DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2012–0077]

[4500030115]

Endangered and Threatened Wildlife and Plants; 12-Month Findings on Petitions to Delist U.S. Captive Populations of the Scimitar-horned Oryx, Dama Gazelle, and Addax

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition findings.

SUMMARY: We, the U.S. Fish and Wildlife Service ("Service"), announce 12-month findings on two petitions to remove the U.S. captive-bred and U.S. captive "populations" of three antelope species, the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*), from the List of Endangered and Threatened Wildlife as

determined under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that delisting the U.S. captive animals or U.S. captive-bred members of these species is not warranted.

DATES: The findings announced in this document were made on **[**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**]**.

ADDRESSES: These findings are available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2012–0077. Supporting documentation we used in preparing these findings is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203. Please submit any new information, materials, comments, or questions concerning these findings to the above street address.

FOR FURTHER INFORMATION CONTACT: Janine Van Norman, Chief, Branch of Foreign Species, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703–358–2171. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq*.) requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that delisting the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. We must publish these 12-month findings in the **Federal Register**.

Previous Federal Action(s)

Two subspecies of the dama gazelle, the Mhorr gazelle (*Gazella dama mhorr*) and Rio de Oro dama gazelle (*G. d. lozanoi*) were listed as endangered in their entirety, i.e., wherever found, on June 2, 1970 (35 FR 8491). On November 5, 1991, we published in the **Federal Register** (56 FR 56491) a proposed rule to list the scimitar-horned oryx, addax, and dama gazelle as

endangered in their entirety. We reopened the comment period on the November 5, 1991, proposed rule to request information and comments from the public on July 24, 2003 (68 FR 43706), and again on November 26, 2003 (68 FR 66395).

On February 1, 2005 (70 FR 5117), we announced a proposed rule and notice of availability of a draft environmental assessment to add new regulations under the Act to govern certain activities with U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle, should they become listed as endangered. The proposed rule covered U.S. captive-bred live animals, including embryos and gametes, and sport-hunted trophies, and would authorize, under certain conditions, certain otherwise prohibited activities that enhance the propagation or survival of the species. The "otherwise prohibited activities" were take; export or reimport; delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce. In the proposed rule, we found that the scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species. We accepted comments on this proposed rule until April 4, 2005.

On September 2, 2005, we published a final rule listing the scimitar-horned oryx, addax, and dama gazelle as endangered in their entirety (70 FR 52319). On September 2, 2005, we also added a new regulation (70 FR 52310) at 50 CFR 17.21(h) to govern certain activities with U.S. captive-bred animals of these three species, as described above. The promulgation of the regulation at 50 CFR 17.21(h) was challenged as violating section 10 of the Act and the National

Environmental Policy Act (42 U.S.C. 4321 *et seq*.), first in both the U.S. District Court for the Northern District of California and the U.S. District Court for the District of Columbia, but then transferred and consolidated in the U.S. District Court for the District of Columbia (see *Friends of Animals, et al.,* v. *Ken Salazar, Secretary of the Interior* and *Rebecca Ann Cary, et al.,* v. *Rowan Gould, Acting Director, Fish and Wildlife Service, et al., 626 F. Supp. 2d 102* (D.D.C. 2009)). The Court found that the rule for the three antelope species violated section 10(c) of the Act by not providing the public an opportunity to comment on activities being carried out with these three antelope species. On June 22, 2009, the Court remanded the rule to the Service for action consistent with its opinion. To comply with the Court's order, we published a proposed rule on July 7, 2011 (76 FR 39804), to remove the regulation at 50 CFR 17.21(h), thus eliminating the exclusion for U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle from certain prohibitions under the Act. Under the proposed rule, any person who intended to conduct an otherwise prohibited activity with U.S. captive-bred scimitar-horned oryx, addax, or dama gazelle would need to qualify for an exemption or obtain authorization for such activity under the Act and applicable regulations. On January 5, 2012, we published a final rule (77 FR 431) removing the regulation at 50 CFR 17.21(h).

On June 29, 2010, we received two petitions, one dated June 29, 2010, from Nanci Marzulla, submitted on behalf of the Exotic Wildlife Association (EWA), and one dated June 28, 2010, from Anna M. Seidmann submitted on behalf of Safari Club International and Safari Club International Foundation (SCI). The SCI petitioner requested that the "U.S. captive populations" of three antelope species, the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*), be removed from the Federal List of Endangered and

Threatened Wildlife (List) under the Act. The SCI petitioner also requested that we "correct the Endangered Species Act listing of scimitar-horned oryx, dama gazelle, and addax to specify that only the populations in the portion of their range outside of the United States are classified as endangered." The EWA petitioner requested that the "U.S. captive-bred populations" of these same three species be removed from the List. Both petitions indicated that removal or delisting of the U.S. captive or U.S. captive-bred individuals of these species was warranted pursuant to 50 CFR 424.11(d)(3) because the Service's interpretation of the original data that these species are endangered in their entirety was in error. EWA's petition contained an additional ground for recommending delisting of the "U.S. captive-bred populations" of these species on the basis that these "populations" have recovered pursuant to 50 CFR 424.11(d)(2). Both petitions clearly identified themselves as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). On September 19, 2012, we published 90-day findings (77 FR 58084) on these petitions indicating that the petitions presented substantial information indicating that delisting the petitioned entities may be warranted.

Species Information

The scimitar-horned oryx, dama gazelle, and addax are each native to several countries in northern Africa. Although previously widespread in the region, populations have been greatly reduced primarily as a result of habitat loss, uncontrolled killing, and inadequacy of regulatory mechanisms (70 FR 52319). Estimated numbers of individuals in the wild are extremely low. The oryx is believed to be extirpated in the wild, the addax numbers fewer than 300, and the dama gazelle numbers fewer than 500. All three species are listed in Appendix I of the

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The International Union for Conservation of Nature (IUCN) Red List categorizes the oryx as "extinct in the wild," and the dama gazelle and addax as "critically endangered" (IUCN Species Survival Commission (SSC) Antelope Specialist Group 2008 in IUCN Redlist 2012a ; Newby and Wacher 2008 in IUCN Redlist 2012b; Newby *et al.* 2008 in IUCN Redlist 2012c). All three species are listed under the Act as endangered in their entirety (see 50 CFR 17.11(h)).

The Sahara Sahel Interest Group (SSIG) estimates that there are approximately 4,000 to 5,000 scimitar-horned oryx, 1,500 addax, and 750 dama gazelle in captivity worldwide (70 FR 52319). These include at least 1,550 scimitar-horned oryx and 600 addax held in managed breeding programs in several countries around the world. We are unaware of information indicating numbers of dama gazelle currently held in managed breeding programs. In addition to individuals of these species held in managed breeding programs, captive individuals are held in private collections and on private game farms and ranches in the United States and the Middle East (IUCN SSC Antelope Specialist Group 2008 in IUCN Redlist 2012a; Newby and Wacher 2008 in IUCN Redlist 2012b; Newby *et al.* 2008 in IUCN Redlist 2012c; 70 FR 52310).

As part of planned reintroduction projects, captive-bred individuals of the three antelope species have been released into fenced, protected areas in Tunisia, Morocco, and Senegal. These animals may be released into the wild when adequately protected habitat is available. However, continued habitat loss and wanton killing have made reintroduction nonviable in most cases (70 FR 52319).

For more information on the scimitar-horned oryx, dama gazelle, and addax, see our final listing rule for these species (70 FR 52319; September 2, 2005).

Evaluation of Listable Entities

Under section 3(16) of the Act, we may consider for listing any species, which includes subspecies of fish, wildlife and plants, or any distinct population segment (DPS) of vertebrate fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Such entities are considered eligible for separate listing status under the Act (and, therefore referred to as listable entities) should we determine that they meet the definition of an endangered species or threatened species.

As previously mentioned, SCI requests delisting of the "U.S. captive populations" of the three antelope species based on the assertion that the Service committed "errors" in the interpretation of the best scientific and commercial data available at the time of the 2005 determination to list the scimitar-horned oryx, dama gazelle, and addax as endangered in their entirety. SCI also requests that we "correct the Endangered Species Act listing of scimitar-horned oryx, dama gazelle, and addax to specify that only the populations in the portion of their range outside of the United States are classified as endangered." EWA requests delisting of the "U.S. captive-bred populations" of the three antelope species on the basis that the Service's interpretation of the original data for the listings was also in error, and in addition asserts that

captive-bred animals of the three species that are held in the United States are recovered.

Essentially, both petitioners request separate designation, or legal status, under the Act for captive animals held within the United States from that of members of the same taxonomic species located in the wild or held in captivity elsewhere around the world. These petitions raised questions regarding whether the Service has any discretion to differentiate the listing status of specimens in captivity from those in the wild.

The Service has not had an absolute policy or practice with respect to this issue, but generally has included wild and captive animals together when it has listed species. In the 2005 listing determination for the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*) (70 FR 52319), the Service found that a differentiation in the listing status of captive specimens of these antelopes in the United States was not appropriate. On March 12, 1990, we published in the **Federal Register** (55 FR 9129) a final rule reclassifying the wild populations of chimpanzees as endangered, while captive chimpanzees remained classified as threatened, and captive chimpanzees within the United States continued to be covered by a special rule allowing activities otherwise prohibited. SCI and EWA, in their petitions to delist U.S. captive and U.S. captive-bred "populations" of scimitar-horned oryx, dama gazelle, and addax, asserted that the treatment by the Service of chimpanzees in 1990 warrants similar treatment now for these antelope species. In addition, in comments dated May 7, 2013, SCI points to the Service's 90-day finding on a petition to list plains bison as threatened. Because the Service had not formally stated whether the current statute, regulations, and policies applicable provide any discretion to differentiate the listing status of specimens in captivity from those in the wild, we reviewed the issues raised by these petitions and in the comments to ensure the Act is implemented appropriately.

As discussed below, we find that the Act does not allow for captive-held animals to be assigned separate legal status from their wild counterparts on the basis of their captive state, including through designation as a separate DPS[1]. It is also not possible to separate out captive-held specimens for different legal status under the Act by other approaches (see *Other Potential Approaches for Separate Legal Status*).[2]

Provisions of the Act

The legal mandate of section 4(a)(1) is to determine "whether any *species* is an endangered species or threatened species . . . ." (emphasis added). In the Act, a "species" is defined to include any subspecies and any DPS of a vertebrate animal, as well as taxonomic species. Other than a taxonomic species or subspecies, captive-held specimens (of a vertebrate animal species) would have to qualify as a "distinct population segment . . . which interbreeds

[1] As compared to populations that exist in the wild, "captivity" is defined as "living wildlife… held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal [sic], eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food" (50 CFR 17.3).

[2] The analysis in this document addresses only situations where it is not disputed that the specimens are members of a wildlife species. This analysis does not address situations where members of a species have been held in captivity for a sufficiently long period that they have developed into a separate domesticated form of the species, including where the domesticated form is sufficiently distinct to be considered a separate taxonomic species or subspecies (e.g., domesticated donkey vs. the African wild ass).

when mature" to qualify as a separate DPS.[3] Nothing in the plain language of the definitions of "endangered species," "threatened species," or "species" expressly indicates that captive-held animals can or cannot have separate status under the Act on the basis of their state of captivity. However, certain language in the Act is inconsistent with a determination of separate legal status for captive-held animals.

Under section 4(c)(1), the agency is to specify for each species listed "over what portion of its range" it is endangered or threatened.[4] "Range," while not defined in the Act, consistently has been interpreted as that general geographic area where the species is found *in the wild.*. Thus, a group of animals held solely in captivity and analyzed as a separate listable entity has no "range," separate from that of the species to which it belongs, at least as that term has been applied under the Act. The Service has consistently interpreted "range" in the Act as a geographic area where the species is found *in the wild.*

As demonstrated in various species' listings at 50 CFR 17.11 and 17.12, information in the "Historic Range" column is the range of the species in the wild. For none of these species does the "range" information include countries or geographic areas on the basis of where specimens are held in captivity, even though the Service knows that specimens of many of these species have long been held in facilities outside their native range, including in the United States.

[3] The Service has already found that the U.S. captive groups of these three species may not meet the definition of "population" (70 FR 52310).

[4] Even though the Service has taken the position in its draft SPR policy (76 FR 76987) that the range information called for under section 4(c)(1) is for information purposes, this statutory language still informs the question of Congress' intent under the statute.

Also, in analyzing the "present or threatened destruction, modification, or curtailment of [a species'] habitat or *range*" (emphasis added) (see section 4(a)(1)(A) of the Act), the Service has traditionally analyzed habitat threats in the native range of wild specimens and not included other geographic areas where specimens have been moved to and are being held in captivity. We are not aware of any Service listing decision where analysis of threats to the "range" has included geographic areas outside the native range where specimens are held in captivity.

In analyzing other threats to a species (see sections 4(a)(1)(B), 4(a)(1)(C), 4(a)(1)(D), and 4(a)(1)(E) of the Act), the Service has also limited its analysis to threats acting upon wild specimens within the native range of the species, and has not included analysis of "threats" to animals held in captivity except as those threats impact the potential for the captive population to contribute to recovery of the species in the geographic area where wild specimens are native.

Finally, the Service's 2011 draft policy on the meaning of the phrase "significant portion of its range" (SPR) (76 FR 76987; December 9, 2011) defines "range" as the "general geographic area within which that species can be found at the time the Fish and Wildlife Service or National Marine Fisheries Service makes any particular status determination. This range includes those areas used throughout all or part of the species' life cycle, even if they are not used regularly (e.g., seasonal habitats). Lost historical range is relevant to the analysis of the status of the species, but it cannot constitute a signficant portion of a species' range. The "general geographic area within which the species can be found" is broad enough to include geographic areas where animals have been moved by humans and are being held in captivity beyond the geographic area in which specimens are found in the wild. However, the Service has

not applied the definition in this manner in the past and does not intend to do so in the future. SPR analyses have been and will be limited to geographic areas where specimens are found in the wild.

In addition to the use of "range" in sections 4(a)(1) and 4(c)(1), the definitions of "endangered species" and "threatened species," found in section 3 of the Act, also discuss the role of the species range in listing determinations. The Act defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range," and a threatened species as "any species which is likely to become an endangered species… throughout all or a significant portion of its range." As noted above, "range" has consistently been interpreted by the Service as being the natural range of the species *in the wild*.[5] For all the reasons discussed above, a group of animals held in captivity could not have separate legal status under the Act because they have no "range" that is separate from the range of the species in the wild to which they belong as that term is used in the Act.

Certain provisions in sections 9 and 10 of the Act show that what Congress intended was that captive-held animals would generally have the same legal status as their wild counterparts by providing certain exceptions for animals held in captivity. Section 9(b)(1) of the Act provides an exemption from certain section 9(a)(1) prohibitions for listed animals held in captivity or in a

[5] *See also* Endangered Species Act: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169 and H.R. 4758 Before the House Subcomm. on Fisheries and Wildlife Conservation and the Environment, House Comm. on Merchant Marine and Fisheries, 93d Cong. 198 (1973) (hereinafter 1973 Hearing on H.R. 37 and others) (Letter from S. Dillon Ripley, Secretary of Smithsonian Institute, to Chairman, House Comm. on Merchant Marine and Fisheries, April 23, 1973 (lauding H.R. 4758, the Administration's legislative proposal that contained a definition of "endangered species" substantially similar to the statutory definition eventually adopted by Congress in the 1973 Act: "In effect the bill offers a great deal of flexibility by providing that a species may be placed on the list if the Secretary determines that it is presently threatened with extinction, not only in all of its *natural* range, but in a significant part thereof, as well.") (emphasis added)).

controlled environment as of the date of the species listing (or enactment of the Act), provided the holding in captivity and any subsequent use is not in the course of a commercial activity. Section 9(b)(2) of the Act provides an exemption from all section 9(a)(1) prohibitions for raptors held in captivity or in a controlled environment as of 1978 and their progeny. Section 10(a)(1)(A) of the Act allows permits to "enhance the *propagation* or survival" of the species (emphasis added). This demonstrates that Congress recognized the value of captive-holding and propagation of listed specimens held in captivity, but intended that such specimens would be protected under the Act, with these activities generally regulated by permit.[6] If captive-held specimens could simply be excluded through the listing process, none of these exceptions and permits would have been needed.

Purpose of the Act

Meaning of Section 2(b) of the Act

The full purposes of the Act, stated in section 2(b), are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [hereafter referred to as the first purpose], to provide a program for the conservation of such endangered species and threatened species [hereafter referred to as the second purpose], and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set

[6] *See* Endangered Species Conservation Act of 1972: Hearing on S. 249, S. 3199 and S. 3818 Before the Senate Subcomm. on the Environment, Senate Comm. on Commerce ,92nd Cong. 211-12 (1972) (statement of Deborah Appel, Assistant to the Director for Public Information, National Audubon Society) (endorsing S. 3199, a bill considered by the Senate that contained similar language eventually adopted by Congress in the purpose section of the 1973 Act, but advising against a specific mandate requiring captive propagation because"the capture of specimens for experiment in captive propagation may in itself endanger the chances of some rare species for survival in the wild.").

forth in subsection (a) of this section [hereafter referred to as the third purpose]". It has been stated, without explanation, that the language of section 2(b) of the Act supports protecting only specimens that occur in the wild. However, the purposes listed in section 2(b) indicate that the three provisions are intended to have independent meaning, with little to indicate that Congress' intent was to protect only specimens of endangered or threatened species found in the wild. The treaties and conventions under the third purpose are expressly those listed in section 2(a)(4) of the Act, all of which are for the protection of wildlife and plants, and none of which are limited to protection of endangered or threatened specimens in the wild.[7] The first purpose calls for conservation of ecosystems, independent of conservation of species themselves (which is separately listed as the second purpose). This does focus on protection of native habitats (those inhabited by the species in the wild in its native range), as it is generally the ecosystems or habitats within which a species has evolved that are those upon which it "depends." However, the phrase "upon which endangered species and threatened species depend" indicates only that ecosystem (i.e., habitat) protection should be focused on that used by endangered and threatened species, and does not indicate that the sole focus of the Act is conservation of species within their native ecosystems. Several provisions in the Act provide authority to protect habitat, independent of authorities applicable to protection and regulation of specimens of listed species themselves. See, for example, section 5 (Land Acquisition), section 6 (Cooperation With the States), section 7 (Interagency Cooperation), and section 8 (International Cooperation).

It is the second purpose under section 2(b) of the Act that speaks to the conservation of species themselves that are endangered or threatened. However, nothing in the language of the

[7] Nor are these treaties and conventions limited to protection of species listed as endangered or threatened under the Act.

second purpose indicates that conservation programs should be limited to specimens located in the wild. The plain language of section 2(b) refers to "species," with no distinction between wild specimens of the species as compared to captive-held specimens of the species. Thus, nothing in the plain language indicates that captive-held specimens should be excluded from the Act's processes and protections that would contribute to recovery (i.e., "conservation") of the entire taxonomic species. It is true that the phrasing of the second purpose ("to provide a program for the conservation of *such* endangered species and threatened species" (emphasis added)) links the second purpose of species recovery to the first purpose of ecosystem (i.e., native habitat) protection, thus making the *goal* of the statute recovery of endangered and threatened species in their natural ecosystems. But there is nothing in the phrasing to indicate that the specific provisions of the statute for meeting this goal should be limited to specimens of the species located within the ecosystems upon which they depend.

Separate Legal Status is Inconsistent with Section 2(b)

The potential consequences of captive-held specimens being given separate legal status under the Act on the basis of their captive state, particularly where captive-held specimens would have no legal protection while wild specimens are listed as endangered or threatened[8], indicate that such separate legal status is not consistent with the section 2(b) purpose of conserving endangered and threatened species. Congress specifically recognized "overutilization for commercial, recreational, scientific, or educational purposes" as a potential threat that

[8] If it were determined that captive-held animals can have separate legal status on the basis of their captive state, proponents of separate legal status could argue that these captive specimens do not qualify as endangered or threatened species because they do not face "threats" that create a substantial risk of extinction to the captive specimens such as those faced by the wild population (see *Section 4: Listing Captive-held Specimens*).

contributes to the risk of extinction for many species. If captive-held specimens could have separate legal status under the Act, the threat of overutilization would likely increase. For example, the taxonomic species would potentially be subject to increased take and trade in "laundered" wild-caught specimens to feed U.S. or foreign market demand because protected wild specimens would be generally indistinguishable from unprotected captive-held specimens. Because there would be no restriction or regulation on the taking, sale, import, export, or transport in the course of commercial activities in interstate or foreign commerce of captive specimens by persons subject to U.S. jurisdiction, there would be a potential legal U.S. market in captive-held endangered or threatened specimens and their progeny operating parallel to any illegal U.S. market (or U.S. citizen participation in illegal foreign markets) in wild specimens. With the difficulty of distinguishing captive-held from wild specimens, especially when they are broken down into their parts and products, illegal wild specimens of commercial value could likely easily be passed off as legal captive specimens and thus be traded as legal specimens.

If captive-held specimens could have separate legal status under the Act, the taxonomic species would also potentially be subject to increased take of animals from the wild and illegal transfer of wild specimens into captivity. The United States is one of the world's largest markets for wildlife and wildlife products.[9] Poachers and smugglers would have increased incentive to remove animals from the wild and smuggle them into captive-holding facilities in the United States for captive propagation or subsequent commercial use of either live or dead specimens, because once in captivity there would be no Act restrictions on use of the captive-held specimens or their offspring. This would be a particular issue for foreign species where States regulate native wildlife (and therefore captive-held domestic endangered or threatened specimens would

[9] See USFWS Office of Law Enforcement Annual Report for FY 2009 p. 7.

continue to be regulated under State law), but often do not regulate use of nonnative wildlife. This could be a particularly lucrative trade for poachers and smugglers because many endangered and threatened species (particularly foreign species) are at risk of extinction because of their high commercial value in trade (as trophies or pets, or for their furs, horns, ivory, shells, or medicinal or decorative use).

Congress included the similarity-of-appearance provision in section 4(e) to allow the Service to regulate species under the Act where one species so closely resembles an endangered or threatened species that enforcement cannot distinguish between the protected and unprotected species and this difficulty is a threat to the species. The Service's only option in the cases of "take" described above would be to complete separate similarity-of-appearance listings for captive-held animals. A similarity-of-appearance listing under the Act for captive-held specimens would make captive specimens subject to the same restrictions as listed wild specimens.

Operation of Key Provisions of the Act

As described in the following subsections, operation of key provisions in section 4 and section 7 of the Act also indicate that it would not be consistent with Congressional intent or the purpose of the Act to treat groups of captive-held specimens as separate listable entities on the basis of their captive state.

Section 4: Listing Captive-held Specimens

The section 4 listing process is not well suited to analyzing threats to an entirely captive-held group of specimens that are maintained under controlled, artificial conditions..

If wild populations and captive-held specimens could qualify as separate listable entities, and it was determined that captive-held specimens do not qualify as endangered or threatened, captive-held specimens would receive no assistance or protection under the Act even in cases where wild populations continue to decline, even to the point of the species being extirpated in the wild, with the specimens in captivity being the only remaining members of the species and survival of the species being dependent on the survival of the captive-held specimens. This would not be consistent with the purposes of the Act.

Groupings of captive-held specimens might not meet the definition of endangered or threatened under the statutory factors because the scope of the section 4 analysis for a captive-specimens listing would be the conditions under which the captive-held specimens exist, not the conditions of the members of the species in the wild, as the captive-held members of the species and wild members of the species would be under separate consideration for listing under the Act and therefore under separate 5-factor analyses. Groupings of solely captive-held specimens might not meet the definition of endangered (in danger of extinction throughout all or a significant portion of their range) or threatened (likely to become endangered within the foreseeable future) when the conditions for individual specimens' survival are carefully controlled under human management, especially for species that readily breed in captivity, where

breeding has resulted in large numbers of genetically diverse specimens, or where there are no known uncontrollable threats such as disease.

The majority of the the section 4(a)(1) factors would be difficult to apply to captive-held specimens with a range independent of wild specimens because they are not readily suited to evaluating specimens held in captivity or might contribute to a determination that the entity under consideration (separate groupings of captive -held specimens) does not qualify as endangered or threatened. There may be situations where only disease threats (factor C) and other natural or manmade factors (factor E) would be applicable to consideration of purely captive-held groups of specimens. The present or threatened destruction, modification, or curtailment of habitat or range (factor A) may not be a threat for a listable entity consisting solely of captive-held specimens, because the physical environment under which captive specimens are held is generally readily controllable and, in many cases, optimized to ensure the physical health of the animal. Overutilization (factor B) is unlikely to be a factor threatening the continued existence of groups of captive-held specimens where both breeding and culling are managed to ensure the continuation of stock at a desired level based on ownership interest and market demand. Predation (factor C) may rarely be a factor for captive-held specimens because predators may be more readily controlled. Human management may provide for all essential life functions, thereby eliminating selection or competition for mates, food, water resources, and shelter.

It is unclear how the "inadequacy of existing regulatory mechanisms" (factor D) would apply to captive-held specimens with a range independent of wild specimens because this factor generally applies in relationship to threats identified under the other factors. Regulatory mechanisms applicable to wild specimens usually include measures to protect natural habitat and laws that regulate activities such as take, sale, and import and export. However, there might be no regulatory mechanisms applicable when the group of specimens under consideration is in captivity (except perhaps general humane treatment or animal health laws).

Section 4: Delisting Captive-held Specimens

If wild populations and groups of captive-held specimens could qualify as separate listable entities, and because groupings of captive-held specimens may not meet the definitions of endangered or threatened under the statutory factors (as discussed above), captive-held specimens currently listed as endangered or threatened (because they were originally listed along with wild specimens as a single listed entity) could be petitioned for, and might qualify for, delisting. These specimens would therefore lose any legal protections of the Act, even as wild populations continue to decline, including to the point of extirpation in the wild. This likewise would not be consistent with the purpose of the Act.

Section 4: Listing Effects on Wild Populations

If wild specimen populations and groups of captive-held specimens could qualify as separate listable entities, and because the analysis for determining legal status of wild

populations would be separate from the analysis for determining legal status of captive specimens, the wild population would likely qualify for delisting in the event that all specimens are lost from the wild (in other words, if they became extinct in the wild), thereby removing both incentives and protections for conservation of the species in the wild and the conservation of its ecosystem.

Under the Service's standard section 4 process, both captive-held and wild specimens of the species are members of the listed entity and have legal status as endangered or threatened. In situations where all specimens in the wild are gone, either because they are extirpated due to threats or because, as a last conservation resort, the remaining wild specimens are captured and moved into captivity, the species remains listed until specimens from captivity can be reintroduced to the wild and wild populations are recovered. However, if captive specimens and wild populations could have separate legal status, once all members of the wild population were gone from the wild, the wild population could be petitioned for and would likely qualify for delisting under 50 CFR 424.11(d)(1) as a "species" that is now extinct. As shown above, the separate captive-held members of the taxonomic species might not qualify for legal status as endangered or threatened, due to the lack of "threats" that create a risk of extinction to the viability of a sustainable, well-managed pool of captive animals. With no listed entities and therefore no authority to use funding or other provisions of the Act for the species, the Service would lose valuable tools for recovery of the species to the wild. This would clearly not be consistent with the purpose of the Act.

Section 7: Consultation

All Federal agencies have a legal obligation to ensure that their actions are not likely to jeopardize the continued existence of endangered and threatened species. This means that for separately listed captive-held endangered or threatened specimens, any Federal agency that is taking an action within the United States or on the high seas that may affect the captive-held listed species arguably would have a legal duty to consult with the Service. However, the section 7 consultation process is not well suited to analysis of adverse impacts posed to a purely captive-held group of specimens given that such specimens are maintained under controlled, artificial conditions.

Section 4: Designation of Critical Habitat

For any listed entity located within the United States or on the high seas, we have a section 4 duty to designate critical habitat unless such habitat is not prudent.[10] Although it is appropriate not to designate critical habitat for foreign species or to limit a critical habitat designation to natural habitats for U.S. species when a listing is focused on the species in the wild (even when some members of the species may be held in captivity within the United States), it is not clear how the Service would support not designating critical habitat when the listed entity would consist entirely of captive-held specimens (when the focus of captivity is within the United States). As with the consultation process, the critical habitat designation duty is not well suited for listings that consist entirely of captive-held specimens, especially given the anomaly of identifying the physical and biological features that would be essential to the

[10] Making a not determinable finding is also an option under section 4(b)(6)of the statute, but only delays the requirement to designate such critical habitat.

conservation of a species consisting entirely of captive animals in an artificial environment. These complexities related to section 7 consultations and designation of critical habitat indicate that Congress did not intend the Service to treat groups of captive-held specimens as separate listable entities on the basis of their captive state.

Legislative History

Legislative history surrounding the 1978 amendment of the definition of "species" in the Act indicates that Congress intended designation of DPSes to be used for designation of wild populations, not separation of captive-held specimens from wild members of the same taxonomic species. The original (1973) definition of species was "any subspecies… and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature" (Pub. L. 93-205). In 1978, Congress amended the Act to the Act's current definition of species, substituting "distinct population segment" for "any other group" and "common spatial distribution" following testimony on the inadequacy of the original definition, such as the exclusion of one category of populations commonly recognized by biologists: disjunct allopatric populations that are separated by *geographic barriers* from other populations of the same species and are consequently reproductively isolated from them physically (See Endangered Species Act Oversight: Hearing Before Senate Subcommittee on Resource Protection, Senate Committee on Environment and Public Works, 95th Cong. 50 (July 7, 1977) (hereinafter 1977 Oversight Hearing) (letter from Tom Cade, Program Director, The Peregrine Fund, to Director of the Service)). Although there was discussion regarding population stocks and reproductive isolation generally, particularly in association with

development of the 1973 definition[11], discussions that provide additional context on the scope of the definition of "species" show that Congress thought of the population-based listing authority as appropriate for populations that are distinct for natural and evolutionary reasons. For example, one witness discussed "species" as associated with the concept of geographic reproductive isolation and including characteristics of a population's ability or inability to freely exchange genes *in nature* (See 1977 Oversight Hearing at 50 (Cade letter)). There is no evidence that Congress intended for the agency to use the authority to separately list groups of animals that have been artificially separated from other members of the species through human removal from the wild and maintenance in a controlled environment. Examples in testimony for which population-based listing authority would be appropriately used were all for wild populations (See 1973 Hearing on H.R. 37 and others at 307 (statement of Stephen Seater, Defenders of Wildlife); Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Senate Subcomm. on Environment, Senate Comm. on Commerce, 93d Cong. 98 (1973) (statement of John Grandy, National Parks and Conservation Assoc.); Endangered Species Authorization: Hearings on H.R. 10883 Before the House Subcomm. on Fisheries and Wildlife Conservation and the Environment, House Comm. on Merchant Marine and Fisheries, 95th Cong. 560 (1978) (statement of Michael Bean, Environmental Defense Fund)). No examples were given suggesting designation of captive-held specimens as appropriate DPSes.

Other Potential Approaches for Separate Legal Status

[11] *See* 1973 Hearing on H.R. 37 and others p. 286 (statement of John Grandy, National Parks and Conservation Assoc.) p. 307 (statement of Stephen Seater, Defenders of Wildlife), and pp. 299–300 (statement of Tom Garrett, Friends of the Earth).

In addition to separate designation as "species," there are two other approaches under which it could be argued that captive-held specimens could be given separate legal status from their wild counterparts: (1) Simply excluding captive-held members of the taxonomic species, subspecies, or DPS listable entity from the Act's protections, or (2) designating only wild members of the taxonomic species as a DPS, with captive-held specimens not included in the DPS. However, neither approach would be consistent with Congress' intent for the Act.

One court has already determined that captive-held specimens of a listable entity cannot simply be excluded when they are members of the listable entity, and the Service agrees with the court's reasoning in this case. The Service cannot exclude captive-held animals from a listing once these animals are determined to be part of the species. This case—*Alsea Valley Alliance* v. *Evans*— involved the listing of coho salmon by the National Marine Fisheries Service (NMFS). NMFS's 1993 Hatchery Policy (58 FR 17573; April 5, 1993) stated that hatchery populations could be included in the listing of wild members of the same evolutionary significant unit (equivalent to a DPS), but only if the hatchery fish were "essential to recovery." In 1998, NMFS listed only "naturally spawned" specimens when it listed an evolutionary significant unit (ESU) of coho salmon (63 FR 42587; August 10, 1998). This decision was challenged in court, and the Court found NMFS's listing decision invalid because it excluded hatchery populations (which are fish held in captivity) even though they were part of the same DPS (or ESU) *Alsea Valley Alliance* v. *Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). The Court held that "Congress expressly limited the Secretary's ability to make listing distinctions below that of subspecies or a DPS of a species," which was the practical result of excluding all hatchery specimens. NMFS subsequently changed its Hatchery Policy in 2005, stating that all hatchery fish that qualify as

members of the ESU would be considered part of the ESU, would be considered in determining whether the ESU should be listed as endangered or threatened, and would be included in any listing under the Act (70 FR 37204; June 28, 2005). NMFS's 2005 Hatchery Policy was upheld by the Ninth Circuit Court in *Trout Unlimited* v. *Lohn,* 559 F. 3d 946 (2009).

For the same reasons as discussed earlier in this document, the Service also cannot simply designate wild members of the taxonomic species (or all wild members and those captive-held animals located outside the United States) as a DPS, leaving all captive-held animals, or captive-held animals located within the United States, unlisted. Although this would avoid designating captive-held animals as a separate DPS and would not technically be excluding animals that otherwise have been found to be members of a DPS (and thereby avoid the error the court found in the *Alsea Valley Alliance* v. *Evans* decision), the result would be separate legal status and no legal protections for captive-held specimens, and many of the same legal and conservation consequences discussed above would occur. For these reasons, we also find this outcome to be inconsistent with Congress' intent for the Act, primarily as inconsistent with the purposes of the Act.

Additional Arguments in the Petitions are Not Supported

SCI argues in its petition that the Service "has a history of not including non-native populations of a species when listing the native populations as endangered or threatened." However, the SCI petition fails to identify any Service policy or consistent practice regarding listing decisions under the Act that exclude or separately designate captive-held animals. The

support cited by SCI in its petition is the Service's listing of the Arkansas River shiner, but the listing of that species is not relevant in considering SCI's petition for separate status for captive animals. In the Arkansas River shiner listing (63 FR 64772; November 23, 1998), as well as listings of some other species of fish with naturalized populations in the United States raised in later comments by SCI, the Service was considering wild populations, not animals held in captivity and under human control. Such wild populations do not exist in human-controlled environments and are not subject to human manipulation of their reproduction. Rather, they often inhabit natural or modified natural ecosystems; are self-sustaining; breed at will without human intervention; survive with little or no human assistance; and are subject to the same processes that affect native wild populations, including habitat loss or modification, disease, predation, human take (regulated or not), and stochastic events (floods, drought, hurricanes, fires, etc.). SCI and EWA appear to concede that scimitar-horned oryx, addax, and dama gazelle occurring in the United States, as well as animals occurring in other countries outside the species' ranges, are held in captivity. In its petition, EWA argues that the Service's 1990 listing for chimpanzees, the one current listing where captive animals are designated as a separate DPS, sets precedent for captive-held populations of widllife. The Service is currently processing a petition to list the species *Pan troglodytes* as endangered in its entirety. On September 1, 2011, we found that the petition presented substantial information indicating that listing the entire species as endangered may be warranted (76 FR 54423).

SCI and EWA also both argue on the basis of error—and citing to a 2007 memorandum issued by the Department of the Interior (DOI) Office of the Solicitor (DOI 2007)—that the Service should find that only the animals living in a significant portion of their range outside the United States should be classified as endangered and that the species are not endangered in the

portion of their range that lies within the United States. It is correct that, in 2007, the Solicitor issued a legal opinion indicating that, based on use of the statutory term "significant portion of its range," the Act allowed the Service to list and apply the protections of the Act only in that portion of the range where a species is found to be an endangered or threatened species. But in May 2011, and following two adverse court decisions on the agency's legal interpretation, the Solicitor withdrew this legal opinion (see 76 FR 76987; December 9, 2011). Since withdrawal of this legal opinion, the Service has published a draft policy that provides its interpretation of the phrase "significant portion of its range" (see 76 FR 76987; December 9, 2011). In the draft policy, the Service concluded that if a species is found to be endangered or threatened in only a significant portion of its range, the entire species is to be listed as endangered or threatened. Thus even if any one of the three antelope species were found to be endangered in only a significant portion of its range, as argued by SCI and EWA, the entire species would still be listed as endangered and the Act's protections would apply to the species in its entirety. In their petitions, SCI and EWA note that all three species qualify for endangered species status elsewhere outside the United States. There was, therefore, no error on this basis in the 2005 listings of these three antelope species. Although this draft policy has not yet been finalized, the Service is considering the interpretations and principles contained in the draft policy as nonbinding guidance when making individual listing determinations, such as these 12-month findings. In addition, for the reasons provided above, the Service could not distinguish between and assign separate legal status to captive□held and wild members of a taxonomic species through an SPR analysis.

Findings

Section 4(b)(3) of the Act and our regulations at 50 CFR 424.14 provide that a person may petition to add or remove a "species" (as defined by the Act) from the Lists of Endangered or Threatened Wildlife or Plants, or change the listed status of a "species." For the reasons given above, neither SCI nor EWA has petitioned to remove or reclassify a grouping of members of the three antelope that qualify to be designated as a separate "species" under the Act, and thereforethe petitioned actions are not warranted

Based on the analysis above, it is the Service's conclusion that, although the Act does not expressly address whether captive-held specimens of wildlife can have separate legal status, the language, purpose, operation, and legislative history of the Act, when considered together, indicate that Congress did not intend for captive-held specimens of wildlife to be subject to separate legal status on the basis of their captive state.[12] This includes designating groups of captive-held specimens as separate DPSes, excluding captive-held specimens during the listing of wild specimens of the same species, and de facto creating separate listed and nonlisted entities by designating one or more DPSes consisting of wild specimens and leaving captive specimens unlisted. It also would include using the "significant portion of its range" language in the definitions of "endangered species" and "threatened species" to provide separate legal status for captive-held specimens.

[12] The decision on whether captive-held specimens can have separate legal status based on their captive state is a separate issue from the role that such specimens should play during a status review. The extent to which captive-held members of a species create or contribute to threats to the species (for example, by fueling trade) or the extent to which captive-held members of a species remove or reduce threats to the species by contributing to the conservation of the species (for example, by providing specimens for population augmentation or reintroduction) is part of the five-factor analysis under section 4(a)(1) of the Act, not a matter of whether the members are part of the listable entity.

For the reasons given above, the U.S. captive, or U.S. captive-bred specimens of, scimitar-horned oryx, dama gazelle, and addax, do not qualify as separate "species" or otherwise qualify for separate legal status under the Act. Therefore, we find that delisting the U.S. captive, or U.S. captive-bred specimens of, scimitar-horned oryx, dama gazelle, and addax, is not warranted. This determination is consistent with our position on the status of U.S. captive□held members of these three antelope species since the 2005 listing decision (70 FR 52319; September 2, 2005). During the public comment periods on the proposed rule to list these three species in their entirety (56 FR 56491, 68 FR 43706, and 68 FR 66395), the Service received several comments indicating that it should list only wild specimens of the three species. In the final rule, the Service noted these comments but stated that "it would not be appropriate to list captive and wild animals separately" (70 FR 52319; September 2, 2005).

In sum, on the basis of our determination under section 4(b)(3)(B) of the Act, we conclude that removing the U.S. captive specimens or U.S. captive-bred specimens of scimitar-horned oryx, dama gazelle, and addax from the List of Endangered and Threatened Wildlife is not warranted. Although these captive specimens remain listed as endangered under the ESA, having these captive individuals listed under the ESA does not necessarily ban the hunting of these individuals on game ranches in the United States. We recognized at the time of listing the species that allowing ranches to continue in their management efforts for these species could help to ensure that a viable group of antelope would be available for reintroduction purposes if conditions in the species' native range improved. Therefore, we have been authorizing well-managed ranches to conduct various management practices, including limited hunting, through our Captive-Bred Wildlife Registration regulation and permitting process. Since the current

regulations went into effect on April 4, 2012, we have approved 139 ranches to maintain the species, of which 107 have been authorized to conduct limited hunts to maintain viable herds on their ranches. We accomplished this effort through use of a simple application process through which ranches obtained the necessary permits.

We encourage interested parties to continue to gather data that will assist with the conservation of the scimitar-horned oryx, dama gazelle, and addax. If you wish to provide information regarding these species, you may submit your information or materials to Janine Van Norman, Chief, Branch of Foreign Species (see **FOR FURTHER INFORMATION CONTACT**), at any time.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Branch of Foreign Species (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this notice are the staff of the Branch of Foreign Species (see **FOR FURTHER INFORMATION CONTACT**).

Authority

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

Dated: May 28, 2013

/s/ Daniel M. Ashe

Director, U.S. Fish and Wildlife Service

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