Appendix A

1994 Fish and Wildlife Service and National Marine Fisheries Service Cooperative ESA policies

[Federal Register: July 1, 1994]

Part VIII

Department of the Interior
Fish and Wildlife Service

Department of Commerce
National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Policy Statements; Notices

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to clarify the role of peer review in activities undertaken by the Services under authority of the Endangered Species Act of 1973 (Act), as amended, and associated regulations in Title 50 of the Code of Federal Regulations. This policy is intended to complement and not circumvent or supersede the current public review processes in the listing and recovery programs.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets, NW., Washington, D.C. 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

The Act requires the Services to make biological decisions based upon the best scientific and commercial data available. These decisions involve listing, reclassification, and delisting of plant and animal species, critical habitat designations, and recovery planning and implementation.

The current public review process involves the active solicitation of comments on proposed listing rules and draft recovery plans by the scientific community, State and Federal agencies, Tribal governments, and other interested parties on the general information base and the assumptions upon which the Service is basing a biological decision.

The Services also make formal solicitations of expert opinions and analyses on one or more specific questions or assumptions. This solicitation process may take place during a public comment period on any proposed rule or draft recovery plan, during the status review of a species under active consideration for listing, or at any other time deemed necessary to clarify a scientific question.

Independent peer review will be solicited on listing recommendations and draft recovery plans to ensure the best biological and commercial information is being used in the decisionmaking process, as well as to ensure that reviews by recognized experts are incorporated into the review process of rulemakings and recovery plans developed in accordance with the requirements of the Act.

Policy

A. In the following endangered species activities, it is the policy of the Services to incorporate independent peer review in listing and recovery activities, during the public comment period, in the following manner:

(1) Listing

(a) Solicit the expert opinions of three appropriate and independent specialists regarding pertinent scientific or commercial

data and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for species under consideration for listing;

(b) Summarize in the final decision document (rule or notice of withdrawal) the opinions of all independent peer reviewers received on the species under consideration and include all such reports, opinions, and other data in the administrative record of the final decision.

(2) Recovery

(a) Utilize the expertise of and actively solicit independent peer review to obtain all available scientific and commercial information from appropriate local, State and Federal agencies; Tribal governments; academic and scientific groups and individuals; and any other party that may possess pertinent information during the development of draft recovery plans for listed animal and plant species.

(b) Document and use, where appropriate, independent peer review to review pertinent scientific data relating to the selection or implementation of specialized recovery tasks or similar topics in draft or approved recovery plans for listed species.

(c) Summarize in the final recovery plan the opinions of all independent peer reviewers asked to respond on an issue and include the reports and opinions in the administrative record of that plan.

Independent peer reviewers should be selected from the academic and scientific community, Tribal and other native American groups, Federal and State agencies, and the private sector; those selected have demonstrated expertise and specialized knowledge related to the scientific area under consideration.

B. Special Circumstances

(1) Sometimes, specific questions are raised that may require additional review prior to a final decision, (e.g. scientific disagreement to the extent that leads the Service to make a 6-month extension of the statutory rulemaking period). The Services will determine when a special independent peer review process is necessary and will select the individuals responsible for the review. Special independent peer review should only be used when it is likely to reduce or resolve the unacceptable level of scientific uncertainty.

(2) The results of any special independent peer review process will be written, entered into the permanent administrative record of the decision, and made available for public review. If the peer review is in the context of an action for which there is a formal public comment period, e.g., a listing, designation of critical habitat, or development of a recovery plan, the public will be given an opportunity to review the report and provide comment.

Scope of Policy

The scope of this policy is Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532).

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries Service.
[FR Doc. 94-16021 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Services under the authority of the Endangered Species Act of 1973 (Act), as amended represent the best scientific and commercial data available. This policy is intended to complement the current public review processes prescribed by sections 4(b)(4)(6) and 10(a)(2)(B) of the Act and associated regulations in title 50 of the Code of Federal Regulations.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

The Act requires the Secretary of the Interior and the Secretary of Commerce to determine whether any species is endangered or threatened (16 U.S.C. 1533). When making these determinations, the Secretary is directed to use the best scientific and commercial data available.

The Services receive and use information on the biology, ecology, distribution, abundance, status, and trends of species from a wide variety of sources as part of their responsibility to implement the Act. Some of this information is anecdotal, some of it is oral, and some of it is found in written documents. These documents include status surveys, biological assessments, and other unpublished material (that is, ``gray literature") from State natural resource agencies and natural heritage programs, Tribal governments, other Federal agencies, consulting firms, contractors, and individuals associated with professional organizations and higher educational institutions. The Services also use published articles from juried professional journals. The reliability of the information contained in these sources can be as variable as the sources themselves. As part of their routine activities Service biologists are required to gather, review, and evaluate information from these sources prior to undertaking listing, recovery, consultation, and permitting actions.

Policy

To assure the quality of the biological, ecological, and other information that is used by the Services in their implementation of the Act, it is the policy of the Services:

a. To require biologists to evaluate all scientific and other information that will be used to (a) determine the status of candidate species; (b) support listing actions; (c) develop or implement recovery plans; (d) monitor species that have been removed from the list of threatened and endangered species; (e) to prepare biological opinions, incidental take statements, and biological assessments; and (f) issue scientific and incidental take permits. This review will be conducted to ensure that any information used by the Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.

b. To gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Services during their implementation of the Act.

c. To require biologists to document their evaluation of

information that supports or does not support a position being proposed as an official agency position on a status review, listing action, recovery plan or action, interagency consultation, or permitting action. These evaluations will rely on the best available comprehensive, technical information regarding the status and habitat requirements for a species throughout its range.

d. To the extent consistent with sections 4, 7, and 10 of the ESA, and to the extent consistent with the use of the best scientific and commercial data available, use primary and original sources of information as the basis for recommendations to (1) place a species on the list of candidate species, (2) promulgate a regulation to add a species to the list of threatened and endangered species, (3) to remove a species from the list of threatened and endangered species, (4) designate critical habitat, (5) revise the status of a species listed as threatened or endangered, (6) make a determination of whether a Federal action is likely to jeopardize a proposed, threatened, or endangered species or destroy or adversely modify critical habitat; and (7) issue a scientific or incidental take permit. These sources shall be retained as part of the administrative record supporting an action and shall be referenced in all official Federal Register notices and biological opinions prepared for an action.

e. To collect, evaluate, and complete all reviews of biological, ecological, and other relevant information within the schedules established by the Act, appropriate regulations, and applicable policies.

f. To conduct management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Services during their implementation of the Act.

Scope of Policy

This policy applies Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532), and for listing, recovery, interagency consultation, management and scientific authorities, and permitting programs as outlined in, and to the extent consistent with, the provisions of sections 4(a)(c), 4(e)(g), 7(a)(c), 8A(c), and 10(a) of the Act, respectively.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries Service.
[FR Doc. 94-16022 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency cooperative policy to establish a procedure at the time a species is listed as threatened or endangered to identify to the maximum extent practicable those activities that would or would not constitute a violation of section 9 of the Endangered Species Act of 1973 (Act), as amended, and to increase public understanding and provide as much certainty as possible regarding the prohibitions that will apply under section 9. By identifying activities likely or not likely to result in violation of section 9 at the time a species is listed, the Services intend to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland

20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Act prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations, and agencies subject to United States jurisdiction. Section 4(d) of the Act allows the promulgation of regulations that apply any or all of the prohibitions of section 9 to threatened species. Under the Act and regulations, it is illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import or export, ship in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered fish or wildlife species and most threatened fish and wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. With respect to endangered plants, analogous prohibitions make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or to remove and reduce to possession any such plant species from areas under Federal jurisdiction. In addition, for endangered plants, the Act prohibits malicious damage or destruction of any such species on any area under Federal jurisdiction, and the removal, cutting, digging up, or damaging or destroying of any such species on any other area in knowing violation of any State law or regulation, or in the course of any violation of a State criminal trespass law.

Policy

It is the policy of the Services to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9. To the extent possible, activities that will be considered likely to result in violation also will be identified in as specific a manner as possible. For those activities whose likelihood of violation is uncertain, a contact will be identified in the final listing document to assist the public in determining whether a particular activity would constitute a prohibited act under section 9.

Scope of Policy

This policy applies for all species of fish and wildlife and plants, as defined under the Act, listed after October 1, 1994.

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries Service.
[FR Doc. 94-16023 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy relative to recovery plan participation and implementation under the Endangered Species Act of 1973, as amended. This cooperative policy is intended to minimize social and economic impacts consistent with timely recovery of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). In addition, this policy provides a Participation Plan process, which involves all appropriate agencies and affected interests in a mutually-developed strategy to implement one or more recovery actions.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

Section 4(f) of the Act directs the Secretary of the Commerce and the Secretary of Interior to develop and implement recovery plans for animal and plant species listed as endangered or threatened, unless such plans would not promote the conservation of the species. Coordination among State, Tribal or Federal agencies, academic institutions, private individuals and organizations, commercial enterprises, and other affected parties is perhaps the most essential ingredient for recovering a species.

Policy

To enhance recovery plan development and implementation, while recommending measures that accomplish the goals of a recovery plan, the Services will:

A. Diversify areas of expertise represented on a recovery team,
B. Develop multiple species plans when possible,
C. Minimize the social and economic impacts of implementing recovery actions,
D. Involve representatives of affected groups and provide stakeholders the opportunity to participate in recovery plan development, and
E. Develop recovery plans within 2 1/2 years after final listing.
(1) Recovery Plan Preparation and Process

The method to be used for recovery plan preparation shall be based on several factors, including the range or ecosystem of the species (limited vs. extensive), the complexity of the recovery actions contemplated, the number of organizations responsible for the implementation of the recovery tasks, the availability and expertise of personnel, and the availability of funds. Outside expertise in the form of recovery teams, other Federal agencies, State agency personnel, Tribal governments, private conservation organizations, and private contractors shall be used, as necessary, to develop and implement recovery plans in a timely manner that will minimize the social and economic consequences of plan implementation.

Team members should be selected for their knowledge of the species or for expertise in elements of recovery plan design or implementation (such as local planning, rural sociology, economics, forestry, etc.), rather than their professional or other affiliations. Teams are to be composed of recognized experts in their fields and are encouraged to explore all avenues in arriving at solutions necessary to recover threatened or endangered species. Factors for selection of team members

are (1) expertise (including current involvement, if possible), with respect to the species, closely related species, or the ecosystem in which it is or may once again become a part, (2) special knowledge of one or more threats contributing to the listed status of the species and (3) knowledge of one or more related disciplines, such as land use planning, state regulations, etc. The Services also will select team members based on special knowledge essential for the development of recovery implementation schedules, particularly development of Participation Plans that are intended to minimize the social and economic effects of recovery actions. Teams should include representatives of State, Tribal, or Federal agencies, academic institutions, private individuals and organizations, commercial enterprises, and other constituencies with an interest in the species and its recovery or the economic or social impacts of recovery.

(2) Involvement of Affected Groups

Whether a recovery plan is developed by the Service's biologists, contractors, or a recovery team, each plan will seek the best information to fulfill the intent of the Act regarding recovery planning. This information and input from affected interests will be used to develop alternatives for recovery implementation that not only meet requirements for the recovery of a species, but minimize social and economic effects of recovery actions. Representatives of affected interests that can be determined during recovery plan development will be asked to participate during plan development and implementation.

(3) Implementing Recovery Actions

Implementation of recovery plans will be accomplished through the means that will provide for timely recovery of the species while minimizing social and economic impacts. The Services will involve all affected interests in the recovery plan implementation process through the development of a Participation Plan. A Participation Plan should involve all appropriate agencies and affected interests in a mutually developed strategy to implement one of more specifically designated recovery actions. Participation Plans should ensure that a feasible strategy is developed for all affected interests while providing realistic and timely recovery of the species.

Nothing in this policy is intended to change the current policy of developing recovery plans within 2\1/2\ years after final listing of a species (18 months for draft recovery plan and a final recovery plan within an additional 12 months of the draft).

Scope of Policy

The scope of this policy is Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 5131-1544).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries Service.
[FR Doc. 94-16024 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to incorporate ecosystem considerations in Endangered Species Act actions regarding listing, interagency cooperation, recovery and cooperative activities.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

A primary purpose of the Act (section 2(b)) is ``to provide a means

whereby the ecosystems upon which endangered or threatened species depend may be conserved. . . ."

Section 5(a) authorizes the establishment and implementation of a program to conserve fish, wildlife, and plants, including those which are listed as endangered or threatened. Section 6 authorizes partnerships with the States to develop cooperative programs for the conservation of endangered and threatened species. Section 7(a)(1) obligates all Federal agencies to utilize their authorities to further the purposes of the Act by carrying out programs for the conservation of endangered and threatened species. Section 8 encourages partnerships with foreign countries to provide for conservation of fish or wildlife and plants. Section 10 conservation planning provides opportunities for ecosystem-level resource protection with non-federal partners to address concerns of threatened and endangered species.

Success of ecosystem management will depend on the cooperation of partners, (federal, state, and private). Setting new internal standards for teamwork and communication between regions and other agencies will be emphasized to support an ecosystem approach to species conservation. Species will be conserved best not by a species-by-species approach but by an ecosystem conservation strategy that transcends individual species. The future for endangered and threatened species will be determined by how well the agencies integrate ecosystem conservation with the growing need for resource use.

Policy

The purpose of this cooperative policy is to promote healthy ecosystems through activities undertaken by the Services under authority of the Endangered Species Act of 1973 (Act), as amended, and associated regulations in Title 50 of the Code of Federal Regulations. In the following endangered species activities, it is the policy of the Services to incorporate ecosystem considerations in Endangered Species Act activities in the following manner:

A. Listing

(1) Group listing decisions on a geographic, taxonomic, or ecosystem basis where possible.

(2) Develop partnerships with other Federal, State, Tribal, and private agencies to conduct comprehensive status reviews across the entire range of candidate species.

B. Interagency Cooperation

(1) Develop cooperative approaches to threatened and endangered species conservation that restore, reconstruct, or rehabilitate the structure, distribution, connectivity and function upon which those listed species depend.

C. Recovery

(1) Develop and implement recovery plans for communities or ecosystems where multiple listed and candidate species occur.

(2) Develop and implement recovery plans for threatened and endangered species in a manner that restores, reconstructs, or rehabilitates the structure, distribution, connectivity and function upon which those listed species depend. In particular, these recovery plans shall be developed and implemented in a manner that conserves the biotic diversity (including the conservation of candidate species, other rare species that may not be listed, unique biotic communities, etc.) of the ecosystems upon which the listed species depend.

(3) Expand the scope of recovery plans to address ecosystem conservation by enlisting local jurisdictions, private organizations, and affected individuals in recovery plan development and implementation.

(4) Develop and implement agreements among multiple agencies that allow for sharing of resources and decision making on recovery actions for wide-ranging species.

D. Cooperative Efforts

(1) Use the authorities of the Act to develop clear, consistent policies that integrate the mandates of Federal, State, Tribal, and local governments to prevent species endangerment by protecting, conserving, restoring, or rehabilitating ecosystems that are important for conservation of biodiversity.

(2) Integrate research and technology development on conservation of endangered and threatened species with initiatives for management of ecosystems that serve many other uses.

(3) Prioritize actions and system monitoring schemes to meet specific objectives for genetic resources, species populations, biological communities, and ecological processes through carefully designed adaptive management strategies.

(4) Integrate ecosystem-based goals of the Endangered Species Act with existing mandates under other environmental laws, such as the National Environmental Policy Act, Clean Water Act, Clean Air Act, Marine Mammal Protection Act, Magnuson Fishery Conservation and Management Act, and Fish and Wildlife Coordination Act.

Scope of Policy

The scope of this policy is Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 under the Act (16 U.S.C. 1532) and for listing, recovery, land acquisition, interagency consultation, international cooperation, and permitting programs as outlined in, and to the extent consistent with the provisions of sections 4(a)(c), 4(e)(g), 7(a)(c), 8A(c), and 10(a) of the Act, respectively.

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries Service.
[FR Doc. 94-16025 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

[Federal Register: July 1, 1994]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to clarify the role of State agencies in activities undertaken by the Services under authority of the Endangered Species Act of 1973, as amended (Act), and associated regulations in title 50 Code of Federal Regulations.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358-2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713-2322).

SUPPLEMENTARY INFORMATION:

Background

The Services recognizes that, in the exercise of their general governmental powers, States possess broad trustee and police powers over fish, wildlife and plants and their habitats within their borders. Unless preempted by Federal authority, States possess primary authority and responsibility for protection and management of fish, wildlife and plants and their habitats.

State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out the program authorized by the Act. The term State agency means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

Policy

In the following Endangered Species Act programs, it is the policy of the Services to:

A. Prelisting Conservation

1. Utilize the expertise and solicit the information of State agencies in determining which species should be included on the list of candidate animal and plant species.
2. Utilize the expertise and solicit the information of State agencies in conducting population status inventories and geographical distribution surveys to determine which species warrant listing.
3. Utilize the expertise of State agencies in designing and implementing prelisting stabilization actions, consistent with their authorities, for species and habitat to remove or alleviate threats so that listing priority is reduced or listing as endangered or threatened is not warranted.
4. Utilize the expertise and solicit the information of State agencies in responding to listing petitions.

B. Listing

1. Utilize the expertise and solicit the information of State agencies in preparing proposed and final rules to: (a) List species as endangered or threatened, (b) define and describe those conditions under which take should be prohibited for threatened species, (c) designate critical habitat, and (d) reclassify a species from

endangered to threatened (or vice versa) or remove a species from the list.

2. Provide notification to State agencies of any proposed regulation in accordance with provisions of the Act.

C. Consultation

1. Inform State agencies of any Federal agency action that is likely to adversely affect listed or designated critical habitat; or that is likely to adversely affect proposed species or proposed critical habitat and request relevant information from them, including the results of any related studies, in analyzing the effects of the action and cumulative effects on the species and habitat.

2. Request an information update from State agencies prior to preparing the final biological opinion to ensure that the findings and recommendations are based on the best scientific and commercial data available.

3. Recommend to Federal agencies that they provide State agencies with copies of the final biological opinion unless the information related to the consultation is protected by national security classification or is confidential business information. Decisions to release such classified or confidential business information shall follow the action agency's procedures. Biological opinions, not containing such classified or confidential business information, will be provided to the State agencies by the Services, if not provided by the action agency, after 10 working days. The exception to this waiting period allows simultaneous provision of copies when there is a joint Federal-State consultation action.

D. Habitat Conservation Planning

1. Utilize the expertise and solicit the information and participation of State agencies in all aspects of the Habitat Conservation Planning (HCP) process.

E. Recovery

1. Utilize the expertise and solicit the information and participation of State agencies in all aspects of the recovery planning process for all species under their jurisdiction.

2. Utilize the expertise and solicit the information and participation of State agencies in implementing recovery plans for listed species. State agencies have the capabilities to carry out many of the actions identified in recovery plans and are in an excellent position to do so because of their close working relationships with local governments and landowners.

3. Utilize the expertise and authority of State agencies in designing and implementing monitoring programs for species that have been removed from the list of Endangered and Threatened Wildlife and Plants. Unless preempted by Federal authority, States possess primary authority and responsibility for protection and management of fish,

wildlife and plants and their habitats, and are in an excellent position to provide for the conservation of these species following their removal from the list.

Scope of Policy

The scope of this policy is Servicewide.

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1536).

Dated: June 27, 1994.
Mollie H. Beattie,
Director, U.S. Fish and Wildlife Service, Department of the Interior.
Dated: June 24, 1994.
Rolland A. Schmitten,
Assistant Administrator for Fisheries, National Marine Fisheries Service.
[FR Doc. 94-16026 Filed 6-30-94; 8:45 am]
BILLING CODE 4310-55-P

Appendix B.

Relevant Recovery related court decisions

Fund for Animals *et al.* v. Babbitt *et al.* – Grizzly Bear

Defenders of Wildlife *et al.* v. Bruce Babbitt *et al.* – Sonoran Pronghorn

Defenders of Wildlife *et al.* v. Norton *et al.* – Flat-Tailed Horned Lizard

SWCBD and Rio Grande Chapter of Trout Unlimited v. Babbitt – Gila Trout

THE FUND FOR ANIMALS, et al., Plaintiffs, v. BRUCE BABBITT,et al., Defendants. THE NATIONAL AUDUBON SOCIETY, et al., Plaintiffs, v. BRUCEBABBITT, et al., Defendants.
Civ. No. 94-1021 PLF, Civ. No. 94-1106 PLF

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

903 F. Supp. 96; 1995 U.S. Dist. LEXIS 14742; 42 ERC (BNA)1068; 26 ELR 20537

September 29, 1995, Decided
September 29, 1995, FILED

SUBSEQUENT HISTORY: [**1]

As Amended May 1, 1997.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, environmental and conservation organizations and concerned individuals (environmentalists), challenged alleged deficiencies in the efforts by defendants, Secretary of Interior (Secretary) and Fish and Wildlife Service (FWS) (jointly federal officials), to fulfil their obligation under the Endangered Species Act (ESA), *16 U.S.C.S. §§ 1531*-1544, to protect grizzly bears, a threatened species. Both parties sought summary judgment.

OVERVIEW: The Secretary delegated day-to-day responsibility to the FWS, and a grizzly bear recovery plan (GBRP) was developed and implemented. The court determined that the federal officials met their required burden of incorporating site-specific management actions into the GBRP, but failed to incorporate objective, measurable recovery criteria. The FWS was accorded flexibility to recommend a range of management actions on a site-specific basis. The FWS had discretion in itschoice of methods to stem the hunting threat to grizzly bears. The court declined to impose road density standards upon the FWS. The FWS was not required to establish linkage zones because it relied on its own determination that too little was known about the potential for such zones. The FWS, in designing objective, measurable criteria for recovery, was required to address five statutory delisting factors, and its failure to do so violated the ESA. The FWS complied with the applicable provisions of the Administrative Procedures Act, *5 U.S.C.S. § 551* et seq., in denying a request for a critical habitat designation for grizzly ecosystems because the FWS adequately explained the facts and policy concerns relied upon.

OUTCOME: The court granted the environmentalists' motion for summary judgment insofar as they alleged that the federal officials' GBRP failed to incorporate objective, measurable recovery criteria. The court denied the environmentalists' motion for summary judgment insofar as it challenged the federal officials' incorporation of site-specific management actions into the GBRP and denied a request for a critical habitat designation.

CORE TERMS: habitat, species, grizzly, grizzly bear, ecosystem, zone, delisting, conservation, site-specific, survival, designation, females, measurable, recommend, monitoring, designate, linkage, mortality, cubs, scientific, regulation, methodology, endangered, maximum, listing, destruction, occupancy, isolation, extinction, predation

CORE CONCEPTS -

Environmental Law: Natural Resources & Public Lands:Endangered Species Act
In considering whether to list a species as "threatened" or "endangered," the Fish and Wildlife Service conducts a formal review in which it must consider the species' status according to five statutory factors. Those factors are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E)other natural or manmade factors affecting its continued existence. *16 U.S.C.S. § 1533*(a)(1).

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
The Secretary of the Interior is required, in most cases, including cases involving grizzly bears, to develop and implement a recovery plan for each threatened or endangered species. *16 U.S.C.S. § 1533*(f).

Environmental Law: Litigation & Administrative Proceedings: Judicial Review
Environmental Law: Natural Resources & Public Lands: Endangered Species Act
Actions taken by the Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act, *16 U.S.C.S. §§ 1531*-1544, are reviewed as agency actions subject to the standards of review under the Administrative Procedures Act (APA), *5 U.S.C.S. § 551* et seq. Under the APA, the court must assess whether the actions of the FWS were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or without observance of procedure required by law. *5 U.S.C.S. § 706*(2)(A), (D).

Environmental Law: Litigation & Administrative Proceedings: Judicial Review
Environmental Law: Natural Resources & Public Lands: Wildlife Protection
In reviewing the action of the Fish and Wildlife Service, the court must be thorough and probing, but if the courtfinds support for the agency action, it must step back and refrain from assessing the wisdom of the decision unless there has been a clear error of judgment. In thoroughly reviewing the agency's actions, the court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors. The court is expected to recognize the agency's expertise and experience with respect to questions involving scientific or technical matters or policy decisions based on uncertain technical information.

Civil Procedure: Summary Judgment: Partial Summary Judgment
Administrative Law: Judicial Review: Standards of Review: Standards Generally
Where a case involves a challenge to a final administrative action, the court's review is limited to the administrative record. Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record, even though the court does not employ the standard of review set forth in Fed. R. Civ. P. 56.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
The Endangered Species Act, *16 U.S.C.S. §§ 1531*-1544, provides that, in developing and implementing recovery plans, the Secretary of the Interior and the Fish and Wildlife Service shall "to the maximum extent practicable" incorporate into each recovery plan a description of such site-specific management actions as may be necessary to achieve the plan's goals for the conservation and survival of the species. *16 U.S.C.S. § 1533*(f)(1)(B)(i).

Administrative Law: Separation & Delegation of Power: Legislative Controls
Environmental Law: Natural Resources & Public Lands: Endangered Species Act

By its silence Congress has delegated to the Fish and Wildlife Service the power to make policy choices that represent a reasonable accommodation of conflicting policies that were committed to the agency's care by the Endangered Species Act, *16 U.S.C.S. §§ 1531*-1544.

Administrative Law: Separation & Delegation of Power: Legislative Controls
The phrase "to the maximum extent practicable" does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible.

Administrative Law: Judicial Review: Standards of Review: Abuse of Discretion
Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review
The choice of one particular action over another is not arbitrary, capricious, or an abuse of discretion simply because one may happen to think it ill-considered, or to represent the less appealing alternative solution available.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review
Environmental Law: Natural Resources & Public Lands: Endangered Species Act
Disagreement between scientists about the necessity of establishing linkage zones is not sufficient to demonstrate arbitrariness by the government in the context of administration of the Endangered Species Act,*16 U.S.C.S. §§ 1531*-1544.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
Under the Endangered Species Act, *16 U.S.C.S. §§ 1531*-1544, a recovery plan is required to include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of the section, that the species be removed from the list. *16 U.S.C.S. § 1533*(f)(1)(B)(ii).

Environmental Law: Litigation & Administrative Proceedings: Judicial Review
Governments: Legislation: Interpretation
Environmental Law: Natural Resources & Public Lands: Endangered Species Act
While courts must defer to a reasonable agency interpretation of the dictates of the Endangered Species Act, *16 U.S.C.S. §§ 1531*-1544, where Congress hasspecifically addressed an issue, the intention of Congress must be given effect. Courts rely on the traditional tools of statutory construction in ascertaining Congress' intent. Where Congress has unambiguously expressed its intent, there is no room for a different interpretation proffered by the Department of Interior.

Administrative Law: Separation & Delegation of Power: Legislative Controls
Governments: Legislation: Interpretation
The word "shall" is an imperative denoting a definite obligation. Use of the phrase "to the maximum extent practicable" indicates a strong Congressional preference that the agency fulfill its obligation to the extent that it is possible or feasible.

Administrative Law: Judicial Review: Standards of Review: Standards Generally
Judicial deference to an agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology.

Administrative Law: Agency Rulemaking: Informal Rulemaking
Environmental Law: Natural Resources & Public Lands: Endangered Species Act
Regulations issued by the Secretary of the Interior (Secretary), pursuant to the Endangered Species Act (ESA), *16 U.S.C.S. §§ 1531*-1544, permit any "interested person" to petition the Secretary requesting designation of critical habitat. *50 C.F.R. § 424.14(a)*; *43 C.F.R. § 14.2*. Neither the ESA nor the regulations prescribe a procedure for such petitions. Rather, they are considered under the provisions of the Administrative Procedures Act (APA), *5 U.S.C.S. §*

551 et seq. *50 C.F.R. § 424.14(a)*, *43 C.F.R. § 14.2*, *5 U.S.C.S. § 553*(e). The APA requires agencies to allow interested persons to petition for the issuance, amendment, or repeal of a rule, and, when such petitions are denied, to give a brief statement of the grounds for the denial. *5 U.S.C.S. §§ 553*(e), 555(e). Agencies denying rulemaking provisions must explain their actions. Thus, the right to petition for rulemaking entitles the petitioning party to a response on the merits of the petition.

Environmental Law: Litigation & Administrative Proceedings: Judicial Review
Environmental Law: Natural Resources & Public Lands: Endangered Species Act
In assessing the actions of the Fish and Wildlife Service(FWS), the court considers whether the actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706*(2)(A). Courts ordinarily afford agencies a particularly high degree of deference regarding their decision not to initiate a rulemaking proceeding. Such a refusal will be overturned only in the rarest and most compelling of circumstances. Nonetheless, the court must assure itself that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record. Where an agency has reversed its course, it must supply a reasoned analysis justifying the reversal.

COUNSEL: For Fund for Animals, Plaintiff: Eric Robert Glitzenstein, Meyer & Glitzenstein, Washington, D.C. For Plaintiffs: Howard I. Fox, Sierra Club Legal Defense Fund, Washington, D.C.

For Defendants: Joseph R. Perella, Environment & Natural Resources Division, U.S. Dept. of Justice, Washington, D.C.

JUDGES: PAUL L. FRIEDMAN, United States District Judge

OPINIONBY: PAUL L. FRIEDMAN

OPINION: [*102] OPINION

I. BACKGROUND

Since the arrival of Europeans in North America, the grizzly bear has been eliminated from all but approximately two percent of its original range in the lower 48 states. Indeed, the bear's historic range, which once included most of the western half of the United States, has receded to small portions of Washington, Idaho, Montana and Wyoming. Grizzly Bear Recovery Plan ("Plan") at ix, 9-10, Administrative Record ("A.R.") Volume 7. Between 1800 and 1975, the grizzly bear population shrank from an estimated 50,000 bears to fewer than 1000. Id. at 9. It is estimated that today there are fewer than 1000 grizzlies in the lower 48 states. Id. at 10-11. In July of 1975, the Secretary of the Interior found that the grizzly bear is likely to become in danger of extinction within the foreseeable[**2] future. Under the authority of the Endangered Species Act ("ESA"), *16 U.S.C. §§ 1531*-1544, he therefore listed the [*103] grizzly bear in the lower 48 states as "threatened" with extinction. *40 Fed. Reg. 31,734 (1975).*

In these companion cases, numerous environmental and conservation organizations and several interested individuals challenge alleged deficiencies in the Secretary's efforts to fulfill his obligation under the Act to protect the grizzly bear's survival. n1 Plaintiffs, Fund For Animals ("FFA"), National Audubon Society ("NAS") and others dispute the adequacy of the recovery plan developed by the Fish and Wildlife Service ("FWS"), to whom the Secretary has delegated his day-to-day responsibilities under the ESA. *50 C.F.R. § 402.01(b)*. FFA and others also dispute the legality of defendants' denial of a petition requesting that defendants designate "critical habitat" for the grizzly bear.

n1 Plaintiffs have standing to bring these suits. They have alleged sufficiently concrete and particularized injuries in fact that are fairly traceable to defendants' actions and redressable by the relief requested. See*Animal Legal Defense Fund, Inc. v. Espy, 306 U.S. App. D.C. 188, 23 F.3d 496, 498 (D.C. Cir. 1994).*

[**3]

The ESA requires that the FWS develop and implement a recovery plan "for the conservation and survival of" any threatened or endangered species. *16 U.S.C. § 1533*(f)(1). Any such plan is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence. Policy and Guidelines for Planning and Coordinating Recovery of Endangered and Threatened Species (May 1990) ("FWS Recovery Guidelines"), A.R. Tab 78 at 1; *50 C.F.R. § 402.02*. It is supposed to provide a means for achieving the species' long-term survival in nature. FWS Recovery Guidelines, A.R. Tab 78. The Act requires that the recovery plan shall, "to the maximum extent practicable," incorporate (1) site-specific management actions necessary for the conservation and survival of the species, and (2) objective, measurable criteria by which to monitor the species' recovery. *16 U.S.C. § 1533* (f)(1)(B). Plaintiffs charge that the final Grizzly Bear Recovery Plan ("GBRP"), issued in September 1993, fails adequately to set forth "site-specific management actions" or "objective, measurable criteria." They insist that the Plan will not stem or abate threats[**4] to grizzly bear survival and predict that, contrary to the intent of Congress, the GBRP will provide the "road map for the bears' forced march to extinction." NAS Mem. in Support of Summ. J. at 3. By contrast, defendants contend that the GBRP fully complies with the ESA.

In 1976, the FWS had proposed to designate "critical habitat" for the grizzlies. Proposed Determination of Critical Habitat, *41 Fed. Reg. 48,758 (1976),* A.R. Tab 17. A "critical habitat" designation protects specific areas inside and outside the geographical region occupied by the threatened species if it is necessary for the conservation of the species. *16 U.S.C. § 1532*(5). In 1979 the FWS withdrew its proposal because the 1978 amendments to the ESA had imposed additional obligations on the FWS before it designated critical habitat. Withdrawal of Proposals, *44 Fed. Reg. 12,382 (1979),* A.R. Tab 23. In 1991 plaintiff Jasper Carlton, the director of the Biodiversity Legal Foundation, filed a petition requesting that defendants designate "criticalhabitat" for the grizzly bear. Letter from Carlton to Servheen of January 16, 1991, attachment at 33 ("Petition to Designate Critical Habitat"), Habitat Record ("H.R.") Tab [**5]4. That petition was denied without the opportunity for public comment. Plaintiffs contend that the denial of Mr. Carlton's petition to designate critical habitat for the grizzly bear was not in accordance with the ESA and the Administrative Procedures Act ("APA"), *5 U.S.C. § 551* et seq.

Both plaintiffs and defendants have moved for summary judgment. For the reasons stated in this Opinion, the Court concludes that defendants have met their burden with respect to incorporating site-specificmanagement actions into the 1993 GBRP, but not with respect to incorporating objective, measurable recovery criteria. The Court also concludes that defendants acted in accordance with the APA in denying Mr. Carlton's petition for the designation of critical habitat for the grizzly bear.

II. STATUTORY FRAMEWORK

The Supreme Court has described the Endangered Species Act as "the most comprehensive [*104] legislation for the preservation of endangered species ever enacted by any nation." Tennessee *Valley Authority v. Hill, 437 U.S. 153, 180, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978).* The Act was designed to "save from extinction species that the Secretary of the Interior designates as endangered or[**6] threatened." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 132 L. Ed. 2d 597, 115 S. Ct. 2407, 2409 (1995).* An "endangered" species is "any species which is in danger of extinction throughout all or a significant portion of its range . . . ." *16 U.S.C. §*

1532(6). 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." *16 U.S.C. § 1532*(20).

In considering whether to list a species as "threatened" or "endangered", the FWS conducts a formal review in which it must consider the species' status according to five statutory factors. Those factors are:

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

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

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

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

16 U.S.C. § 1533(a)(1). In listing the grizzly bear in the lower 48 states as "threatened" with extinction, the FWS relied on each[**7] statutory factor except the "disease or predation" factor. *40 Fed. Reg. 31,734.*

Once a species is listed as threatened or endangered, the FWS "must do far more than merely avoid the elimination of [the] protected species. It must bring these species back from the brink so that they may be removed from the protected class . . . ." *Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D.D.C. 1977).* The Act contains a number of provisions designed to stem the threat of extinction, promote recovery of those species found to be threatened or endangered, and establish systems to conserve the species even after the threat of extinction has passed.

Concurrent with making a determination to list a species as threatened or endangered, the Secretary is required "to the maximum extent prudent and determinable" to issue regulations "designating any habitat of such species which is then considered to be critical habitat." *16 U.S.C. § 1533*(a)(3)(A). The duty to make a critical habitat designation at the same time as the determination is made to list a species was added to the ESA in 1978. Congress excused from this requirement those species that were already listed at the time the[**8] Act was amended, specifying that "critical habitat may be established for [species listed prior to the amendment] . . . for which no critical habitat has heretofore been established." *16 U.S.C. § 1532*(5)(B). Grizzly bears are a previously listed species.

The Secretary is required in most cases, including the grizzly bear's, to "develop and implement" a "recovery plan" for each threatened or endangered species. *16 U.S.C. § 1533*(f). According to the FWS, a recovery plan"delineates, justifies, and schedules the research and management actions necessary to support recovery of a species, including those that, if successfully undertaken, are likely to permit reclassification or delisting of the species." FWS Guidelines, A.R. Tab 78 at 1. The ESA directs that the plan shall, "to the maximum extent practicable," include:

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

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

*16[**9] U.S.C. § 1533*(f)(1)(B).

The FWS is empowered to remove listed species fromthe threatened or endangered lists only when the species has recovered sufficiently so that the protections of the ESA no longer are needed. *16 U.S.C. § 1533*(c)(2)(B)(i). To initiate a delisting process, [*105] the FWS must publish notice of a proposed regulation that concludes that delisting is appropriate in light of the same five factors considered for listing a species. *16 U.S.C. § 1533*(a), (b), (c). After assessing all the technical or scientific data in the administrative record as they relate to the five factors, the agency must exercise its expertise in determining whether to list or delist the species. *Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988).*

III. STANDARD OF REVIEW

These actions are brought under the ESA's citizen suit provision, *16 U.S.C. § 1540*(g), and the Administrative Procedure Act, *5 U.S.C. § 706.* Actions taken by the FWS pursuant to the ESA are reviewed as agency actions subject to the standards of review under the APA. See *Las Vegas v. Lujan, 282 U.S. App. D.C. 57, 891 F.2d 927, 932 (D.C. Cir. 1989).* Under the APA, the Court must assess whether the actions[**10] of the FWS were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." *5 U.S.C. § 706*(2)(A), (D).

In reviewing the action of the FWS, the Court must be thorough and probing, but if the Court finds support for the agency action, it must step back and refrain from assessing the wisdom of the decision unless there has been "a clear error of judgment." *Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989).* In thoroughly reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors. *Marsh v. Oregon Natural Resources Council, 490 U.S. at 378; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971); Professional Drivers Council v. Bureau of Motor Carrier Safety, 227 U.S. App. D.C. 312, 706 F.2d 1216, 1220 (D.C. Cir. 1983).* The Court is[**11] expected to recognize the agency's expertise and experience with respect to questions involving scientific or technical matters or policy decisions based on uncertain technical information. *Marsh v. Oregon Natural Resources Council, 490 U.S. at 375-78; State of New York v. Reilly, 297 U.S. App. D.C. 147, 969 F.2d 1147, 1150-51 (D.C. Cir. 1992).*

Because this case involves a challenge to a final administrative action, the Court's review is limited to the administrative record. *Camp v. Pitts, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973).* n2 Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record, *Richards v. I.N.S., 180 U.S. App. D.C. 314, 554 F.2d 1173, 1177 n.228 (D.C. Cir. 1977),* even though theCourt does not employ the standard of review set forth in Rule 56, Fed. R. Civ. P.

n2 Defendants have objected to plaintiff NAS's filing of a December 1993 study and a newspaper article discussing the study, both of which post-date the agency decision at issue here. Generally, review of an agency's decision "is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 420.* Plaintiffs claim that their submission may properly be considered as demonstrating that the FWS failed to consider all of the relevant factors when adopting the GBRP. See *Environmental Defense Fund, Inc. v. Costle, 211 U.S. App. D.C. 313, 657 F.2d 275, 285 (D.C. Cir. 1981).* Plaintiffs' filing does not add any new information that compels the Court to make an exception to the rule that review is limited to the record before the agency. Accordingly, the Court has not considered this submission.

[**12]

IV. SITE-SPECIFIC MANAGEMENT ACTIONS

A. The Meaning of the Site-Specific Management Action Provision

The ESA provides that "in developing and implementing recovery plans," the Secretary and the FWS shall "to the maximum extent practicable" incorporate into each recovery plan "a description of such site-specific management actions as may be necessary to achieve the plan's goals for the conservation and survival of the species." *16 U.S.C. §1533*(f)(1)(B)(i).

[*106] Defendants interpret the "site-specific" provision to require the FWS to identify specific "sites" inhabited by grizzly bears and to describe management actions for each of these "sites." The GBRP designates several distinct geographic ecosystems or recovery zones inhabited by grizzly bears and lists management measures to be taken within each of the ecosystems. Planat 33-37. Defendants therefore contend that the GBRP incorporates a description of "site-specific management actions." Plaintiffs, on the other hand, maintain that the ESA requires a description of "specific" management actions, techniques or standards. The Court's reading of the provision is consistent with defendants' interpretation.

The hyphen in "site-specific" [**13] indicates that the word "specific" modifies the word "site," not the term "management actions." The FWS has reasonably interpreted the ESA to require that the agency, in designing management actions, consider the distinct needs of separate ecosystems or recovery zones occupied by a threatened or endangered species. The Court may not reject the FWS' reasonable interpretation of the "site-specific management action" provision of the statute. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).*

Resolution of that grammatical question, however, does not resolve the issue of what the "management actions" for each site must consist of. The ESA states that they must be those actions found by the agency to be "necessary to achieve the plan's goals for the conservation and survival of the species." *16 U.S.C. § 1533*(f)(1)(B)(i). The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any . . . species to the point at which the measures provided pursuant to this chapter are no longer necessary." *16 U.S.C. § 1532*(3). While Congress has repeatedly amended the recovery[**14] plan provision in order to add express direction regarding the contents of what must be included in a recovery plan, the statute does not detail specific methods or procedures that are necessary to achieve conservation and survival. See *Sierra Club v. Lujan, 1993 U.S. Dist. LEXIS 3361, 36 ERC (BNA) 1533 (W.D. Tex. 1993);* S. Rep. No. 240, 100th Cong., 2d Sess. 9 (1988), reprinted in, 1988 U.S.C.C.A.N 2708; FWS Guidelines, A.R. Tab 78 at 2-3. In fact, the legislative history shows that Congress recognized that a wide range of actions could be needed to conserve diverse species and the need for flexibility in choosing those actions. See S. Rep. No. 240, 100th Cong., 2d Sess. 2009 (1988), reprinted in, 1988 U.S.C.C.A.N. 2700, 2709.

To be sure, the ESA suggests that methods and procedures, including scientific resources management activities -- such as research, census, law enforcement,habitat acquisition and maintenance, propagation, live trapping, and transplantation -- may be necessary to conserve species. *16 U.S.C. § 1532*(3). But none of these methods or procedures is mandated by the Act. Moreover, while the legislative history suggests that incorporation of "site-specific[**15] management objectives" is supposed to assure that recovery plans "are as explicit as possible in describing steps to be taken in the recovery of a species," S. Rep. No. 240, 100th Cong., 2d Sess. 9 (1988), reprinted in, 1988 U.S.C.C.A.N. 2709, it does not delineate the content of those steps. By its silence Congress has delegated to the FWS the power to make policy choices that "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *State of Ohio v. United States Dep't of the Interior, 279 U.S. App. D.C. 109, 880 F.2d 432, 441 (D.C. Cir. 1989)* (quoting *Chevron, U.S.A., Inc. v. National Resources Defense*

Council, Inc., 467 U.S. at 844-45 (quotation omitted)). The Court concludes that the FWS has the flexibility under the ESA to recommend a wide range of "management actions" on a site-specific basis.

B. Application of the "Site-Specific Management Action" Requirement to the 1993 Grizzly Bear Recovery Plan

Plaintiffs dispute whether the Plan even meets the FWS' interpretation of the "site-specific management action" provision because, they contend, it does not contain management actions that, even accepting[**16] defendants' reading of the statute, are specific [*107] to particular sites. Plaintiffs point out that the management actions recommended for the various ecosystems are largely the same and are described in boilerplate statements. See, e.g., Plan at 56, 77, 96 (concerning management guidelines for private and state lands); Plan at 50, 71, 90 (concerning livestock grazing); Plan at 49, 70, 89, 107 (concerning law enforcement efforts); Plan at 49, 70, 89, 107 (concerning bear baiting); Plan at 50, 71-72, 90, 109 (concerning application of Interagency Grizzly Bear Guidelines to protect from threat of resource development).

The fact that many of the management actions are the same for the different geographic ecosystems does not render the Plan unlawful. Plaintiffs have not disagreed with defendants' assertion that certain of the same biological principles apply to grizzly bear management in the various ecosystems. More importantly, where the ecosystems differ, the Plan does recommend different management actions. For example, the Plan recommends that one bear be introduced into the Yellowstone ecosystem every ten years because of the biological need for genetic diversity. Plan at 56. This[**17] recommendation is not repeated for the other ecosystems. In addition, the Plan promises to develop separate minimum habitat values for each ecosystem. Plan at 55, 76, 96, 113. The site-specificity of the effort demonstrates that the FWS considered the specific needs of each grizzly ecosystem.

Plaintiffs' greater concern is the lack of detail in the recommended management actions. Defendants' responsibility is "to the maximum extent practicable" to identify management actions "necessary to achieve the Plan's goals for the conservation and survival of the species." Obviously, the phrase "to the maximum extent practicable" does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible. *Doe v. Board of Educ. of Tullahoma City Schools, 9 F.3d 455, 460 (6th Cir. 1993); SMS Data Products Group, Inc. v. United States, 853 F.2d 1547, 1553 (Fed. Cir. 1988); Cape May Greene, Inc. v. Warren, 698 F.2d 179, 191 (3d Cir. 1983).* Plaintiffs add that the ESA requires that a recovery plan be both developed and implemented. *16 U.S.C. § 1533*(f). They argue that the word "implement" would[**18] be rendered meaningless in the absence of detailed and specific management measures and that "inaction eviscerates the recovery planning provisions . . . and amounts to an abdication of the Federal Defendants' responsibility to plan for the survival and recovery . . . of endangered and threatened species." *Sierra Club v. Lujan, 1993 U.S. Dist. LEXIS 3361, 36 ERC (BNA) 1533, 1993 WL 151353* at *25.

The reality faced by the FWS, and alluded to in its papers, however, is that myriad factors potentially affect the grizzly bears. It is not feasible for the FWS to attempt to address each possibility. By the time an exhaustively detailed recovery plan is completed and ready for publication, science or circumstances could have changed and the plan might no longer be suitable. Thus, the FWS recognized in the Plan that it would bereviewed every five years and revised as necessary. Plan at 31. In these circumstances, the Court concludes that the FWS has provided sufficient detail to satisfy thestatute.

It is not necessary for a recovery plan to be an exhaustively detailed document. Several other ESA provisions, some of which do not afford the FWS much discretion, already place limits on activities[**19] that may affect the grizzlies or empower the FWS to restrict threatening activities as needed. See, e.g., *16 U.S.C. §§ 1532*(a)(3)(A), 1536(a)(2), 1536(b)(4)(B)(iii), 1539(a)(2)(A). It is true that the recovery plan provision places a separate obligation on the FWS aside from those imposed by other provisions of the ESA. See *Idaho Dep't of Fish and Game v. National Marine Fisheries Service, 850 F. Supp. 886, 895 (D. Or. 1994).* But the Plan's recommendations are

implemented through FWS programs, cooperation and consultation with states, and the obligation of federal agencies to consult with the FWS or to implement conservation programs. See *16 U.S.C. §§ 1535,* 1536(a)(1), (2). These programs may in many cases require the development of detailed and possibly site or situation specific restrictions to protect the grizzly bear. Because science and circumstances [*108] change, however, the FWS needs, and the statute provides, some flexibility as it implements the recovery plan.

What the ESA requires is the identification of management actions necessary to achieve the Plan's goals for the conservation and survival of the species. A recovery plan that recognizes specific threats to the[**20] conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action, would not meet the ESA's standard. Nor would a Plan that completely ignores threats to conservation and survival of a species. Here, the Court finds that the Plan does either recommend actions or recommend steps that could ultimately lead to actions to stave off the threats to the grizzly bears that have been identified.

Plaintiffs point, however, to several perceived deficiencies with the recommendations. The Court deals with these seriatim.

1. Hunting

Plaintiffs fault the Plan for identifying the danger to the grizzly bears posed by hunting, but merely recommending that information be circulated to huntersregarding storage of game that would be appetizing to the grizzly bears and the likely location and proper identification of grizzly bears. Plan at 49. The Plan also recommends coordination of state, federal and tribal law enforcement, that black bear hunting regulations be modified to reduce conflict with grizzly safety, and that attention be concentrated on eliminating black bear baiting in[**21] the recovery zones because it may attract grizzly bears. Plan at 48-49.

These measures do address one of the hunting concerns that was identified by the FWS when it listed the grizzly bears: humans kill grizzly bears out of fear and a perception that the bears pose a threat to human safety. See *40 Fed. Reg. 31,734.* They also address other threats related to hunting that are recognized in the GBRP, such as food conditioning and habituation. See Plan at 5-7. Plaintiffs have not pointed to any place in the ESA that requires more than the recommendation of actions to counter identified threats to the grizzly bear. The choice of one particular action over another is not arbitrary, capricious or an abuse of discretion "'simply because one may happen to think it ill-considered, or to represent the less appealing alternative solution available.'" *Hondros v. United States Civil Service Comm'n, 720 F.2d 278, 295 (3d Cir. 1983)* (quoting *Calcutta E. Coast of India & E. Pakistan v. Federal Maritime Comm'n, 130 U.S. App. D.C. 261, 399 F.2d 994, 997 (D.C. Cir. 1968)).* The Court will not impose plaintiffs' or its own view of a better way to stem the threat posed by hunting than the methods chosen by the FWS. [**22]

2. Roads

The GBRP recognizes that roads have various deleterious impacts on grizzlies. Plan at 22, 145. It recommends the standardization of road density measurement techniques through an Interagency Grizzly Bear Committee Task Force, Plan at 149; the development of actual standards for each ecosystem and their adoption into land management planning, Plan at 149; and research regarding the effects of various road densities on grizzly bear habitat use and mortality, Plan at 53. It also provides interim open road density standards. Plan at 50, 71-72, 90, 109.

According to plaintiffs, there already is sufficientscientific data to set road density standards withoutfurther delay. They argue that a promise to design site-specific management actions in the future cannot meet the ESA's requirements and that the Plan's recommendation of interim standards to protect road management options is

insufficient. While plaintiffs have several objections to the content of the interim standards, the Plan recommends that the interim standards be implemented in such a manner as to maintain management options after the establishment of standards that are tailored to each ecosystem. These definite[**23] management actions address the threat posed to the grizzlies by the infiltration of roads into their habitat. The Court therefore concludes that the FWS has met its statutory responsibility. For the Court to insist that the FWS impose different road density standards would be to interfere with the agency's discretion in designing [*109] management actions. See *Hondros v. United States Civil Service Comm'n, 720 F.2d at 295.*

3. Human Activities/Resource Development

In order to control the impact of resource development on the grizzly bear, the Plan recommends that land managers document the effect of resource development activities and apply the Interagency Grizzly Bear Guidelines to harmonize resource development with the grizzlies' needs. Plan at 21-22, 31, 47, 50-51, 71-72, 90-91, 109; see Interagency Grizzly Bear Guidelines ("IGB Guidelines"), A.R. Tab 236. The IGB Guidelines classify grizzly habitat into five separate Management Situations that are defined by their population and habitat conditions and the management direction for that particular habitat rather than geographically (which is how the recovery zones are classified). The management direction recommends various[**24] actions to be taken with respect to the different threats to the grizzly bearswithin each particular Management Situation. The most aggressive protection measures are described for Management Situation 1 and the least aggressive for Management 5.

The Interagency Grizzly Bear Guidelines were established by agreement between federal, state and Canadian agencies. IGB Guidelines, A.R. Tab 236 at Preface. n3 Plaintiffs strenuously criticize both the Plan, for incorporating an external document -- the IGB Guidelines -- into the Plan without public comment, and the FWS for abdicating its responsibility to develop its own management actions and to make them available for public comment. *16 U.S.C. §§ 1533*(f)(1), (f)(4). While it is true that the Guidelines were not separately subject to notice and comment procedures, all the released drafts of the GBRP incorporated the IGB Guidelines, and there was a sufficient opportunity to comment on each draft of the GBRP. The Court therefore finds that there has been a sufficient opportunity to comment on the incorporation of the IGB Guidelines into the Plan and the proposed management actions of the FWS. The procedures employed conformed with the ESA. [**25] See *16 U.S.C. § 1533*(f)(4).

n3 The FWS is permitted under the ESA to procure the services of "appropriate public and private agencies and institutions and other qualified persons." *16 U.S.C. § 1533*(f)(2).

While plaintiffs have pointed to several perceived flaws in the IGB Guidelines, they have not shown that defendants have traveled beyond the discretionary range permitted by the ESA. The GBRP identifies the threat to grizzly habitat posed by logging, mining, oil and gas development, livestock grazing, interference with grizzly dens and recreation. Plan at 7-8, 33-37, 90-91. The IGB Guidelines respond to each of these threats. Plan at 90-91; see, e.g., IGB Guidelines, A.R. Tab. 236 at 7-20, 21-34, 35-39, 40-49. In addition, the Plan recommends that land managers consider the needs of the grizzlies in making management decisions and provides for ongoing monitoring of the effect of threatening activities on the grizzly bear. Plan at 91. By directly and specifically addressing the threats posed by human[**26] activities and resource development, the FWS has met itsobligation under the ESA. The Court will not substitute plaintiffs' or its own view of the best way to combat such threats to grizzly survival. See *Hondros v. United States Civil Service Comm'n, 720 F.2d at 295.*

4. Linkage Zones

Isolation of grizzly bear populations was identified in 1975 as one of the reasons for listing the grizzly bear as threatened. *40 Fed. Reg. 31,734.* Linkage zones, which provide contiguous habitat of sufficient quality between the recovery zones to allow the movement of grizzly bears between the zones, are one possible means of combatting genetic isolation. Plan at 24-27. The Plan explains, however, that "linkage zones are desirable for recovery, but are not essential for delisting at this time."Plan at 25; see, also, Plan at 24, 26, 27-28, 56. The Plan's solution is to initiate a five year study to evaluate the potential linkage between the various ecosystems. The results of the study "will be the basis for future actions regarding the linkage zone question." Plan at 25. The Plan also recommends that, in the interim, [*110] land management agencies take precautions not to degrade the potential[**27] linkage areas. Plan at 24-26; FWS Response to Issues Raised Concerning the GBRP (January 1994) ("1994 FWS Response"), A.R. Tab 172 at 12.

Plaintiffs argue that the Plan is flawed because it does not currently protect linkage zones. It is true that the FWS recognizes linkage zones as one possible means of countering genetic isolation. Plan at 24-26. Nevertheless, the Plan explains that linkage zones are not necessary at this time and cautions that "at this time, very little is known about the potential for linkage zones." Plan at 25. Defendants point out that, of 460 grizzly bears who have been radio-tracked in four different ecosystems for the past 20 years, not one of the bears has been observedmoving between the ecosystems. 1994 FWS Response, A.R. Tab 172 at 12.

While the record may be interpreted differently by plaintiffs than by defendants, disagreement between scientists about the necessity of establishing linkage zones is not sufficient to demonstrate arbitrariness by the government. *Marsh v. Oregon Natural Resources Council, 490 U.S. at 378; State of New York v. Reilly, 969 F.2d at 1150; Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1576 (9th Cir. 1993).* The[**28] record supports the finding that grizzly bears are not currently moving between ecosystems and, therefore, that linkage zones may not be "necessary" at this time or may not be capable of being properly established. In addition, the Plan's recommendation that the Yellowstone grizzly population be augmented at regular intervals suggests that the FWS is not simply waiting for the results of the linkage zone study before it takes any action to combat genetic isolation. Plan at 27-28, 56. n4

n4 Plaintiffs accuse defendants of bowing to political and other non-scientific pressures in formulating the GBRP. As evidence, they point to the statement in the Plan that its management approach is "sensitive to the social concerns of people living in [grizzly ecosystems]," Plan at 19, and the fact that the author of the Plan, Dr. Christopher Servheen, is quoted in a newspaper article as responding to a question about the Plan's lack of linkage zone protection by saying "that's politically naive. La-la land is where you can go and make decisions like that." "US Fish & Wildlife Presents: The Grizzly Bear Mating Game," Missoula Independent, October 2, 1992, at 9, A.R. Tab 510 at attachment 1.

The Court rejects plaintiffs' claim that these quotations are evidence that the FWS violated the ESA's requirement that recovery plans be "based solely on the best available scientific data." 134 Cong. Rec. 19273 (1988) (Statement of Senator Mitchell). The ESA's listing and delisting factors include consideration of manmade factors affecting the species' continued existence and overutilization of grizzly bears. *16 U.S.C. § 1533*(a). These provisions demonstrate that human factors that have biological consequences for the bear are relevant considerations. In this limited manner, therefore, social consequences that might increase human-caused mortality are relevant, and consideration of such factors is not impermissible. As to Dr. Servheen's comments, theirmeaning is not entirely clear and the Court is not persuaded that they have the probative value that plaintiffs ascribe to them.

[**29]

For all these reasons, the Court finds that defendants have met their obligation under the ESA to incorporate site-specific management actions into the 1993 GBRP. n5

n5 Because the Court has found that the ESA permits substantial license to the FWS in recommending site-specific management actions and that the FWS has met its burden by recommending protective actions or explaining why it is impracticable to do so for identified threats to the conservation and survival of the grizzly bears; the Court need not address plaintiffs' argument respecting the applicability of NEPA to recovery plans. The Court rejects plaintiffs' suggestion that the FWS was improperly motivated by its desire to avoid NEPA.

V. OBJECTIVE, MEASURABLE CRITERIA FOR DELISTING

A. The Relationship Between The "Objective, Measurable Criteria" Requirement And The Delisting Factors

Plaintiffs' second challenge to the GBRP is based on the requirement that a recovery plan include "objective, measurable criteria which, when met, would result[**30] in a determination, in accordance with the provisions of this section, that the species be removed from the list . . . ." *16 U.S.C. § 1533*(f)(1)(B)(ii). The GBRP delineates six distinct geographic grizzly bear ecosystems in the lower 48 states. Plan at 10-11. It describes three monitoring or recovery criteria by which to measure grizzly bear population status in each ecosystem:

[*111] (1) the number of females with cubs seenannually over a six-year period;

(2) the distribution of females with cubs throughout the ecosystem over a six-year period; and

(3) the annual number of human-caused mortalities.

Plan at 19. The Plan specifies numerical or percentage population goals for each of these criteria within each identified grizzly ecosystem. See Plan at 33-34. In addition, the Plan requires the development and completion of a Grizzly Bear Conservation Strategy before the commencement of any delisting process by the FWS to ensure that adequate regulatory mechanisms will survive delisting.

Plaintiffs insist that the "objective, measurable criteria" must specifically assess whether the threats that originally led to a decision to list a species have been remedied[**31] in ways that would permit biological recovery of the listed species. Defendants dispute whether they are forced to design criteria that specifically address the five statutory listing and delisting factors, see supra at page 5, because, even if the recovery plan objectives are met, a species cannot be delisted without the publication of a notice of proposed rulemaking addressing the statutory factors and a public comment period. They assert that all that is required is that the GBRP's objective, measurable criteria should likely lead to a finding that the five statutory delisting factors are met. Defs.' Mem. in Support of Summ. J. at 29.

"Likely to lead," however, is not the language of the ESA. While the Court must defer to a reasonable agency interpretation of the dictates of the ESA, where Congress has specifically addressed an issue its intention must be given effect. *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. at 843 n.9.* The Court relies on the "traditional tools of statutory construction" in ascertaining Congress' intent. Id.; *State of Ohio v. United States Dep't of the Interior, 279 U.S. App. D.C. 109, 880 F.2d 432, 441 (D.C. Cir. [**32] 1989).* And where Congress "has unambiguously expressed its intent . . . there is no room for [a different] interpretation proffered by the Department." *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, 310 U.S. App. D.C. 168, 45 F.3d 469, 473 (D.C. Cir. 1995).*

The ESA states that the FWS "shall, to the maximum extent practicable," incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination . . . that the species be removedfrom the list." *16 U.S.C. § 1533*(f)(V)(B)(ii). The word "shall" is an imperative denoting a definite obligation. *SMS Data Products Group, Inc. v. United States, 853 F.2d at 1553.* Use of the phrase "to the maximum extent practicable" indicates a strong congressional preference that the agency fulfill its obligation to the extent that it is possible or feasible. *Id. at 1553; Doe v. Board of Educ. of Tullahoma City Schools, 9 F.3d at 460.* As to the word "would," it is used in the conclusion of a conditional sentence to express a contingency or possibility. See Webster's Third New International Dictionary 2638 (3d ed. 1993). Therefore, "would result in a determination[**33] . . . that the species be removed from the list" sets a target to be aimed at by meeting the recovery goals set forth in the Plan.

Congress has spoken in clarion terms: the objective, measurable criteria must be directed towards the goal of removing the endangered or threatened species from the list. Since the same five statutory factors must be considered in delisting as in listing, *16 U.S.C. § 1533*(a), (b), (c), the Court necessarily concludes that the FWS, in designing objective, measurable criteria, must address each of the five statutory delisting factors and measure whether threats to the grizzly bear have been ameliorated. See *Defenders of Wildlife v. Andrus, 428 F. Supp. at 170;* see H. Rep. No. 567, 97th Cong., 2d Sess. 12, reprinted in 1982 U.S.C.C.A.N. 2812 ("delisting should be based on the same criteria . . . as listing").

B. Application of "Objective, Measurable Criteria" Requirement To The Grizzly Bear Recovery Plan Criteria

Defendants contend that the recovery criteria, population parameters and Conservation Strategy detailed in the GBRP actually do address all five statutory delisting factors (threat to habitat, overutilization, disease or [*112]predation, [**34] inadequacy of existing regulatory mechanisms, other natural or manmade factors affecting existence). n6

n6 The GBRP explains that the purpose of the "females with cubs" criterion is to "demonstrate that a known minimum number of adult females are alive to reproduce and offset existing mortality . . . [but] is not adequate to characterize population trend or precise population size." Plan at 20. The "distribution of females with cubs" or "occupancy" criterion is designed to "demonstrate adequate distribution of the reproductive cohort in the recovery zone . . . . provide evidence of adequate habitat management . . . [and] indicate future occupancy by grizzly bear offspring." Plan at 20. The "human-caused mortality" criterion is part of a mortality management method that permits annual recalculation of the sustainable mortality limits for each ecosystem. Plan at 20.

Defendants assert that the "females with cubs" and "occupancy" criteria together serve as an indicator of adequate habitat management (Delisting [**35]Factor 1). Habitat degradation and loss is acknowledged by all parties to be a significant threat to grizzly recovery. See Plan at 21. In listing the grizzly bear, the FWS specifically cited the diminution of the bear's range from much of the Western United States to isolated regions in a few states and the threats posed by resource development, trail construction and accessibility tolivestock. *40 Fed. Reg. 31,734.* In order adequately to address the first delisting factor, the "females with cubs" and "occupancy" criteria must measure the present or threatened danger to the quality and quantity of grizzly habitat, including the effect of those threats recognized in 1975.

There may be some rationale for concluding that minimum bear population and grizzly distribution throughout a habitat over time have a positive correlation to the quality of habitat. But see *The Fund for Animals, Inc. v. Turner,*

1991 U.S. Dist. LEXIS 13426, 1991 WL 206232 at *4 (D.D.C. 1991); Knight and Blanchard, "Can the status of the Yellowstone Grizzly Bear Population be determined by counting females with cubs-of-the-year," (1993), ("Knight and Blanchard Report"), A.R. Tab 258 at 8 (poor habitat quality may result in greater chances[**36] of observing bears). The "females with cubs" and "occupancy" criteria, however, fail to assess the number and distribution of bears beyond the borders of the recovery ecosystems. Plan at 17-18. Because grizzly bears inhabit more land than is included in the recovery zones, id., those criteria do not measure present danger or destruction to grizzly bear habitat. Moreover, the two criteria do not seem capable of assessing the habitat of a larger, recovered grizzly bear population, let alone threatened habitat destruction. See Letter from Barbee to Servheen of February 4, 1991, A.R. Tab 337 at 4; Letter from Willcox to Servheen of February 2, 1991, A.R. Tab 386 at 4. The FWS has not explained how minimum bear population and grizzly distribution goals consider how much habitat and of what quality is necessary for recovery or how the answers to these questions can be derived from the "females with cubs" and "occupancy" criteria. n7

n7 Plaintiffs criticize the "females with cubs" and "occupancy" criteria for failing to consider historic habitat destruction, thereby redefining the grizzly bear habitat in its threatened state, rather than according to the bear's historic range. By turning a blind eye to habitat restoration, plaintiffs argue, the Plan ignores what is acknowledged to be the greatest threat to the survival of the grizzly bear -- habitat destruction. While destruction in the past may be relevant to assessing some of the threats to the species, the ESA only requires the recovery criteria to consider "present and threatened" danger and destruction. There does not appear in the statute any requirement that habitat loss be measured against the grizzly range during its most expansive period.Nonetheless, because habitat loss was one of the factors specifically relied on by the FWS in listing the grizzly bear, the FWS must consider the habitat loss in its assessment of the quantity and quality of grizzly bear habitat. See *Defenders of Wildlife v. Andrus, 428 F. Supp. at 170;* see H. Rep. No. 567, 97th Cong., 2d Sess. 12, reprinted in 1982 U.S.C.C.A.N. 2812.

[**37]

Nor does the Plan's requirement that a Conservation Strategy (that will include minimum habitat values and additional monitoring methods) be implemented beforeany delisting process is commenced address this deficiency. The promise of habitat based recovery criteria some time in the future simply is not good enough. The purpose of the habitat recovery criteria is to measure the effect of habitat quality and quantity on grizzly recovery. See FWS Recovery Guidelines, [*113]A.R. Tab 78 at 1-5. Such monitoring is not possible if there is no scale against which to gauge the status of the habitat. Defendants have not met their burden to develop objective, measurable criteria by which to assess present or threatened destruction, modification or curtailment of the grizzly bear's habitat or range.

Defendants initially claimed that the "females with cubs" and "occupancy" criteria address the threat of disease to the grizzly bears (Delisting Factor 3, along with predation). After plaintiffs conceded that there is no current threat of disease to the grizzlies and no such threat was recognized at the time the grizzly bear was listed, however, defendants acknowledged that the criteria do not[**38] address disease. Defs.' Mem. in Support of Summ. J. at 23. As discussed above, the recovery criteria must be aimed at achieving the goal of delisting the grizzly bears and, thus, the FWS is not excused from addressing any of the five delisting factors.By wholly failing to consider whether there is a need or an appropriate means of monitoring whether disease is a threat to the grizzly bear, the FWS has failed to meet its obligation under the ESA.

Defendants next assert that the "human-caused mortality" criterion and the Conservation Strategy relate to the overutilization of the species and predation delisting factors (Delisting Factors 2 and 3). When the bears were listed, the FWS specifically noted that humans killed grizzly bears out of fear and a perception that the bears posed a threat to human safety and that other losses were caused by livestock predation. *40 Fed. Reg. 31,734.* As to the human-

caused mortality criterion, it seems to directly monitor overutilization by humans for commercial, recreational, scientific, or educational purposes. Defendants have not explained, however, how the human-caused mortality criterion addresses the threat caused by grizzly predation of livestock. [**39] As with habitat assessment, the yet-to-be-developed Conservation Strategy is not an adequate substitute for recovery criteria that measure the threat posed by livestock predation by the grizzly bear.

Defendants also claim that the Conservation Strategy addresses the inadequacy of the existing regulatory mechanisms factor (Delisting Factor 4). At the time the bears were listed, the FWS noted that management measures and regulation were hindered by the agencies' lack of sufficient data regarding habitat, population size, reproduction, mortality and "most importantly" annual turnover and population trends. *40 Fed. Reg. 31,734.* The promise that the eventual Conservation Strategy will ensure adequate regulatory mechanisms suggests that the FWS still has not gathered sufficient data. Nonetheless, as the Conservation Strategy is not yet developed, it is paradoxical to say that it measures the inadequacy of "existing" regulatory mechanisms. Defendants have not met their obligation to develop objective, measurable criteria by which to assess the inadequacy of existing regulatory mechanisms.

Defendants claim that all three monitoring or recovery criteria help assess the other natural or manmade[**40] threats factor (Delisting Factor 5). In determining that the bears should be listed, the FWS specifically recognized that isolation of grizzly bear subpopulations prevented biological reinforcement of the species and that increasing human use of the national parks inhabited by the bears was detrimental to the bears. *40 Fed. Reg.31,734.* The Court finds that defendants have not explained how any of the recovery criteria considers isolation. Because isolation was one of the reasons that the grizzlies were listed in the first place, the Court agrees with plaintiffs that the FWS therefore has failed to meet its obligation under the ESA to incorporate into the GBRP objective, measurable criteria addressing genetic isolation.

C. Scientific Validity of Monitoring Methods and Population Targets

As noted above, the Plan specifies numerical or percentage population goals for each of the three recovery criteria within each identified grizzly ecosystem, see Plan at 33-34, and, with the three recovery criteria, a methodology for monitoring whether those goals have been met. Plaintiffs object that (1) the [*114] method of monitoring the bears' population status is unreliable and (2) the population[**41] goals are not based upon the best scientific evidence available.

The Plan explains that the "females with cubs" measurement "demonstrate[s] that a known minimum number of adult females are alive to reproduce and offset existing mortality in the ecosystem." Plan at 20. The FWS concedes, however, that the methodology will notgauge population "trends or precise population size . . . ." Plan at 20. Numerous grizzly bear biologists have criticized this monitoring methodology because, despite its own acknowledged limitations, it is being relied on in the Plan as the principal determinant of whether population goals have been met. See, e.g., Comments from Metzgar to Servheen of January 7, 1990, ("Metzgar Comments"), A.R. Tab 439 at 2. Plaintiffs' foremost objection is that the "females with cubs" methodology is vulnerable to variable observer effort and for that reason has been criticized as unreliable and subjective. See Knight and Blanchard Report, A.R. Tab 258 at 7; Metzgar Comments, Tab 439 at 3. Even a report appended to the Plan acknowledges that "the applicationof sighting efficiency estimates [which are a base assumption of the monitoring criteria] cannot be substantiated[**42] since there is no way to assess their accuracy and they are therefore little better than guesses." Plan at 159 (Appendix C), Report of the Yellowstone Grizzly Bear Population Task Force (1988). Defendants argue (without reasonable explanation) that both under and over-intensive observer effort are accounted for by the Plan's monitoring methodology, so the grizzly bear is guaranteed appropriate protection. Defs.' Mem. in Support of Summ. J. at 15.

Judicial "deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology." *State of Louisiana ex rel. Guste v. Verity, 853*

F.2d 322, 329 (5th Cir. 1988). Here, however, the Plan's own acknowledgement of the limitations of the monitoring methodology and the fact that the methodology is unreliable undermines the decision of the FWS to adopt the methodology incorporated into the Plan. The Court is unable to find in the record a rational reason for the agency's decision. The Court therefore finds that the agency failed to "explain the evidence which is available, and [failed to] offer a 'rational connection between the facts found[**43] and the choice made.'" *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Ins. Co., 463 U.S. at 52;* see *Northern Spotted Owl v. Hodel, 716 F. Supp. at 482.* In addition, the Court notes that it has found the three recovery criteria incorporated into the Plan (females with cubs, occupancy, human-caused mortality) to be largely inadequate to meet the FWS' burden to address the ESA's delisting factors. Accordingly, the FWS must reconsider the available evidence and its decision to adopt the population monitoring methodology that it has incorporated into the GBRP.

Plaintiffs' second objection is that the population goals are defective. They contend that the FWS, while purporting to rely on conservation biology principles, did not properly conduct a population viability analysis in setting the goals. In other words, plaintiffs contend that defendants' results are defective and that the population targets are too low. Plaintiffs claim that the population targets in the Plan are not based on the best scientific data available and that they therefore are arbitrary and capricious.

Plaintiffs have painstakingly detailed the reasons why they maintain the goals are too low and have[**44] pointed to numerous studies finding that larger populations of grizzly bears than those recommended in the Plan are necessary to make the grizzly populations viable. Nonetheless, the Court must accord a high level of deference to agency judgments involving scientific matters within the FWS' area of expertise. *Mount Graham Squirrel v. Espy, 986 F.2d at 1571; State of Louisiana ex rel Guste v. Verity, 853 F.2d at 329.* While deference does not require the Court to accept the population targets if there is no scientific support for them or if they are blatantly wrong, the fact that a judgment may be disputable does not render it arbitrary and capricious. See *Mount Graham Squirrel v. Espy, 986 F.2d at 1571.* [*115] The government is entitled to rely on analyses and opinions that are non-dispositive without its decision being rendered arbitrary and capricious. *Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992).*

In this case, defendants have demonstrated that there is disagreement among experts regarding the correct population size that is necessary for viability. See Mark S. Boyce, "Population Viability Analysis," 23 Annu. Rev. Ecol. Syst. 481 (1992), A.R. Tabs[**45] 189; Mark S. Boyce, "Population Viability Analysis: Adaptive Management for Threatened and Endangered Species" (1993), A.R. Tab 189A; see also 1994 FWS Response, A.R. Tab 172 at Attachment. The fact that there is such disagreement does not render the agency's action arbitrary and capricious, however. *Greenpeace Action v. Franklin, 982 F.2d at 1350.* Based on the record, the Court does not find that defendants' designation of population targets is arbitrary and capricious.

Plaintiffs also criticize defendants' reliance on theexistence of Canadian grizzly populations to justify lowpopulation goals, Plan at 27, because there is no evidence of the contiguity of the population and because the ESA does not apply to Canada. Moreover, the FWS itself has recognized that Canadian grizzly bears suffer the same development pressures as do United States bears. Plan at 23; *58 Fed. Reg. 43,856 (1992).* The Court agrees that it appears contradictory for the FWS to concede that "bear populations in Canada immediately north of the [Cabinet/Yaak grizzly bear ecosystem] and in the Canadian portions of the Selkirk and Northern Continental Divide grizzly bear ecosystems are small," and that "continuing[**46] human development in areas in Canada north of these ecosystems is threatening to isolate these grizzly populations from other bear populations in British Columbia," Plan at 23, and yet still to rely on the protection posed by the contiguity of the Cabinet/Yaak and Selkirk ecosystems with Canadian grizzly bear populations. Plan at 27. The FWS has not explained how the uncontrollable threats to Canadian grizzly bears were offset in the calculation of population targets. Therefore, the FWS must explain whether reliance on the existence of Canadian bears influenced its population targets and why such reliance is reasonable.

V. CRITICAL HABITAT DESIGNATION

Regulations issued by the Secretary of the Interior permit any "interested person" to petition the Secretary requesting designation of critical habitat. *50 C.F.R. § 424.14(a)*; *43 C.F.R. § 14.2*. Neither the ESA nor the regulations prescribe a procedure for such petitions. Rather, they are considered under the provisions of the APA. *50 C.F.R. § 424.14(a)*; *43 C.F.R. § 14.2*; *5 U.S.C. § 553*(e). n8

n8 A "critical habitat" designation protects specific areas inside and outside the geographical region occupied by the threatened species if it is necessary for the conservation of the species. *16 U.S.C. §1532*(5). For those species listed after the 1978 amendments to the ESA, the FWS is required to designate critical habitat unless it finds that the benefits of nondesignation outweigh the benefits of designation. *16 U.S.C. § 1533*(b)(2). For previously listed animals, such as the grizzly bear, the ESA states that "critical habitat may be established for those species . . . as set forth in subparagraph (A) of this paragraph." *16 U.S.C. § 1532*(5)(B). Subparagraph A defines critical habitat.

Defendants argue that the decision to designate critical habitat for a species listed prior to the 1978 Amendments is discretionary. Plaintiffs argue that the ESA's recognition of the centrality of critical habitat to the protection of species indicates that the critical habitat designation must be made even for those species listed prior to the 1978 amendments unless the benefits of non-designation outweigh the benefits of designation. *16 U.S.C. § 1533*(b)(2). The Court agrees with defendants that the plain language of the ESA renders the decision to designate critical habitat a discretionary decision.

[**47]

The APA requires agencies to allow interested persons to "petition for the issuance, amendment, or repeal of a rule," *5 U.S.C. § 553*(e), and, when such petitions are denied, to give "a brief statement of the grounds for the denial," *5 U.S.C. § 555*(e). Agencies denying rulemaking provisions must explain their actions. *American Horse Protection Ass'n, Inc. v. Lyng, 258 U.S. App. D.C. 397, 812 F.2d 1, 4 (D.C. Cir. 1987).* Thus, the right to petition [*116] for rulemaking entitles the petitioning party to a response on the merits of the petition.

In assessing the actions of the FWS, the Court considers whether they were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *5 U.S.C. § 706*(2)(A); *American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d at 4-5.* Courts ordinarily afford agencies a particularly high degree of deference regarding their decision not to initiate a rulemaking proceeding. Id. Such a refusal will be overturned only in the rarest and most compelling of circumstances. *WWHT, Inc. v. FCC, 211 U.S. App. D.C. 218, 656 F.2d 807, 817 (D.C. Cir. 1981).* Nonetheless, the Court must assure itself that the agency "has adequately explained the facts and[**48] policy concerns it relied on, and thatthe facts have some basis in the record." *National Ass'n of Regulatory Utility Comm'rs v. U.S. Dep't of Energy, 271 U.S. App. D.C. 197, 851 F.2d 1424, 1430 (D.C. Cir. 1988)* (citation omitted); *Professional Drivers Council v. Bureau of Motor Carrier Safety, 227 U.S. App. D.C. 312, 706 F.2d 1216, 1220-21 (D.C. Cir. 1983).* Plaintiffs contend that the FWS reversed its course because it withdrew its 1976 proposal to designate critical habitat after the ESA was amended in 1978 and new obligations were imposed on the FWS before the designation of critical habitat. Where an agency has reversed its course, it must supply a reasoned analysis justifying the reversal. *Motor Vehicle Manufacturers Ass'n, Inc. v. State FarmMutual Auto. Insurance Co., 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).*

In January 1991, as part of his comments on the first revised GBRP, Jasper Carlton, the director of the Biodiversity Legal Foundation, petitioned the FWS for a "critical habitat" designation for the four main grizzly bear

ecosystems. Petition to Designate Critical Habitat, H.R. Tab 4, 5. n9 In his petition Mr. Carlton maintained that "disruption[**49] of grizzly habitat by human activities is the principal cause of the precarious status of the remaining grizzly populations." Petition to Designate Critical Habitat, H.R. Tab 4, Attachment at 33; see Letter from Carlton to Turner of September 12, 1991, H.R. Tab 8. He argued that the IGB Guidelines are inadequate because (1) since they are not statutes or regulations, citizens may not use the IGB Guidelines to compel action or sue for violations of the Guidelines; (2) individual agencies can avoid safeguarding the grizzly bears because the IGB Guidelines permit agencies discretion in designating the different management areas, and the level of protection afforded the different management situations varies widely; (3) the Guidelines do not provide sufficiently strong protection to those bears in the two lowest priority management situations; and (4) the national forests have been slow to incorporate theguidelines into their forest plans or have avoided the guidelines. A critical habitat designation, contended Mr. Carlton, would not only impose an obligation on all federal agencies to insure that their actions are not likely to jeopardize the continued existence of the grizzly bear, [**50]but would also mandate that federal agencies refrain from any action likely to result in the destruction or adverse modification of critical habitat. Petition to Designate Critical Habitat, H.R. 5, Attachment at 35.

n9 In a letter dated February 20, 1991, the FWS explained that the ESA does not provide for a petition to designate critical habitat, but that his petition would be considered under the provisions of the APA. Letter from Buterbaugh to Carlton of February 20, 1991, H.R. Tab 6. On April 20, 1992, the FWS published in the Federal Register notice of Mr. Carlton's petition and its determination that it was not a petitionable action under the ESA. Petitions to Change Status of Grizzly Bear Population, *57 Fed. Reg. 14,372, 14,374 (1992).*

In September 1992, the FWS denied Mr. Carlton's petition without either publishing the petition in the Federal Register for public comment or soliciting scientific review addressing Mr. Carlton's concerns. Letter from Morgenweck to Carlton of September 14, 1992, H.R. Tab[**51] 13. n10 In denying the [*117]petition, the FWS acknowledged that critical habitat for a listed species should be designated to the maximum extent prudent and determinable. *50 C.F.R. § 424.12(a)*. FWS regulations explain that such a designation would not be prudent if identification of critical habitat can be expected to increase the degree of taking or other human activities, if it would not be beneficial to the species, or if it would be redundant. *50 C.F.R. § 424.12(a)(1)*. In this case, the FWS explained that recovery zones and management situations within the recovery zones were developed for the conservation of grizzly bear habitat. These zones are covered by the IGB Guidelines, with which member agencies have agreed to comply, and all federal agencies are required to consult with the FWS before carrying out permitting, leasing and selling actions in the recovery zones. For these areas, the FWS must ensure biological nonjeopardy. The FWS asserted that the current habitat protection is comparable to that of critical habitat and that designation of critical habitat would be redundant,i.e., not prudent.

n10 Plaintiffs charge that because the FWS did not solicit comments and opinions, there is no record to support the agency's decision. *National Ass'n of Regulatory Utility Comm'n v. United States Dep't of Energy, 851 F.2d at 1430.* Under Department of the Interior regulations, if the official responsible for acting on a petition determines "that public comment may aid in consideration of the petition," he or she may initiate a comment proceeding. *43 C.F.R. § 14.4*, And the APA requires an opportunity for public comment when an agency proposes rules. *5 U.S.C. § 553*(b), (c). There is no requirement, however, in either the APA or Department of Interior regulations that the FWS must solicit comments on a decision not to propose a rule to designate critical habitat. See *43 C.F.R. § 14.4*; *5 U.S.C. § 553*(b), (c). The Court will not impose procedural requirements on the FWS that are not already required by statute or provided for by the agency's own rules. See *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 524, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978).*

[**52]

The FWS further explained that the current recovery zones encompass more land than a critical habitat designation likely would include. If critical habitat were designated for Management Situation 1 areas, the highest priority areas, then the current regime of regulation would likely be eliminated and protection for Management Situation 2 and 3 areas, which has been beneficial, might be deemphasized, diluted or eliminated entirely. Therefore, the FWS asserted that a critical habitat designation would not benefit the species. Finally, the FWS explained that the current management regime has achieved social acceptance and that designating critical habitat could lead to a backlash that would jeopardize recovery.

The FFA plaintiffs allege that the FWS violated the ESA by providing an inadequate explanation of its reasoning and by failing to provide a reasoned justification for the reversal of its 1976 proposal to designate critical habitat. Having considered the record in this case, the Court is satisfied, however, that the denial of Mr. Carlton's petition must be left undisturbed. The FWS adequately explained the facts and policy concerns it relied on and plaintiffs have not demonstrated[**53] that these assertions and opinions are unlawful, arbitrary, capricious or wholly irrational.

VI. CONCLUSION

For all of these reasons, plaintiffs' motions for summary judgment are granted in part and denied in part and defendants' motion for summary judgment is granted in part and denied in part. An Order consistent with this Opinion is entered this same day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 9/29/95

ORDER

Upon consideration of plaintiffs' motions for summary judgment, defendants' motion for summary judgment, the responses and replies, and the administrative record, and for the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that plaintiffs' motions for summary judgment are GRANTED in part and DENIED in part. Partial judgment is entered for plaintiffs on Count One of their complaint in Civil Action 94-1021. Judgment is entered for plaintiffs on Counts One and Two of their complaint in Civil Action 94-1106; it is

FURTHER ORDERED that defendants' motion for summary judgment is GRANTED in part and DENIEDin part. Partial judgment is entered for defendants on Count One of the complaint in Civil Action 94-1021. Judgment[**54] is entered for defendants on Count Two of the complaint in Civil Action 94-1021. Judgment is entered for defendants on Count Three of the complaint in Civil Action 94-1106; it is

[*118] DECLARED that defendants have acted in a manner that is arbitrary and capricious and contrary to law by issuing a Recovery Plan that fails to establish objective, measurable criteria which, when met, would result in a

determination, in accordance with the provisions of the Endangered Species Act, that the grizzly bear be removed from the threatened species list; and it is

FURTHER ORDERED that this matter is remanded to the Fish and Wildlife Service, which has 90 days from the date of this Order to reconsider those portions of the 1993 Grizzly Bear Recovery Plan that have been found to be contrary to the dictates of the Endangered Species Act.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 9/29/95

DEFENDERS OF WILDLIFE, et al., Plaintiffs, v. BRUCE BABBITT,et al., Defendants.

Civil Action No. 99-927 (ESH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

130 F. Supp. 2d 121; 2001 U.S. Dist. LEXIS 1480; 52 ERC(BNA) 1301; 31 ELR 20477

February 12, 2001, Decided
February 12, 2001, Filed

DISPOSITION: [**1] Plaintiff's motion for summary judgment [32-1] GRANTED in part and DENIED in part. Partial judgment entered for plaintiffs on Count I and Count VI. Judgment entered for plaintiffs on Count III; and Defendant's motion for summary judgment [58-1] GRANTED in part and DENIED in part. Partial judgment entered for defendants on Count I and Count VI. Judgment entered for defendants on Count II, Count IV, and Count V; and Defendant's motion to strike [34-1] DENIED as moot.

CASE SUMMARY

PROCEDURAL POSTURE: Each party moved for summary judgment in plaintiffs' environmental suit against defendant agencies over survival of the Sonoran pronghorn under the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the National Environmental Policy Act, *42 U.S.C.S. § 4321* et seq., and the Administrative Procedure Act, *5 U.S.C.S. § 706.*

OVERVIEW: Plaintiffs sued defendants in their official capacities, for failure to comply with the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the National Environmental Policy Act, *42 U.S.C.S. § 4321* et seq., and the Administrative Procedure Act, *5U.S.C.S. § 706,* with respect to survival of the endangered Sonoran pronghorn. Each side sought summary judgment. The court granted each motion in part and denied each in part. It granted plaintiffs summary judgment as to the relevant biological opinions (BOs), but in favor of the consulting agency defendants as to their biological assessments (BAs). The court remanded for analysis of the environmental baseline in each BO and the effects of actions when added to that baseline, plus the impact of authorized incidental takes and cumulative impacts of federal activities, including military activities. Several BOs were deficient because of their overly narrow definitions, such as for an action area. But several environmental impact statements had taken a sufficiently "hard look" at the environmental consequences of their various actions and remand was not required.

OUTCOME: Plaintiffs' and defendants' summary judgment motions were each granted in part and denied in part. The biological opinions, recovery plan, and certain environmental impact statements (EISs) did not fully comply with law, but defendants were taking steps to conserve and recover the pronghorn, and the biological assessments prepared by consulting agencies and certain EISs did comply with law.

CORE TERMS: pronghorn, cumulative, species, environmental, baseline, consultation, regulation, habitat, endangered species, delisting, summary judgment, practicable, survival, estimate, incidental, jeopardize,

anticipated, conservation, measurable, grazing, proposed action, biological, wildlife, indirectly, continued existence, immediate area, endangered, site-specific, deficient, insure

CORE CONCEPTS -

Administrative Law: Judicial Review: Standards of Review: Standards Generally
Under the standards of review set forth in the Administrative Procedure Act, *5 U.S.C.S. § 706,* the court must review whether the agency actions at issue are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706*(2)(A).

Administrative Law: Judicial Review: Standards of Review: Standards Generally
In thoroughly reviewing an agency's actions, the court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors.

Civil Procedure: Summary Judgment: Summary Judgment Standard
Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record, even though the court does not employ the standard of review set forth in Fed. R. Civ. P. 56.

Environmental Law: Natural Resources & Public Lands:Wildlife Protection
Under § 7 of the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., when a federal agency undertakes or permits actions that may affect a listed species, the agency must consult with the U.S. Fish and Wildlife Service to insure that their activities are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species. *16 U.S.C.S. § 1536*(a)(2).

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Under the formal consultation process, an agency prepares a Biological Assessment (BA) that evaluates the impact of its activities on the listed species, and the U.S. Fish and Wildlife Services, after evaluation of the BA and the best scientific and commercial data available, issues a Biological Opinion detailing how the agency action affects the species and whether the action is likely to jeopardize the continued existence of the species. *16 U.S.C.S. § 1536* (a)(2), (b)(3)(A), (c).

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
If the U.S. Fish and Wildlife Services concludes that activities are not likely to jeopardize a species, it may provide for incidental take of the species. *16 U.S.C.S. § 1536*(b)(4). "Take" is defined to include action that would harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. *16 U.S.C.S. § 1532*(19).

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

Pursuant to U.S. Fish and Wildlife Services regulations, "harass" in the definition of "take" in the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. *50 C.F.R. § 17.3*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection

Under § 4 of the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the U.S. Fish and Wildlife Services is required to develop and implement a recovery plan for the conservation and survival of a listed endangered or threatened species. *16 U.S.C.S. § 1533*(f)(1).

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Consulting agencies do not have the duty to evaluate cumulative effects in the Biological Assessments they prepare.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
See *50 C.F.R. § 402.14(g)*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Under the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., "cumulative effects" are those effects of future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation. *50 C.F.R. § 402.02*.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A Biological Opinion must include an analysis of the effects of the action on the species when added to the environmental baseline -- in other words, an analysis of the total impact on the species. *50 C.F.R. § 402.02*. Moreover, there must be analysis of the impact of the total amount of take authorized, not simply a listing of those numbers.

Environmental Law: Natural Resources & Public Lands:Wildlife Protection
The regulations define "action area" as all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or it has entirely failed to consider an important aspect of the problem.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Under the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., the U.S. Fish and Wildlife Service is required to develop and implement a recovery plan for the conservation and survival of the Sonoran pronghorn. *16 U.S.C.S. § 1533*(f)(1). Any such recovery plan is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
See *16 U.S.C.S. § 1533*(f)(1)(B)(i)-(iii).

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A recovery plan that recognizes specific threats to the conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action, would not meet the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., standard.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Objective, measurable criteria must be directed towards the goal of removing an endangered or threatened species from the list. Since the same five statutory factors must be considered in delisting as in listing, the U.S. Fish and Wildlife Services, in designing objective, measurable criteria, must address each of the five statutory delisting factors and measure whether threats to the species have been ameliorated.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
See *16 U.S.C.S. § 1533*(a)(1).

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review
The requirement that an agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Agencies shall utilize their authorities in furtherance of the purposes of the Endangered Species Act of 1973, as amended, *16 U.S.C.S. § 1531* et seq., by carrying out programs for the conservation of endangered species. *16 U.S.C.S. § 1536* (a)(1).

Administrative Law: Judicial Review: Standards of Review
The case law is well settled that federal agencies are accorded discretion in determining how to fulfill their *16 U.S.C.S. § 1536*(a)(1) obligations.

Environmental Law: Environmental Quality Review
The National Environmental Policy Act, *42 U.S.C.S. § 4321* et seq., mandates the preparation of an environmental impact statement on any major federal action significantly affecting the quality of the human environment. *42 U.S.C.S. § 4332*(C).

Environmental Law: Environmental Quality Review
The required scope of an environmental impact statement is defined as the range of actions, alternatives, and impacts to be considered. *40 C.F.R. § 1508.25*. To determine the scope of environmental impact statements, agencies shall consider three types of actions, three types of alternatives, and three types of impacts. They include connected, cumulative, and similar actions, alternatives and mitigating measures, and impacts, which may be direct, indirect, and cumulative.

Environmental Law: Environmental Quality Review
"Cumulative impact" is the impact on the environment which results from the incremental impact of an actionwhen added to other past, present, and reasonably foreseeable future actions. regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *40 C.F.R. § 1508.7*.
Environmental Law: Environmental Quality Review
See *40 C.F.R. § 1508.7*.

Environmental Law: Environmental Quality Review
Administrative Law: Judicial Review: Standards of Review: Standards Generally
In reviewing a federal agency's compliance with the National Environmental Policy Act (NEPA), *42 U.S.C.S. § 4321* et seq., the court employs a highly deferential standard of review. Neither NEPA nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a hard look at environmental consequences. A court must enforce the statute by ensuring that agencies comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results.

Environmental Law: Environmental Quality Review

Under *40 C.F.R. § 1502.2(a)*, environmental impact statements shall be analytic rather than encyclopedic.

Environmental Law: Natural Resources & Public Lands: Wildlife Protection
Under *40 C.F.R. § 1502.2(b)*, impacts shall be discussed in proportion to their significance. There shall only be brief discussion of other than significant issues.

COUNSEL: For Plaintiffs: Howard M. Crystal, Meyer & Glitzenstein, Washington, DC.

For Defendants: Kenneth E. Kellner, Martin Lalond, U.S. Department of Justice, Washington, DC.

JUDGES: ELLEN SEGAL HUVELLE, United States District Judge.

OPINIONBY: ELLEN SEGAL HUVELLE

OPINION: [*122]

MEMORANDUM OPINION

Plaintiffs, Defenders of Wildlife and Paul Huddy, bring this suit against defendants in their official capacities as the Secretaries and Directors of the Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, National Park Service, Department of Defense, United States Air Force, United States Navy, United States Army, United States Army National Guard, United States Marine Corps, Department of Justice, [**2] Immigration and Naturalization Services, and the United States Border Patrol, alleging failure to comply with the Endangered Species Act of 1973, as amended, ("ESA"), *16 U.S.C. §§ 1531* et seq.; the National Environmental Policy Act ("NEPA"), *42 U.S.C. § 4321,* et seq.; and the Administrative Procedure Act ("APA"), *5 U.S.C. § 706,* with respect to the survival of the Sonoran pronghorn.

As grounds for their motion for summary judgment, plaintiffs argue (1) that the Biological Assessments ("BA") and Biological Opinions ("BO") prepared by defendants pursuant to the consultation process set forth in Section 7(a)(2) of the ESA, *16 U.S.C. § 1536*(a)(2), are deficient because they fail to analyze the cumulative impacts or effects of other federal agency activities on the survival of the Sonoran pronghorn; (2) that the December 1998 Final Revised Sonoran Pronghorn Recovery Plan ("Plan" or "Recovery Plan") prepared by the Fish and Wildlife Service ("FWS") fails to comply with Section 4(f) of the ESA, *16 U.S.C. § 1533*(f), for its failure to set forth required site-specific[**3] management actions; objective, measurable criteria; and estimates of the time required to carry out those measures, and to provide for appropriate notice and public [*123] comment; (3) that the Environmental Impact Statements ("EIS") prepared by defendants do not analyze the cumulative impacts of all agency activities as required by the NEPA; and (4) that defendants are failing to utilize their authority to implement programs for the conservation and recovery of the Sonoran pronghorn, in violation of Section 7(a)(1) of the ESA, *16 U.S.C. § 1536*(a)(1). Defendants contend that they have complied with the requirements of the ESA and NEPA in their consultations, preparation of the Recovery Plan, and formulations of the EISs, and that they are taking actions to conserve and recover the pronghorn as required by the ESA.

Both plaintiffs and defendants move for summary judgment. For the reasons set forth more fully below, the Court finds that the BOs, the Recovery Plan, and certain EISs do not fully comply with the ESA and NEPA, and therefore grants plaintiffs' motion in part and deniesdefendants' motion in part. The Court further finds that defendants are taking steps to[**4] conserve and recover the pronghorn as required by the ESA, the BAs prepared by the consulting agencies do comply with the ESA, and that certain EISs do comply with NEPA, and therefore grants defendants' motion in part and denies plaintiffs' motion in part. n1

n1 Defendants have also moved to strike affidavits submitted by plaintiffs in support of their summary judgment motion as being outside the administrative record and therefore beyond the scope of the Court's

review. The Court does not rely on these affidavits in its decision and therefore will deny defendants' motion to strike as moot.

BACKGROUND

The Sonoran pronghorn (Antilocapra americana sonoriensis), one of five subspecies of pronghorn, evolved in a unique desert environment and have distinct adaptations to this environment which distinguish it from other subspecies. Plan at 1-4. In 1967, the FWS designated the Sonoran subspecies as endangered. *32 Fed. Reg. 4001* (March 11, 1967). While there is uncertainty as to the current population[**5] of Sonoran pronghorn in the United States, the most recent estimates range between 120 and 250 pronghorn. Def. St. P4; Pl. St. P4. The only habitat in which Sonoran pronghorn currently remain in the United States is federally-owned land in Southwest Arizona. See Plan at 8. In Arizona, pronghorn inhabit the Barry M. Goldwater Range ("BMGR" or "Goldwater Range"), the Cabeza Prieta National Wildlife Refuge ("CPNWR" or "Cabeza Prieta NWR"), the Organ Pipe Cactus National Monument ("OPCNM" or "Organ Pipe Cactus NM"), and to a lesser extent, nearby Bureau of Land Management ("BLM") grazing allotments. Id. The Goldwater Range is reserved for the use of the United States Air Force ("USAF") and United States Marine Corps ("USMC"), and is also used by the United States Army National Guard ("ARNG"). The CPNWR is administered by FWS and OPCNM is administered by the National Park Service ("NPS"). The Immigration and Naturalization Service ("INS") and United States Border Patrol ("BP") also operate in the area of the pronghorn habitat, primarily along the United States-Mexico border.

Factors threatening the continued survival of the Sonoran subspecies include lack of recruitment (survival[**6] of fawns), insufficient forage and/or water, drought coupled with predation, physical manmade barriers to historical habitat, illegal hunting, degradation of habitat from livestock grazing, diminishing size of the Gila and Sonoyta rivers, and human encroachment. Plan at 21. Plaintiffs contend that the various military activities taking place in the pronghorn habitat are contributing significantly to the threat of extinction. Defendants claim that although themilitary activities "must be monitored and controlled, they do not constitute a survival threat to the Sonoran pronghorn." Def. Mot. at 4. Plaintiffs also contend that INS/BP activities, grazing on BLM lands, and recreational activities in Cabeza Prieta [*124] NWR and Organ Pipe Cactus NM are adversely impacting the pronghorn. Defendants argue that these activities do not jeopardize the continued survival of the species.

STANDARD OF REVIEW

This case is brought pursuant to the ESA's citizen suit provision, *16 U.S.C. § 1540*(g), and the Administrative Procedure Act, *5 U.S.C. § 706.* Under the standards of review set forth in the APA, the Court must review whether the agency actions at[**7] issue are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706*(2)(A).

In reviewing the action of the agencies, the Court must engage in a "thorough, probing, in-depth review," *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971),* to determine whether the agencies have "examined the relevant data and articulated a satisfactory explanation for its action. . . ." *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).* "In thoroughly reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors." *Fund for Animals v. Babbitt, 903 F. Supp. 96, 105 (D.D.C. 1995)* (citing *Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989);*

Citizens to Preserve Overton Park, 401 U.S. at 415-16;[**8] *Professional Drivers Council v. Bureau of Motor Carrier Safety, 227 U.S. App. D.C. 312, 706 F.2d 1216, 1220 (D.C. Cir. 1983)).* "Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record . . . , even though the Court does not employ the standard of review set forth in Rule 56, Fed. R. Civ. P." Id. (citations omitted).

I. ENDANGERED SPECIES ACT CLAIMS

A. Statutory Framework

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill, 437 U.S. 153, 180, 98 S. Ct. 2279,57 L. Ed. 2d 117 (1978).* In enacting the ESA, Congress recognized that "from the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask." *Id. at 178* (citing H.R. Rep. No. 93-412, pp. 4-5 (1973)). Its stated purposes are "to provide a means whereby the ecosystems upon which endangered species and[**9] threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . ." *16 U.S.C. § 1531*(b). n2 The Supreme Court has noted that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id. at 184.* The Court has also recognized the enactment of the ESA constituted "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species . . . [and] reveals a conscious decision by Congress [*125] to give endangered species priority over the 'primary missions' of federal agencies." *Id. at 185.* "All persons, including federal agencies, are specifically instructed not to 'take' endangered species, . . . [and federal] agencies in particular are directed by . . . the Act to 'use . . . all methods and procedures which are necessary' to preserve endangered species." *Id. at 184-85* (citations omitted).

n2 One of the primary threats to endangered species and their habitat is that "man and his technology has [sic] continued at any ever-increasing rate to disrupt the natural ecosystem. This has resulted in a dramatic rise in the number and severity of the threats faced by the world's wildlife." *Id. at 176* (citation omitted).

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Under Section 7 of the ESA, when a federal agency undertakes or permits actions that may affect a listed species, the agency must consult with FWS to "insure" that their activities are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *16 U.S.C. § 1536*(a)(2). Under the formal consultation process, the agency prepares a Biological Assessment ("BA") that evaluates the impact of its activities on the listed species, and the FWS, after evaluation of the BA and "the best scientific and commercial data available," issues a Biological Opinion ("BO") detailing "how the agency action affects the species" and whether the action is "likely to jeopardize the continued existence" of the species. *16 U.S.C. § 1536*(a)(2), (b)(3)(A), (c). If the FWS concludes that the activities are not likely to jeopardize the species, it may provide for incidental take of the species. *16 U.S.C. § 1536*(b)(4). "Take" is defined to include action that would "harass, harm, pursue, hunt, shoot, wound, kill, [**11] trap, capture, or collect, or [] attempt to engage in any such conduct." *16 U.S.C. § 1532*(19). n3 Pursuant to FWS regulations, "harass in the definition of 'take' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." *50 C.F.R. § 17.3*. Under Section 4 of the ESA, FWS is also required to develop and implement a

recovery plan "for the conservation and survival of" a listed endangered or threatened species. *16 U.S.C. § 1533*(f)(1).

n3 Under the ESA the "take" of an endangered or threatened animal is prohibited, unless authorized by the ESA or by an incidental take statement. *16 U.S.C. § 1538*(a)(1).

B. Section 7(a)(2) -- Consideration of Other Agency Activities

Under Section 7 of the ESA, each defendant[**12] agency "shall . . . insure that" its activities are "not likely to jeopardize the continued existence" of the Sonoran pronghorn. *16 U.S.C. § 1536*(a)(2). Plaintiffs argue that defendants have failed to comply with this mandate because they have not taken into account the cumulativeeffects of all of the federal activities that affect pronghorn in preparing the BAs and BOs, and therefore, the BAs and BOs have incorrectly concluded that each defendant agency's activities would not jeopardize the continued survival of the pronghorn. Plaintiffs move the Court to remand the BAs and BOs to the defendant agencies for consultation about and consideration of these cumulative effects. Defendants contend that the BAs prepared by the consulting agencies need not evaluate cumulative effects. Defendants also contend that the consideration of "cumulative effects" in the BOs prepared by FWS need not include a discussion of other federal agency activities under the regulations implementing the ESA, but instead they are to be evaluated within the context of the "environmental baseline." Defendants argue that the BO's prepared by FWS have adequately addressed the other federal [**13]activities in the "action area" that constitute the "environmental baseline." Plaintiffs respond by arguing that defendants have, in certain cases, used an overly narrow definition of the action area of a particular agency's activities so as to exclude consideration of other federal activities, and that while some of the BO's list or acknowledge other federal activities affecting pronghorn, none [*126] of the BO's provides an analysis of the impacts of all the federal activities on the species or analyzes the proposed actions in the context of that aggregate impact.

Contrary to defendant's argument, the Court is persuaded, as explained more fully below, that FWS must analyze the effects of the action in conjunction with the effects of other agencies' actions on the pronghorn, and that this has not been adequately done with respect to the BOs at issue here. The purpose of Section 7(a)(2)'s consultation requirement is to insure that an agency's activities do not jeopardize endangered species such as the pronghorn. For this reason, applicable regulations require an agency to analyze the effects of its activities when added to the past and present impacts of all federal activities in the[**14] action area on an endangered species, as well as certain anticipated actions that have already undergone formal or early consultation. An agency cannot fulfill this duty by simply listing the relevant activities or by narrowly defining the action area to exclude federal activities that are impacting the pronghorn. By limiting their analysis in such a manner, defendants avoid their statutory duty under the ESA to insure that their activities do not jeopardize the existence of the pronghorn. Therefore, the Court will grant summary judgment to plaintiffs on their Section 7(a)(2)claims relating to the BOs prepared by FWS in consultation with defendants, and remand those BOs for further consideration consistent with the regulations and the Court's opinion. n4

n4 By contrast, the Court finds that the consulting agencies do not have the duty to evaluate the cumulative effects in the BAs they prepare. Under *50 C.F.R. § 402.12(f)*, "the contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action." The regulation further provides that "the following may be considered for inclusion: . . . an analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies." Id. (emphasis added). The Court therefore will grant summary judgment in favor of the consulting agency defendants withrespect to the BAs.

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1. Environmental Baseline

The applicable regulations mandate that FWS address the following pursuant to formal consultation:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.
(2) Evaluate the current status of the listed species or critical habitat.
(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.
(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.14(g) (emphasis added). n5

n5 Under the ESA, "'cumulative effects' are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *50 C.F.R. § 402.02* (emphasis added). Therefore, defendants are correct that an analysis of "cumulative effects," as defined by the regulations, need not incorporate an analysis of the effects of other federal agency activities on the pronghorn.

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The "'effects of the action' refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." *50 C.F.R. § 402.02* (emphasis added). n6 In turn, "the environmental [*127] baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." Id. (emphasis added). It is therefore in the analysis of the environmental baseline that other federal activities in the action area that impact pronghorn must be taken into account by FWS. In turn, the analysis of the effects of theaction must address these effects in conjunction with the impacts that constitute the baseline. In addition, the Secretary is required, if an incidental take is authorized, to specify in its[**17] opinion the impact of such incidental taking on the species. *16 U.S.C. § 1536*(b)(4). The impact of an authorized incidental take cannot be determined or analyzed in a vacuum, but must necessarily be addressed in the context of other incidental take authorized by FWS. As illustrated below, the BOs prepared with respect to the activities of defendants do not contain this required analysis. Therefore, the Court will remand the BOs to the FWS to complete an analysis of the environmental baseline in each opinion and the effects of the action when added to that baseline. n7 Such analysis should also address any take authorized with respect to the pronghorn, as an anticipated future impact.

n6 "Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." Id. Plaintiffs do not argue that the activities of the defendants which are the subjects of separate BOs are interrelated or interdependent.

n7 In that each incidental take statement relies on its accompanying BO in reaching its no jeopardy conclusion, FWS should also reconsider the incidental take statements in light of the revisions made to the BOs.

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For example, the September 5, 2000, INS/Border Patrol BO for "United States Border Patrol Activities in the Yuma Sector, Wellton Station, Yuma, Arizona," which is the most recent of the BOs at issue, concludes that agency action is not likely to jeopardize the continued existence of the pronghorn, and anticipates incidental take in the form of harassment that is likely to injure up to one pronghorn every ten years. Attachment to Plaintiffs' Notice of Filing at Summary 1. As required by the regulations, in its discussion of the environmental baseline, the BO sets forth all of the federal activities in the action area, which is broadly defined, that have past, present, or future anticipated impact on the pronghorn. n8 Id. at 15-18. The BO notes activities of CPNWR, BLM, USAF, USMC, and OPCNM, and indicates the amount of take authorized, if any, with respect to each activity. Id. at 17-18. The BO also sets forth the anticipated effects of the Border Patrol activities on the pronghorn. Id. at 18-21. The BO is deficient, however, in that it does not analyze the effects of the activity in light of the environmental baseline. Simply reciting [*128] the activities and impacts that constitute[**19] the baseline and then separately addressing only the impacts of the particular agency action in isolation is not sufficient. See *Greenpeace v. National Marine Fisheries Service, 80 F. Supp. 2d 1137, 1149 (W.D. Wash. 2000)* ("Although [the BO] states that its conclusions are based on a "cumulative effects analysis," and even contains a section titled "Cumulative Effects," in fact this section contains no analysis whatsoever and is nothing more than a list . . . . The section contains no explanation of how the various groundfish fisheries and fishery management measures interrelate and how the overall management regime may or may not affect Steller sea lions.") (citations omitted); see also *Natural Resources Defense Council v. Hodel, 275 U.S. App. D.C. 69, 865 F.2d 288, 298 (D.C. Cir. 1988)* (under NEPA, finding insufficient "conclusory remarks [and] statements that do not equip a decisionmaker to make an informed decision about alternative courses of action, or a court to review the Secretary's reasoning"). There must be an analysis of the status of the environmental baseline given the listed impacts, not simply a recitation of the activities of the[**20] agencies. See *Greenpeace, 80 F. Supp. 2d at 1149.* The BO must also include an analysis of the effects of the action on the species when "added to" the environmental baseline -- in other words, an analysis of the total impact on the species. *50 C.F.R. § 402.02*. Moreover, there must be analysis of the impact of the total amount of take authorized, not simply a listing of those numbers. Such a critical analysis is missing fromthe INS BO, as well as the other BOs at issue here. n9

n8 The BO includes all the federal activities impacting pronghorn which have been the subject of consultation between an agency and FWS. None of the other BOs even contains a comprehensive list of these activities, let alone an analysis of their impacts on the pronghorn or an analysis of the effect of the proposed action when added to those impacts. For example, in the April 17, 1996 USMC BO for "Existing and Proposed Activities by the Marine Corps Air Station-Yuma in the Arizona Portion of the Yuma Training Range Complex," the discussion of the environmental baseline acknowledges USAF activities in the Goldwater Range, Army National Guard activities in the Goldwater Range, Border Patrol activities in the Goldwater Range and the Cabeza Prieta NWR, recreational use of CPNWR, Organ Pipe Cactus NM, and BLM lands, and livestock grazing. FWS ESA R. 2380-81 (hereinafter cited as "FWS "). But a mere listing of activities does not constitute an analysis of the impacts of these activities, which is what is required by the regulation defining the baseline. *50 C.F.R. § 402.02* ("the environmental baseline includes the past and present impacts of all Federal, State, or private actions . . . [and] the anticipated impacts . . .") (emphasis added). The USAF, BLM and NPS BOs do not even mention certain of the other federal activities that impact pronghorn in the action area.

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n9 NPS has reinitiated consultation with FWS with respect to Organ Pipe Cactus NM. This does not, however, moot the Court's consideration of the existing BO. *Greenpeace, 80 F. Supp. 2d at 1151-52.*

2. Action Area

The BOs of several of the defendant agencies are also deficient because of their overly narrow definition of action area, which results in the exclusion of certain relevant impacts from the environmental baseline. The environmental baseline includes, inter alia, "the past and present impacts of all Federal, State, or private actionsand other human activities in the action area, [and] the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." *50 C.F.R. § 402.02*. The regulations define "action area" as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Id. In certain BOs, defendants have defined the action area in a manner inconsistent with this definition.

Defendants[**22] attempt to argue that their analysis need not consider other federal activities, since the action area is limited to the federal lands under the control of that agency and/or the immediate area of that agency's action. For example, defendants claim the USMC BO went further than necessary in noting the USAF use ofthe Gila Bend segment of the BMGR, because USMC "has no direct authority" there. Def. Mot./Opp. at 40. That is not the test of whether an area is part of the action area. If pronghorn there will be directly or indirectly affected by USMC activity, the impacts of other activities there must be included as part of the environmental baseline. See *50 C.F.R. § 402.02*. Similarly, with respect to the BLM grazing allotments BO, defendants argue that the action area consists solely of the grazing allotment lands, in other words, the immediate area involved. Id. at 50. n10 The regulations [*129] explicitly reject such a definition of the action area. See *50 C.F.R. § 402.02*. n11

n10 Similarly, defendants argue that the action area at issue in the NPS "Organ Pipe Cactus National Monument General Management" BO consists only of the national monument area, which is the immediate area, without acknowledging indirect affects on pronghorn outside that immediate area. Def. Mot./Opp. at 55. However, in the section labeled "Effects of the Action," the BO notes the possibility that traffic along State Road 85, which is located in part within the monument, "may act as a barrier to the pronghorn, restricting their movements to east of the highway," FWS 902, which is separate from the present range of most pronghorn, which is west of the highway. Def. Ex. 3. The opinion notes that "not only is the highway a possible deterrent to expanding pronghorn populations, but the resulting modified behavior patterns may lead to a reduction in genetic exchange, reduced viability, and the ability to adapt to environmental change." FWS 902. Notwithstanding these possible direct and indirect effects from activities in Organ Pipe, including the potential isolation of pronghorn east of SR 85 from the rest of the population, and restriction of the remainder of the population to areas west of SR 85, the BO contains no discussion of past, present, or anticipated future impacts of federal activities in the pronghorn range north and west of Organ Pipe, including BLM grazing lands, the Goldwater Range, and Cabeza Prieta. These lands should be considered part of the action area, as they were by USMC and INS, as the pronghorn there will be indirectly affected by the activities in the immediate area (Organ Pipe) if their range is restricted by such activities. See *50 C.F.R. § 402.02*.

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n11 While defendants maintain other federal activities need not legally be included in this limited action area, the BLM BO does mention the USAF and USMC BOs in its discussion of the environmental baseline. FWS 1780. However, there is no analysis of the BLM action in connection with those impacts. Second, defendants' mere reference to other agency activities does not cure the narrow definition of the action area as limited to the grazing allotments, which the BLM BO applies.

The Court cannot accept these overly narrow applications of the definition of an "action area," since they are inconsistent with both the broad purpose of the statute and the definition of "action area" set forth in *50 C.F.R. § 402.02*. Pronghorn move across this relatively discreet area of land entirely under federal management without regard to which federal agency is responsible for administering a particular area. Given the unambiguous definition of an "action area," it cannot be narrowly applied so as to avoid taking into account the impacts of other federal activities on the pronghorn. Such[**24] an application would undermine the Act's requirement that agencies "insure" that their actions do not jeopardize the continued existence of endangered species.

Such a narrow approach to defining the action area in these three BOs is also inconsistent with the broader the definition of action area correctly applied in the INS and USMC BOs. n12 For example, as discussed above, the INS BO correctly includes all federal activities impacting pronghorn in its discussion of the environmental baseline, not just those activities in the immediate area of the Border Patrol activities. Similarly, the USMC BO discussion of the environmental baseline, while it did not specifically define the action area, noted activities in the Goldwater Range and Cabeza Prieta (which overlaps with the Goldwater Range) undertaken by USAF and Border Patrol, grazing on adjacent BLM lands, and recreational activities in Cabeza Prieta, Organ Pipe, and BLM lands. n13 This is consistent with the expansive [*130] regulatory definition of action area, as these adjacent areas may be indirectly affected by the military action on the Goldwater Range since all U.S. pronghorn are found in this area. In contrast, the USAF BO, while[**25] not specifically defining the action area, considered only USMC activities in the Goldwater Range. n14 The Court finds that the USAF, BLM, and NPS BOs have failed to define the "action area" to include areas where pronghorn may be directly or indirectly affected by the agency action, and in turn to address the impacts that constitute the environmental baseline in that larger area. In contrast, the Court considers that the listing of federal activities contained in the INS BO, which are referenced more generally in the USMC BO, is an appropriate scope of analysis for the environmental baseline under the definition of action area set forth in *50 C.F.R. § 402.02*.

n12 Moreover, the defendants' argument on this point is inconsistent. For example, while defendants argue there is no basis to extend an action area to includeother agency actions, they nonetheless claim that "FWS takes into account all federal impacts through its baseline analysis, even though the particular action may be far more limited in scope." Reply at 11 (emphasis added) (citing the INS BO as an example). By its terms, the environmental baseline includes only federal activities in the action area. Therefore, defendants' argument that other federal activities are not part of the action area but are part of the environmental baseline does not make sense. To the extent that defendants are arguing a BO need not re-analyze a separate federal action, that is not the issue.The environmental baseline must include the impacts of that action, not a re-examination of the action in its entirety. While defendants appear to concede such baseline analysis is required, id., as discussed above, they also argue in effect that they need not include these impacts in the environmental baseline given their limited definition of the action area.

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n13 As discussed above, the USMC BO noted these activities without discussing the impacts of the activities. The USMC BO expresses concern about USAF military activities but states that analysis of those would be more appropriately addressed in consultation with Luke Air Force Base. FWS 2402. However, the

regulations require that in addressing the effects of the action, FWS must consider the effects when added to the past and present impacts of other federal activities, as well as anticipated future impacts of federal activities which have "already undergone formal or early section 7 consultation." *50 C.F.R. § 402.02*. The USMC BO need not undertake comprehensive analysis of those USAF activities which are properly the subject of a separate consultation which was underway at the time the BO was issued, but if particular impacts of those activities are anticipated, they must be incorporated into the environmental baseline. Id.

n14 The ARNG activities on the North-Tac of the Gila Band sector of the Goldwater Range are also addressed in this BO. No BO addressed the ARNG activities on East-Tac because there are no pronghorn there.

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The Court therefore remands the USAF, BLM, and NPS BOs for an analysis of the past and present impacts of the additional activities in the action area where pronghorn may be indirectly affected, as well as any anticipated impacts of activities in that area which have begun Section 7 consultation. See *50 C.F.R. § 402.02*.

3. Incidental Take

On remand, FWS must also reconsider its opinions as to the impact of the incidental take authorized by each BO in light of the revisions made to the BOs. See *16 U.S.C. § 1536*(b)(4). The Court recognizes that the authorization of an incidental take by these BOs does notnecessarily mean that take will occur, or that it will occur at the level anticipated. However, FWS has authorized a total level of take greater than the incidental take provided for in any individual BO without analyzing whether that total level jeopardizes the survival of the pronghorn species. Each incidental take statement simply cites the conclusion of the accompanying BO that the activity at issue is not likely to jeopardize the pronghorn. The population of the Sonoran pronghorn is sparse and its range is relatively[**28] limited. While the take of one or two pronghorn as a result of a particular activity may not jeopardize the species as a whole, the aggregate take of pronghorn resulting from each federal activity affecting pronghorn may pose such a risk. As incremental incidental takes are authorized, the impact of those takes on the species must be viewed in the context of previously authorized takes and other impacts that are part of the environmental baseline.

In sum, the BOs do not, contrary to regulatory mandate, adequately analyze the effect of each proposed action when added to the environmental baseline. See *50 C.F.R. §§ 402.14(g)*, 402.02. Nowhere is there a comprehensive discussion, as opposed to a listing, of the impacts that the various federal activities have in the aggregate on the pronghorn. While the Court has reviewed the defendants' actions with deference, defendants' actions do not appear to have been "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, 401 U.S. at 416.* See also *State Farm Mutual Ins. Co., 463 U.S. at 52* [*131] (agency must "offer a rational connection between the facts found[**29] and the choice made") (citation omitted); *Greenpeace, 80 F. Supp. 2d at 1147* ("A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or it has entirely failed to consider an important aspect of the problem.").

Therefore the Court grants summary judgment in favor of plaintiffs on the Section 7(a)(2) claim concerning the BOs and will remand the BOs to the FWS and the consulting agency defendants for further consultation, consideration, and any revisions that may be warranted. n15

n15 The Court declines to hold that given the insufficiency of the BOs, the defendants are, as a matter of law, acting in violation of Section 9 of the ESA, which prohibits unauthorized take. *16 U.S.C. § 1538.* While the record supports the conclusion that defendants' activities may result in take, there is no evidence that there has in fact been a take of pronghorn since the opinions were issued. Plaintiffs also argue that defendants are violating ESA Section 7(d), which provides that "after initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." *16 U.S.C. § 1536*(d). There is no evidence that the activities engaged in by defendants involve the irreversible or irretrievable commitment of resources within the meaning of this section. Summary judgment is therefore granted in favor of defendants with respect to the claims made by plaintiff under Section 9 and Section 7(d).

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C. Section 4(f) -- Sufficiency of the Recovery Plan

The FWS is responsible for the formulation of a recovery plan pursuant to a delegation of authority from the Secretary under the ESA. See *50 C.F.R. § 402.01(b)*. Under the ESA, FWS is required to develop and implement a recovery plan "for the conservation and survival of" the Sonoran pronghorn. *16 U.S.C. § 1533*(f)(1). "Any such [recovery] plan is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence." *Fund for Animals, 903 F. Supp. at 103.* Such a plan "shall, to the maximum extent practicable . . . incorporate in each plan":

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
(iii) estimates of the time required and the cost to carry out those measures needed to achieve[**31] the plan's goal and to achieve intermediate steps toward that goal.

16 U.S.C. § 1533(f)(1)(B)(i)-(iii). "The phrase 'to the maximum extent practicable' does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." *Fund for Animals, 903 F. Supp. at 107* (citations omitted). Plaintiffs allege that the "Final Revised Sonoran Pronghorn Recovery Plan" ("the Plan") issued by FWS in December 1998 is deficient in all three respects. n16

n16 Plaintiffs also allege that FWS did not provide for an adequate public comment period before approval of the final plan. The Court need not decide whether the FWS complied with the ESA requirement that "the Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan [and] shall consider all information presented during the public comment period prior to approval of the plan," *16 U.S.C. § 1533*(f)(4), since FWS will have the opportunity on remand to remedy any arguable procedural deficiencies.

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1. Site-Specific Management Actions

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The ESA provides that "in developing and implementing recovery plans," the [*132]Secretary and the FWS shall "to the maximum extent practicable" incorporate into each recovery plan "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species." *16 U.S.C. § 1533*(f)(1)(B)(i). "While the legislative history suggests that incorporation of 'site-specific management objectives' is supposed to assure that recovery plans 'are as explicit as possible in describing steps to be taken in the recovery of a species,' . . . the FWS has the flexibility under the ESA to recommend a wide range of 'management actions' on a site-specific basis." *Fund for Animals, 903 F. Supp. at 106* (citations omitted). Plaintiffs argue that the Plan does not contain site-specific management actions, but provides only for further research and sets broad, unspecific goals.

The plan proposes four main categories of recovery actions: (1) "Enhance present population of Sonoran pronghorn to reach recovery goal of 300 adults. Decrease factors that are potentially[**33] limiting growth"; (2) "Establish and monitor new, separate herd(s)"; (3) "Continue monitoring the Sonoran pronghorn population. Maintain a protocol for a repeatable, comparable and justifiable survey technique"; and (4) "Verify taxonomic status of the species." Plan at 38-42. Under each action is a series of steps or tasks to be undertaken to accomplishthe action. "What the ESA requires is the identification of management actions necessary to achieve the Plan's goals for the conservation and survival of the species. A recovery plan that recognizes specific threats to the conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action, would not meet the ESA's standard." *Fund for Animals, 903 F. Supp. at 108.*

The Court finds that the Plan does "recommend actions or . . . steps that could ultimately lead to actions" to address the threats identified. Id. While some of the tasks and interim steps merely provide for further investigation or research, others are concrete, specific actions. The Court cannot say that too many of them involve only research[**34] or investigation, or that alternative or additional actions should be implemented. See id. ("The choice of one particular action over another is not arbitrary, capricious or an abuse of discretion simply because one may happen to think it ill-considered, or to represent the less appealing alternative solution available. The Court will not impose plaintiffs' or its own view of a better way to stem the threat posed . . . than the methods chosen by the FWS.") (citations and internal quotation marks omitted).

The Plan also states that "this plan is to be short-term (about 7 years) as critical survival information is not sufficiently understood about this animal. Annual updates, rather than a new plan or major revision, will be the concept for maintaining an up-to-date recovery plan. Implementation plans will be written for each major recovery project and will provide necessary details of the project." Plan at iv. See *Fund for Animals, 903 F. Supp. at 107-08* ("Because science and circumstances change, however, the FWS needs, and the statute provides, some flexibility as it implements the recovery plan."). The Court will defer to the agency's discretion that critical[**35] information is not sufficiently known to implement an exhaustively detailed plan at this time, and that annual updates for the short-term duration of the plan are the best method to insure that the plan is current and up-to-date. *Id. at 107* ("It is not feasible for the FWS to attempt to address each possibility. By the time an exhaustively detailed recovery plan is completed and ready for publication, science or circumstances could have changed and the plan might no longer be suitable. Thus, the FWS recognized in the Plan that it would be reviewed every five years and revised as necessary. In these circumstances, the Court concludes that the FWS has [*133] provided sufficient detail to satisfy the statute.").

2. Objective Measurable Criteria

The ESA states that the FWS "shall, to the maximum extent practicable," incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination . . . that the species be removedfrom the list." *16 U.S.C. § 1533*(f)(1)(B)(ii). "Congress has spoken in clarion terms: the objective, measurable criteria must be directed towards the goal of removing the endangered or threatened[**36] species from the list. Since the same five statutory factors must be considered in delisting as in listing, the Court

necessarily concludes that the FWS, in designing objective, measurable criteria, must address each of the five statutory delisting factors and measure whether threats to the [species] have been ameliorated." *Fund for Animals, 903 F. Supp. at 111* (citations omitted). Pursuant to the ESA, the five delisting factors are:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence. . . .

16 U.S.C. § 1533(a)(1). The Plan sets forth a program and certain criteria for downlisting the species from endangered to threatened, rather than delisting altogether. Plan at iii ("The recovery objective is to remove the Sonoran pronghorn from the list of endangered species. This revision addresses first downlisting the subspecies to threatened."). The[**37] criteria set forth in the Plan for consideration of reclassifying the Sonoran pronghorn as "threatened" rather than "endangered" are either 1) when there are "an estimated 300 adult Sonoran pronghorn in one U.S. population and a second separate population is established in the U.S. and remains stable over a five year period," or 2) "numbers are determined to be adequate to sustain the population through time." Plan at 37. These criteria plainly do not address the five delisting factors. Defendants argue that the factors are otherwise addressed in the Plan in that certain recovery actions recognize, study, and attempt to address these five categories of potential threats. The fact that these factors are discussed elsewhere in the plan as areas for further research fails to satisfy the requirement that the criteria proposed for downlisting address these five factors and whether these factors pose a continuing threat to the species. Indeed, the factors are not even mentioned with respect to the criteria.

Defendants cite Southwest Center for Biological Diversity v. Babbitt, Civ. 98-372 TUC JMR (D.Ariz. Aug. 18, 1999), slip. op. at 12, where the court deferred to the FWS's determination[**38] that it was not practicable to incorporate the five statutory delisting factors into the objective, measurable delisting criteria in the recovery plan at issue. The court found that FWS had outlined where the record "supports the conclusion that development of delisting criteria was not practicable without first satisfying downlisting criteria," and outlined plans to research the delisting factors. Id. at 11-12. Here, however, defendant FWS has simply stated that the plan will first address downlisting the pronghorn to threatened, Plan at iii, without explaining the reasoning behind that determination or outlining where the record supports that determination. The court in Southwest Center for Biological Diversity found that such a "conclusory statement does not alone constitute an adequate justification for the failure to incorporate delisting criteria." Id. at 11. Here, FWS has provided little more than [*134] its conclusion. n17 This is insufficient to excuse compliance with the requirement to incorporate the five statutory delisting factors into the objective, measurable criteria. See *Jost v. Surface Transp. Bd., 338 U.S. App. D.C. 289, 194 F.3d 79, 85 (D.C. Cir. 1999)*[**39] ("The requirement that an agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result. . . . We may not supply a reasoned basis for the agency's decision that the agency itself has not given.") (citations and internal quotation marks omitted); *American Lung Ass'n v. EPA, 328 U.S. App. D.C. 232, 134 F.3d 388, 392 (D.C. Cir. 1998)* ("Judicial review can only occur when agencies explain their decisions with precision for it will not do for a court to be compelled to guess at the theory underlying the agency's action.") (citations and internal quotation marks omitted); *Greenpeace, 80 F. Supp. 2d at 1147* ("A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions . . . .").

n17 Defendants state that because the pronghorn was listed as endangered before these statutory criteria were established, the FWS has never been required to make a determination as to which of the five factors are present with respect to the pronghorn. This does not explain why they need not make the determination at this time. The Plan also states that "because some significant aspects of the life history of the Sonoran pronghorn are not yet known, a delisting date cannot be projected at this time." Planat iv. Similarly, the fact

that a delisting date cannot be projected with exactitude does not explain why the delisting criteria cannot be incorporated into the Plan.

[**40]

The Court will therefore remand the Plan to FWS to incorporate the criteria, or alternatively, to provide an adequate explanation as to why the delisting criteria cannot practicably be incorporated at this time.

3. Time Estimates

The recovery plan is required "to the maximum extent practicable" to incorporate "estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." *16 U.S.C. § 1533*(f)(1)(B)(iii). The Plan contains an "Implementation Schedule," which is a chart of the tasks listed under each of the four categories of management actions. Plan at 43-45. However, of the 23 tasks listed, only 5 have a specific estimate of the time required to carry out that task. Id. at 44-45. The other 19 are described simply as "ongoing." Id. No time estimates are provided for the intermediate steps that are listed below certain tasks. All of the tasks implementing actions (2) "establish and monitor new, separate herd(s)" and (3) "continue monitoring the Sonoran pronghorn population, maintain a protocol for a repeatable, comparable and justifiable survey technique" [**41] are listed as ongoing without any specific time estimates. Id.

Undoubtedly, certain measures cannot be completed by a time certain, for they are by definition ongoing. For example, "protect present range" (task 1.5) will presumably continue indefinitely into the future. Id. at 38. However, time estimates could be provided for certain interim measures listed under that task which are not even included on the chart, such as "investigate preferred habitat, determine areas preferred for pronghorn activities . . .[,] investigate preferred forage species . . . , complete a vegetation map that includes all pronghorn habitat." Id. (task 1.52). That such measures will be subject to ongoing revision and updating does not mean that it is not practicable to provide a time estimate within which they could initially be completed. Other tasks, such as some of the many investigation and research projects described as ongoing, do not appear tobe tasks of indefinite duration. While a particular research project may require more time than is initially anticipated, the statute does not require that binding deadlines be set. It does require, where practicable, time estimates. The Court[**42] will therefore remand the Plan to FWS to provide estimates where practicable [*135] or to explain why estimates are not practicable for the tasks or interim measures.

In sum, the Court will grant partial summary judgment for defendants on plaintiff's Section 4(f) claim, as defendants have included in the Plan site-specific management actions for the recovery of pronghorn. TheCourt will grant partial summary judgment for plaintiffs on their Section 4(f) claim, as defendants have failed to incorporate into the Plan objective measurable criteria for the delisting of the pronghorn, and estimates of the time required to carry out those measures needed to achieve the plan's goal and intermediate steps toward that goal. The Court will therefore remand the Plan to the FWS for inclusion of these elements or for an explanation why their inclusion is not practicable.

D. Section 7(a)(1) - Programs for the Conservation of Endangered Species

Plaintiffs contend that defendants are violating Section 7(a)(1)'s requirement that the agencies "shall . . . utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered species . . . ." *16 U.S.C. § 1536*[**43] (a)(1). Plaintiffs claim that the defendants are violating the statute by continuing to engage in certain activities that plaintiffs allege are harmful to the pronghorn or by failing to take certain measures that plaintiffs believe will help to conserve the pronghorn. Plaintiffs cite as examples the USAF's opposition to lowering the speed limit on State Road 85, which runs through the Organ

Pipe Cactus National Monument, to facilitate movement of the pronghorn, and the military's continued training and flight activities during the fawning season. Pl. Mot. at 40-42. Plaintiffs state that they do not intend for the Court to order defendants to implement particular conservation actions, but instead contend that defendants are not "in compliance with this [statutory] mandate in any respect." Pl. Opp. at 42 (emphasis in original). The record does not support a finding that defendants have failed entirely to carry out programs for the conservation of the pronghorn. Plaintiffs clearly dispute that defendants are doing enough, and believe that the additional measures they advocate should be implemented. However, "the case law is well settled that federal agencies are accorded discretion[**44] in determining how to fulfill their § 1536(a)(1) obligations. . . . Likewise, this court is not the proper place to adjudge and declare that defendants have violated the ESA as a matter of law by not implementing the processes listed by [plaintiff]." *Coalition for Sustainable Resources v. U.S. Forest Service, 48 F. Supp. 2d 1303, 1315-16 (D. Wyo. 1999)* (and cases cited therein). Therefore, the Court cannot find that defendants have failed to comply with Section 7(a)(1).

II. NATIONAL ENVIRONMENTAL POLICY ACT CLAIMS

The National Environmental Policy Act ("NEPA") mandates the preparation of an environmental impact statement ("EIS") on any major federal action "significantly affecting the quality of the human environment . . . ." *42 U.S.C. § 4332*(C). n18 Plaintiffs allege that the EISs prepared with respect to defendants' activities affecting the pronghorn are deficient in that they do not adequately address the cumulative impacts of all actions that affect the pronghorn. Defendants argue, citing *Allison v. Department of Transportation, 285 U.S. App. D.C. 265, 908 F.2d 1024 (D.C. Cir. 1990),* that theyare not required to[**45] address [*136] the impacts of actions that are not related to or dependent on the proposed action at issue in an EIS. Defendants overstate the holding of Allison, and ignore the definition of cumulative impacts set forth in the regulations. The required scope of an EIS is defined as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement." *40 C.F.R. § 1508.25*. "To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts." Id. They include connected, cumulative, and similar actions, alternatives and mitigating measures, and impacts, which may be direct, indirect, and cumulative. Id. "'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *40 C.F.R. § 1508.7* [**46].

n18 The statement shall include: "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." Id.

In Allison, petitioners asserted that the FAA "failed to analyze the cumulative impact of the proposed airport together with the impacts of other planned but unrelated projects in the area, in violation of applicable CEQ regulations." *908 F.2d at 1031* (emphasis added). n19 The Court of Appeals rejected that argument, holding that "it is not required by the pertinent CEQ regulations to consider projects that are neither related to nor dependant on the airport," for *40 C.F.R. § 1508.25(a)* [**47] provides that "unconnected single actions" need not be considered within the scope of an EIS. Id. But here, plaintiffs are not arguing that future, unrelated planned actions by other federal agencies should beconsidered within the scope of the EISs prepared by defendants. Rather, plaintiffs argue that the regulations require an EIS to address a proposed action's incremental impact on the pronghorn when added to the impact of other past, present, and reasonably foreseeable future federal

activities that also affect the pronghorn. n20 They are clearly correct, for the regulations require agencies to consider cumulative impacts in an EIS, which are definedas "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *40 C.F.R. § 1508.7*. n21

n19 The Council on Economic Quality ("CEQ"), an agency within the Executive Office of the President, has promulgated regulations implementing NEPA that are "binding on all federal agencies." *42 U.S.C. § 4342; 40 C.F.R. § 1500.3*.

[**48]

n20 As set forth above, the scope of an EIS must address certain "actions" and certain "impacts." *40 C.F.R. § 1508.25*. Under the regulations, connected, cumulative and similar actions are within the scope of an EIS. Id. Similarly, direct, indirect and cumulative impacts are to be considered. Id. While Allison reiterates that *40 C.F.R. § 1508.25(a)* does not require unrelated single actions to be considered in an EIS, the decision does not address the requirement that cumulative impacts must be considered.

n21 Plaintiffs also rely on cases that address when a single EIS addressing all regional federal activities (a "REIS") must be prepared. There has not been a showing that defendants should be required to prepare a REIS, as opposed to preparing separate EISs that address cumulative impacts under *40 C.F.R. § 1508.25* and § 1508.7.

In reviewing a federal agency's compliance with NEPA, the Court employs a highly deferential standard of review. "Neither [NEPA] nor its legislative history[**49] contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21, 49 L. Ed. 2d 576, 96 S. Ct. 2718 (1976).* "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences . . . ." Id. (citation omitted). A court must "enforce the statute by ensuring that agencies [*137] comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results." *Citizens Against Burlington, Inc. v. Busey, 290 U.S. App. D.C. 371, 938 F.2d 190, 194 (D.C. Cir. 1991).* Plaintiffs argue that defendants have failed tosatisfy the requirement that they address cumulative impacts. Upon review of the EISs at issue, the discussion of cumulative impacts contained therein and the record herein, the Court finds that the EISs prepared by USAF and BLM have taken a sufficiently "hard look" at the environmental consequences of their various actions. However, the EISs prepared by USMC and by NPS with respect to Organ Pipe Cactus NM are remanded for further consideration of cumulative impacts.

The September[**50] 1998 Department of Defense/USAF Barry M. Goldwater Range Renewal Legislative EIS ("USAF LEIS") notes in its discussion of cumulative impacts U.S. Border Patrol activities, Cabeza Prieta NWR activities, BLM activities, USMC activities, and Organ Pipe Cactus NM activities. USAF LEIS 6-6 to 6-8. n22 The LEIS discusses the impacts of these activities on a variety of environmental concerns, including biological resources, wildlife, and the pronghorn in particular. USAF LEIS at 6-11 to 6-20; 6-18 to 6-20. n23 While the analysis could be more comprehensive, the Court finds this discussion to be sufficient to satisfy the regulations and the "hard look" requirement. See *40 C.F.R. § 1502.2(a)* ("Environmental impact statements shall be analytic rather than encyclopedic.").

n22 Army National Guard activities on North-Tac and South-Tac are also addressed in the USAF LEIS, rather than in a separate EIS. There is no basis for the Court to conclude that ARNG activities on East-Tac impact pronghorn either directly or indirectly by increasing use of North-Tac or South-Tac. Therefore, the cumulative impacts analysis of the ARNG in its Western Army National Guard Aviation Training Site Expansion EIS need not address impacts on pronghorn.

[**51]

n23 Plaintiffs argue that the omission from the LEIS of discussion of the take authorized by the FWS by defendants' activities alone renders this and all of the other EISs deficient under the statute. The LEIS does incorporate the issue of authorized take by reference to the USAF and USMC BOs under *40 C.F.R. § 1502.21*. Moreover, the Court finds no legal basis upon which to require an EIS prepared under NEPA to specifically consider authorized takes under the ESA in order to satisfy NEPA's requirement of considering cumulative impacts.

The 1985 BLM EIS for the Resource Management Plan ("RMP") for the Lower Gila area concludes that the proposed action may lead to positive long-term impact on pronghorn habitat, and that pronghorn would not be affected by rangeland developments recommended in the proposed action. BLM NEPA 646. Similarly, the 1990 BLM EIS addressing the Goldwater Amendment to the RMP found that the "net effect" of the proposed actions on pronghorn "will be beneficial through the long term as plant communities recover and human-pronghorn conflicts diminish. [**52]" BLM NEPA 1655. There is no section entitled "cumulative impacts" and there is no discussion of other federal agency activities in the area. However, because the EISs found that the actions proposed would result in long-term benefit to the pronghorn (and by implication no incremental adverse impact), discussion of other actions by other agencies that adversely impact the pronghorn would not be necessary within the BLM EIS. See *40 C.F.R. § 1502.2(b)* ("Impacts shall be discussed in proportion to their significance. There shall only be brief discussion of other than significant issues.").

By contrast, the January 1997 USMC Yuma Training Range Complex Final Environmental Impact Statement ("USMC EIS") fails to satisfy the regulations. While the USMC EIS contains a comprehensive discussion of the various impacts of the proposed USMC activities on the environment in general, it fails to provide sufficient analysis of cumulative impacts on the pronghorn. The USMC EIS recognizes that "cumulative impacts may result [*138] from ongoing military activities, recreational use of the Range land and wildlife management operations, and U.S. Immigration Service operations to[**53] monitor the borderlands." USMC NEPA 21265. n24 The discussion of cumulative impacts on natural resources states that "impacts to biological resources from existing and proposed Marine Corps use of the Goldwater Range result primarily from use of the airspace and vehicular use." USMC NEPA 21266. The EIS states that "the proposed changes to airspace use would slightly increase the amount of noise to which wildlife are exposed to on the Cabeza Prieta NWR, and other portions of the Range. Civilian use of the airspace includes use by the U.S. Immigration Service, USFWS, and [Arizona Game and Fish Department]. . . . Sonoran pronghorn are also exposed to noise from military aircraft and ground impacting activities on the Air Force portion of the range." Id. n25 The EIS also acknowledgesthat "other non-military activities potentially affecting biological resources on the Range include vehicular traffic from the U.S. Border Patrol and by the general public . . . [which] could potentially disturb Sonoran pronghorn . . . as well as disturb habitat." Id. at 21267. While the EIS states that noise would be increased and both the pronghorn and their habitat will be disturbed, there is [**54]no analysis of what the nature and extent of the impacts would be on the pronghorn. See *Natural Resources Defense Council v. Hodel, 275 U.S. App. D.C. 69, 865 F.2d 288, 299 (D.C. Cir. 1988)* ("The FEIS does devote a few more sentences here to the inter-regional effects on migrating species but these snippets do not constitute real analysis; they merely state (and restate) the obvious . . . ."). n26 Because the discussion of cumulative impacts consists only of "conclusory remarks, statements that do not

equip a decisionmaker to make an informed decision about alternative courses of action, or a court to review the Secretary's reasoning," *865 F.2d at 298,* the Court will remand the EIS for further consideration of such impacts and further revisions to the EIS as warranted.

n24 The EIS also states that existing land uses within close proximity include the Air Force section of the Range and Cabeza Prieta NWR. Id.

n25 The EIS also cites research activities such as capturing and fitting pronghorn with radio telemetry equipment which may increase disturbance to the pronghorn but benefit them in the long term. Id.

[**55]

n26 Again, reference to the USMC BO, at USMC NEPA 21163, does not cure this deficiency as that BO is also lacking in such analysis. Defendants also cite the discussion of cumulative impacts at USMC NEPA 21260-61, which discussed the impact of USMC action on the airspace. This discussion does not address the impact of increased use of this airspace on wildlife, but considers issues such air safety, visitor disturbance and civil/commercial aviation access and congestion.

Similarly, the NPS EIS, which was prepared in 1997 for its Organ Pipe Cactus National Monument Final General Management Plan, is deficient. In its discussion of "cumulative impacts," the EIS states that the proposed actions would result in "a negligible loss of additional wildlife habitat," since all areas of planned development are already intruded upon by humans. NPS NEPA 5059. The EIS also found that notwithstanding the monument's protection of the habitat which supports endangered species, "excessive highway mortality along State Road 85 would continue to decimate all forms of wildlife along this 27-mile road corridor." [**56] Id. The EIS concluded that because some species (such as the pronghorn) are at the boundary of their range in Organ Pipe Cactus NM, "highway mortality could possibly eliminate some species from this portion of their range as well as potentially reduce their genetic variability and reproductive fitness." Id. n27 While the section is entitled "cumulative impacts," there is no discussion of the incremental impact of this effect [*139]"when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *40 C.F.R. § 1508.7.* As in *Hodel, 865 F.2d at 298,* while "the []EIS contains sections headed 'Cumulative Effects' . . . nothing in the []EIS provides the requisite [cumulative] analysis." This EIS is therefore remanded to the NPS for consideration and analysis of such impacts. n28

n27 There is additional discussion of the issue of highway mortality at NPS NEPA 5800-01, but no discussion of cumulative impacts.

n28 Neither INS nor NPS (for Cabeza Prieta NWR) have prepared EISs. Plaintiffs do not address in their opening motion the NEPA compliance of INS or NPS (with respect to management of Cabeza Prieta NWR). In opposition to defendants' motion, however, plaintiffs argue that initiation of the NEPA process by NPS and INS does not moot their claims, citing Greenpeace. In Greenpeace, the court held that re-initiation of consultation under the ESA did not moot plaintiff's claims that the existing BO was inadequate, because until a comprehensive opinion is in place, the court "retains the authority to determine whether

anycontinuing action violates the ESA . . . ." *80 F. Supp. 2d at 1152.* Here plaintiffs are not asking that the Court review any existing NEPA document prepared by INS or by NPS on Cabeza Prieta NWR. Nor have plaintiffs requested that the Court order NPS and INS to initiate consultation under NEPA, which defendants state they either have done or intend to do. Plaintiffs have similar complaints regarding the compliance of INS, Tucson Sector and NPS, Cabeza Prieta NWR (Comprehensive Conservation Plan) with the ESA, both of which have initiated consultation but have not yet produced biological opinions. While plaintiffs argue their claims are not moot as to these two agencies, they fail to request any relief as to these defendants. The Court will therefore grant defendants summary judgment as to these claims.

[**57]

Because the EISs prepared by USMC and NPS (Organ Pipe Cactus NM) fail to provide sufficient consideration of cumulative impacts, as required by *40 C.F.R. §§ 1508.7* and 1508.25, the Court will grant partial summary judgment to plaintiffs on their NEPA claims against these defendants. The Court will grant partial summary judgment to defendants on the NEPA claims relating to the USAF EIS and the BLM EIS. The Court will also grant partial summary judgment to defendants ARNG, INS, and NPS (Cabeza Prieta NWR) on plaintiff's NEPA claims.

CONCLUSION

For all of these reasons, plaintiffs' motion for summary judgment is granted in part and denied in part and defendants' motion for summary judgment is granted in part and denied in part. An accompanying Order consistent with this opinion will be issued.

ELLEN SEGAL HUVELLE

United States District Judge

DATE: 2/12/01

ORDER

Upon consideration of plaintiffs' motion for summary judgment, defendants motion for summary judgment, the oppositions thereto, the replies, and the entire record of this proceeding, it is hereby

ORDERED that plaintiff's motion [32-1] is GRANTED in part and [**58] DENIED in part. Partial judgment is entered for plaintiffs on Count I and Count VI. Judgment is entered for plaintiffs on Count III; and it is

FURTHER ORDERED that defendant's motion [58-1] is GRANTED in part and DENIED in part. Partial judgment is entered for defendants on Count I and Count VI. Judgment is entered for defendants on Count II, Count IV, and Count V; and it is

DECLARED that the Fish and Wildlife Service has acted in a manner that is arbitrary and capricious andcontrary to law by issuing Biological Opinions that fail to address the impact of each defendant's activities on the pronghorn when added to the environmental baseline, *50 C.F.R. §§ 402.02*, 402.12(g), and fail to include in the environmental baseline the impacts of all federal activities in the area in which defendants are proposing or engaging in action that may affect, directly or indirectly, the pronghorn, *50 C.F.R. § 402.02*; and it is

22

FURTHER ORDERED that this matter is remanded to Fish and Wildlife Service, [*140]which has 120 days from the date of the Order to reconsider, in consultation with defendants, those portions of[**59] the Biological Opinions that have been found to be contrary to the dictates of the Endangered Species Act; and it is

DECLARED that the Fish and Wildlife Service has acted in a manner that is arbitrary and capricious and contrary to law by issuing a Recovery Plan that fails to establish (1) objective measurable criteria which, when met, would result in a determination that the pronghorn may be removed from the list of endangered species or, if such criteria are not practicable, an explanation of that conclusion and (2) estimates of the time required to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal where practicable, or, if such estimates are not practicable, an explanation of that conclusion; and it is

FURTHER ORDERED that this matter is remanded to the Fish and Wildlife Service, which has 120 days from the date of this Order to reconsider those portions of the December 1998 Final Revised Sonoran Pronghorn Recovery Plan that have been found to be contrary to the dictates of the Endangered Species Act; and it is

DECLARED that the United States Marine Corps and the National Park Service (Organ Pipe Cactus[**60] National Monument) have acted in a manner that is arbitrary and capricious and contrary to law by issuing Environmental Impact Statements that fail to address the cumulative impacts of their activities on the pronghorn, when added to other past, present, and reasonably foreseeable future actions, regardless of what agency undertakes those actions, *40 C.F.R. § 1508.7*; and it is

FURTHER ORDERED that this matter is remanded to the United States Marine Corps and the National Park Service (Organ Pipe Cactus National Monument), which have 120 days from the date of the Order to reconsider, in consultation with defendants, those portions of the Environmental Impact Statements that have been found to be contrary to the dictates of the National Environmental Policy Act; and it is

FURTHER ORDERED that defendant's motion to strike [34-1] is DENIED as moot.

ELLEN SEGAL HUVELLE

United States District Judge

DATE: 2/12/01

DEFENDERS OF WILDLIFE; TUCSON HERPETOLOGICAL SOCIETY;HORNED LIZARD CONSERVATION SOCIETY; SIERRA CLUB; DESERT PROTECTIVE COUNCIL;BIODIVERSITY LEGAL FOUNDATION; DALE TURNER; WENDY HODGES; FRANCIS ALLAN MUTH,Plaintiffs-Appellants v. GALE NORTON, Secretary of the Department of theInterior, * JAMIE RAPPAPORT CLARK, Director, U.S. Fish and Wildlife Service;GAIL KOBETICH, Supervisor, Carlsbad Field Office, Defendants-Appellees. * Gale Norton is substituted for Bruce Babbitt as Secretary of the Departmentof the Interior, pursuant to Fed. R. App. P. 43(c)(1).

Nos. 99-56362, 00-55496

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

258 F.3d 1136; 2001 U.S. App. LEXIS 17030; 53 ERC (BNA)1297; 2001 Cal. Daily Op. Service 6429; 2001 Daily Journal DAR 7927; 31 ELR20846

January 9, 2001, Argued and Submitted, Pasadena, California
July 31, 2001, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of California. D.C. No. CV-97-02330-TJW/LSP. Thomas J. Whelan, District Judge, Presiding.

DISPOSITION: REVERSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, environmental organizations and individuals (environmentalists), sued defendant Secretary of the Interior and other government officials, challenging the secretary's decision not to designate a species as threatened under the Endangered Species Act (ESA). The environmentalists appealed the order of the United States District Court for the Southern District of California, which granted the officials' motion for summary judgment.

OVERVIEW: The flat-tailed horned lizard was listed as a candidate for protection as a threatened species under the ESA, but the secretary subsequently withdrew the listing. The secretary argued that protection was no longer warranted since public land habitats were sufficient to neutralize threats to the lizard on private land, and the conservation agreement between federal and state agencies provided adequate protection for the lizard. The appellate court first noted that, while the secretary erroneously deemed the lizard not to be in danger of extinction if its population remained viable on public lands, the environmentalists were equally incorrect in determining the danger of extinction based solely on the quantitative amount of habitat projected to be lost. The court then held that the lizard could be extinct throughout a significant portion of its range if there were major geographical areas in which it was no longer viable. The secretary was thus required to explain why the area in which the lizard could no longer live was not a significant portion of its range, and to address the lizard's viability in a site-specific manner with regard to the potential conservation agreement.

OUTCOME: The order granting summary judgment to the officials was reversed, with directions to remand the case to the secretary for reconsideration.

CORE TERMS: species, lizard, extinction, habitat, listing, endangered, endangered species, proposed rule, conservation, extinct, animal, Endangered Species Act, candidate, foreseeable future, horned lizard, flat-tailed, public land, final decision, public lands, recommending, viability, survival, legislative history, alligator, grizzly, quantitative, moratorium, deference, withdraw, desert

LexisNexis (TM) HEADNOTES - Core Concepts:

Environmental Law: Natural Resources & Public Lands: Endangered Species Act

[HN1] The Endangered Species Act, *16 U.S.C.S. § 1531* et seq., protects species of fish, wildlife, and plants which the Secretary of the Department of the Interior identifies as either endangered or threatened. A species is endangered if it is in danger of extinction throughout all or a significant portion of its range. *16 U.S.C.S. § 1532*(6). Similarly, a species is threatened if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. *16 U.S.C.S. § 1532*(20).

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
[HN2] If the Secretary of the Department of the Interior decides that, based on the best scientific and commercial data available, one or more of five statutorily defined factors demonstrates that a species is endangered or threatened, she must issue a proposed rule recommending that species for protection under the Endangered Species Act, *16 U.S.C.S. § 1531* et seq. *16 U.S.C.S. § 1533*(b)(1)(A). A period of public comment follows. Within one year, the secretary must either publish a final rule designating the species for protection or, if she finds that available evidence does not justify the action, withdraw the proposed rule. 50 C.F.R. § 424.17(a)(iii).

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
[HN3] The five factors the Secretary of the Department of the Interior must consider when determining a species' eligibility for protection under the Endangered Species Act, *16 U.S.C.S. § 1531* et seq., are: (A) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting the species continued existence. *16 U.S.C.S. § 1533*(a)(1).

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
[HN4] Candidates are any species being considered by the Secretary of the Department of the Interior for listing as an endangered or threatened species, but not yet the subject of a proposed rule. 50 C.F.R. § 424.02(b). The 1982 United States Fish and Wildlife Service regulations define candidates designated category 2 as taxa for which information in the possession of the Service indicated that proposing to list as endangered or threatened was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not currently available to support proposed rules.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
[HN5] See Pub. L. No. 104-6, 109 Stat. 73 (1995).

Governments: Legislation: Interpretation
[HN6] When interpreting a statute, the court must follow a natural reading which would give effect to all of the statute's provisions.

Governments: Legislation: Interpretation
[HN7] When the plain language of a statute is ambiguous, courts may examine the textual evolution of the contested phrase and the legislative history that may explain or elucidate it.

Environmental Law: Natural Resources & Public Lands: Endangered Species Act
[HN8] 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. Those areas need not coincide with national or state political boundaries, although they can.

Administrative Law: Judicial Review: Standards of Review: Standards Generally
[HN9] A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant factors.

Administrative Law: Judicial Review: Standards of Review: Standards Generally
[HN10] Deference to an agency interpretation is not due when the agency has apparently failed to apply an important term of its governing statute. The court cannot defer to what it cannot perceive.

Administrative Law: Judicial Review: Standards of Review: Standards Generally
[HN11] The court ordinarily will not defer to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.

Administrative Law: Judicial Review: Standards of Review: Standards Generally
[HN12] The court cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision.

COUNSEL: Neil Levine, Earthlaw, Denver, Colorado, for the plaintiffs-appellants.

Robert H. Oakley and Andrew Mergen, U.S. Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the defendants-appellees.

JUDGES: Before: Stephen S. Trott, Sidney R. Thomas, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Berzon.

OPINIONBY: Marsha S. Berzon

OPINION: [*1137]

BERZON, Circuit Judge:

The Defenders of Wildlife ("Defenders") appeal from an order of the district court granting summary judgment in favor of the Secretary of the Interior (the "Secretary"). The order upheld a decision by the Secretary not to designate the flat-tailed horned lizard for protection as a threatened species under the Endangered Species Act ("ESA"). *16 U.S.C. § 1531* et seq. We find that, in making that decision, the Secretary both relied on an improper standard and failed to consider important factors relevant to the listing process. Accordingly, we find her decision arbitrary and capricious and reverse[**2] the district court's order.

I. Background

[HN1] The Endangered Species Act protects species of fish, wildlife and plants which the Secretary identifies as either "endangered" or "threatened." A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *16 U.S.C. § 1532*(6). Similarly, a species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *16 U.S.C. § 1532*(20).

[HN2] If the Secretary decides that, based on "the best scientific and commercial data available," one or more of five statutorily defined factors demonstrates that a species is endangered or threatened, n1 she [*1138] must issue a proposed rule recommending that species for ESA protection. *16 U.S.C. § 1533*(b)(1)(A). A period of public comment follows. Within one year, the Secretary must either publish a final rule designating the species for protection or, if she finds" that available evidence does not justify the action," withdraw the proposed rule. 50 C.F.R. § 424.17(a)(iii); see [**3] also *16 U.S.C. § 1533*(b)(6)(A). n2

n1 [HN3] The five factors the Secretary must consider when determining a species' eligibility for protection are:

(A) the present or threatened destruction, modification, or curtailment of [the species'] habitat or range;

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

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms;

(E) other natural or manmade factors affecting[the species] continued existence. *16 U.S.C. § 1533*(a)(1).
n2 The Secretary may also delay a final decision for up to six months because of "substantial disagreement" in the scientific community regarding the "sufficiency or accuracy of the available data relevant to the determination or revision concerned." *16 U.S.C. § 1533*(b)(6)(B)(i).

A. The Flat-Tailed Horned Lizard

At issue in this case is the flat-tailed horned lizard (Phrynosoma [**4]mcallii) (the "lizard"), "a small, cryptically colored iguanid" that has adapted to the harsh conditions of the western Sonoran desert. *58 Fed. Reg. 62,624, 62,625*/1 (Nov. 29, 1993). "It has the typically flattened body shape of horned lizards, a dark mid-vertebral stripe, a somewhat flattened tail, relatively long head spines or horns, and two rows of fringed scales on each side of the body. Dorsally, the flat-tailed horned lizard is pale gray to light rusty brown; the animal's ventral surface is white and unmarked." Id.

The lizard's natural habitat stretches across parts of southern California (namely, Imperial and eastern San Diego counties), southwestern Arizona and northwestern Mexico. *Id. at 62,626*/1. Over the last century, human activity has markedly affected this habitat. The filling of the Salton Sea, the conversion of arid desert into productive agricultural land, and the development of urban areas around Yuma, Arizona and El Centro, California have resulted in the disappearance of approximately 34% of the lizard's historic range. Id. As a result, animal conservation groups, including Defenders, have expressed concerns about the lizard's[**5] continued viability, and the United States Fish and Wildlife Service ("FWS") had targeted the lizard for ESA protection for much of the past two decades. *62 Fed. Reg. 37,852, 37,854* (July 15, 1997).

B. The Lizard's Listing History

The Secretary first identified the lizard as a category 2 candidate for listing under the ESA in 1982. [HN4] Candidates are "any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule." 50 C.F.R. § 424.02(b). At that time, n3 FWS regulations defined candidates designated category 2 as "taxa for which information in the possession of the Service indicated that proposing to list as endangered or threatened was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not currently available to support proposed rules." *61 Fed. Reg. 7596, 7597* (Feb. 28, 1996).

n3 The FWS dropped the subcategorization of candidates in 1996. *61 Fed. Reg. 7596, 7597-98* (Feb. 28, 1996).

[**6]

The lizard remained a category 2 candidate until 1989, when the Secretary elevated it to category 1 status. Category 1 included species "for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule." Id. It was not until November 29, 1993, however, that the Secretary finally published a proposed rule listing the lizard as a threatened species. [*1139] *58 Fed. Reg. at 62,624*/3. Pursuant to the statutory requirements, the Secretary should have completed her review of the lizard and issued her final order by November 29, 1994. *16 U.S.C. § 1533*(b)(6)(A)(i) (requiring action within one year of publication of the proposed rule). That day passed, however, without further action by the Secretary.

The passage of Public Law No. 104-6, 109 Stat. 73 (1995), in April 1995 interrupted progress on the lizard and other species awaiting listing decisions. Although the statute's primary purpose was to replenish funds for various overseas military operations, it included a rider that withdrew $1.5 million "from the amounts available [to the FWS] for making determinations about whether a[**7] species is a threatened or endangered species and whether habitat is critical habitat under the Endangered Species Act of 1973." Id. Furthermore, the rider provided that:

[HN5]
none of the remaining funds appropriated under [the Endangered Species Act] may be made available for making a final determination that a species is threatened or endangered or that habitat constitutes a critical habitat (except a final determination that a species previously determined to be endangered is no longer endangered but continues to be threatened).

To the extent that the Endangered Species Act of 1973 has been interpreted or applied in any court order (including an order approving a settlement between the parties to a civil action) to require the making of a determination respecting any number of species or habitats by a date certain, that Act shall not be applied to require that the determination be made by that date if the making of the determination is made impracticable by the recission made by the preceding sentence.

Id.; see also *Environmental Defense Center v. Babbitt, 73 F.3d 867 (9th Cir. 1995)* (discussing the impact of Public Law No. 104-6). Thus, while[**8] the 1995 rider did not directly repeal the ESA, it imposed a virtual moratorium on all species listings. *Id. at 870-71.*

The moratorium remained in effect until April 26, 1996, when President Clinton signed an executive waiver allowing the Secretary to once again list species for protection. n4 Another year passed, however, without a final decision on the lizard. Finally, on May 16, 1997, in response to a lawsuit brought by Defenders to compel action on the lizard, the district court in Arizona ordered the Secretary to issue a final decision within 60 days.

n4 A Resolution, H.R. 3019, granted the President authority to waive the moratorium at his discretion. See Jeffrey S. Kopf, Slamming Shut the Ark Doors: Congress's Attack on the Listing Process of the Endangered Species Act, 3 ANIMAL L. 103, 126 (1997).

One month after the court's order, a group of federal and state agencies n5 signed a Conservation Agreement ("CA") implementing a recently completed rangewide management strategy to[**9] protect the lizard, developed by representatives of the Federal Bureau of Land Management ("BLM"), the FWS, and state and local agencies. Pursuant to the CA, cooperating parties agreed to take voluntary steps aimed at" reducing threats to the species, [*1140] stabilizing the species' populations, and maintaining its ecosystem." The underlying management strategy was based on an earlier effort by the BLM and the California Department of Fish and Game to provide protections for the lizard after it had been elevated to category 1 candidate status by the FWS in 1989.

n5 The participating parties included the United States Fish and Wildlife Service, the United States Bureau of Land Management, The United States Bureau of Reclamation, the United States Marine Corps, the United States Navy, the Arizona Game and Fish Department, and the California Department of Parks and Recreation. The California Department of Fish and Game participated in the development of the Conservation Agreement but was not a signatory at the time the Secretary issued her withdrawal decision.

[**10]

Critical to the implementation of the CA was the designation of five "management areas" (MAs) subject to protective measures, including the monitoring of lizard populations, limitation of habitat disturbance including off-highway vehicle use, and acquisition of private inholdings. Some of the measures included in the CA had been in place for years, long before the Secretary published the initial proposed rule recommending the lizard for protection. Many of the actions and the overall scope of the MAs effected by the conservation effort, however, were new.

The Secretary issued her final decision on July 15, 1997 (the "Notice") withdrawing the proposed rule that had earlier recommended the lizard for listing as a threatened species. The Notice was premised on three factors: (1) that population trend data did not conclusively demonstrate significant population declines; (2) that some of the threats to the lizard's habitat had grown less serious since the proposed rule was issued; and (3) that the recently devised "conservation agreement would ensure further reductions in threats. " *62 Fed. Reg. 37852.* The Secretary's ultimate conclusion also turned on her determination that, [**11] however serious the threats to the lizard on private land, "large blocks of habitat with few anticipated impacts exist on public lands throughout the range of this species . . . ." *62 Fed. Reg. 37860.* The Secretary did not, however, separately consider whether the lizard is or will become extinct in "a significant portion of its range, "as that term is used in the statute.

Six months after the Secretary withdrew the proposed rule, Defenders filed the instant suit challenging that decision. The district court granted summary judgment in favor of the Secretary on June 16, 1999, upholding the Secretary's decision not to list the lizard. The court accepted the Secretary's conclusion that none of the five statutory factors were present with respect to the lizard, holding that the Secretary reasonably relied on the Conservation Agreement to support that conclusion. This appeal followed.

II. Analysis

Defenders claims that "the best scientific evidence" available on the lizard and its habitat demonstrates the presence of as many as four of the five statutory factors indicating that a species is either threatened or endangered and thus eligible for ESA protection. The[**12] Secretary's answer to this claim is two-fold: First, although the Secretary does not dispute that these factors may evidence threats to the lizard on private land, she contends that adequate habitat exists on public land to ensure the species' viability. Second, the Secretary relies on the newly introduced Conservation Agreement, which she contends will establish added protections for the lizard's public land habitat and thus remove the threat of extinction throughout all or a significant portion of its range in the foreseeable future. Both parts of this analysis, we conclude, are faulty.

A. "Extinction throughout . . . a significant portion of its range"

The distinction between public and private land explains much of the dispute between the Secretary and Defenders. Defenders' arguments in support of its claim that listing is warranted focus primarily on the loss of lizard habitat on [*1141] private land. The Secretary, on the other hand, emphasizes the conservation efforts on public land to support her conclusion that the lizard is not threatened with extinction. *62 Fed. Reg. at 37,858* ("Because of the large amount of flat-tailed horned lizard habitat located[**13] on public lands within the United States and the reduction of threats on these lands due to changing land-use patterns and conservation efforts of public agencies, threats due to habitat modification and loss do not warrant listing of the species at this time." (Emphasis added)). The distinction also explains, in large part, the shift between the Secretary's initial findings that accompanied the proposed rule, recommending the lizard for protection based on concern about habitat loss on private land, and her findings that accompanied the withdrawal decision, emphasizing that available public lands are sufficient to support the species.

Whether the lizard's potential survival in its public land habitat is sufficient to preclude ESA protection depends largely on the meaning of the phrase "in danger of extinction throughout . . . a significant portion of its range." *16 U.S.C. § 1532*(6) (emphasis added). Assuming the lizard's population remains viable on public land, it is not in danger of extinction throughout all its range. Defenders argue, however, that if the lizard's private land habitat constitutes "a significant portion of its range" and[**14] its survival there, as Defenders allege, is in jeopardy, the ESA requires the Secretary to designate the lizard for protection.

Standing alone, the phrase "in danger of extinction throughout . . . a significant portion of its range "is puzzling. According to the Oxford English Dictionary, "extinct" means "has died out or come to an end . . . . Of

a family, class of persons, a race of species of animals or plants: Having no living representative." Thus, the phrase" extinct throughout . . . a significant portion of its range" is something of an oxymoron. Similarly, to speak of a species that is "in danger of extinction" throughout "a significant portion of its range" may seem internally inconsistent, since "extinction "suggests total rather than partial disappearance. n6 The statute is therefore inherently ambiguous, as it appears to use language in a manner in some tension with ordinary usage.

n6 See also the Oxford English Dictionary's relevant definition of "extinction":

4. Of a race, family, species, etc.: The fact or process of becoming extinct; a coming to an end or dying out; the condition of being extinct.

[**15]

1. The Secretary's Explanation

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 in her brief 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, or will be within the foreseeable future." She 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. n7

n7 As we explain later, the Secretary has at other times applied the statute inconsistently with her current interpretation.

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[**16] to the threat of extinction throughout all its range. Because the [*1142] 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.

Such a redundant reading of a significant statutory phrase is unacceptable. [HN6] When interpreting a statute, we must follow a "natural reading . . ., which would give effect to all of [the statute's] provisions." *United Food and Commercial Workers Union Local 571 v. Brown Group, Inc., 517 U.S. 544, 549, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996)* (emphasis added). By reading "all" and" a significant portion of its range" as functional equivalents, the Secretary's construction violates that rule.

The Secretary tries to distinguish her definition of a species in danger "throughout . . . a significant portion of its range" from a species in danger "throughout all" its range by noting Congress' expressed commitment to long-term conservation and its hope that the ESA would protect species well before they reached the brink of extinction. The extension[**17] of ESA protections to a species in danger "throughout . . . a significant portion of its range," the Secretary asserts, offers protection to species not yet faced with imminent extinction and therefore reflects the incremental approach Congress intended the ESA to provide. But this function too is fulfilled elsewhere in the statute.

As noted, the ESA provides protection to both "endangered species" and "threatened species." While an "endangered species" is a species "in danger of extinction throughout all or a significant portion of its range," *16

U.S.C. § 1532(6), "threatened species" include those "which are likely to become . . . endangered species within the foreseeable future throughout all or a significant portion of [their]range." *16 U.S.C. § 1532*(20). The Secretary's interpretation thus conflates the distinct ESA protections for species facing extinction throughout "all" and throughout "a significant portion" of their range with the separate protections for "threatened" and for "endangered species." As such, the Secretary's construction once again views the statute as saying the same thing twice.

This understanding of the[**18] statutory language not only clashes with the rule against surplusage we have already discussed, but also runs up against the statute's legislative history. n8 Congress did recognize that, as the Secretary stresses, "extinction is a gradual process," but Congress incorporated that recognition not in the "significant portion" phrase but in the protection for "threatened" species. During the Senate floor debate, Senator Tunney of California observed that the ESA

provides protection to a broader range of species by affording the Secretary the power to list animals which he determines are likely in the foreseeable future to become extinct, as well as those animals which are presently threatened with extinction. This gives the Secretary and the States which adopt endangered species management plans, the ability not only to protect the last remaining members of the species but to take steps to insure that species which are likely to be threatened with extinction never reach the state of being presently endangered.

120 Cong. Rec. 25,668 (1973) (statement of Sen. Tunney) (emphasis added); see, also [*1143] *16 U.S.C. § 1531*(b) ("The purposes of this chapter [**19]are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species." (Emphasis added)). Congress' desire to provide incremental protection to species in varying degrees of danger does not, therefore, explain the ESA's protection for species facing extinction throughout only "a significant portion of [their] range."

n8 [HN7] When the plain language of a statute is ambiguous, courts may "examine the textual evolution of the [contested phrase] and the legislative history that may explain or elucidate it." *United States v. R.L.C., 503 U.S. 291, 298, 112 S. Ct. 1329, 117 L. Ed. 2d 559 (1992).*

2. Defenders' Explanation

Defenders' interpretation of the phrase "extinction throughout . . . a significant portion of its range" is similarly unsatisfactory. Defenders takes a more quantitative approach to the phrase, arguing that the projected loss of 82% of the lizard's habitat[**20] in this case constitutes "a substantial portion of its range." Appellants then cite to other cases in which courts found listing of species warranted after the loss of even smaller amounts of habitat. *Federation of Fly Fishers v. Daley, 131 F. Supp. 2d 1158,* Civ. No. 99-981-SI (N. D. Cal. Oct. 25, 2000), Slip Op. at 17-18 (finding listing of the steelhead trout warranted despite protections covering 64% of its range); *ONRC v. Daley, 6 F. Supp. 2d 1139, 1157 (D. Or. 1998)* (finding the coho salmon in danger of extinction despite federal forest land protections extending over 35% of its range); *45 Fed. Reg. 63,812, 63,817-18* (Sept. 25, 1980) (listing the Coachella Valley fringe-toed lizard as a threatened species although 50% of its historical habitat remained).

There are two problems with Defenders' quantitative 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[**21] small historical range may quickly become endangered after the loss of even a very small percentage of suitable habitat. n9 As

the examples cited by Defenders and noted above demonstrate, the percentage of habitat loss that will render a species in danger of extinction or threatened with extinction will necessarily be determined on a case by case basis. Furthermore, were a bright line percentage appropriate for determining when listing was necessary, Congress could simply have included that percentage in the text of the ESA.

n9 The Secretary offers a compelling counter-argument to the Defenders' suggested approach:

> A reading of the phrase "significant portion of its range," that adopts a purely quantitative measurement of range and ignores fact-based examination of the significance of the threats posed to part of the species' range to the viability of the species as a whole, does not carry out the purpose of the statute. Such an interpretation would fail to protect species in danger of extinction because it might not allow listing of species where areas of range vital to the species' survival--but not the majority of the range--face significant threats. Additionally, this interpretation could erroneously result in listing of species that are in no danger of extinction merely because they no longer inhabit all of their historical range. This latter result would greatly multiply the listing of species and subject both federal agencies and private individuals to the requirements of the ESA, even though such species are self-sustaining in the wild and do not require the protective measures of the ESA.

[**22]

In the absence of a fixed percentage, Defenders' suggested interpretation of the phrase begins to look a lot like the faulty definition offered by the Secretary, i.e., "a substantial portion of its range" means an amount of habitat loss such that total extinction [*1144] is likely in the near future. As noted above, this reading does not comport with the other terms of the statute.

3. Insight from the Legislative History

The legislative history of the ESA suggests an entirely different meaning of the inherently ambiguous phrase" extinction throughout . . . a significant portion of its range."

The ESA was actually the third in a series of laws enacted in the late 1960s and early 1970s aimed at protecting and preserving endangered species. The previous two, however, defined endangered species narrowly, including only those species facing total extinction. Neither extended protection to a species endangered in only a "significant portion of its range." See Endangered Species Conservation Act, Pub. L. 91-135 § 3(a), 83 Stat. 275 (Dec. 5, 1969) (describing endangered species as those threatened by "worldwide extinction"); Endangered Species Preservation Act, Pub. L. 89-669 § 1(c), [**23] 80 Stat. 926 (Oct. 15, 1966) (describing an endangered species as one whose "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").

The ESA's broadened protection for species in danger of extinction throughout "a significant portion of their range" was thus a significant change. The House Report accompanying the bill acknowledged as much, noting that the new definition's expansion to include species in danger of extinction "in any portion of its range" 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." H.R. Rep. No. 412, 93rd Cong., 1 Sess. (1973) (emphasis added).

It appears that Congress added this new language in order to encourage greater cooperation between federal and state agencies and to allow the Secretary more flexibility in her approach to wildlife management. The case

of the American alligator, which was frequently cited during the Senate debate, illustrates this[**24] likely intent:

In 1973, the range of the alligator stretched from the Mississippi Delta in Louisiana to the Everglades of Florida. Its distribution over that range, however, varied widely. While habitat loss had pushed the species to the verge of extinction in Florida, conservation efforts had resulted in an overabundance of alligators in Louisiana, such that harvesting was required to keep the alligators from overrunning the human population. In order to address problems such as this, the Act allows the Secretary to "list an animal as 'endangered' through all or a portion of its range." *62 Fed. Reg. 25,669 (July 25 1973).* Senator Tunney explained:

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[**25] of the species.

Id. In describing this provision as "perhaps the most important section of this bill," id., Senator Tunney also noted that

The plan for Federal-State cooperation provides for much more extensive discretionary action on the part of the Secretary and the State agencies. Under existing law [(namely, the Endangered [*1145] Species Conservation Act of 1969)], 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.

Id.

The historical application of the Act is consistent with this interpretation of the statute, not with the interpretation suggested by the Secretary in her briefs in this case. Grizzly bears, for example, are listed as threatened species within the contiguous 48 states, but not in Alaska. Similarly, only the California, Oregon and Washington populations of the marbled murrelet, whose range in North America extends from the Aleutian Archipelago in Alaska to Central California, are listed[**26] as threatened. *57 Fed. Reg. 45,328* (Oct. 1, 1992). See also *63 Fed Reg. 13,134* (Mar. 18, 1998) (listing the desert bighorn sheep in the peninsular ranges of southern California, although not in the range extending into Baja California); *62 Fed Reg. 30,772* (June 5, 1997) (listing as endangered the population of Stellar sea lions occurring west of 144 degrees W. longitude, while continuing to list the remaining population as threatened); *52 Fed. Reg. 25,229* (July 6, 1987) (listing the Florida population of Audubon's crested caracara, a hawk that occurs from Florida, southern Texas and Arizona, and northern Baja California, south to Panama, as threatened); *50 Fed. Reg. 50,726* (Dec. 11, 1985) (listing the population of piping plovers as endangered in the watershed of the Great Lakes and threatened throughout the remainder of its range). n10

n10 The text of the ESA and its subsequent application seems to have been guided by the following maxim:

There seems to be a tacit assumption that if grizzlies survive in Canada and Alaska, that is good enough. It is not good enough for me. . . . Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there.

ALDO LEOPOLD, A SAND COUNTY ALMANAC 277 (1966).

[**27]

We conclude, consistently with the Secretary's historical practice, that [HN8] 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. Those areas need not coincide with national or state political boundaries, although they can. The Secretary necessarily has a wide degree of discretion in delineating "a significant portion of its range," since the term is not defined in the statute. But where, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a "significant portion of its range." *Asarco, Inc. v. EPA, 616 F.2d 1153, 1159 (9th Cir. 1980)* (" [HN9] A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant factors.").

4. Application to This Case

As noted, [**28] the Secretary did not, in her Notice, expressly consider the "extinction throughout . . . a significant portion of its range" issue at all. n11 Had she applied the [*1146] flexible standard we have adopted to the instant case, she might have determined that the lizard is indeed in danger of" extinction throughout . . . a significant portion of its range."

n11 Accordingly, we owe the Secretary's interpretation no deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* As the D.C. Circuit explained in analogous circumstances, [HN10] deference "is not due when the [agency] has apparently failed to apply an important term of its governing statute. We cannot defer to what we cannot perceive." *International Longshoremen's Ass'n, AFL-CIO v. National Mediation Bd., 276 U.S. App. D.C. 319, 870 F.2d 733, 736 (D.C. Cir. 1989).* Nor do we owe deference to the interpretation of the statute now advocated by the Secretary's counsel--newly minted, it seems, for this lawsuit, and inconsistent with prior agency actions--as [HN11] we ordinarily will not defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988).*

[**29]

First, the habitat on private land may constitute" a significant portion of its range" demanding enhanced protections not required on public lands; alternatively, the inverse may be true. Second, and perhaps more persuasively given this interpretation of the statute, the lizard may face unique threats in either California or Arizona, or in major subportions of either state. Notably, the California Department of Fish and Game initially declined to sign the Conservation Agreement relied upon by the Secretary, suggesting perhaps that the lizard's habitat in the two states may require different degrees of protection.

The Secretary does not address at all in the Notice whether, on either of these bases, the lizard was "extinct throughout . . . a significant portion of its range." This omission with respect to a significant legal issue raised by the factual circumstances would itself be a sufficient basis for remanding the case to the Secretary to consider the question. *People of State of Cal. v. FCC, 39 F.3d 919, 925 (9th Cir. 1994)* (we will reverse an agency action "if the record reveals that the agency has failed to consider an important aspect of the problem.") (internal[**30] quotation marks omitted). Further, the explanation of the Secretary's lawyers, even were we to consider it, n12 is, for the reasons already surveyed, flatly inconsistent with the statute.

n12 In general, " [HN12] we cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision." *Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001).*

12

Nor did the Secretary address the lizard's viability in a site-specific manner with regard to the putative benefits of the CA. Although the Notice asserts that "MAs have been designated in the" five areas identified in the CA, *62 Fed. Reg. 37860,* there is evidence that, in at least three of those areas, the designation process was either incomplete or wholly unstarted at the time the Notice was issued. See *63 Fed. Reg. 16272; 63 Fed. Reg. 66561, 66561-62.* Nowhere does the Secretary account for the effects of failure to implement the CA immediately in those areas where delay was expected. [**31] Thus, it is unclear how the benefits assertedly flowing from the CA affected any particular portion of the lizard's habitats, and accordingly unclear how the CA could have mitigated threats to the lizard throughout "a significant portion of its range." We therefore conclude that the Secretary's decision to withdraw the proposed rule designating the lizard as protected cannot be enforced on the basis of the Notice.

III. Conclusion

For the foregoing reasons, we conclude that the Secretary's decision to withdraw the proposed rule recommending the lizard for ESA protection was arbitrary and capricious. We therefore REVERSE the district court's decision dismissing the Defenders' claim, with directions that the case be remanded to the Secretary for consideration in accord with the legal standards outlined in this opinion of the question [*1147] whether the proposed rule listing the lizard as threatened should be withdrawn.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, a non-profit corporation; and RIO GRANDE CHAPTER OF TROUT UNLIMITED, a non-profit corporation, Plaintiffs,	:	CIV 98-372 TUC JMR
v.	:	
BRUCE BABBITT, Secretary of the Department of the Interior, Defendant.	:	

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This case focuses on the recovery plan issued by U.S. Fish and Wildlife Service ("FWS") for the Gila trout, a small fish indigenous to Arizona and New Mexico that has been listed as an endangered species.

Plaintiffs, Southwest Center for Biological Diversity ("Southwest Center") and Rio Grande Chapter of Trout Unlimited ("Trout Unlimited"), challenge the Secretary of the Department of the Interior's compliance with the statutory provisions of the Endangered Species Act ("ESA"). Plaintiffs request the Court to (1) declare the recovery plan developed for the Gila trout to be in violation of ESA, and (2) enjoin the Secretary to issue a new recovery plan that specifies delisting objectives and provides delisting criteria.

The parties have filed cross-motions for summary judgment. After a hearing before this Court on April 26, 1999, the parties have submitted supplemental briefs in support of their

motions. Plaintiffs argue that, as a matter of law, the Gila trout recovery plan does not comply with ESA's mandate to provide for measures that enable a species to be taken off the list of threatened or endangered species. Defendant counters that plaintiffs do not have standing and cannot challenge the Secretary's discretion.

For the following reasons, defendant's Motion for Summary Judgment will be granted.

BACKGROUND

The parties' statements of facts and the administrative record reveal the following undisputed facts. The Gila trout has been listed as an endangered species since 1967. It is native to the streams of the Mogollon Plateau of New Mexico and Arizona and is distinguished by iridescent gold sides. The Secretary considers the Gila trout to be a recoverable species. Administrative Record ("AR") 245.

In 1960, the Gila trout was limited to five small populations in the upper Gila River system. High water quality and stream cover are required to sustain the species. Habitat degradation along with competition and hybridization with non-indigenous trout represent the major threats to the Gila trout.

In 1983, FWS[1] issued a recovery plan for the Gila trout, which was then revised in 1984. In 1987, FWS proposed to downlist the Gila trout from endangered to threatened. However, when new information demonstrated that the Gila trout continued to decline, FWS withdrew this proposal.

In 1993, FWS revised its recovery plan for the Gila trout. The recovery plan states that "if recovery efforts are successful, downlisting may be expected. Delisting criteria have not been

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[1]FWS was delegated authority for non-marine species such as the Gila trout.

determined...The estimated date for downlisting is the year 2000. Delisting criteria cannot be addressed at present, but will be determined when downlisting criteria are met." AR 276 at 35.

DISCUSSION

A. Standard of Review

This action is brought pursuant to ESA's citizen suit provision, 16 U.S.C. § 1540(g), and the Administrative Procedure Act, 5 U.S.C. § 706. Pursuant to the APA, the Court must assess whether the agency actions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A).

The standard of review is highly deferential and presumes an agency's action to be valid. Ethyl Corp. v. Environmental Protection Agency, 541 F. 2d 1, 34 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). The agency's interpretation of a statute and its interpretation of its own regulations are entitled to great deference, but the judiciary is the final authority on issues of statutory construction. Natural Resources Defense Council v. Department of Interior, 113 F. 3d 1121, 1124 (9th Cir. 1997). In conducting its inquiry, the Court's role is not to substitute its judgment for that of the agency. Arizona v. Thomas, 824 F. 2d 745, 748 (9th Cir. 1987). The Court will conduct a thorough, probing, in-depth review, limited to ensuring that the agency's decision is based on relevant statutory factors and is not a clear error of judgment. Camp v. Pitts, 411 U.S. 138, 142 (1973). The Court will consider whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis on the record, and whether the agency considered the relevant factors. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

Generally, the Court will not look beyond the administrative record. Camp, 411 U.S. at 141-142. However, the Court may consider material outside the administrative record when necessary to determine whether the agency has considered all relevant factors and has explained its decision, when the agency relied on documents not in the record, or when necessary to explain technical terms or complex subject matter. Southwest Center for Biological Diversity v. Forest Service, 100 F. 3d 1443, 1450 (9th Cir. 1996).

B. Statutory Framework

ESA states that the Secretary "shall develop and implement recovery plans for the "conservation and survival" of listed species. 16 U.S.C. § 1533(f)(1). Conservation is defined as "the use of all methods and procedures which are necessary to bring any endangered species to the point at which such measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). The Secretary's regulations define recovery as "the point at which protection under the Act is no longer required." 50 C.F.R. § 424.11(d)(2).

The Secretary, in developing and implementing recovery plans, "shall, to the maximum extent practicable," incorporate (1) site specific management actions as may be necessary to achieve the goal for conservation and survival of the species, and (2) objective, measurable criteria which, when met, would result in a determination that a species be removed from the list. 16 U.S.C. § 1533(f)(1)(B). The objective, measurable criteria must address each of the five statutory factors considered in listing the species pursuant to Section 1533. Those factors are:

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

(B) over-utilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

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

16 U.S.C. § 1533(a)(1).

The 1990 Recovery Guidelines of FWS ("FWS Guidelines") instruct that recovery "is the process by which the decline of an endangered or threatened species is arrested or reversed, and threats to its survival are neutralized, so that its long-term survival in nature can be ensured." AR 227. "A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of a species, including those that, if successfully undertaken, are likely to permit reclassification or delisting of the species."

Relevant to delisting, the FWS Guidelines provide:

> There may be cases where not enough habitat remains to support a population that meets viability criteria. In these cases, full recovery is not achievable, and the plan should clearly state why delisting is not a practical objective....
>
> Though most of the tasks included in the outline should be those that are expected to be carried out in the near future, all tasks necessary to achieve full recovery of the species should be identified.

The FWS Guidelines advise that it "is important to consider all strategies that may alleviate known threats..." At the same time, the FWS Guidelines instruct FWS to "[c]hoose among delisting, downlisting, or protection of existing populations for a specific time period for the foreseeable future. Be ambitious but do not set an unobtainable objective."

C. Standing

Defendant challenges the plaintiffs' standing to bring this action. To establish standing,

plaintiffs must show (1) an injury-in-fact that is (a) concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the complained of conduct; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In cases of procedural injury claims, a plaintiff must show a threatened concrete interest underlying the procedural interest. Id. at 560-63.

To survive this challenge to standing on summary judgment, plaintiffs must submit affidavits or other evidence to demonstrate that one or more of the plaintiffs' members would be directly affected by the contested activity.

1. Injury-In-Fact

Plaintiffs claim a procedural injury due to the Secretary's alleged failure to satisfy his statutory obligations pursuant to ESA in developing a recovery plan for the Gila trout. Defendant argues that plaintiffs cannot demonstrate injury-in-fact because they have only a generalized concern for the environment. According to the defendant, plaintiffs' action is based on an unsupported assumption that more could or should be done to help the Gila trout. Additionally, defendant argues that plaintiffs have no injury because the Gila trout species has improved in certain areas. Defendant points out that plaintiffs waited more than five years to file suit after the recovery plan was issued.

Defendant's argument against standing relies largely upon Lujan v. Defenders of Wildlife, where several environmental groups challenged a regulation affecting the habitat of an endangered species abroad. The Secretary had allegedly promulgated the regulation without following the proper procedures. The environmental groups argued that they had standing because ESA

conferred upon them the right to have the correct procedures followed. The Supreme Court held, inter alia, that the plaintiffs could not establish an injury-in-fact based on "some day" intentions to visit the threatened areas without a description of a concrete plan. Lujan, 504 U.S. at 564.

The instant circumstances are distinguishable from those of Lujan. Plaintiff, Southwest Center, is a New Mexico non-profit corporation that is actively involved in species and habitat protection. The members and staff of Southwest Center participate in efforts to protect and preserve the habitat essential to the continued survival of the Gila trout. By affidavit, David Hogan, the Desert Rivers Coordinator of Southwester Center, avers that he uses the Gila trout habitat for biological, educational, and scientific research, and that he is harmed professionally and personally by the failure of the Secretary to seek full recovery of Gila trout. Mr. Hogan makes annual trips to the Gila trout habitat for research and recreational purposes.

Plaintiff, Trout Unlimited, which is a local trout conservation organization, has supplied the affidavit of its president, Michael Norte. Mr. Norte is an avid recreational fly-fisherman, who has participated in the Gila trout recovery measures, uses the Gila trout habitat, and is harmed by any failure to ensure the Gila trout's full recovery, which prevents him from fishing for the species.[2]

Plaintiffs explain that they waited five years to file suit because they were involved in efforts to participate in and promote the Gila trout based on the current recovery plan. Plaintiffs filed suit when they realized that the Gila trout would not fully recover without an articulation of delisting objectives and criteria in the recovery plan.

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[2]To date, the Gila trout has increased in numbers but recovery has not even progressed far enough to downlist the species to "threatened" and it remains a "nofish" species.

In this instance, the plaintiffs' members have averred to more than "some day" intentions to visit the Gila trout habitat. Plaintiffs' members live in the vicinity of the Gila trout habitat and have described specific plans to return to that habitat within the next year. Their professional and recreational interests depend on the well-being of the Gila trout. Since non-compliance with ESA has an adverse effect upon their use and enjoyment of the Gila trout, plaintiffs have demonstrated a concrete injury-in-fact that is more than a generalized interest in the environment.

2. Redressability

In a second argument against standing, defendant asserts that a new recovery plan addressing delisting criteria would not redress plaintiffs' injuries because the recovery plan already sets forth the process for the Gila trout's recovery. Defendant claims that the recovery plan represents a guideline for future goals but does not mandate action to obtain those goals. Therefore, defendant contends that it is conjectural whether any recovery activity would be altered or affected with a new recovery plan that addresses delisting.

Plaintiffs counter that they assert a procedural right pursuant to ESA's citizen suit provision. A plaintiff may assert a procedural right to protect his concrete interests even though he cannot establish with any certainty that the remedy will meet all normal standards for redressability. Lujan, 504 U.S. at 572 n. 7. As the Supreme Court elaborated, a person living next to a proposed dam site may challenge an agency's failure to prepare an environmental impact statement even though he cannot establish with any certainty that the statement will cause the license for the dam construction to be withheld. Therefore, in the instant case, plaintiffs have standing to challenge the Secretary's failure to comply with ESA in developing the recovery plan although the incorporation of delisting objectives and criteria into the recovery plan may not

necessarily result in the Gila trout's full recovery.

D. Incorporation of Delisting Objectives and Criteria

Plaintiffs allege that the Gila trout recovery plan violates ESA because it lacks delisting objectives and incorporates no delisting criteria. Plaintiffs claim that by limiting the goal merely to downlisting, the Secretary allows the Gila trout to remain vulnerable to catastrophic events.

Defendant asserts that the Secretary has the discretion to decline to incorporate delisting objectives and criteria. Therefore, defendant contends that this Court does not have jurisdiction over this action since ESA's citizen suit provision provides for enforcement of only the Secretary's non-discretionary acts. Plaintiffs counter that incorporation of delisting objectives and criteria into the recovery plan is a mandatory requirement for a recoverable species except where delisting is not practicable.

To ascertain congressional intent, the Court interprets the relevant provisions of ESA according to the traditional cannons of statutory construction. Where Congress has unambiguously expressed its intent, there is no room for a different interpretation of agency intent. Legal Assistance for Vietnamese Asylum Seeker v. Department of State, 45 F.3d 469, 473 (D.C.Cir. 1995). The Court must defer to a reasonable agency interpretation of ESA, but where Congress has specifically addressed an issue its intention must be given effect. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

ESA requires the Secretary to develop recovery plans for the "conservation and survival" of the species and states that the Secretary "shall, to the maximum extent practicable," incorporate into the recovery plan "objective, measurable criteria which, when met, would result in a determination ... that the species be removed from the list." 16 U.S.C. § 1533(f)(1). The

in a determination ... that the species be removed from the list." 16 U.S.C. § 1533(f)(1). The word "shall" is an imperative denoting a definite obligation. SMS Data Products Group, Inc. v. United States, 853 F. 2d 1547, 1553 (Fed. Cir. 1988). The word "practicable" in common usage means "possible to practice or perform," or "capable of being put into practice, done or accomplished: feasible." Webster's Third New International Dictionary (1993). Therefore, the statutory language of Section 1533 demonstrates that Congress unambiguously intended that the Secretary be required to incorporate delisting criteria where possible or feasible.[3] Fund for the Animals v. Babbitt, 903 F. Supp. 96, 111 (D.C.C. 1995). Where it is not feasible or possible to develop delisting criteria, Congress granted the Secretary discretion to decline to do so.

Since it is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking, this Court has jurisdiction to review this claim pursuant to ESA's citizen suit provision. Bennett v. Spear, 520 U.S. 154, 172 (1997). The Court will review the Secretary's action to determine whether he arbitrarily and capriciously failed to fulfill his duty to incorporate "to the maximum extent practicable" delisting criteria and objectives.

ESA requires that decisions be made upon the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). It is not necessary for a recovery plan to be an exhaustively detailed document, but a recovery plan will not meet ESA's standards if it only

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[3]The Court does not agree that language cited by the defendant from the FWS Guidelines relieves the Secretary of the duty to incorporate delisting objectives and criteria when practicable. The FWS Guidelines state, "Choose among delisting, downlisting, or protection of existing populations for a specific time period or for the foreseeable future." (emphasis added) AR 227 at 1. This directive suggests only that the agency develop short term goals as appropriate. It does not indicate that the Secretary has unfettered discretion to ignore incorporation of delisting objectives and criteria when practicable.

recognizes specific threats to the conservation and survival of a threatened or endangered species, but fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action. Fund for Animals, 903 F. Supp. at 108.

In this instance, the recovery plan states that delisting cannot be addressed until downlisting criteria are met, which is estimated to occur in 2000. This conclusory statement does not alone constitute an adequate justification for the failure to incorporate delisting criteria. However, the defendant has outlined where the record supports the conclusion that development of delisting criteria was not practicable without first satisfying downlisting criteria. A court may uphold an agency decision of less than ideal clarity if the agency's path may be reasonably discerned. Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1983).

In this instance, the agency's reasoning may be discerned from the record as follows. Flood and fires in 1988 and 1989 destroyed wild Gila trout populations, severely damaged the species' habitat, and reversed the recovery efforts that had taken place during the last decade. AR 261 at 6; 256 at 123. As a result, FWS shifted its priorities to focus on renovation of whole drainages rather than small headwater streams, which action requires increased captive-breeding efforts and identification of more streams for evaluation and restoration. AR 210 at 1; 244 at 6-7; 276 at 1.

While developing the 1993 revision to the recovery plan, FWS determined that it needed to research whether the five remaining Gila trout populations should be maintained in isolation to preserve genetic diversity or whether they safely could be interbred. At the same time, FWS found that captive-breeding efforts had not yet been sufficiently successful to ensure a steady,

plentiful fish supply to restock and restore whole drainages. Therefore, FWS needed to research the Gila trout's taxonomy, hatchery development, reestablishment efforts, and the number of suitable streams for reintroduction prior to developing delisting criteria. Since these four areas of research are relevant to the five statutory factors of Section 1533(a)(1), the Court defers to the agency's discretion that it was not practicable to incorporate the objective, measurable delisting criteria for the 1993 recovery plan. Furthermore, the recovery plan specifies delisting objectives by outlining the corrective action necessary to achieve recovery of the Gila trout. AR 276 at 35-41.

Plaintiffs claim that the scientific data available was sufficient to develop delisting criteria. However, judicial deference to the agency is greatest when reviewing technical matters within its area of expertise, and the Court will not evaluate the quality of FWS's scientific data. State of Louisiana ex rel. Guste v. Verity, 853 F. 2d 322, 329 (5th Cir. 1988).

Since the Secretary's decision to defer incorporation of specific delisting criteria into the recovery plan was not arbitrary and capricious, summary judgment will enter in favor of the defendant.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Summary Judgment is DENIED. The defendant's Motion for Summary Judgment is GRANTED. The Clerk of the Court is directed to enter judgment in favor of the defendant and to close this case.

It is SO ORDERED this 18th day of August, 1999.

WARREN W. EGINTON, SENIOR UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF CONNECTICUT, SITTING BY DESIGNATION

Appendix C

THREATS ASSESSMENT

Glossary of Threat Terms

Stresses - The types of threats afflicting species and their habitats. This term breaks the concept of threats down to two components, stresses and sources of the stress. The purpose of narrowing the definition of threats is having the ability to develop conservation measures that focus on the stress, rather than focusing on the source of the stress.

Source of stresses - The agent generating the stress on species or habitats. The source of stress can come from within the system itself or threats imposed from the outside. Most sources of stresses are human induced.

Conceptual model - A qualitative model of the system and species life stages with the interrelations between the system and threats shown in diagram form. Several threats are interlinked or independent and these can be illustrated on the model of the system.

Critical threats - Those threats that rank highest as deteriorating species or system. Persistent stresses may be critical threats.

Background on Threat Assessment Method

The Nature Conservancy developed a planning approach that addresses threats and called it the "Five S's"(TNC 2000). Part of this approach involves an analysis of stresses and sources of stress of conservation sites. The Five S approach, developed for sites, can be adapted as a tool for our recovery planning for threats to species.

The online automated Microsoft Excel worksheet is available at http://www.consci.org/scp/
Click on 5S Handbook, then click on Download workbook. To adapt the tool for use with endangered and threatened species, instead of conservation sites, it may be helpful to print out the worksheet and fill it in manually, rather than use the automated version.

Two components of threats:

(1) Stress - a process or event with direct negative impact on species or system upon which it depends; for example, increased sedimentation is a stress on freshwater mussels.

(2) Source of stress - the action or entity from which a stress is derived; for example, the

source of increased sedimentation could be over-collection, clear-cutting trees, road construction, etc.

Applications for Recovery Planning

Every recovery plan should contain a fair assessment of conditions and stresses and sources of stresses and prioritize the stresses. The Nature Conservancy technique is one method, but any similar approach would be just as valuable.
.
The TNC threats assessment framework provides an organized way to evaluate a situation with threats surrounding your species of interest for evaluating stresses, sources of stress and strategies for addressing threats. This type of organizing model can be useful even to the most seasoned practitioners as a way of articulating assumptions and testing the ideas of a recovery team.

Be as honest and object and unbiased as possible. You should not be labeling a human activity as a source of a stress if you have not verified it.

Recognize and respond to any emerging threats so that your preliminary thoughts can at least be considered in the later iterations of a threats assessment. Emerging threats have become even more important to consider in the dynamically changing environment we are facing because a potential threat could provide a rapid challenge.

A recovery plan that lists the threats only in the "Reasons for Listing" section is not sufficient.
A threats assessment involves the following general steps (The TNC method has been adapted here to focus on species rather than conservation sites).

Steps to conducting a threats assessment

1. Define the ecological systems and species that will be considered in the assessment. (May be effective to consolidate individual species into major ecological system groupings). If conservation requirements for several species are related, or the same or different, it make s sense to combine the two into a system. If an action for conserving one species threatens the other, then your model should show the relationship.
2. Collect information on the ecological context and human context for the species and habitat
3. Identification - Can you pinpoint which threat(s) led to species decline? This is usually answered initially in the listing package. The threats used to list the species should be re-evaluated during recovery planning, although there should be consistency in identification of threats between listing document and recovery plan. What is threatening the target species, ecological communities and natural process on which the species depends currently? Brainstorm on the ways that species is affected and list all possible threats. What critical threats

must be abated first? Build a model of the natural processes and patterns that characterize the interactions of the species, ecological and human setting and relating threats.

4. Identify the major stresses to the species and system. The stresses to consider should be happening now, or have high potential to occur within the next ten years.
5. Assessment - Rank relative importance of each threat in recovery planning. The evaluation and ranking of stresses and the sources of stress is made easier by using a matrix, such as the simplified one below). The matrix is a visual way of organizing complicated interactions and potential threats and system behavior. How immediate and severe are the stresses? How much knowledge does the recovery team have of the stresses? Which of the stresses are most serious?
6. Rank the stresses.
7. Verify the threats through a planning process to refine information.

Criteria for evaluating and ranking stresses and sources of stresses:

Scope - The geographic scope of the threat to the species or system. Impacts can be widespread or localized.

Severity - A measure of the level of damage to species or system that can reasonablely be expected within 10 years under current circumstances. Ranges from total destruction, serious or moderate degradation or slight impairment.

Magnitude - The severity plus scope.

Frequency - A temporal measure of the threat.

Immediacy - There are varying degrees of immediacy, including, a species is intrinsically vulnerable to threats, or identifiable threats can be "mapped" and seen as increasing or decreasing, or the threats are reasonably predictable.

Persistence - To identify a persistent threat the active and historical sources of the stress are evaluated.

Restoration feasibility - If the threats have undermined the integrity of the system to the point that it can not be recovered, then the restorability has been reduced. The other end of the scale is if the system can be recovered once the threat is removed.

Likelihood - For a potential threat, a statement of likelihood could be measured.

Irreversibility - some threats may be so severe or may no be currently serious, but in the future will increase inexorably and be impossible to reverse if not abated within the

next 10 years.

The Recovery Narrative portion of the recovery plan should outline how to mitigate threats in recovery implementation. What current and potential stresses interfere with the maintenance of ecological processes? A strategy to eliminate or mitigate threats and reach recovery goals should be based on a realistic assessment of the ability to affect human uses and the surrounding landscape. For instance, if it is not realistic to restore a species to a functioning component of the ecosystem due to threats, it may mean that you review your goals (determine that species will be down listed to a permanent management state).

Threats Assessment is an iterative process that should provide feedback to management actions. Look for information gaps, where research into the causes and effects of threats may be needed. Look at threats as they affect the dynamics of the populations and critical paths for recovery. Decide where to link management and where to put resources addressing threats when resources are limited.

Florida Panther Example -

Loggerhead Sea turtle Example -

Simple example of a stress analysis that uses a scoring system based on weights for the criteria of restoration feasibility and severity.

Stress	Severity	Source of Stress	Restoration feasibility	Score
Sedimentation	High	cattle operations	Med	5
Altered hydrology	Med	roads, development	Low	3
Non-native species	Low	stocking game fish	High	4
Recreational use	Low	fishing, boating	Low	2

Once a threats assessment has been completed, a recommended approach for determining and prioritizing actions to abate priority threats is found in Appendix ---- This should include an adaptive management approach. Where can this appendix direct to the next step? Determining actions??

Further Reference

"The Five-S Framework for Site Conservation: A Practitioner's Handbook for Site Conservation Planning and Measuring Conservation Success" Volume I and II. The Nature Conservancy 2000.

Appendix D.

MEMORANDUM OF UNDERSTANDING ESTABLISHING THE CANADA/MEXICO/UNITED STATES TRILATERAL COMMITTEE FOR WILDLIFE AND ECOSYSTEM CONSERVATION AND MANAGEMENT

MEMORANDUM OF UNDERSTANDING
ESTABLISHING
THE CANADA/MEXICO/UNITED STATES
TRILATERAL COMMITTEE FOR WILDLIFE AND ECOSYSTEM
CONSERVATION AND MANAGEMENT

Environment Canada, through the Canadian Wildlife Service, the *Secretaria de Medio Ambiente, Recursos Naturales y Pesca de los Estados Unidos Mexicanos* (SEMARNAP), through the *Unidad Coordinadora de Asuntos Internacionales,* and the U.S. Fish and Wildlife Service, hereinafter called "the Parties".

DESIRING to facilitate the conservation of species and the ecosystems on which they depend;

CONSIDERING that the Governments of Canada, Mexico and the United States are signatories to a number of Treaties and Conventions that provide for bilateral, trilateral or multilateral cooperation related to the conservation of species and the ecosystems on which they depend; including but not limited to the following :

a) 1916 Convention Between the United States and Great Britain for the Protection of Migratory Birds,

b) 1936 Treaty for the Protection of Migratory Birds and Game Mammals, between Mexico and the United States,

c) 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,

d) 1971 Convention of Wetlands of International Importance Especially as Waterfowl Habitat,

e) 1973 Convention on International Trade of Endangered Species of Wild Fauna and Flora,

f) 1992 Convention on Biological Diversity,

g) 1993 North American Agreement on Environmental Cooperation.

CONSIDERING that a number of arrangements have been created to facilitate cooperation between "national entities" relative to the conservation of species and the ecosystems on which they depend, including those establishing the following committees preceding this Memorandum of Understanding:

a) The Mexico-U.S. Joint Committee on Wildlife and Plant Conservation, created in 1975 by an interagency agreement (revised in 1984) to facilitate cooperation between the current *Dirección General de Conservación y Aprovechamiento Ecológico de México* (formerly within SEDUE and SEDESOL) and the U.S. Fish and Wildlife Service (Department of the Interior); and

b) The Tripartite Committee for the Conservation of Migratory Birds and their Habitat, created in 1988 by a Memorandum of Understanding among the Canadian Wildlife Service (Environment Canada), the *Dirección General de Conservación y Aprovechamiento Ecológico de México (SEMARNAP),* and the United States Fish and Wildlife Services (Department of the Interior);

AFFIRMING that the establishment of a Trilateral Committee for Wildlife and Ecosystem Conservation and Management will replace the above agreements with the aim of facilitating the efficient and effective coordination of these cooperative activities;

AGREE on the following :

ARTICLE I
PURPOSE

To facilitate and enhance coordination , cooperation and the development of partnerships among the wildlife agencies of the three countries, and with other associated and interested entities, regarding projects and programmes for the conservation and management of wildlife, plants, biological diversity and ecosystems of mutual interest, the Parties hereby establish the Canada/Mexico/United States Trilateral Committee for Wildlife and Ecosystems Conservation and Management, hereinafter called the "Trilateral Committee". Such projects and programs will include scientific research, law enforcement, sustainable use and any other aspect related to this purpose.

ARTICLE II
ORGANIZATION

1. The Trilateral Committee will comprise the following members:

   a) the Director General of the Canadian Wildlife Service;

   b) the Chief of the *Unidad Coordinadora de Asuntos Internacionales* of the Ministry of Environment, Natural Resources and Fisheries of Mexico; and

   c) the Director of the United States Fish and Wildlife Service.

2. Each member will designate an organizational contact.
3. The Trilateral Committee will meet once a year. These meetings will be organized, on a rotational basis, by each of the Parties signatory to this Memorandum of Understanding. Special meetings of the Directors or their support staff may be held as needed.
4. The Trilateral Committee may establish sub-committees or working groups to provide advice regarding particular program areas or assignments.
5. The Trilateral Committee may invite representatives of other entities, non-governmental organizations or individuals, to participate in their deliberations, and as appropriate, will facilitate cooperation with such entities.

ARTICLE III
FUNCTIONS

1. The Trilateral Committee will perform the following functions:

   a) Implement this Memorandum of Understanding in accordance with the international Treaties and Conventions referenced in the preamble as well as with the North American Waterfowl Management Plan (as revised in 1994), the federal, state, provincial and local laws, and the conservation priorities of each country;

   b) Develop, implement, review and coordinate specific cooperative conservation projects and programs; and

   c) Integrate its projects and programs into the conservation priorities of the country in which those projects and programs take place.

   d) Any other functions that the Parties may agree upon.

ARTICLE IV
OPERATIONS

1. Decisions will be made through a consensus of the Chief of the *Unidad Coordinadora de Asuntos Internacionales* and the Directors or their designated representatives.

2. A preliminary agenda will be prepared and distributed at least four weeks prior to the meeting by the Organizational Contact of the host country.

3. Projects and programs decided upon at the annual Trilateral Committee meeting will be followed-up in a timely manner.

4. The Organizational Contact of the host agency will prepare and distribute minutes within two weeks following the meeting.

5. The Organizational Contacts will coordinate the implementation of cooperative projects and programs in the three countries.

6. Activities undertaken pursuant to this Memorandum of Understanding will be subject to the availability of funds and other relevant resources available to each Director, to the Chief of the *Unidad Coordinadora,* and to the laws and regulations of the countries involved.

ARTICLE V
FINAL PROVISIONS

1. This Memorandum of Understanding will take effect upon signature, and will remain in effect for a period of five years, extended automatically for similar time periods, unless any of the Parties wishes to withdraw by giving written notification to the other Parties three months in advance of the desired date of termination.

2. The termination of this Memorandum of Understanding will not affect the completion of cooperative actions formalized while it was in force.

3. This Memorandum of Understanding may be modified by mutual agreement among the Parties, formalized through written communications, in which the date in which such modifications will enter into force shall be specified.

DONE in the City of Oaxaca on the ninth day of April of the year One Thousand, Nine Hundred Ninety Six, in three originals, each in the Spanish, French and English languages, each of texts being equally authentic.

For Environment Canada the Canadian Wildlife Service	For the Secretaria de Medio Ambiente, Recursos Naturales y Pesca de Mexico	For the U.S. Fish and Wildlife Service
David Brackett Director General	Jose Luis Samaniego Leyva Chief, Unidad Coordinadora de Asuntos Internacionales	John G. Rogers Director

Appendix E.

FRAMEWORK FOR COOPERATION BETWEEN THE US. DEPARTMENT OF THE INTERIOR AND ENVIRONMENT CANADA IN THE PROTECTION AND RECOVERY OF WILD SPECIES AT RISK

FRAMEWORK FOR COOPERATION BETWEEN THE U.S. DEPARTMENT OF THE INTERIOR AND ENVIRONMENT CANADA IN THE PROTECTION AND RECOVERY OF WILD SPECIES AT RISK

The goal of this framework is to prevent populations of wild species shared by the United States and Canada from becoming extinct as a consequence of human activity, through the conservation of wildlife populations and the ecosystems on which they depend.

THE UNITED STATES AND CANADA:

- share a common concern for and commitment to the protection and recovery of wild species at risk of extinction;
- have a long history of cooperation in the management of shared populations of wildlife and plants, as demonstrated by collaborative efforts for the recovery of endangered migratory species such as the whooping crane (*Grus americana)* and the piping plover (*Charadrius melodus*);
- recognize that greater success in protecting and recovering shared populations of species at risk can be achieved through cooperative, coordinated action; and
- acknowledge that conservation action is most often effective when implemented using a multi species approach at the landscape level.

THE UNITED STATES DEPARTMENT OF THE INTERIOR AND ENVIRONMENT CANADA ANNOUNCE A FRAMEWORK FOR COOPERATIVE ACTION TO:

I. facilitate the exchange of information and technical expertise regarding the conservation of species at risk and their habitat;
II. harmonize the evaluation and identification of such species;
III. provide a means of identifying species at risk that require bilateral action;
IV. promote the development and implementation of joint or multi-national recovery plans for species identified as endangered or threatened;
V. encourage expanded and more effective partnerships between our two agencies and states, provinces, and territorial, aboriginal and tribal governments, and the private sector (individuals, conservation groups, corporations, etc.) in recovery efforts;
VI. create greater public awareness and involvement regarding the need to conserve wildlife populations and the ecosystems on which they depend, and to prevent the loss of shared species; and

VII. use the cooperative arrangements established in the Trilateral Committee for Wildlife and Ecosystem Conservation and Management to provide a mechanism for establishing mutual priorities, coordinating recovery actions, and ensuring efficient use of available resources for the protection and recovery of species at risk.

The implementing agencies for this framework are the U.S. Fish and Wildlife Service of the U.S. Department of the Interior and the Canadian Wildlife Service of Environment Canada.

In recognition of the continental nature and importance of many species at risk, and existing partnerships, the United States and Canada intend to invite the participation of Mexico in this framework.

Signed at Washington, D.C.

This 7th day of April 1997;

FOR THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

Secretary Bruce Babbitt

FOR CANADA
DEPARTMENT OF THE ENVIRONMENT

Minister Sergio Marchi