIVE SECRETARIAT



(Copy of document hand delivered on June 29, 2011)

June 29, 2011
Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C. Street N.W.
Washington, D.C. 20240

Rowan Gould
Acting Director,
U.S. Fish and Wildlife Service
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Re: 60-day Notice of Intent to Sue Over Violations of the Endangered Species Act and the Administrative Procedures Act in the Decision to Include of U.S. Captive Populations of Scimitar-Horned Oryx, Dama Gazelle and Addax in the Listing of these Species as Endangered on September 2, 2005 and/or the Failure to Correct the Endangered Species Act Listing of Scimitar-Horned Oryx, Dama Gazelle and Addax To Specify That Only the Populations in the Portion of Their Range Outside of The United States Are Classified As Endangered

This letter serves as a 60-day notice by Safari Club International ("SCI") of its intent to sue Secretary of the Interior Ken Salazar, the U.S. Department of the Interior, Acting Director of the U.S. Fish and Wildlife Service Rowan Gould, and the U.S. Fish and Wildlife Service ("FWS" or "Service"). Unless corrected, SCI will challenge the following violations of the Endangered Species Act ("ESA") and the Administrative Procedures Act ("APA"): (1) the decision to include U.S. captive populations of the scimitar-horned oryx, dama gazelle and addax in the endangered species listing of the three antelope species on September 2, 2005; and (2) the failure to correct that endangered species listing by removing the U.S. captive herds of the three species after the ruling by Judge Kennedy of the U.S. District Court for the District of Columbia, which found federal regulations applicable to those captive populations to be illegal. At this time, the U.S. captive herds do not qualify for endangered species status. In fact, the inclusion of the captive herds in the endangered species listing has a detrimental impact on the conservation status of these three species. The continued listing of these U.S. captive populations and failure of the FWS to remove the U.S. captive herds from the endangered species list discourages

Safari Club International

60 Day Notice of Intent to Sue Over Illegal Classification of U.S. Captive Herds of Scimitar-Horned Oryx, Dama Gazelle and Addax as Endangered

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private efforts to conserve these three species and will result in population reductions and a potential loss to the species as a whole. The FWS has violated its statutory and regulatory obligations under the ESA and APA and has acted arbitrarily and capriciously in failing to promote, protect and encourage private conservation efforts currently being directed at captive herds within the United States. This 60 day notice is being sent in accordance with 16 U.S.C. § 1540(g).

Safari Club International

Safari Club International (“SCI”), a nonprofit IRC § 501(c)(4) corporation, has approximately 53,000 members worldwide, many of whom own, conserve and/or hunt individual antelope from those captive populations of scimitar-horned oryx, dama gazelle and addax in the United States. SCI’s missions, in the United States, and throughout the world, include the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. SCI carries out its mission with the help of its sister organization, Safari Club International Foundation (“SCIF”). SCIF is a nonprofit IRC § 501(c)(3) corporation. Its missions include the conservation of wildlife, education of the public concerning sustainable use hunting and its use as a conservation tool, and humanitarian services. More specifically, the conservation mission of SCIF is: (a) to support the conservation of the various species and populations of game animals and other wildlife and the habitats on which they depend; and (b) to demonstrate the importance of hunting as a conservation and management tool in the development, funding and operation of wildlife conservation programs.

SCI members hunt, own, raise, breed and/or trade members of the three antelope species on ranches in the United States. The illegal listing of the captive populations and the Service’s failure to remedy that illegality jeopardize SCI members’ ability to continue to use and conserve these species.

SCI participated in numerous comment opportunities provided by the U.S. Fish and Wildlife Service (“FWS” or “Service”) in its consideration of the listing status of the three species generally as well as the status of the U.S. captive populations of those species. SCI also commented on the proposed regulation intended to exempt the U.S. captive populations from ESA take prohibitions and to allow continued hunting of members of the U.S. captive herds and other activities that enhance the propagation and survival of the species. In some of those comments, SCI advocated that the FWS was not required to list those captive populations as endangered and that the Service had the authority to treat those captive populations differently than populations of members of the species living in their native ranges. For example, in comments submitted on October 22, 2003, SCI advocated that the FWS designate the captive populations of the three species in the United States as “distinct population segments” (“DPSs”) and that these DPSs “be given separate consideration” for the purpose of listing. SCI also

Safari Club International - Washington DC Office

501 2nd Street, NE, Washington, DC 20002 • Phone 202 543 8733 • Fax 202 543 1205 • www.safariclub.org

Safari Club International

60 Day Notice of Intent to Sue Over Illegal Classification of U.S. Captive Herds of Scimitar-Horned Oryx, Dama Gazelle and Addax as Endangered

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participated in litigation in federal district courts in California and the District of Columbia to defend the Section 4 regulation following its adoption on September 2, 2005. 70 Fed. Reg. 52310. On June 22, 2009, a Judge in the U.S. District Court for the District of Columbia ruled that the regulation violated the ESA because it allowed the take of species listed as endangered without the requirement for individual enhancement of survival permit applications and the commensurate public notice and comment opportunities. *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 115 (D.D.C. 2009). The court remanded the matter to the Service for further proceedings consistent with his ruling, leaving it to the Service to promulgate new regulations that would not violate the ESA. *Id.*

SCI submitted a Petition to Remove U.S. Captive Herds of Scimitar-Horned Oryx, Dama Gazelle and Addax from the Endangered Species List Based Upon Error on June 28, 2010. In that petition, SCI reminded the FWS how regulations imposing permit requirements for the trade and take of U.S. captive populations of the three species would discourage private ranchers from continuing to raise, breed and trade these animals and would result in fewer herds and significant population reductions. The FWS has not acted on that petition.

Appearance and Status of the Scimitar-Horned Oryx, Dama Gazelle and Addax

The three antelope species at issue are not native to the United States and were introduced into this country from populations in their home ranges in various parts of Africa. The status of the species in the wild was well documented by the Service in the September 2, 2005, rules listing the species as endangered, and permitting the continuation of activities, including hunting of the species, for the purpose of enhancing the survival of the three species. 70 Fed. Reg. 52310 (September 2, 2005); 70 Fed. Reg. 52319 (September 2, 2005). The scimitar-horned oryx (oryx dammah) was historically found in the wild in Algeria, Burkina Faso, Chad, Egypt, Libyan Arab Jamahiriya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sudan, Tunisia, and Western Sahara. It stands about 47 inches [119 centimeters (cm)] tall and weighs around 450 pounds [204 kilograms (kg)]. It is generally pale in color, but the neck and chest are dark reddish brown. Adult animals possess a pair of horns curving back in an arc up to 50 in (127 cm) long. 70 Fed. Reg. 52319 (September 2, 2005). Scimitar-horned oryx have all but disappeared from the wild. There were an estimated 500 Scimitar-horned oryx in Chad and Niger until about 1985, but by 1988 only a few dozen individuals survived in the wild. Since then there have been no confirmed sightings in the wild. International Union for Conservation of Nature and Natural Resources (“IUCN”), <http://www.iucnredlist.org/apps/redlist/details/15568/0> (June 28, 2011). Captive populations in fenced protected areas can be found in a number of range countries, including Tunisia, Morocco, and Senegal. 70 Fed. Reg. 52319 (September 2, 2005). In 2005, at least 1,550 captive animals were held in managed breeding programs around the world (Gilbert 2005), not including those found on private ranches in the United States. *Id.* at

Safari Club International

60 Day Notice of Intent to Sue Over Illegal Classification of U.S. Captive Herds of Scimitar-Horned Oryx, Dama Gazelle and Addax as Endangered

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52321. In addition, it is believed that more than 4,000 are kept in a private collection in the United Arab Emirates. *Id.* Captive herds of scimitar-horned oryx are also found in South Africa.

The addax (*addax nasomaculatus*) is generally about 42 inches (106 cm) tall at the shoulder and weighs around 220 pounds (100 kg). 70 Fed. Reg. 52319 (September 2, 2005). It has a grayish white coat and its horns twist in a spiral up to 43 inches (109 cm) long. *Id.* It was originally found in the wild in Chad, Mauritania, Niger, Algeria, Egypt, Libyan Arab Jamahiriya, Sudan, and Western Sahara. *Id.* Unlike scimitar-horned oryx, some addax can still be found in the wild. *Id.* The IUCN approximates that there are 300 still living in Niger, Chad and Mauritania. *Id.* at 52320.

Today, the only known remaining population survives in the Termit/Tin Toumma region of Niger. However, there are sporadic records of small isolated groups and individuals from eastern Air Mountains/Western Ténéré desert in Niger, and from the Equey region of western Chad (Newby in press). Possible rare vagrants from these areas may be seen in north Niger, southern Algeria and Libya (Newby in press). There are continued rumours of Addax along the Mali/Mauritania border (Majabat Al Koubra), but no confirmed sightings for several years. However, in early March, 2007, the fresh tracks of about 15 Addax were seen in central Mauritania, in an area where they had not been reported for over 20 years (R. Vernet in Newby in press).

<http://www.iucnredlist.org/apps/redlist/details/512/0>. In addition to those in fenced populations in their former home ranges in Tunisia and Morocco, some addax have been reintroduced into the wild in these countries. *Id.*

The dama gazelle (*gazella dama*) stands about 39 inches (99 cm) tall at the shoulder and weighs around 160 pounds (72 kg). 70 Fed. Reg. 52319 (September 2, 2005). Its upper body is mostly reddish brown, and the head, rump, and underparts are white. *Id.* Its horns curve back and up, but are generally less than half the length of those of the scimitar-horned oryx. *Id.* Their historic home range included Chad, Mali, Niger, Libyan Arab Jamahiriya, Mauritania, Morocco, Nigeria, Algeria, Tunisia, Senegal, Sudan and Western Sahara. *Id.* They are believed to have disappeared from North Africa but some still remain in Mali, Chad and Niger. *Id.* Some dama gazelle are living in enclosed facilities in their home ranges in Morocco, Tunisia and Senegal. <http://www.iucnredlist.org/apps/redlist/details/8968/0>.

Currently, aside from the remaining wild populations of addax and dama gazelle, captive herds of the three species are found both inside and outside the United States. 70 Fed. Reg. 52319, 52320 (September 2, 2005). In the United States, captive populations are growing and thriving. *Id.* In 2004, Dr. Elizabeth Cary Mungall conducted research for the Exotic Wildlife Association (“EWA”) to assess population numbers and habitat conditions for captive

Safari Club International

60 Day Notice of Intent to Sue Over Illegal Classification of U.S. Captive Herds of Scimitar-Horned Oryx, Dama Gazelle and Addax as Endangered

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populations of the three antelope species. Dr. Mungall reviewed a series of statewide censuses and collected data via a survey of EWA members who owned herds of one or more of the three species. Her research not only revealed significant numbers of each species on ranches in Texas and/or ranches owned by EWA members, but also demonstrated remarkable population increases over a relatively short period of time:

As shown by a series of statewide censuses (1966, 1971, 1974, 1979, 1984, 1988, 1994) in Texas done by the Texas Parks and Wildlife Department, the state wildlife agency, numbers of the three subject species kept in private ownership have been increasing (Ramsey 1967, Cook 1972, Harmel 1975, Harmel 1980, Traweek 1985, Traweek 1989, Traweek, 1995). This census series is further discussed in Mungall and Sheffield (1994). To confirm the situation, a further census was done in 1996 at the request of the Exotic Wildlife Association (EWA) by the Texas Agricultural Statistics Service (anonymous 1996). Dama gazelle numbers were checked again in an October 2003 phone census done by the author for EWA as described in the next section (Mungall 2004).

In summary, starting with the first census in which the species appeared:

Scimitar-horned oryx: 32 in 1979 to 1,006 in 1994 to 2,145 in 1996.

Addax: 2 in 1971 to 587 in 1994 to 1,824 in 1996.

Dama gazelle: 9 in 1979 to 149 in 1994 to 91 in 1996 to 369 in 2003.

Submission for the Comment Period on Proposed Listing of Scimitar-Horned Oryx, Addax, and Dama Gazelle Under the Endangered Species Act, A technical report prepared for the Exotic Wildlife Association, by Elizabeth Cary Mungall, January 6, 2004.

Regulations and Litigation Pertaining to the Three Antelope Species

The FWS listed the scimitar-horned oryx, dama gazelle and the addax throughout the world as endangered on September 2, 2005, after almost 14 years of deliberation over how to deal with the disparate status of the members of the species in the wild as compared to the captive herds in the United States. The Service first proposed an endangered species listing on November 5, 1991. 56 Fed. Reg. 56491. After an initial public comment opportunity, the Service re-opened the comment period on June 8, 1992, again on July 24, 2003, 68 Fed. Reg. 43706, and then for a third time on November 26, 2003. 68 Fed. Reg. 66395.

The Service's protracted deliberation over the listing status of the three species was due in great part to the dilemma of how to protect the species in the wild without severely undermining the pattern of trade and use of the species within the United States that had so benefitted the population numbers and health of the captive herds. An endangered classification creates severe restrictions on the use and trade of such animals. The individual ranchers who own and maintain these herds do so on a strictly voluntary basis. Management and conservation

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60 Day Notice of Intent to Sue Over Illegal Classification of U.S. Captive Herds of Scimitar-Horned Oryx, Dama Gazelle and Addax as Endangered

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of wildlife cannot occur without financial resources. To generate the funds necessary to feed, raise, breed and care for these exotic animals, many ranchers allow limited hunting of their herds. In addition, owners of these captive herds trade and sell members of their herds in order to bring in new blood lines and maintain genetic diversity and health. As long as the three species were free of federal listing classification, their value remained high, which facilitated an important incentive for the continued volunteer efforts of the U.S. ranchers. The endangered species classification severely interferes with the economy and system by which the ranchers have been willing to participate in efforts that significantly increased the U.S. numbers of these animals. The additional burdens, costs and uncertainties introduced by endangered species classification significantly undermine the value of the animals, and encourage many ranchers to abandon their conservation efforts.

Ultimately, on September 2, 2005, the Service decided to list the three species, in their entirety, as endangered. The Service did not adopt SCI's recommendation to exclude U.S. captive populations from this listing, instead interpreting the ESA to prohibit disparate listing designations between wild and captive/exotic populations of a species. The Service explained that "[i]t would not be appropriate to list captive and wild animals separately." 70 Fed. Reg. 52319, 52320 (September 2, 2005).

The Service decided to include U.S. captive populations in the endangered species listing despite the fact that the Service lacked evidence that these captive populations were being used to seed reintroductions of these species into the wild. At best, the Service could only document reintroductions from captive herds into other captive herds, some but not all in their home range, but not into the wild. For example, the FWS noted that reintroductions of dama gazelle had contributed to semi-captive populations of the species in its home range:

Although the dama gazelle is the least susceptible of the three antelopes to pressures from humans and domestic livestock, it has declined rapidly in the last 20 years, and only small numbers survive in most of the eight countries within its historical range. Noble (2002) estimated that the wild population of *G. dama ruficollis* is fewer than 200 specimens, *G. dama dama* is about 500 specimens, and *G. dama mhorri* may be extinct in the wild. It was previously extirpated from Senegal, but has since been reintroduced, and in 1997, at least 25 animals existed there as part of a semi-captive breeding program (IUCN 2003). The dama gazelle, including all subspecies, is listed as endangered by IUCN (2003). The Mhorri gazelle may only be found in captive collections or reintroduced populations in large fenced enclosures within range countries (Antelope Taxon Advisory Group 2002, IUCN 2003). In 1983, the Mhorri gazelle was listed in CITES Appendix I.

Id. at 52320. The FWS further documented the lack of reintroductions into the wild:

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Fenced reintroductions of scimitar-horned oryx are ongoing in Morocco, Tunisia, and Senegal (Monfort in litt. 2003, Monfort 2003). Five dama gazelle have been introduced to a large enclosure in Senegal (Ba and Clark 2003). These specimens are fenced in large tracts of suitable or recovering habitat and held for breeding and eventual reintroduction. The founder stock was largely derived from captive-breeding facilities. *However, threats to survival of the antelopes still occur outside of the fenced areas so reintroduction into the wild has rarely occurred.*

Id. at 52322 (emphasis added). Although noting the role that captive breeding could have for future reintroductions, the Service admitted that reintroductions into the wild were presently infeasible:

Captive-breeding programs operated by zoos and private ranches have effectively increased the numbers of these animals while genetically managing their herds. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Currently, however, continued habitat loss and wonton (sic) killing have made reintroduction nonviable in most cases.

Id. at 52322. The listing rule documented only the *potential* for U.S. captive bred herds to support reintroductions into the wild. At the time of listing, only introductions from captivity into captivity were possible, leaving to conjecture the value that U.S. captive herds will have for conservation of the species in the wild.

The Service attempted to preserve the ongoing conservation efforts being conducted by private U.S. ranchers by carving out a special exception to the take prohibitions normally applicable to species listed as endangered. On September 2, 2005, the Service issued a rule that exempted United States captive-bred members of the three antelope species from the take and other prohibitions of section 9 of the ESA. 70 Fed.Reg. 52310 (Sept. 2, 2005). That regulation was challenged and on June 22, 2009, Judge Kennedy of the U.S. District Court for the District of Columbia ruled that regulation to be in violation of the ESA's permit notice and comment requirements. *Friends of Animals v. Salazar*, 626 F. Supp.2d 102 (D.D.C. 2009). Judge Kennedy remanded the rule, directing the Service to issue new regulations that conformed to ESA requirements. *Id.* at 118.

The U.S. Fish and Wildlife Service Violated 16 U.S.C. § 1533 and 5 U.S.C. § 706 When It Included the U.S. Captive Populations in the Endangered Species Act Listing for the Three Antelope Species

At the time that it listed the three species as endangered, the Service interpreted each of the three species as a single indivisible unit, and concluded that it was unable to differentiate when specifying the listing status of the three species between the captive herds living in the

Safari Club International

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United States and those living outside the United States in their home range. The FWS erroneously characterized the portions of the species that it evaluated and erroneously interpreted its authority to designate species and/or portions of species.

Error One: The Service Failed to Utilize Its Authority to Distinguish and Specify the Portion of The Three Species Range in the United States.

The Service refused to specify a different classification for U.S. captive populations, claiming that “[i]t would not be appropriate to list captive and wild animals separately.” 70 Fed. Reg. 52319, 52320 (September 2, 2005). In basing its listing decision on that premise, the Service erroneously failed to take into account the captive populations of the three species that live within and outside of their home ranges in countries other than the U.S., in zoos, private facilities and captive herds.¹ Had the FWS done so, it could have divided the populations by international geographical boundaries, rather than separating the species into strictly captive vs. wild designations. The FWS could have specified that the portion of the range for all populations, both captive and wild, living outside the United States, required listing, and that no such listing status was necessary for any members of the species living within the U.S.

¹ For example, the FWS is aware of captive herds of scimitar-horned oryx living in South Africa. 74 Fed. Reg. 58977 (November 16, 2009). In addition, the IUCN reports that there are several captive herds of dama gazelle around the world:

Dama Gazelle are present in captivity, but the number of founders is limited (Sausman 1998; Thuesen 1998). Animals from Almeria breeding facility in Spain were introduced to an enclosure (R'mila Royal Reserve) in Morocco (130 present in 2007; Cuzin *et al.* in press) and gazelles from München Zoo (originally bred at Almeria) were released into an enclosure in Souss-Massa N.P. (12 animals in 2006); these semi-captives are intended to form part of a reintroduction programme in Morocco. All of the animals from Almeria stock originate from Western Sahara. Elsewhere, Dama Gazelle were released into the 2,000-ha Bou-Hedma N.P. in Tunisia in the early 1990s (Abaigar *et al.* 1997) where around 17 were present in 2006 (T. Wachter pers. comm.); gazelles have also been reintroduced to Guembeul Faunal Reserve in Senegal (Cano *et al.* 1993) and a reintroduction programme in Ferlo North Reserve is underway (7 animals).

<http://www.iucnredlist.org/apps/redlist/details/8968/0>. The IUCN also reports captive herds of addax located around the world.

There are over 600 Addax in Europe, Libya (Sabratha), Egypt (Giza Zoo), North America, Japan and Australia in managed breeding programmes”

<http://www.iucnredlist.org/apps/redlist/details/512/0>

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In addition, the FWS arbitrarily and capriciously rejected SCI's recommendation that the Service designate the U.S. captive populations of the three species as distinct population segments. Nothing in the Service's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (February 7, 1996) prohibits the Service from designating the U.S. captive herds of the three species as three DPSs, distinct and separate from those outside of the United States, being raised in captivity or in the wild.

Error Two: The FWS Should Not Have Included the U.S. Captive Populations of the Three Species in the Endangered Listing Classification

The FWS's duty to conserve species applies to species in the wild, not those in captivity. That duty is reflected in the language of the statute itself. Section 1539, describing the exceptions to prohibitions applicable to listed species, indicates that the Secretary of the Interior may issue permits for takings that "will not appreciably reduce the *likelihood* of the survival and recovery of the species *in the wild*..." 16 U.S.C. § 1539(a)(2)(B)(iv) (emphasis added). Under the Service's own reasoning, non-native, captive populations should not be included in the listing of a species, unless the FWS can demonstrate the likelihood that the captive populations will influence species conservation in the wild. At this time, the FWS cannot make that showing.

The FWS has a history of not including non-native populations of a species when listing the native populations as endangered or threatened. In 1998, the Service issued a Final Rule listing the Arkansas River Basin Population of the Arkansas River Shiner as threatened. 63 Fed. Reg. 64772 (November 23, 1998). Despite listing all Arkansas River basin populations of the fish living in the Canadian River in New Mexico, Oklahoma and Texas and the Cimarron River in Kansas and Oklahoma, the Service chose not to list a non-native, introduced population that occurred in the Pecos River in New Mexico. *Id.* The Service noted that the Arkansas River basin population was discrete from the non-native Pecos River population, based on natural, geographic isolation. *Id.* at 64774. The Service found the Arkansas River basin population to qualify as a distinct population segment (DPS), but did not make a similar finding for the Pecos River population. Instead, the Service found that the non-native, introduced Pecos River population was not a listable entity:

Although it is discrete, the Pecos River basin population of the ARS [Arkansas River Shiner] is not significant because it is an introduced population located outside of the species' historic range and, at this time, is not essential for recovery of the species within its historic range. Therefore, the Arkansas River basin population of the ARS is a listable entity under the Act, and the non-native, introduced Pecos River population is not a listable entity under the Act.

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Id. The Service took into consideration the Pecos River population's potential for providing additional genetic material to the listed Arkansas River basin population. Nevertheless, the Service found it unnecessary to list the Pecos River population because it could not improve the status of the Arkansas River basin DPS in its historic range. *Id.* The Service also determined that conservation of the non-native population was not required by the ESA:

The purpose of the Act is to conserve threatened and endangered species and the ecosystems on which they depend. Non-native, introduced populations, while possibly useful in recovery/restoration efforts, are not a viable substitute for species conservation in native ecosystems. We do not believe listing or active conservation of the introduced Pecos River population is appropriate nor is such conservation required by the Act.

Id. at 64777. The disparate non-listed status for the non-native Pecos River population of the Arkansas River Shiner persists today. Consequently, the decision to list the non-native herds of the three antelope species directly contradicts the Service's policy and practice with respect to non-native populations.

The policy to exclude non-native populations from ESA listing is not unique to the Arkansas River Shiner. The FWS's sister agency, the National Marine Fisheries Service, has recently issued a 90-day "may be warranted" finding, accepting a petition to *delist* coho salmon (*Oncorhynchus kisutch*) in coastal counties south of the ocean entrance to San Francisco Bay, California, from the Federal List of Endangered and Threatened Wildlife. The basis is that the salmon at issue may not be native to the distinct population segment in which they have been included, and therefore "do not constitute an important component in the evolutionary legacy of the species." 75 Fed. Reg. 16745, 16746 (April 2, 2010).²

² The scenario involving the non-native captive populations of the three antelope species is markedly different than the scenario considered by the Oregon District Court in *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). In that case, the court rejected the NMFS attempt to exclude hatchery born coho salmon from a DPS and listing that included naturally born coho. The hatchery salmon were swimming side-by-side in the same bodies of water with the natural born coho, the NMFS considered the progeny of hatchery born salmon to be "naturally spawned" and the area in which the hatchery and natural born salmon co-existed was the native, historic range of the latter. In the three antelope situation, the U.S. is not the historic range of any of the three species, and the captive members of the three herds do not interact with non-captive, native members of the species. The captive members are isolated both geographically and reproductively, and their location is thousands of miles from the home range of the species.

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Recently, the FWS approached a petition to list the plains bison in a similar manner, rejecting the notion that members of captive herds of plains bison be included in a potential listing:

There does not appear to be any conservation value for plains bison in commercial herds, as members of these herds are not used in restoration programs. Instead, their primary purpose is the production of meat and other commodities for commercial purposes. Our interpretation is that the Act intended to conserve species in their native ecosystems. We are not considering plains bison managed for production of meat and other commodities in this finding because we do not believe that individuals propagated and managed for commercial uses aid in the conservation or the recovery of the subspecies in the wild. For the purposes of this finding, we are analyzing status and potential threats to a petitioned entity that includes plains bison managed primarily for purposes of wildlife and ecosystem conservation, hereby referred to as wild plains bison, even though no bison herd has remained in a completely wild state since prehistoric times (see our discussion on Significance, below). Consequently, we do not address commercial bison herds further in this finding.

76 Fed. Reg. 10299, 10301 (February 24, 2011). Although unlike the commercial populations of plains bison, members of U.S. captive herds of the three antelope species have been used for reintroductions, those reintroductions have been into other captive herds. Until their value for reintroductions into the wild can be established, their listing, based on the speculation that they can help conserve the species in the wild, violates the ESA.

Error Three: The Service Should Not Have Classified the U.S. Portions of the Species' Ranges as Endangered

The ESA obligates the Service to specify the portion of a listed species' range that is to be designated as "endangered" or "threatened." 16 U.S.C. § 1533(c)(1). Pursuant to this statutory directive, the FWS should have designated the scimitar-horned oryx, dama gazelle and addax as "listed" species based on their status outside the U.S. and should have specified only those portions of the species where they are to be protected as "endangered" or "threatened" species. In other words, Section 1533(c)(1) provides the mechanism that the FWS must use when it needs to specify a different listing status for different portions of a species. Consequently, pursuant to 1533(c)(1), the antelope living in the significant portion of their range outside of the U.S., could be classified as "endangered" while those living in captivity in the U.S. would not receive federal listing status or protection. The Service's error was in failing to specify scimitar-horned oryx, dama gazelle and addax as requiring federal ESA protections *only* within the portion of their ranges outside of the United States and in failing to leave the captive populations in the United States without such classification or unnecessary federal protection.

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The FWS further erred in not analyzing the status of the three species in their current ranges within the United States, and in not finding that the current ranges of the three species in the U.S. qualify as significant portions of the three species' ranges. A species is endangered only if it is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532 (6). That is not the case for the three antelope species. Although they may qualify for endangered status in the wild, they are not in danger of extinction throughout their range in the United States. The Service's failure to conduct an analysis of whether the U.S. current range constitutes a significant portion of the three species' ranges led to further error. The FWS erroneously failed to make the determination that the U.S. portions of the three antelopes' ranges (or the species in their entireties) did not qualify for endangered species status due to the fact that the species were not in danger of extinction throughout all or the significant portion of their ranges in the United States.

Inclusion of the U.S. Captive Populations Violates the Conservation Purposes of the ESA

Instead of promoting the conservation of species in jeopardy of extinction, the listing of the U.S. captive herds of the three antelope species discourages private enhancement efforts and harms the species' futures. By listing the U.S. captive populations as endangered, the Service has created a situation where private ranch owners must request and the Service must issue permits for the trade, use and take of members of these herds. These permit obligations discourage private ranchers from raising and breeding herds of these animals, and will likely prompt many to abandon their enhancement efforts. As a consequence, the U.S. captive numbers of these animals will diminish and the conservation efforts that have resulted in thousands of these animals in captivity in the U.S. will be lost. Any conservation value attributable to the U.S. captive populations has been jeopardized by the inclusion of these U.S. captive populations in the endangered species listing.

Conclusion

In 2005, the FWS erroneously determined, when establishing the listing status of scimitar-horned oryx, dama gazelle and addax, that the U.S. captive herds of the antelope should be included with portions of the species' range living outside of the United States. Although portions of the three species living in ranges outside of the U.S. may indeed qualify for endangered status, the U.S. captive herds should never have been included in that designation. The FWS erred in assuming that excluding the U.S. populations would have resulted in different listing statuses based exclusively on a captive/wild distinction. The Service arbitrarily and capriciously failed to acknowledge that the captive populations in the United States are not the only ones throughout the world and that captive populations outside of the U.S. would also have been encompassed in the endangered listing. The Service also erred in ignoring its own practice

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and policy of distinguishing the listing status of captive populations of species and/or excluding non-native populations from listing of native members of the species. The FWS relied upon conjecture in reasoning that the captive populations in the United States have a direct link to conservation of the species in the wild, since no direct reintroductions into the wild are currently possible. The Service erred in failing to take into account its authority to specify a different listing status for different portions of each species' range and/or to create distinct population segments of the portions of the three species that live in the United States and to exclude those DPS's from the endangered species listing. To compound these errors, the Service failed to reverse its listing decision once Judge Kennedy ruled against the legality of the special exemption applicable to these U.S. captive herds and failed to act on SCI's delisting petition based on error. In response, the Service should have acknowledged its error and should have delisted the captive herds.

When it came to the conservation of scimitar-horned oryx, dama gazelle and addax, the Service chose form over substance. Continued listing of these captive herds is harmful to the future of the three species, while removal from the endangered species list will benefit the conservation of the three species. SCI gives 60-day notice that, unless the Service corrects the illegal inclusion of the captive populations of the three antelope species in the endangered species listing, SCI will pursue litigation in federal court and will seek injunctive and declaratory relief as well as legal fees and costs regarding these violations.

If you should have any questions concerning this matter, please contact Anna M. Seidman, Director of Litigation, Safari Club International, 202-543-8733 or aseidman@safariclub.org.

Thank you.

Sincerely,



Kevin Anderson
President,

Safari Club International

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The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Rowan Gould
Acting Director
U.S. Fish and Wildlife Service
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: 60-Day Notice of Intent to Sue Over Violations of the Endangered Species Act and the Administrative Procedures Act in the Decision to Include U.S. Captive Populations of Scimitar-Horned Oryx, Dama Gazelle, and Addax in the listing of these species as endangered on September 2, 2005 and the failure to classify only the population of these species outside the United States as endangered

Dear Sirs:

This letter serves as a 60-day notice by the Exotic Wildlife Association (EWA) of its intent to sue Secretary of the Interior, Ken Salazar, the U.S. Department of the Interior, Acting Director of U.S. Fish and Wildlife Service, Rowan Gould, and the U.S. Fish and Wildlife Service (FWS). Unless corrected, EWA will challenge the following violations of the Endangered Species Act (ESA) and the Administrative Procedures Act (APA): (1) the decision to include U.S. captive populations of the scimitar-horned oryx, dama gazelle, and addax in the endangered species listing of the three antelope species on September 2, 2005 and (2) the failure to correct that endangered species listing by removing the U.S. captive herds of the three species after the ruling by Judge Kennedy of the U.S. District Court for the District of Columbia in *Friends of Animals v. Salazar*, No. 04-1660, which held federal regulations applicable to those captive populations “violated subsection 10(c)” of the ESA.¹ At this time, U.S. captive-bred herds do not qualify for endangered species status. In fact, the inclusion of the captive herds in the

¹ *Friends of Animals v. Salazar*, 622 F. Supp. 2d 102, 120 (D.D.C. 2009).

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endangered species listing has a detrimental impact on the conservation status of these three species. The continued listing of these U.S. captive populations and failure of FWS to remove the U.S. captive herds from the endangered species list discourages private efforts to conserve these three species and will result in population reductions and a potential loss to the species as a whole. FWS has violated its statutory and regulatory obligations under the ESA and APA and has acted arbitrarily and capriciously in failing to promote, protect, and encourage private conservation efforts currently being directed at captive herds within the United States. This 60-day notice is being sent in accordance with 16 U.S.C. § 1540(g).

In addition, on June 29, 2011, Safari Club International (SCI) submitted a similar 60-day Notice of Intent to Sue concerning the same facts and regulations as in this letter. EWA incorporates SCI's letter by reference, a copy of which is attached as Exhibit 1.

I. Exotic Wildlife Association

EWA is a 501(c)(6) trade organization with headquarters in Ingram, Texas and is registered and licensed to do business in Texas. Formed in 1967, EWA has grown into what is now the oldest and most successful association of its type in North America. EWA's mission is to encourage and expand the conservation of indigenous and non-indigenous hoofstock animals and to help EWA members develop and strengthen the markets for their animals. EWA promotes this mission by protecting the rights of private ranchers to manage and control their own land and the indigenous and non-indigenous hoofstock animals living on it. EWA promotes "conservation through commerce" and articulates the need for "sustainable utilization" of wildlife as a conservation tool and as a viable tool to maintain proper carrying capacity on private property. EWA also works to educate policy makers, the media, and the public through research and advocacy about the exotic wildlife industry and sustainable utilization of wildlife, and serves its members by providing technical support and information to benefit them, their animals, and their industry.

EWA represents and serves members throughout the United States and in several foreign countries that have propagated and protected some of the largest populations of privately owned wildlife. Members own and raise scimitar-horned oryx, dama gazelle, and addax on their private ranches and market them to other ranchers.

Through research and advocacy, EWA has taken action to protect its members' ability to continue to own, raise, and market these three species without unnecessary and burdensome legal restrictions that will detrimentally affect EWA and its members' efforts to conserve these animals. EWA has consulted with experts in exotic wildlife and employs a biologist to study the impact of EWA members' "conservation through

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commerce” efforts on the health and number of scimitar-horned oryx, dama gazelle, and addax both inside and outside the United States. In response to FWS’s proposed rule to list these three species under the ESA, EWA submitted comments and supporting research to FWS opposing the listing of these animals as endangered and explaining why the listing would be harmful to the survival of U.S. captive-bred populations of the species.²

EWA also commented on the proposed regulation that exempted the U.S. captive-bred populations of these three antelope species from the ESA take prohibitions to enhance their propagation and survival. EWA stated that:

If these animals are listed as endangered it will also greatly restrict trade. Restricted trade stands in the way of economic incentive. Without economic incentive there will be no private breeding programs. Eventually, instead of protecting animals born in the US, it will severely impede anyone who wants to breed these animals When it’s too much of a hassle and burden to fight for permits, the animal value goes down as does the economic incentive. Then the animals are truly endangered both here and in their land of origin.³

In addition, EWA also participated in litigation in federal district courts in California and the District of Columbia to defend the Section 4 regulation exempting these three species of antelope from the ESA take prohibitions.⁴ On June 22, 2009, a judge in the U.S. District Court for the District of Columbia held that the regulation violated the APA and was contrary to the ESA because it allowed the take of species listed as endangered without the requirement for individual enhancement of survival permit applications and the commensurate public notice and comment opportunities.⁵ The court remanded the matter to FWS for further proceedings consistent with his ruling, leaving it to the agency to promulgate new regulations that would not violate the ESA.

II. Factual and Procedural Background

In 2005, FWS lumped together the wild and semi-wild populations of the three antelope in their native African habitat, captive populations in the Middle East and

² Administrative Record (A.R.) 70–71 (citations to A.R. are to the Third Supplemental Administrative Record regarding the Exclusion of U.S. Captive-Bred Scimitar-horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions, Final Rule Civil Case Nos. 04-1660 and 06-2120 (Consolidated Cases) as certified by FWS Records Officer on September 4, 2008).

³ A.R. 70.

⁴ 70 Fed. Reg. 52,310.

⁵ *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009).

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elsewhere around the world, and the substantial captive-bred populations in the United States and listed them all as endangered.⁶ That rule identified dangers to the continued existence of the species in their native African range:

The best available information indicates that the causes of decline of these antelopes are (1) habitat loss through desertification, permanent human settlement, and competition with domestic livestock, and (2) regional military activity and uncontrolled killing. These threats have caused the possible extinction in the wild of the scimitar-horned oryx and the near-extinction of the addax in the wild.⁷

But the listing rule identified no danger to the captive-bred U.S. populations of the three antelopes. FWS stated, in fact, that just the opposite is true—that captive breeding has stemmed the decline of the species and provided founders' stock for eventual reintroduction:

Captive breeding is a manmade factor that has stemmed the decline of the three species. It has provided the founder stock necessary for reintroduction, maintenance of otherwise potentially lost bloodlines, and opportunities for research. The scimitar-horned oryx is possibly extinct in the wild and therefore, but for captive breeding, the species might be extinct. For addax and dama gazelle, they occur in very low numbers in the wild, and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively). The SSIG estimates that there are about 4,000–5,000 scimitar-horned oryx, 1,500 addax, and 750 dama gazelle in captivity worldwide. Captive-breeding programs operated by zoos and private ranches have effectively increased the numbers of these animals while genetically managing their herds. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Currently, however, continued habitat loss and wonton [sic] killing have made reintroduction nonviable in most cases. *See* 70 FR 5117 for a detailed discussion of the role of captive breeding in the conservation of these species.⁸

Instead, believing it had the authority to do so, FWS sought to insure the continued success of captive breeding in the U.S. by exempting bona fide captive breeding

⁶ 50 C.F.R. § 17.11(h) (2010); Final Rule to List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319 (Sept. 2, 2005).

⁷ 70 Fed. Reg. at 52,319.

⁸ *Id.* at 52,322.

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programs from many of the take prohibitions, subject to certain conditions. The rule listing the three species stated:

[T]he Service may authorize otherwise prohibited activities that enhance the propagation or survival of the species, such as captive breeding to increase the population size or improve the gene pool, under section 10(a)(1)(A) of the Act. In response to these comments, on February 1, 2005 (70 FR 5117), we initiated a separate rulemaking by announcing a proposed rule and notice of availability of a draft environmental assessment to add a new subsection, 17.21(h), to govern certain activities with U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle, should they become listed as endangered. The proposed rule covered U.S. captive-bred live specimens, embryos, gametes, and sport-hunted trophies and would authorize certain otherwise prohibited activities that enhance the propagation or survival of the species. The “otherwise prohibited activities” were take; export or reimport; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce. In the proposed rule, we determined that the scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species. Comments were accepted until April 4, 2005. The final rule is published in today’s Federal Register.⁹

FWS may well have declined to list the U.S. captive-bred populations of these three antelope species had it not believed that it had the authority instead to simply adopt a tandem rule treating those populations differently. For FWS understood that it was crucial that the listing of these three species not occur without providing a partial take exemption to provide incentives for the continued propagation and enhancement of the species:

It was critical that development of a rule that provides an incentive to continue captive breeding of these species proceed concurrently with the determination of their legal status under the Act to ensure that no breeding programs would be disrupted by a final listing determination.¹⁰

⁹ *Id.* at 52,320.

¹⁰ *Id.* at 52,313.

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So although FWS's decision to list the U.S. captive-bred populations of these three antelope species as endangered could have made the conservation activities of the private ranches impracticable, the exemption instead encouraged the owners of the U.S. captive-bred populations of thousands of scimitar-horned oryx, dama gazelle, and addax to continue providing the animals with habitats similar to their native homeland and to care for them using first-class animal husbandry practices. And although populations of the three species living in the wild outside the United States still plainly qualify for endangered status, U.S. captive-bred populations are certainly no longer endangered, if they ever were.

But the exemption that has allowed the U.S. captive-bred antelope to thrive is now itself extinct. A recent ruling of a federal district court invalidated the exemption rule, thereby destroying the critical balance FWS created when it simultaneously listed the species worldwide while exempting U.S. captive-bred populations from certain take prohibitions. Without the exemption, the crucial incentive for continued captive-bred breeding created by that now-invalidated rule no longer exists, jeopardizing the integrity of the U.S. captive-bred conservation programs. FWS must restore this balance if the species are to be saved.

In short, FWS should invoke its authority under 50 C.F.R. § 424.11(d) to delist the U.S. captive-bred populations of the three antelope species in order to save them from extinction.

A. History of the scimitar-horned oryx, dama gazelle, and addax

The three antelope species are not native to the United States. They were introduced into this country from their native ranges in northern Africa. All three species are extinct or near extinction in their home ranges:

The best available information indicates that the causes of decline of these antelopes are (1) habitat loss through desertification, permanent human settlement, and competition with domestic livestock, and (2) regional military activity and uncontrolled killing. These threats have caused the possible extinction in the wild of the scimitar-horned oryx and the near-extinction of the addax in the wild. All three species are in danger of extinction throughout their ranges. Accordingly, we are listing these three antelopes as endangered.¹¹

¹¹ *Id.* at 52,319.

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1. The scimitar-horned oryx

The scimitar-horned oryx (*Oryx dammah*) was historically found in the wild in Algeria, Burkina Faso, Chad, Egypt, Libyan Arab Jamahiriya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sudan, Tunisia, and Western Sahara.¹² The scimitar-horned oryx stands about 47 inches [119 centimeters (cm)] tall and weighs around 450 pounds [204 kilograms (kg)].¹³ It is generally pale in color, but the neck and chest are dark reddish brown.¹⁴ Adult scimitar-horned oryxes possess a pair of horns curving back in an arc up to 50 in (127 cm) long.¹⁵ Scimitar-horned oryx have all but disappeared from the wild.¹⁶ There were an estimated 500 scimitar-horned oryx in Chad and Niger until about 1985, but by 1988, only a few dozen individuals survived in the wild.¹⁷ Since then there have been no confirmed sightings in the wild.¹⁸

But captive-bred populations in fenced-protected areas can be found in a number of range countries, including Tunisia, Morocco, and Senegal.¹⁹ In 2005, at least 1,550 captive-bred animals were held in managed breeding programs around the world,²⁰ not including those found on private ranches in the United States.²¹ In addition, it is believed that more than 4,000 are kept in a private collection in the United Arab Emirates.²² Captive-bred herds of scimitar-horned oryx are also found in South Africa.²³

2. The addax

The addax (*Addax nasomaculatus*) is generally about 42 inches (106 cm) tall at the shoulder and weighs around 220 pounds (100 kg).²⁴ The addax has a grayish white coat and its horns twist in a spiral up to 43 inches (109 cm) long.²⁵ It was originally found in the wild in the desert or semi-desert habitats of the Sahara and the Sahel regions of North

¹² IUCN SSC Antelope Specialist Group 2008, *Oryx dammah*, IUCN Red List of Threatened Species 2010.1 (2010), available at <http://www.iucnredlist.org/apps/redlist/details/15568/0> [hereinafter "IUCN Red List"].

¹³ 70 Fed. Reg. at 52,319.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ IUCN Redlist, *Oryx dammah*, <http://www.iucnredlist.org/apps/redlist/details/15568/0>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ A.R. 311-12.

²⁴ 70 Fed. Reg. at 52,319.

²⁵ *Id.*

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Africa.²⁶ They were also originally found in Chad, Mauritania, Niger, Algeria, Egypt, Libyan Arab Jamahiriya, Sudan, and Western Sahara. In fact, there were reports of “immense herds” of addax north of Lake Chad in the 1920s.²⁷

These populations dramatically declined after World War II in their native range. Drought and destruction of their native habitat contributed significantly to the sharp decline of the addax.

But unlike scimitar-horned oryx, some addax can still be found in the wild. The International Union for Conservation of Nature (IUCN) approximates that there are 300 addaxes still living in Niger, Chad, and Mauritania:

Today, the only known remaining population survives in the Termit/Tin Toumma region of Niger. However, there are sporadic records of small isolated groups and individuals from eastern Air Mountains/Western Ténéré desert in Niger, and from the Equey region of western Chad (Newby in press). Possible rare vagrants from these areas may be seen in north Niger, southern Algeria and Libya (Newby in press). There are continued rumours of Addax along the Mali/Mauritania border (Majabat Al Koubra), but no confirmed sightings for several years. However, in early March, 2007, the fresh tracks of about 15 Addax were seen in central Mauritania, in an area where they had not been reported for over 20 years.²⁸

In addition to those in fenced populations in their former home ranges in Tunisia and Morocco, some addaxes have been reintroduced into the wild in these countries.²⁹

3. The dama gazelle

The dama gazelle (*Gazella dama*) stands about 39 inches (99 cm) tall at the shoulder and weighs around 160 pounds (72 kg).³⁰ The dama gazelle’s upper body is mostly reddish brown, and its head, rump, and under parts are white.³¹ Its horns curve back and up but are generally less than half the length of those of the scimitar-horned oryx.³² Their historic home range included Chad, Mali, Niger, Libyan Arab Jamahiriya,

²⁶ A.R. 3.

²⁷ A.R. 11.

²⁸ IUCN Redlist, *Addax nasomaculatus*, <http://www.iucnredlist.org/apps/redlist/details/512/0> (citation omitted).

²⁹ *Id.*

³⁰ 70 Fed. Reg. at 52,319.

³¹ *Id.*

³² *Id.*

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Mauritania, Morocco, Nigeria, Algeria, Tunisia, Senegal, Sudan, and Western Sahara.³³ They are believed to have disappeared from North Africa but some remain in Mali, Chad, and Niger.³⁴ Some dama gazelle are living in enclosed facilities in their home ranges in Morocco, Tunisia, and Senegal.³⁵

B. The decision to list the three antelope species as endangered included a decision to exempt U.S. captive-bred populations from ESA requirements

On September 2, 2005, FWS listed the scimitar-horned oryx, dama gazelle, and the addax throughout the world as endangered, after almost 14 years of deliberation over how to deal with the disparity between the alarmingly low numbers of the species in the wild as compared to the large numbers in herds on private ranches in the United States. FWS first proposed an endangered species listing on November 5, 1991.³⁶ After an initial public comment opportunity, FWS reopened the comment period on November 5, 1991, again on July 24, 2003,³⁷ and then for a third time on November 26, 2003.³⁸

FWS's protracted deliberation over the listing status of the three species was due largely to the dilemma of how to protect the species in the wild without severely undermining the conservation of the species in the United States, which have benefitted the population numbers and health of the captive-bred herds.³⁹ An endangered classification would cause severe restrictions on the management and trade of these animals.⁴⁰ The individual ranchers who own and maintain these herds do so on a strictly voluntary basis. But management and conservation of wildlife cannot be carried out without financial resources. So, owners of these herds trade and sell members of their herds to bring in new blood lines and to maintain genetic diversity and health. As long as the three species were free of federal listing classification, their value remains high, which facilitates an important incentive for the continued conservation efforts of the U.S. ranchers. A listing as "endangered," without an exemption from the permitting requirements under the ESA, would severely interfere with the ranchers' ability to

³³ IUCN Redlist, *Nanger dama*, <http://www.iucnredlist.org/apps/redlist/details/8968/0>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Proposed Endangered Status for Scimitar-horned Oryx, Addax, and Dama Gazelle, 56 Fed. Reg. 56,491 (Nov. 5, 1991).

³⁷ Endangered Status for Scimitar-Horned Oryx, Addax, and Dama Gazelle, 68 Fed. Reg. 43,706 (June 24, 2003).

³⁸ Endangered Status for Scimitar-Horned Oryx, Addax, and Dama Gazelle, 68 Fed. Reg. 66,395 (Nov. 26, 2003).

³⁹ 70 Fed. Reg. at 52,311.

⁴⁰ See 50 C.F.R. § 17.21 (2010).

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participate in efforts that significantly increased the U.S. numbers of these animals.⁴¹ The additional burdens, costs, and uncertainties associated with a listing would significantly reduce the value of the animals and force many ranchers to abandon their conservation efforts.

Ultimately, on September 2, 2005, FWS decided to list the three species as endangered for both the native or wild populations and the U.S. captive-bred populations. FWS did not adopt the recommendation to exclude U.S. captive-bred herds from this listing, concluding that “[i]t would not be appropriate to list captive-bred and wild animals separately.”⁴²

But FWS was aware that listing the three species as endangered could jeopardize the continued healthy status and increasing numbers of U.S. captive-bred populations. FWS acknowledged that

scimitar-horned oryx, addax, and dama gazelle are dependent on captive-bred breeding and activities associated with captive-bred breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species.⁴³

Thus, to allow the private conservation ranches to continue their success with the species, and to mitigate the impending harm that would arise from the listing, on the same date that it listed the species as endangered, FWS adopted a regulation that excluded U.S. captive-bred populations of the scimitar-horned oryx, dama gazelle, and addax from certain ESA take prohibitions:

We are amending 50 CFR § 17.21 by adding a new paragraph (h), which will apply to U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle. The provision allows for the take; export or re-import; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce of U.S. captive-bred live scimitar-horned oryx, addax, or dama gazelle, including embryos and gametes, and sport-hunted trophies, as long as certain criteria are met.⁴⁴

⁴¹ 70 Fed. Reg. at 52,313.

⁴² *Id.* at 52,320.

⁴³ *Id.*

⁴⁴ *Id.* at 52,317.

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C. As a result of the exemption, the U.S. captive-bred populations of the three antelope are thriving and increasing in numbers

Thanks to FWS's decision to promulgate 50 C.F.R. § 17.21(h), U.S. captive-bred populations of the three species have continued to increase and thrive.

In 2004, Dr. Elizabeth Cary Mungall conducted research for EWA to assess population numbers and habitat conditions for U.S. captive-bred populations of the three antelope species. Dr. Mungall reviewed a series of statewide censuses and collected data in a survey of EWA members who owned herds of one or more of the three species. Her research not only revealed significant numbers of each species on the ranches owned by EWA members, but also demonstrated remarkable increases in the populations on these ranches over a relatively short period of time:

As shown by a series of statewide censuses (1966, 1971, 1974, 1979, 1984, 1988, 1994) in Texas done by the Texas Parks and Wildlife Department, the state wildlife agency, numbers of the three subject species kept in private ownership have been increasing. This census series is further discussed in Mungall and Sheffield (1994). To confirm the situation, a further census was done in 1996 at the request of the Exotic Wildlife Association (EWA) by the Texas Agricultural Statistics FWS. Dama gazelle numbers were checked again in an October 2003 phone census done by the author for EWA as described in the next section.⁴⁵

In summary, starting with the first census in which the species appeared:

- Scimitar-horned oryx: 32 in 1979 to 1,006 in 1994 to 2,145 in 1996.
- Dama gazelle: 9 in 1979 to 149 in 1994 to 91 in 1996 to 369 in 2003.
- Addax: 2 in 1971 to 587 in 1994 to 1,824 in 1996.⁴⁶

Last year, EWA conducted a survey of its members to update the data for the U.S. captive-bred populations of the three antelope species and retained Dr. Mungall to verify the data. EWA's survey reveals a several-fold increase in the populations of each of the three antelope species, including a 500 percent increase in scimitar-horned addax. EWA's survey shows the following current populations of captive-bred animals in the United States:

⁴⁵ A.R. 326 (citations omitted).

⁴⁶ *Id.*

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- Scimitar-horned oryx: 11,032
- Dama gazelle: 894
- Addax: 5,112

D. Litigation that resulted in the invalidation of the exemption

Certain conservation organizations challenged the tandem rule for the three antelope species, and EWA intervened to assist FWS in defense of the rule in federal district courts in California and the District of Columbia.⁴⁷ On June 22, 2009, the U.S. District Court for the District of Columbia ruled that the regulation violated the ESA because it allowed the take of species listed as endangered without the requirement for case-by-case permit applications and the commensurate public notice and comment opportunities.⁴⁸ The court remanded the matter to FWS for further proceedings consistent with the ruling, leaving it to FWS to promulgate new regulations that would not violate the ESA.

The delisting of the U.S. captive-bred members of these three species would be consistent with the court's ruling. If U.S. captive-bred populations of the three species are delisted, take of U.S. captive-bred populations would require no exemption from the ESA's take prohibitions, no permit applications, nor any public notice and comment on individual permit applications.

III. Reasons why these three species of U.S. captive-bred antelope should be delisted

Federal regulations provide three circumstances under which FWS may delist a previously listed species—extinction, recovery, and error. The second and third of these circumstances applies to the listing of the scimitar-horned oryx, dama gazelle, and addax:

(2) Recovery. The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required. 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.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.⁴⁹

⁴⁷ *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009); *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 (N.D. Cal. Sept. 30, 2006).

⁴⁸ *Friends of Animals*, 626 F. Supp. 2d at 120.

⁴⁹ 50 C.F.R. § 424.11(d).

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EWA seeks the delisting of the U.S. captive-bred populations of scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazelle dama*), and addax (*Addax nasomaculatus*) under the authority of 16 U.S.C. § 1533(b)(3)(A), 5 U.S.C. § 553(e), and 50 C.F.R. § 424.11(d)(3) because FWS's interpretation of the original data for the listing was in error and because the U.S. captive-bred populations of the three antelope are recovered.

A. FWS's 2005 interpretation of the data was in error because FWS failed to identify the U.S. captive-bred populations of the three species as separate DPSs that are not endangered

In 2005, when FWS listed the three antelope species as endangered, FWS failed to distinguish between the foreign populations (that are endangered, particularly in their native range) and the U.S. captive-bred population that is not. Today, the best scientific and commercial data available demonstrate that the U.S. captive-bred population of each of the three antelope species is a distinct population segment (DPS) and that these captive-bred DPSs are not endangered. To comply with the ESA, therefore, FWS must delist the U.S. captive-bred populations of each of the three antelope species, but should retain the endangered classification for all populations outside the United States.

1. The U.S. captive-bred populations are a distinct population segment

The ESA authorizes the Secretary to list "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."⁵⁰ In 1996, FWS published its official interpretation of this statutory language in a policy intended to guide its listing, delisting, and reclassification of DPS's of vertebrate species.⁵¹ Under the 1996 DPS policy, FWS considers three elements during the listing, delisting or reclassification process:

1. Discreteness of the population segment in relation to the remainder of the species to which it belongs;
2. The significance of the population segment to the species to which it belongs; and
3. The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered, or threatened?).⁵²

⁵⁰ 50 C.F.R. § 424.11; 50 C.F.R. § 424.02(k).

⁵¹ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996).

⁵² *Id.* at 4,725.

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Discreteness. The U.S. captive-bred populations of the three antelope species inhabit ranches, zoos, and similar non-native habitats in this country far from their native range. They are discrete because they are markedly separated from other populations of the same species as a consequence of physical, physiological, and ecological factors, and because within the United States these populations are subject to very different protections for species exploitation, management of habitat, conservation status, and regulatory mechanisms than they are outside the United States. Under the DPS policy, a population qualifies as a DPS if it is either physically separated or separated by international boundaries from other populations of the same species:

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions:

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. . . .
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.⁵³

Since the U.S. captive-bred populations of all three species meet both the physical and the international boundary tests, they are distinct populations whose listing status FWS should consider separately from that of the African and other non-U.S. populations of the same species.

Significance. Since they represent the largest and most abundant populations in the world, the U.S. captive-bred populations of the three antelope species are significant, meeting the second test set out in the DPS policy. As the DPS policy states, “[b]ecause precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.”⁵⁴

By any measure, however, the U.S. captive-bred populations of these three species are significant because they produce a surplus of animals for domestic use and for reintroduction to their native range.

Status. Finally, these thriving and well-managed U.S. captive-bred populations of the three species, properly considered as DPSs, simply fail to qualify for listing under the

⁵³ *Id.*

⁵⁴ *Id.*

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criteria set out in the Act. As the DPS policy explains, “[i]f a population segment is discrete and significant (i.e., it is a distinct population segment) its evaluation for endangered or threatened status will be based on the Act’s definitions of those terms and a review of the factors enumerated in section 4(a). It may be appropriate to assign different classifications to different DPS’s of the same vertebrate taxon.”⁵⁵

The 2005 rule listing the three antelope species as endangered identified only dangers to the continued existence of the African populations:

The best available information indicates that the causes of decline of these antelopes are (1) habitat loss through desertification, permanent human settlement, and competition with domestic livestock, and (2) regional military activity and uncontrolled killing. These threats have caused the possible extinction in the wild of the scimitar-horned oryx and the near-extinction of the addax in the wild.⁵⁶

FWS did not identify any such dangers to the U.S. captive-bred populations but, in fact, to the contrary found that the three species were dependent on U.S. captive breeding efforts for their conservation:

In the proposed rule, we determined that the scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species.⁵⁷

In fact, captive-bred populations of the antelope are only mentioned in the listing to explain why the species are not already extinct:

Captive breeding is a manmade factor that has stemmed the decline of the three species. It has provided the founder stock necessary for reintroduction, maintenance of otherwise potentially lost bloodlines, and opportunities for research. The scimitar-horned oryx is possibly extinct in the wild and therefore, but for captive breeding, the species might be extinct. For addax and dama gazelle, they occur in very low numbers in the wild, and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively). The SSIG estimates that there are about 4,000-5,000 scimitar-horned oryx, 1,500 addax, and 750 dama

⁵⁵ *Id.*

⁵⁶ 70 Fed. Reg. at 52,319.

⁵⁷ *Id.* at 52,320.

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gazelle in captivity worldwide. Captive-breeding programs operated by zoos and private ranches have effectively increased the numbers of these animals while genetically managing their herds. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Currently, however, continued habitat loss and wonton killing have made reintroduction nonviable in most cases. See 70 FR 5117 for a detailed discussion of the role of captive breeding in the conservation of these species.⁵⁸

2. There are precedents for treating U.S. captive-bred species as a separate DPS

An excellent precedent for identifying and treating the U.S. captive-bred populations of these three species is found in FWS's 1990 listing of chimpanzees. While listing the wild populations as endangered, FWS explained the circumstances requiring a listing of threatened for the captive-bred populations:

There is controversy regarding the viability and fecundity of over-all captive populations, but management of certain captive breeding groups seems to be becoming more sophisticated and successful. A studbook for *P. troglodytes* has been developed, and proposals to establish a Species Survival Plan are being prepared by members of the American Association of Zoological Parks and Aquariums. These plans are designed to maintain the genetic diversity of the captive population. Approximately 240 *P. troglodytes* are held by the Association's member institutions. . . .

From 1,100 to 1,450 *P. troglodytes* are held by biomedical facilities in the United States. . . . Furthermore, eight institutions hold most of these animals, and all but one currently provide records to the International Species Inventory System. Five of the eight are part of the National Chimpanzee Breeding Program coordinated and supported by the National Institutes of Health. This program now has about 400 animals. Its immediate goal is to augment the breeding population with half of the offspring (about 35 animals/year). . . .⁵⁹

⁵⁸ *Id.*

⁵⁹ Endangered Status for Chimpanzee and Pygmy Chimpanzee, 55 Fed. Reg. 9129, 9129 (Mar. 12, 1990).

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B. The three species are not endangered in the portion of their current range that lies within the United States

The ESA requires that the Secretary list as endangered “any species which is in danger of extinction throughout all or a significant portion of its range.”⁶⁰ Although a plain reading of this language would appear to authorize the Secretary to list a species as endangered in only a portion of its entire range, for many years FWS argued that such a listing would be listing a lesser entity than those specified in the definition of “species” in the ESA. In 2001, however, the Ninth Circuit rejected that interpretation.⁶¹ And at least seven district courts have adopted or followed the Ninth Circuit’s lead.⁶²

In 2007, the Solicitor issued a formal legal opinion to assist FWS in formulating a new policy concerning the meaning of “significant portion of its range” (SPR). The Solicitor’s opinions are entitled to great weight.⁶³

In that opinion, the Solicitor concluded that when FWS makes a determination that a species is in danger of extinction throughout a significant portion of its range, FWS should list the species as endangered only in that portion of its range:

[W]henver the Secretary concludes because of the statutory five-factor analysis that a species is “in danger of extinction throughout . . . a significant portion of its range,” it is to be listed and the protections of the ESA applied to the species in that portion of its range where it is specified as an “endangered species”⁶⁴

The Solicitor’s opinion was based primarily on the plain language of the ESA:

The word is used as part of a phrase—“in danger of extinction”—that is modified by the phrase “throughout . . . a significant portion of its range.” Thus, for purposes of the ESA, a species can be “endangered” even if it is facing extinction only in a significant portion of its range. In other words, a species does not need to be in danger of extinction everywhere—i.e., be in

⁶⁰ 16 U.S.C. § 1532(6); *see also* 16 U.S.C. § 1533.

⁶¹ *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (flat-tailed horned lizard).

⁶² *See Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) (gray wolf); *Defenders of Wildlife v. Secretary, U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) (gray wolf); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002) (Canada lynx); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 274 Fed. Appx. 542 (9th Cir. 2008) (coastal cutthroat trout).

⁶³ *California v. United States*, 438 U.S. 645, 676 n.30 (1978) (citing *Zemel v. Rusk*, 381 U.S. 1 (1965), *Perkins v. Matthews*, 400 U.S. 379 (1971), and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)).

⁶⁴ Department of the Interior Solicitor’s Memorandum M-37013, *The Meaning of “In Danger of Extinction Throughout All or A Significant Portion of Its Range”* 3 (Mar. 16, 2007).

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danger of total disappearance—to merit the protection of the ESA. As long as it is in danger of extinction “throughout . . . a significant portion of its range”—i.e., is in danger of disappearing in that significant portion of the range—it must be protected in that portion of its range where, in fact, it is an “endangered species.”⁶⁵

The Solicitor thus concluded that the Secretary must not only determine that a species is in danger of extinction within its range, but must also specify (in appropriate cases) the portions of that range in which the species is endangered:

I conclude that if the Secretary determines that a species is in danger of extinction in a significant portion of its range, he must specify the portion of its range where it is an endangered species and then apply the protections in the Act to the members of the species in that portion of its range.⁶⁶

The Solicitor further noted that FWS had in fact listed several species as endangered only within a portion of their range, rather than throughout all of their range:

Prior to the 1978 Amendments, some listings specified that species were endangered in only part of their range within the United States. Boundaries for these partial range listings varied from the U.S.-Canadian border defining the contiguous United States for such species as the grizzly bear and gray wolf, to a mere three parishes in Louisiana comprising the listed range of the American alligator. Species were also listed as endangered in some states and threatened in others, such as the gray wolf and the bald eagle.⁶⁷

The best available scientific and commercial data therefore do not support a conclusion that the U.S. captive-bred antelope species are, in fact, endangered within the United States, a range separated by geographic and political boundaries from their native range in Africa and from various captive breeding programs around the world. For example, in 2004 Dr. Mungall reported that U.S. captive-bred populations of the three antelope species in Texas had grown markedly since captive breeding programs began in the 1970s.⁶⁸ The following chart summarizes Dr. Mungall’s population survey results:

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 2 n.3 (citations omitted).

⁶⁸ A.R. 323, Elizabeth Cary Mungall, Ph.D., *Submission for the Comment Period on Proposed Listing of Scimitar-Horned Oryx, Addax, and Dama Gazelle Under the Endangered Species Act* (Jan. 6, 2004).

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Captive Populations in Texas⁶⁹

Scimitar-horned Oryx			
Year	1979	1994	1996
Population	32	1,006	2,145
Dama Gazelle			
Year	1979	1996	2003
Population	9	91	269
Addax			
Year	1971	1994	1996
Population	2	587	1824

Dr. Mungall's survey did not count the large numbers of these species bred in Florida or in zoos across the country, so the numbers in captivity in the United States are actually higher than shown by Dr. Mungall's study.

As previously noted, last year EWA completed a survey to update Dr. Mungall's data. That survey demonstrated a several-fold increase in the populations of each species. Scimitar-horned oryxes increased from 2,145 in 1996 to 11,032 in 2010, an increase of 414%; dama gazelles increased from a population of 91 in 1996 to 894 in 2010, an increase of 882%; and addaxes increased from 1,824 in 1996 to 5,112 in 2010, an increase of 180%.

That the species are endangered in their native African ranges does not support listing the U.S. captive-bred animals as endangered. There is, quite simply, no scientific or commercial data on which to conclude that the three antelope species are also in danger of extinction here in the United States. To the contrary, U.S. captive breeding has produced a surplus population that has supplied individuals for reintroduction to their native range and even required culling to avoid overpopulation. To comply with the ESA, therefore, FWS must identify the portion of its range (Africa and other areas outside the United States) where they are endangered—and delist the populations located in the United States (which are not in danger of extinction). As FWS recently stated:

[E]ven before the 2007 Solicitors opinion, we have applied differential levels of protections for species facing differential levels of threats in different parts of their range. For example, in 1978, the gray wolf was protected as endangered in the lower-48 States, except in Minnesota, where

⁶⁹ *Id.* at 326.



June 29, 2011

Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C. Street N.W.
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Rowan Gould
Acting Director,
U.S. Fish and Wildlife Service
U.S. Department of the Interior
1849 C Street N.W.
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Re: 60-day Notice of Intent to Sue Over Violations of the Endangered Species Act and the Administrative Procedures Act in the Decision to Include of U.S. Captive Populations of Scimitar-Horned Oryx, Dama Gazelle and Addax in the Listing of these Species as Endangered on September 2, 2005 and/or the Failure to Correct the Endangered Species Act Listing of Scimitar-Horned Oryx, Dama Gazelle and Addax To Specify That Only the Populations in the Portion of Their Range Outside of The United States Are Classified As Endangered

This letter serves as a 60-day notice by Safari Club International (“SCI”) of its intent to sue Secretary of the Interior Ken Salazar, the U.S. Department of the Interior, Acting Director of the U.S. Fish and Wildlife Service Rowan Gould, and the U.S. Fish and Wildlife Service (“FWS” or “Service”). Unless corrected, SCI will challenge the following violations of the Endangered Species Act (“ESA”) and the Administrative Procedures Act (“APA”): (1) the decision to include U.S. captive populations of the scimitar-horned oryx, dama gazelle and addax in the endangered species listing of the three antelope species on September 2, 2005; and (2) the failure to correct that endangered species listing by removing the U.S. captive herds of the three species after the ruling by Judge Kennedy of the U.S. District Court for the District of Columbia, which found federal regulations applicable to those captive populations to be illegal. At this time, the U.S. captive herds do not qualify for endangered species status. In fact, the inclusion of the captive herds in the endangered species listing has a detrimental impact on the conservation status of these three species. The continued listing of these U.S. captive populations and failure of the FWS to remove the U.S. captive herds from the endangered species list discourages

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private efforts to conserve these three species and will result in population reductions and a potential loss to the species as a whole. The FWS has violated its statutory and regulatory obligations under the ESA and APA and has acted arbitrarily and capriciously in failing to promote, protect and encourage private conservation efforts currently being directed at captive herds within the United States. This 60 day notice is being sent in accordance with 16 U.S.C. § 1540(g).

Safari Club International

Safari Club International (“SCI”), a nonprofit IRC § 501(c)(4) corporation, has approximately 53,000 members worldwide, many of whom own, conserve and/or hunt individual antelope from those captive populations of scimitar-horned oryx, dama gazelle and addax in the United States. SCI’s missions, in the United States, and throughout the world, include the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. SCI carries out its mission with the help of its sister organization, Safari Club International Foundation (“SCIF”). SCIF is a nonprofit IRC § 501(c)(3) corporation. Its missions include the conservation of wildlife, education of the public concerning sustainable use hunting and its use as a conservation tool, and humanitarian services. More specifically, the conservation mission of SCIF is: (a) to support the conservation of the various species and populations of game animals and other wildlife and the habitats on which they depend; and (b) to demonstrate the importance of hunting as a conservation and management tool in the development, funding and operation of wildlife conservation programs.

SCI members hunt, own, raise, breed and/or trade members of the three antelope species on ranches in the United States. The illegal listing of the captive populations and the Service’s failure to remedy that illegality jeopardize SCI members’ ability to continue to use and conserve these species.

SCI participated in numerous comment opportunities provided by the U.S. Fish and Wildlife Service (“FWS” or “Service”) in its consideration of the listing status of the three species generally as well as the status of the U.S. captive populations of those species. SCI also commented on the proposed regulation intended to exempt the U.S. captive populations from ESA take prohibitions and to allow continued hunting of members of the U.S. captive herds and other activities that enhance the propagation and survival of the species. In some of those comments, SCI advocated that the FWS was not required to list those captive populations as endangered and that the Service had the authority to treat those captive populations differently than populations of members of the species living in their native ranges. For example, in comments submitted on October 22, 2003, SCI advocated that the FWS designate the captive populations of the three species in the United States as “distinct population segments” (“DPSs”) and that these DPSs “be given separate consideration” for the purpose of listing. SCI also

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participated in litigation in federal district courts in California and the District of Columbia to defend the Section 4 regulation following its adoption on September 2, 2005. 70 Fed. Reg. 52310. On June 22, 2009, a Judge in the U.S. District Court for the District of Columbia ruled that the regulation violated the ESA because it allowed the take of species listed as endangered without the requirement for individual enhancement of survival permit applications and the commensurate public notice and comment opportunities. *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 115 (D.D.C. 2009). The court remanded the matter to the Service for further proceedings consistent with his ruling, leaving it to the Service to promulgate new regulations that would not violate the ESA. *Id.*

SCI submitted a Petition to Remove U.S. Captive Herds of Scimitar-Horned Oryx, Dama Gazelle and Addax from the Endangered Species List Based Upon Error on June 28, 2010. In that petition, SCI reminded the FWS how regulations imposing permit requirements for the trade and take of U.S. captive populations of the three species would discourage private ranchers from continuing to raise, breed and trade these animals and would result in fewer herds and significant population reductions. The FWS has not acted on that petition.

Appearance and Status of the Scimitar-Horned Oryx, Dama Gazelle and Addax

The three antelope species at issue are not native to the United States and were introduced into this country from populations in their home ranges in various parts of Africa. The status of the species in the wild was well documented by the Service in the September 2, 2005, rules listing the species as endangered, and permitting the continuation of activities, including hunting of the species, for the purpose of enhancing the survival of the three species. 70 Fed. Reg. 52310 (September 2, 2005); 70 Fed. Reg. 52319 (September 2, 2005). The scimitar-horned oryx (*oryx dammah*) was historically found in the wild in Algeria, Burkina Faso, Chad, Egypt, Libyan Arab Jamahiriya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sudan, Tunisia, and Western Sahara. It stands about 47 inches [119 centimeters (cm)] tall and weighs around 450 pounds [204 kilograms (kg)]. It is generally pale in color, but the neck and chest are dark reddish brown. Adult animals possess a pair of horns curving back in an arc up to 50 in (127 cm) long. 70 Fed. Reg. 52319 (September 2, 2005). Scimitar-horned oryx have all but disappeared from the wild. There were an estimated 500 Scimitar-horned oryx in Chad and Niger until about 1985, but by 1988 only a few dozen individuals survived in the wild. Since then there have been no confirmed sightings in the wild. International Union for Conservation of Nature and Natural Resources (“IUCN”), <http://www.iucnredlist.org/apps/redlist/details/15568/0> (June 28, 2011). Captive populations in fenced protected areas can be found in a number of range countries, including Tunisia, Morocco, and Senegal. 70 Fed. Reg. 52319 (September 2, 2005). In 2005, at least 1,550 captive animals were held in managed breeding programs around the world (Gilbert 2005), not including those found on private ranches in the United States. *Id.* at

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52321. In addition, it is believed that more than 4,000 are kept in a private collection in the United Arab Emirates. *Id.* Captive herds of scimitar-horned oryx are also found in South Africa.

The addax (*addax nasomaculatus*) is generally about 42 inches (106 cm) tall at the shoulder and weighs around 220 pounds (100 kg). 70 Fed. Reg. 52319 (September 2, 2005). It has a grayish white coat and its horns twist in a spiral up to 43 inches (109 cm) long. *Id.* It was originally found in the wild in Chad, Mauritania, Niger, Algeria, Egypt, Libyan Arab Jamahiriya, Sudan, and Western Sahara. *Id.* Unlike scimitar-horned oryx, some addax can still be found in the wild. *Id.* The IUCN approximates that there are 300 still living in Niger, Chad and Mauritania. *Id.* at 52320.

Today, the only known remaining population survives in the Termit/Tin Toumma region of Niger. However, there are sporadic records of small isolated groups and individuals from eastern Air Mountains/Western Ténéré desert in Niger, and from the Equey region of western Chad (Newby in press). Possible rare vagrants from these areas may be seen in north Niger, southern Algeria and Libya (Newby in press). There are continued rumours of Addax along the Mali/Mauritania border (Majabat Al Koubra), but no confirmed sightings for several years. However, in early March, 2007, the fresh tracks of about 15 Addax were seen in central Mauritania, in an area where they had not been reported for over 20 years (R. Vernet in Newby in press).

<http://www.iucnredlist.org/apps/redlist/details/512/0>. In addition to those in fenced populations in their former home ranges in Tunisia and Morocco, some addax have been reintroduced into the wild in these countries. *Id.*

The dama gazelle (*gazella dama*) stands about 39 inches (99 cm) tall at the shoulder and weighs around 160 pounds (72 kg). 70 Fed. Reg. 52319 (September 2, 2005). Its upper body is mostly reddish brown, and the head, rump, and underparts are white. *Id.* Its horns curve back and up, but are generally less than half the length of those of the scimitar-horned oryx. *Id.* Their historic home range included Chad, Mali, Niger, Libyan Arab Jamahiriya, Mauritania, Morocco, Nigeria, Algeria, Tunisia, Senegal, Sudan and Western Sahara. *Id.* They are believed to have disappeared from North Africa but some still remain in Mali, Chad and Niger. *Id.* Some dama gazelle are living in enclosed facilities in their home ranges in Morocco, Tunisia and Senegal. <http://www.iucnredlist.org/apps/redlist/details/8968/0>.

Currently, aside from the remaining wild populations of addax and dama gazelle, captive herds of the three species are found both inside and outside the United States. 70 Fed. Reg. 52319, 52320 (September 2, 2005). In the United States, captive populations are growing and thriving. *Id.* In 2004, Dr. Elizabeth Cary Mungall conducted research for the Exotic Wildlife Association (“EWA”) to assess population numbers and habitat conditions for captive

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populations of the three antelope species. Dr. Mungall reviewed a series of statewide censuses and collected data via a survey of EWA members who owned herds of one or more of the three species. Her research not only revealed significant numbers of each species on ranches in Texas and/or ranches owned by EWA members, but also demonstrated remarkable population increases over a relatively short period of time:

As shown by a series of statewide censuses (1966, 1971, 1974, 1979, 1984, 1988, 1994) in Texas done by the Texas Parks and Wildlife Department, the state wildlife agency, numbers of the three subject species kept in private ownership have been increasing (Ramsey 1967, Cook 1972, Harmel 1975, Harmel 1980, Traweek 1985, Traweek 1989, Traweek, 1995). This census series is further discussed in Mungall and Sheffield (1994). To confirm the situation, a further census was done in 1996 at the request of the Exotic Wildlife Association (EWA) by the Texas Agricultural Statistics Service (anonymous 1996). Dama gazelle numbers were checked again in an October 2003 phone census done by the author for EWA as described in the next section (Mungall 2004).

In summary, starting with the first census in which the species appeared:

Scimitar-horned oryx: 32 in 1979 to 1,006 in 1994 to 2,145 in 1996.

Addax: 2 in 1971 to 587 in 1994 to 1,824 in 1996.

Dama gazelle: 9 in 1979 to 149 in 1994 to 91 in 1996 to 369 in 2003.

Submission for the Comment Period on Proposed Listing of Scimitar-Horned Oryx, Addax, and Dama Gazelle Under the Endangered Species Act, A technical report prepared for the Exotic Wildlife Association, by Elizabeth Cary Mungall, January 6, 2004.

Regulations and Litigation Pertaining to the Three Antelope Species

The FWS listed the scimitar-horned oryx, dama gazelle and the addax throughout the world as endangered on September 2, 2005, after almost 14 years of deliberation over how to deal with the disparate status of the members of the species in the wild as compared to the captive herds in the United States. The Service first proposed an endangered species listing on November 5, 1991. [56 Fed. Reg. 56491](#). After an initial public comment opportunity, the Service re-opened the comment period on June 8, 1992, again on July 24, 2003, [68 Fed. Reg. 43706](#), and then for a third time on November 26, 2003. [68 Fed. Reg. 66395](#).

The Service's protracted deliberation over the listing status of the three species was due in great part to the dilemma of how to protect the species in the wild without severely undermining the pattern of trade and use of the species within the United States that had so benefitted the population numbers and health of the captive herds. An endangered classification creates severe restrictions on the use and trade of such animals. The individual ranchers who own and maintain these herds do so on a strictly voluntary basis. Management and conservation

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of wildlife cannot occur without financial resources. To generate the funds necessary to feed, raise, breed and care for these exotic animals, many ranchers allow limited hunting of their herds. In addition, owners of these captive herds trade and sell members of their herds in order to bring in new blood lines and maintain genetic diversity and health. As long as the three species were free of federal listing classification, their value remained high, which facilitated an important incentive for the continued volunteer efforts of the U.S. ranchers. The endangered species classification severely interferes with the economy and system by which the ranchers have been willing to participate in efforts that significantly increased the U.S. numbers of these animals. The additional burdens, costs and uncertainties introduced by endangered species classification significantly undermine the value of the animals, and encourage many ranchers to abandon their conservation efforts.

Ultimately, on September 2, 2005, the Service decided to list the three species, in their entirety, as endangered. The Service did not adopt SCI's recommendation to exclude U.S. captive populations from this listing, instead interpreting the ESA to prohibit disparate listing designations between wild and captive/exotic populations of a species. The Service explained that "[i]t would not be appropriate to list captive and wild animals separately." 70 Fed. Reg. 52319, 52320 (September 2, 2005).

The Service decided to include U.S. captive populations in the endangered species listing despite the fact that the Service lacked evidence that these captive populations were being used to seed reintroductions of these species into the wild. At best, the Service could only document reintroductions from captive herds into other captive herds, some but not all in their home range, but not into the wild. For example, the FWS noted that reintroductions of dama gazelle had contributed to semi-captive populations of the species in its home range:

Although the dama gazelle is the least susceptible of the three antelopes to pressures from humans and domestic livestock, it has declined rapidly in the last 20 years, and only small numbers survive in most of the eight countries within its historical range. Noble (2002) estimated that the wild population of *G. dama ruficollis* is fewer than 200 specimens, *G. dama dama* is about 500 specimens, and *G. dama mhorri* may be extinct in the wild. It was previously extirpated from Senegal, but has since been reintroduced, and in 1997, at least 25 animals existed there as part of a semi-captive breeding program (IUCN 2003). The dama gazelle, including all subspecies, is listed as endangered by IUCN (2003). The Mhorri gazelle may only be found in captive collections or reintroduced populations in large fenced enclosures within range countries (Antelope Taxon Advisory Group 2002, IUCN 2003). In 1983, the Mhorri gazelle was listed in CITES Appendix I.

Id. at 52320. The FWS further documented the lack of reintroductions into the wild:

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Fenced reintroductions of scimitar-horned oryx are ongoing in Morocco, Tunisia, and Senegal (Monfort in litt. 2003, Monfort 2003). Five dama gazelle have been introduced to a large enclosure in Senegal (Ba and Clark 2003). These specimens are fenced in large tracts of suitable or recovering habitat and held for breeding and eventual reintroduction. The founder stock was largely derived from captive-breeding facilities. *However, threats to survival of the antelopes still occur outside of the fenced areas so reintroduction into the wild has rarely occurred.*

Id. at 52322 (emphasis added). Although noting the role that captive breeding could have for future reintroductions, the Service admitted that reintroductions into the wild were presently infeasible:

Captive-breeding programs operated by zoos and private ranches have effectively increased the numbers of these animals while genetically managing their herds. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Currently, however, continued habitat loss and wonton (sic) killing have made reintroduction nonviable in most cases.

Id. at 52322. The listing rule documented only the *potential* for U.S. captive bred herds to support reintroductions into the wild. At the time of listing, only introductions from captivity into captivity were possible, leaving to conjecture the value that U.S. captive herds will have for conservation of the species in the wild.

The Service attempted to preserve the ongoing conservation efforts being conducted by private U.S. ranchers by carving out a special exception to the take prohibitions normally applicable to species listed as endangered. On September 2, 2005, the Service issued a rule that exempted United States captive-bred members of the three antelope species from the take and other prohibitions of section 9 of the ESA. 70 Fed.Reg. 52310 (Sept. 2, 2005). That regulation was challenged and on June 22, 2009, Judge Kennedy of the U.S. District Court for the District of Columbia ruled that regulation to be in violation of the ESA's permit notice and comment requirements. *Friends of Animals v. Salazar*, 626 F. Supp.2d 102 (D.D.C. 2009). Judge Kennedy remanded the rule, directing the Service to issue new regulations that conformed to ESA requirements. *Id.* at 118.

The U.S. Fish and Wildlife Service Violated 16 U.S.C. § 1533 and 5 U.S.C. § 706 When It Included the U.S. Captive Populations in the Endangered Species Act Listing for the Three Antelope Species

At the time that it listed the three species as endangered, the Service interpreted each of the three species as a single indivisible unit, and concluded that it was unable to differentiate when specifying the listing status of the three species between the captive herds living in the

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United States and those living outside the United States in their home range. The FWS erroneously characterized the portions of the species that it evaluated and erroneously interpreted its authority to designate species and/or portions of species.

Error One: The Service Failed to Utilize Its Authority to Distinguish and Specify the Portion of The Three Species Range in the United States.

The Service refused to specify a different classification for U.S. captive populations, claiming that “[i]t would not be appropriate to list captive and wild animals separately.” 70 Fed. Reg. 52319, 52320 (September 2, 2005). In basing its listing decision on that premise, the Service erroneously failed to take into account the captive populations of the three species that live within and outside of their home ranges in countries other than the U.S., in zoos, private facilities and captive herds.¹ Had the FWS done so, it could have divided the populations by international geographical boundaries, rather than separating the species into strictly captive vs. wild designations. The FWS could have specified that the portion of the range for all populations, both captive and wild, living outside the United States, required listing, and that no such listing status was necessary for any members of the species living within the U.S.

¹ For example, the FWS is aware of captive herds of scimitar-horned oryx living in South Africa. 74 Fed. Reg. 58977 (November 16, 2009). In addition, the IUCN reports that there are several captive herds of dama gazelle around the world:

Dama Gazelle are present in captivity, but the number of founders is limited (Sausman 1998; Thuesen 1998). Animals from Almeria breeding facility in Spain were introduced to an enclosure (R'mila Royal Reserve) in Morocco (130 present in 2007; Cuzin *et al.* in press) and gazelles from München Zoo (originally bred at Almeria) were released into an enclosure in Souss-Massa N.P. (12 animals in 2006); these semi-captives are intended to form part of a reintroduction programme in Morocco. All of the animals from Almeria stock originate from Western Sahara. Elsewhere, Dama Gazelle were released into the 2,000-ha Bou-Hedma N.P. in Tunisia in the early 1990s (Abaigar *et al.* 1997) where around 17 were present in 2006 (T. Wachter pers. comm.); gazelles have also been reintroduced to Guembeul Faunal Reserve in Senegal (Cano *et al.* 1993) and a reintroduction programme in Ferlo North Reserve is underway (7 animals).

<http://www.iucnredlist.org/apps/redlist/details/8968/0>. The IUCN also reports captive herds of addax located around the world.

There are over 600 Addax in Europe, Libya (Sabratha), Egypt (Giza Zoo), North America, Japan and Australia in managed breeding programmes”

<http://www.iucnredlist.org/apps/redlist/details/512/0>

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Id. The Service took into consideration the Pecos River population's potential for providing additional genetic material to the listed Arkansas River basin population. Nevertheless, the Service found it unnecessary to list the Pecos River population because it could not improve the status of the Arkansas River basin DPS in its historic range. *Id.* The Service also determined that conservation of the non-native population was not required by the ESA:

The purpose of the Act is to conserve threatened and endangered species and the ecosystems on which they depend. Non-native, introduced populations, while possibly useful in recovery/restoration efforts, are not a viable substitute for species conservation in native ecosystems. We do not believe listing or active conservation of the introduced Pecos River population is appropriate nor is such conservation required by the Act.

Id. at 64777. The disparate non-listed status for the non-native Pecos River population of the Arkansas River Shiner persists today. Consequently, the decision to list the non-native herds of the three antelope species directly contradicts the Service's policy and practice with respect to non-native populations.

The policy to exclude non-native populations from ESA listing is not unique to the Arkansas River Shiner. The FWS's sister agency, the National Marine Fisheries Service, has recently issued a 90-day "may be warranted" finding, accepting a petition to *delist* coho salmon (*Oncorhynchus kisutch*) in coastal counties south of the ocean entrance to San Francisco Bay, California, from the Federal List of Endangered and Threatened Wildlife. The basis is that the salmon at issue may not be native to the distinct population segment in which they have been included, and therefore "do not constitute an important component in the evolutionary legacy of the species." 75 Fed. Reg. 16745, 16746 (April 2, 2010).²

² The scenario involving the non-native captive populations of the three antelope species is markedly different than the scenario considered by the Oregon District Court in *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). In that case, the court rejected the NMFS attempt to exclude hatchery born coho salmon from a DPS and listing that included naturally born coho. The hatchery salmon were swimming side-by-side in the same bodies of water with the natural born coho, the NMFS considered the progeny of hatchery born salmon to be "naturally spawned" and the area in which the hatchery and natural born salmon co-existed was the native, historic range of the latter. In the three antelope situation, the U.S. is not the historic range of any of the three species, and the captive members of the three herds do not interact with non-captive, native members of the species. The captive members are isolated both geographically and reproductively, and their location is thousands of miles from the home range of the species.

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Recently, the FWS approached a petition to list the plains bison in a similar manner, rejecting the notion that members of captive herds of plains bison be included in a potential listing:

There does not appear to be any conservation value for plains bison in commercial herds, as members of these herds are not used in restoration programs. Instead, their primary purpose is the production of meat and other commodities for commercial purposes. Our interpretation is that the Act intended to conserve species in their native ecosystems. We are not considering plains bison managed for production of meat and other commodities in this finding because we do not believe that individuals propagated and managed for commercial uses aid in the conservation or the recovery of the subspecies in the wild. For the purposes of this finding, we are analyzing status and potential threats to a petitioned entity that includes plains bison managed primarily for purposes of wildlife and ecosystem conservation, hereby referred to as wild plains bison, even though no bison herd has remained in a completely wild state since prehistoric times (see our discussion on Significance, below). Consequently, we do not address commercial bison herds further in this finding.

76 Fed. Reg. 10299, 10301 (February 24, 2011). Although unlike the commercial populations of plains bison, members of U.S. captive herds of the three antelope species have been used for reintroductions, those reintroductions have been into other captive herds. Until their value for reintroductions into the wild can be established, their listing, based on the speculation that they can help conserve the species in the wild, violates the ESA.

Error Three: The Service Should Not Have Classified the U.S. Portions of the Species' Ranges as Endangered

The ESA obligates the Service to specify the portion of a listed species' range that is to be designated as "endangered" or "threatened." 16 U.S.C. § 1533(c)(1). Pursuant to this statutory directive, the FWS should have designated the scimitar-horned oryx, dama gazelle and addax as "listed" species based on their status outside the U.S. and should have specified only those portions of the species where they are to be protected as "endangered" or "threatened" species. In other words, Section 1533(c)(1) provides the mechanism that the FWS must use when it needs to specify a different listing status for different portions of a species. Consequently, pursuant to 1533(c)(1), the antelope living in the significant portion of their range outside of the U.S., could be classified as "endangered" while those living in captivity in the U.S. would not receive federal listing status or protection. The Service's error was in failing to specify scimitar-horned oryx, dama gazelle and addax as requiring federal ESA protections *only* within the portion of their ranges outside of the United States and in failing to leave the captive populations in the United States without such classification or unnecessary federal protection.

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The FWS further erred in not analyzing the status of the three species in their current ranges within the United States, and in not finding that the current ranges of the three species in the U.S. qualify as significant portions of the three species' ranges. A species is endangered only if it is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532 (6). That is not the case for the three antelope species. Although they may qualify for endangered status in the wild, they are not in danger of extinction throughout their range in the United States. The Service's failure to conduct an analysis of whether the U.S. current range constitutes a significant portion of the three species' ranges led to further error. The FWS erroneously failed to make the determination that the U.S. portions of the three antelopes' ranges (or the species in their entireties) did not qualify for endangered species status due to the fact that the species were not in danger of extinction throughout all or the significant portion of their ranges in the United States.

Inclusion of the U.S. Captive Populations Violates the Conservation Purposes of the ESA

Instead of promoting the conservation of species in jeopardy of extinction, the listing of the U.S. captive herds of the three antelope species discourages private enhancement efforts and harms the species' futures. By listing the U.S. captive populations as endangered, the Service has created a situation where private ranch owners must request and the Service must issue permits for the trade, use and take of members of these herds. These permit obligations discourage private ranchers from raising and breeding herds of these animals, and will likely prompt many to abandon their enhancement efforts. As a consequence, the U.S. captive numbers of these animals will diminish and the conservation efforts that have resulted in thousands of these animals in captivity in the U.S. will be lost. Any conservation value attributable to the U.S. captive populations has been jeopardized by the inclusion of these U.S. captive populations in the endangered species listing.

Conclusion

In 2005, the FWS erroneously determined, when establishing the listing status of scimitar-horned oryx, dama gazelle and addax, that the U.S. captive herds of the antelope should be included with portions of the species' range living outside of the United States. Although portions of the three species living in ranges outside of the U.S. may indeed qualify for endangered status, the U.S. captive herds should never have been included in that designation. The FWS erred in assuming that excluding the U.S. populations would have resulted in different listing statuses based exclusively on a captive/wild distinction. The Service arbitrarily and capriciously failed to acknowledge that the captive populations in the United States are not the only ones throughout the world and that captive populations outside of the U.S. would also have been encompassed in the endangered listing. The Service also erred in ignoring its own practice

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and policy of distinguishing the listing status of captive populations of species and/or excluding non-native populations from listing of native members of the species. The FWS relied upon conjecture in reasoning that the captive populations in the United States have a direct link to conservation of the species in the wild, since no direct reintroductions into the wild are currently possible. The Service erred in failing to take into account its authority to specify a different listing status for different portions of each species' range and/or to create distinct population segments of the portions of the three species that live in the United States and to exclude those DPS's from the endangered species listing. To compound these errors, the Service failed to reverse its listing decision once Judge Kennedy ruled against the legality of the special exemption applicable to these U.S. captive herds and failed to act on SCI's delisting petition based on error. In response, the Service should have acknowledged its error and should have delisted the captive herds.

When it came to the conservation of scimitar-horned oryx, dama gazelle and addax, the Service chose form over substance. Continued listing of these captive herds is harmful to the future of the three species, while removal from the endangered species list will benefit the conservation of the three species. SCI gives 60-day notice that, unless the Service corrects the illegal inclusion of the captive populations of the three antelope species in the endangered species listing, SCI will pursue litigation in federal court and will seek injunctive and declaratory relief as well as legal fees and costs regarding these violations.

If you should have any questions concerning this matter, please contact Anna M. Seidman, Director of Litigation, Safari Club International, 202-543-8733 or aseidman@safariclub.org.

Thank you.

Sincerely,



Kevin Anderson
President,

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Safari Club International



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To: 049036

JUL 25 2011

Mr. Kevin Anderson
President
Safari Club International
501 2nd Street, NE
Washington, DC 20002

Dear Mr. Anderson:

On July 1, 2011, we received your letter dated June 29, 2011, professing notice of your intent to sue regarding alleged Endangered Species Act (ESA) violations related to our final rule issued on September 5, 2005, listing the scimitar-horned oryx, dama gazelle, and addax as endangered and a petition submitted by Safari Club International dated June 28, 2010, to revise the listing or delist the U.S. captive populations of the three species.

The Branch of Foreign Species (BFS) within the U. S. Fish and Wildlife Service (Service) is the lead office for the scimitar-horned oryx, dama gazelle, and addax. The Service's BFS is currently directing available staff and resources towards completion of a number of court-ordered actions, including listing determinations for twelve bird species. The Service anticipates it will be able to make an initial finding on your petition in the next fiscal year.

We appreciate your interest in conservation. If you have any questions concerning this matter, please contact Gina Shultz at (703) 358-2478.

Sincerely,

Gina M. Shultz
Chief, Office of ESA Litigation